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Unearthing the Problematized Terrain of Prolonged Occupation

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key words: prolonged occupation; *travaux préparatoires*; the Lieber Code; Brussels Declaration; the Oxford Manual; the Hague Regulations; the Geneva Civilians Conventions; the First Additional Protocol sovereignty; ‘one-year’ rule;

Abstract

This paper will explore the *travaux préparatoires* of the legal instruments of the laws of war and international humanitarian law (IHL) with a view to obtaining crucial insight into their drafters’ ‘original’ understandings as to the issues of the provisional nature and the temporal length of occupation. The findings of the *travaux* show that the framers of the ‘classic’ laws of war instruments agreed on the general premise that the legal regime of occupation ought to be provisional. In the concurrent doctrinal discourses, this premise was endorsed by most scholars. The examinations of the draft records of the 1949 Geneva Civilians Convention reveal that even the proponents of ‘transformative occupation’ did not seem to envisage the occupation of the kind that would endure for decades. Nevertheless, by the time the 1977 Additional Protocol I was crafted, several instances of protracted occupation persisted. This seemed to be decisive for a shift in the argumentative structure. There is no gainsaying the applicability of IHL to any occupied territories, irrespective of the length of occupation. Yet, the suggestion that nothing under IHL would forestall an occupying power from engaging in a long-term occupation departs from the traditional premise that occupation ought to be provisional. This also seems to be paradoxical in historical perspectives.

1. Introduction - How Prolonged Occupation Has been Accounted for

Throughout the historical upheavals of warfare and occupation, legal experts and state practice have had to grapple with the entangled question of how to rationalize a relatively lengthy pattern of occupation.¹ Since the adoption of the Geneva Conventions (GCs) of

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¹ In this paper, the term ‘prolonged occupation’ is understood as referring to a protracted form of occupation that is stretched for decades.

1949,² the factual ‘phenomenon’³ of the so-called ‘prolonged occupation’⁴ can be seen in several places. The primary purpose of this paper is to explore how the drafters of the documents of the laws of war and of international humanitarian law (IHL) comprehended the question of temporal length of occupation and how this question has been addressed in the trajectory of doctrinal discourses. Special focus will be placed on the ‘original’ intention of the traditional laws of war such as the Brussels Declaration (1874) and the Hague Regulations (1899/1907), as these have provided the fundamental basis for the legal regime of belligerent occupation.

The paper will start with tracing the historical evolution of the legal concept of occupation and evaluating the nature of the legal regime of occupation that has crystallized since the second half of the nineteenth century. After providing brief rationales for having recourse to the *travaux préparatoires*, in-depth examinations will turn to the relevant legal documents. In the ‘formative period’ of the laws of war (1863-1949), the normative matrix on the law of belligerent occupation was initiated by the Lieber Code (1863), and nurtured by the Brussels Declaration (1874), the Oxford Manual (1880) and the Hague Regulations (1899/1907). Investigations into the preparatory works of the relevant legal instruments will help better grasp the drafters’ understanding of both the legal nature of an occupying power’s authority and the basic ideas or ‘principles’ governing its extraordinary authority under those instruments. This assists in ascertaining if the drafters of those instruments contemplated a lengthy drawn-out occupation within the normative structure. In the subsequent sections, the findings of the underlying assumptions of those classic documents will be compared to the modern practice and doctrines of IHL that have unfolded since the adoption of the GCs (1949). Detailed queries will be made into the preparatory work of the GCIV and API. These will be followed by succinct evaluations of the modern doctrinal discourses, which seem to depart from the classic premise of the law of war that stressed the temporary nature of occupation. In the final section, this paper will briefly engage in critical examinations of the argumentative structure(s) surrounding the protracted form of occupation in the light of the historical and political context.

Identifying the background condition(s) of the issue to be explored and demarcating the parameters of their implications are essential for any analytical investigations in the

² The decades-long instances of occupation include (but are not limited to): the Palestinian territories occupied by neighbouring states at different temporal phases since 1948 (the Gaza Strip by Egypt between 1959-1967; the large segments of the West Bank by Jordan between 1948-1967; the Gaza Strip by Israel between 1967-2005 or until now; and the West Bank, East Jerusalem and the Golan Heights by Israel since 1967); Tibet by China since 1950; Northern Cyprus by Turkey since 1974; the Western Sahara under gradual Moroccan occupation since 1975; East Timor occupied by Indonesia between 1975-1999.

³ For a suggestion for an emerging conceptualisation of ‘occupation as a normative phenomenon’, see Yaël Ronen, ‘A Century of the Law of Occupation’, (2014) *Yearbook of International Humanitarian Law* 169 at 184-185; and Aeyal Gross, *The Writing on the Wall – Rethinking the International Law of Occupation*, (Cambridge: Cambridge University Press, 2017), at 2-4, 6 et seq.

⁴ See Adam Roberts, ‘Prolonged Military Occupation: the Israeli-Occupied Territories Since 1967’, (1990) 84 *AJIL* 44-103.

disciplines of social science. After all, the law as social construct is ‘a cultural medium of expressive form’,⁵ which ought to be grasped as profoundly rooted in a particular context of time and space.⁶ With respect to laws of war, as noted by Mégret, ‘the contemporary laws of war, as the culmination of centuries of European thought expressed in the language of nineteenth-century positivism, are necessarily a by-product of the specific conditions that gave rise to them’.⁷

2. The Historical Evolution of the Law of Belligerent Occupation

2.1. From the Notion ‘Substituted Sovereignty’ to a Rudimentary Legal Concept of Occupation

The factual phenomenon of invasion, conquest and temporary military occupation was observable in different parts of the world for centuries throughout the human history whenever dominant or rivalling states vied for territorial aggrandizement. Yet, as will be explained below, it was not until after the Napoleonic War that the legal regime of belligerent occupation with its distinct rights and obligations of the occupying power came to be conceived. In the opinion of Hall, one of the leading late-nineteenth century scholars of international law, what was prevalent in the practice of the European warfare until the Seven Years War (1763) was the doctrine of ‘substituted sovereignty’.⁸ According to this doctrine, invaders were considered to replace the local sovereignty of the invaded territory and to assume the full sovereign power during the invasion phase.⁹ Hall argued that this doctrine fell into desuetude only after mid-eighteenth century.¹⁰

⁵ Desmond Manderson, *Songs Without Words – Aesthetic Dimension of Law and Justice*, (Berkeley: Univ. of California Press, 2000), at 201.

⁶ Costas Douzinas and Adam Gearey, *Critical Jurisprudence – The Political Philosophy of Justice*, (Oxford: Hart, 2005), at 248.

⁷ Frédéric Mégret, ‘From “Savages” to “Unlawful Combatants”’: a Postcolonial Look at International Humanitarian Law’s “Other”’, in Anne Orford (ed.), *International Law and Its Others*, (Cambridge: Cambridge University Press, 2009), 265-317, at 304.

⁸ William Edward Hall, *Treatise on International Law*, (3rd ed., 1890) at 463-464, 466, 469, para. 154.

⁹ For instance, the invader was authorized to demand impressment (forcing an oath of allegiance of the occupied populations, and the handing over of the territory even while questions of hostilities remained undecided) as if they had been the invader’s subjects and territory: *ibid.*, at 463-464, para. 154. See also *ibid.*, 416, para. 136; Thomas Baty, ‘The Relations of Invaders to Insurgents’, (1926-27) 36 *Yale Law Journal* 966, at 966-967, 972-973. See also Larissa Oppenheim, ‘The Legal Relations Between an Occupying Power and the Inhabitants’, (1917) 33 *Law Quarterly Review* 363, at 363 (explaining that ‘the occupant is for the time being the sovereign of the occupied territory’, while treating this doctrine as untenable at the time of his writing).

¹⁰ Hall explained that:

After the termination of the Seven Years’ War these violent usages seem to have fallen into desuetude, and at the same time indications appear in the writings of jurists which show that a sense of the difference between the rights consequent upon occupation and upon conquest was beginning to be felt.

Hall, *supra* n. 8, at 463, para. 153, footnote omitted. Baty challenged this historical timeline. He argued that any theory of ‘substituted sovereignty’ had been defunct as early as the end of the medieval period in Europe. In his view, since then, an invading power, when assuming the full sovereign power of the territories that it overran, was condemned as abusing its power: Baty, *ibid.*, at 972.

As stated by Verzijl's historical survey, it seems that a rudimentary fragment of the law of occupation alongside a qualified understanding of the 'substituted sovereignty' appeared after the Treaty of Utrecht (1713). The effective occupation of territory was comprehended as 'operating a change of sovereignty under the *condition suspensive*... of a peace treaty with retroactive effect'.¹¹ Later, publishing during the Seven Years' War in the mid-eighteenth century, Vattel was instrumental in recognising the legal effect of occupation as being that of a provisional state of affairs, which was to be distinguished from conquest.¹² There was an understanding that the nature of the occupying power was turned into 'a quasi-sovereignty'¹³ or a 'trustee'.¹⁴ According to Hall, 'the invader was invested with a quasi-sovereignty, which gave him a claim as of right to the obedience of the conquered population, and the exercise of which was limited only by the qualifications, which gradually became established'. Hall added that the invader 'must not as a general rule modify the permanent institutions of the country, and that he must not levy recruits for his army'.¹⁵ In terms of special importance attached to the rights of private property of civilians

¹¹ Jan Hendrik Willem Verzijl, *International Law in Historical Perspective – Part IX A, The Laws of War* (A.W. Sijhoff, 1978), at 151 (emphasis in original).

¹² Vattel observed that:

Les immeubles, les terres, les villes, les provinces, passent sous la puissance de l'ennemi qui s'empare, mais l'acquisition ne se consomme, la propriété ne devient stable et parfait que par le traité de paix, ou par l'entière soumission et l'extinction de l'État auquel ces villes et provinces appartenaient. (...) Un tiers ne peut donc acquérir avec sûreté une place ou une province conquise, jusqu'à ce que le souverain qui la perdue y ait renoncé par le traité de paix, ou que, soumis sans retour, il ait perdu sa souveraineté. (Immovable possessions, lands, towns, provinces...become the property of the enemy who makes himself master of them: but it is only by the treaty of peace, or the entire submission and extinction of the state to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect. (...) a third party cannot safely purchase a conquered town or province, till the sovereign from whom it was taken has renounced it by a treaty of peace, or has been irretrievably subdued, and has lost his sovereignty.)

Emer de Vattel, *Le Droit des Gens ou Principe de la Loi Naturelle Appliqués à la Conduite et aux Affaires et des Nations et des Souverains*, (London, 1758), Livre III, Chapter XIII, paras 197-198; *idem*, *The Law of Nations or Principles of the Law of Nature, as Applied to the Conduct of Affairs of Nations and Sovereigns* (translated by Joseph Chitty, Philadelphia: Johnson, 1844), at 455.

¹³ Hall referred to the nature of belligerent occupation under the system of 'quasi-sovereignty' as 'the doctrine of temporary and partial substitution of sovereignty': Hall, *supra* n. 8, at 464.

¹⁴ Baty, *supra* n. 9 at 973. For the modern proposal for a belligerent occupation as a trustee see Allan Gerson, 'Trustee Occupant: The Legal Status of Israel's Presence in the West Bank', (1973) 14 *Harvard International Law Journal* 1-49. See also Orna Ben-Naftali, 'PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies', in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law*, (Oxford: Oxford University Press, 2011), at 129-200, at 140, n. 63.

¹⁵ Hall's explanation on the 'quasi-sovereignty' doctrine on the nature of belligerent occupation deserves full citation:

While the continuing sovereignty of the original owner became generally recognised for certain purposes, for other purposes the occupant was supposed to put himself temporarily in his place. The original national

under occupation, the notion of ‘quasi-sovereignty’ had similarity to the concept of occupation that has crystallized in the legal instruments in the second half of the nineteenth century.¹⁶ What made the doctrine of substituted sovereignty distinguishable from the modern concept of occupation is that the former admitted of considerably extensive powers of the kind reserved to sovereign states.¹⁷ Nonetheless, even according to this doctrine, it was never envisaged that the occupying power as a ‘quasi-sovereign’ would be invested with the power to transform the national character of the territory and population.¹⁸ According to Hall¹⁹ and Oppenheim,²⁰ the residual and ‘remote influence’ of the earlier doctrine of substituted sovereignty persisted until the mid-nineteenth century, and on the fringe of publicists, even until the late nineteenth century.²¹ Writing in 1858, Georg Friedrich von Martens (1858) explained that the ‘conqueror’ (‘*vainqueur*’) can substitute itself with the vanquished government and exercise the sovereign power until the peace treaty.²²

2.2. Emergence of Belligerent Occupation as a Distinct Legal Concept

It is suggested that the emergence of belligerent occupation as a distinct legal concept wholly set apart from the right of conquest (and from the doctrine of substituted

character of the soil and its inhabitants remained unaltered; but the invader was invested with a quasi-sovereignty, which gave him a claim as of right to the obedience of the conquered population, and the exercise of which was limited only by the qualifications, which gradually became established, that he must not as a general rule modify the permanent institutions of the country, and that he must not levy recruits for his army.

Hall, *supra* n. 8, at 464-465, para. 154.

¹⁶ Georg Friedrich von Martens, *Précis du droit des gens moderne de l'Europe* (1858), at 254-255, para. 280 (referring to the restrictions on private property only in case where this was ‘impérieusement préscript par les nécessités de la lutte’). See also Johan Ludwig Klüber, *Droit des gens moderne de l'Europe* (1831), Vol. II, at 40 and 42, para. 255-256.

¹⁷ Baty, *supra* n. 9.

¹⁸ *Ibid*, at 973.

¹⁹ Hall, *supra* n. 8, at 468, para. 154, at 466-468. He refers to Klüber, *supra* n. 16, Vol. II, at 42, para. 256 as indicating an example of the residual influence of the doctrine of substituted sovereignty doctrine. Yet, as will be explained in n. 26 below, this is a flawed reading of his work.

²⁰ Oppenheim (1917), *supra* n. 9, at 6, at 363.

²¹ This was especially the case when examining the nature of the relation between the inhabitants and the occupying power. For instance, even some prominent scholars in the mid-nineteenth century continued to espouse the notion that the duty of obedience could be imposed on the inhabitants under occupation. Further, it should be noted that irrespective of whether or not based on such notion of substituted sovereignty, it is suggested that Lieber’s concept of occupation embodied a rejection of the then emerging theories that maintained a quasi-contractual relationship between the occupant and the inhabitants, which exchanged temporary obedience for protection: Rotem Giladi, ‘A Different Sense of Humanity – Occupation in Frances Lieber’s Code’, (2012) 94 IRRC 81, at 114.

²² Von Martens (1858), *supra* n. 16, at 254-255, para. 280. Note, however, his caveat that occupation does not entail taking possession of the public and private property of the occupied. See also Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, Vol. II, Para. 64, (Oxford University Press, 1861) (arguing that ‘if a belligerent Nation takes possession of an Enemy’s territory, it takes possession not merely of the soil and the movable property upon it, but of the Sovereignty over it, and may exercise the latter during such time as it remains in possession of the territory’).

sovereignty) was most marked in the wake of the Napoleonic War.²³ The post-war settlement raised various problems, including the need to distinguish between temporary and permanent conquest,²⁴ the (in)ability of temporary conquerors to acquire title to assets of the occupied or conquered territories, as well as the question of how to reconcile those economic and financial transactions with the post-war problems of the *jus postliminii*.²⁵ By the mid-nineteenth century, the *law* of belligerent occupation, as a distinct legal category (as part of the laws of war), has taken its embryonic shape and started to grow in gestation.²⁶ As claimed by Korman, the notion of *occupatio bellica* came to develop as a legal category separate from the idea of *debellatio*.²⁷ In this context, an occupying power was grasped as a non-sovereign, temporary holder of power equipped with specific rights and

²³ Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law* (Oxford: Clarendon, 1996), at 110 (referring to the recognition of the distinction between ‘belligerent occupation’ that referred to the condition short of sovereignty and ‘subjugation’); Peter M.R. Stirk, *History of Military Occupation from 1792 to 1914*, (Edinburgh University Press, 2016). Note that during the Napoleonic War, the British occupied Egypt under the rule of Ottoman Turkey, demanding allegiance of the local inhabitants: Baty, *supra* n. 9, at 973.

²⁴ Conquest is defined as acquiring enemy territory by military means with intention of enlarging national territory: Rotem Giladi, ‘The *Jus Ad Bellum/Jus In Bello* Distinction and the Law of Occupation’, (2008) 41(1/2) *Israel Law Review* 246, at 273. This should be distinguished from military occupation, ‘a yet undecided phase of war’: Niisuke Ando, *Surrender, Occupation and Private Property in International Law* 35 (Oxford: Clarendon, 1991).

²⁵ Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Washington D.C.: Carnegie Endowment, 1942), at 10-11, paras 40-42. *Jus postliminii* refers to the restoration of the legal status quo ante following the end of occupation or of hostilities: P. Fauchille, *Traité de droit international public*, tome II, (1921), at 1058-59; and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II: The Law of Armed Conflict (1968), at 199, 204, 338 and 346.

²⁶ See Klüber, *supra* n. 16, Vol. II, at 40 and 42, paras 255-256. His work showed a transition from the earlier doctrine of substituted sovereignty to the one akin to the modern legal notion of occupation as we understand today. He argued that while the conqueror takes place of the displaced government in exercising ‘sovereign rights’, this would never give the fact of conquest the right of attributing sovereignty of the country concerned. See also Lassa Francis Oppenheim, *International Law – A Treatise*, Vol. II (War and Neutrality), 2nd ed., at 211, para. 169 (London: Longmans/Green, 1912) (arguing that ‘although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, he is not the Sovereign of the territory, and therefore has no right to make changes in the laws or in the administration except those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war’).

²⁷ Korman, *supra* n. 23, at 110. See also Henry Wager Halleck, *International Law*, (San-Francisco: H.H. Bancroft, 1861), at 776, which discussed that ‘the right of military occupation (*occupatio bellica*)’ evolved in the usage of nations and the laws of war to differ from ‘the right of complete conquest (*debellatio* [sic] *ultima Victoria*)’.

obligations.²⁸ According to Loening²⁹ and Hersch Lauterpacht,³⁰ in the academic discourse, it was August Wilhelm Heffter that pioneered in developing the legal doctrine of ‘belligerent occupation’ as marked off from the notion of conquest.³¹ In his treatise of 1844, Heffter already set forth the basic principles of the law of belligerent occupation. He observed that, except in the case of *debellatio*, the legal concept of occupation was merely the form of *temporary* control that suspended the exercise of sovereign rights of the occupied state. In his view, this would not result in the transfer of sovereignty.³²

The foundational ideas of the law of belligerent occupation as developed later on reflected the legal consciousness of European legal advisors in the mid-nineteenth century. It is suggested that Francis Lieber tried to obtain some insight from the practice of European states during, and in the aftermath of, ‘modern European wars’ (namely, the Napoleonic wars) when preparing the military manual for the American Civil War (1861-65).³³ The Lieber Code (1863), which is the earliest positivised text that enunciated the law of

²⁸ Nehal Bhuta, ‘The Antinomies of Transformative Occupation’, (2005) 16(4) EJIL 721, at 725.

²⁹ Edgar Loening, ‘L’administration du Gouvernement Général de l’Alsace Durant la Guerre de 1870-1871’, (1872) 4 *Revue de Droit International et de Législation Comparé* 622 at 627-628 (referring to three basic principles on belligerent occupation that Heffter summarized: (1) ‘l’occupation d’un pays par l’ennemi pendant la durée de la guerre constitue un rapport entièrement différent de la conquête du pays’ (‘the occupation of a country by the enemy during the period of the war constitutes a relation entirely different from the conquest of the country’); (2) ‘pendant l’occupation d’un territoire par l’ennemi le gouvernement antérieur est suspendu’ (‘during the occupation of a territory by the enemy the previous government is suspended’); (3) ‘mais le gouvernement antérieur n’est que suspendu, et ses pouvoirs ne passent pas dans toute leur étendue à l’ennemi envahissant, lequel n’est pas investi de la souveraineté’ (‘but the previous government is only suspended, and its powers do not pass in all their extent to the invading enemy, which is not invested with the sovereignty’); translation by the present author. See also D. August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart*, (Berlin: E.H. Schroeder, 1844).

³⁰ Lassa Oppenheim, *International Law: A Treatise, Vol. 2: War, Peace and Neutrality*, ed. Hersch Lauterpacht, 5th edition, (London: Longmans, 1935), at 344.

³¹ See also Eyal Benvenisti, ‘The Origins of the Concept of Belligerent Occupation’, (2008) 26(3) *Law and History Review* 621 at 630-632. Nevertheless, Heffter did not fully recognize another special principle of belligerent occupation, namely, the requirement of minimum interference with local laws: *ibid.*, at 631.

³² Heffter stated that: ‘[o]nly if complete defeat of a state authority (*debellatio*) has been reached and rendered this state authority unable to make any further resistance, can the victorious side also take over the state authority, and begin its own, albeit usurpatory, state relationship with the defeated people....Until that time, there can be only a factual confiscation of the rights and property of the previous state authority, which is suspended in the meantime’: Heffter, *supra* n. 29, para. 131 (translation by the present author). The original text reads: ‘Erst wenn eine vollständige Besiegung der bekriegten Staatsgewalt (*debellatio*) eingetreten und dieselbe zu fernem Widerstande unfähig gemacht ist, kann sich der siegreiche Theil auch der Staatsgewalt bemächtigen, und nun ein eigenes, wiewohl usurpatorisches, Staatsverhältniß mit dem besiegten Volke beginnen....Bis dahin findet lediglich eine thatsächliche Beschlagnahme der Rechte und des Vermögens der inzwischen suspendirten bisherigen Staatsgewalt Statt’ (all classic spellings in the original). See also *ibid.*, para. 185; Halleck, *supra* n. 27, at 777 and 781, paras 2 and 5 (discussing the doctrines among European writers, who highlighted ‘temporary’ character of military occupation). As will be discussed later, Halleck stresses ‘a different rule’ followed by the United States practice: *ibid.*, at 784-787, paras 8-9.

³³ Mégret, *supra* n. 7, at 316.

belligerent occupation,³⁴ proclaims the introduction of ‘martial law’ in the area under occupation. Furthermore, the drafters of the Brussels Declaration (1874), which provided the prototype for the subsequent treaties on the laws of war, drew out much of normative dividends from the Lieber Code.³⁵

While the Lieber Code assumes the state of occupation as a matter of factual control when determining the applicability of martial law, it fails to define what is meant by occupation.³⁶ This was done in the subsequent Brussels Declaration (1874). The first paragraph of Article 1 of this Declaration stipulates that ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army’. The second paragraph of this provision proclaims that ‘[t]he occupation extends only to the territory where such authority has been established and can be exercised’.³⁷ Subsequently, such a two-tier structure of defining the concept of ‘occupation’ is incorporated into Article 42 Hague Regulations (1899/1907). This positivised rule, one of the achievements of codifying the laws of war in the second half of the nineteenth century, has proven to be remarkably resilient over the vicissitudes of war and occupation. It maintains enduring relevance to present-day cases of occupation.

3. The Nature of Occupation Understood in the ‘Classic’ Doctrines

It is of special importance to summarize the distinct features of the legal regime of belligerent occupation³⁸ which have come to be recognized in the doctrines of the laws of war since the second half of the nineteenth century. The role and scope of the exceptional powers granted to the occupier are considered a simulacrum of state sovereign

³⁴ Giladi (2012), *supra* n. 21, at 82 and 87. While the ideas on occupation were derived from the European practice and doctrine, the Lieber Code was considered novel as presenting a basis of a treaty: Benvenisti, (2008), *supra* n. 31, at 640-641.

³⁵ It ought to be noted that this system of law duly mirrored and fed the then prevalent social and political consciousness of ‘civilized’ nations in North America and Europe, including the primordial importance of private property based on the idea of laissez-faire economy. See, for instance, Hall, *supra* n. 8, at 470, para. 155.

³⁶ Article 1(1) of the Lieber Code proclaims that ‘[a] place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not.’

³⁷ Translation into English by ICRC. Article 1 in the authentic French text reads that ‘Un territoire est considéré comme occupé lorsqu’il se trouve placé de fait sous l’autorité de l’armée ennemie. L’occupation ne s’étend qu’aux territoires où cette autorité est établie et en mesure de s’exercer’.

³⁸ Apart from belligerent occupation (*occupatio bellica*), it is possible to contemplate two more genres of occupation: *occupatio mixta - bellica pacifica*, or mixed occupation, which refers to the state of occupation that can come into existence between an armistice and the conclusion of a treaty of peace among the belligerents; and *occupatio pacifica*, which addresses the case of military occupation of foreign territory in time of peace, which is based on consent, or at least acquiescence, of the territorial state: F. Llewellyn Jones, ‘Military Occupation of Alien Territory in Time of Peace’, (1921) 7 *Transactions Grotius Soc’y* 133 at 149-150. Those two other forms of occupation are supposed to share with belligerent occupation the two-tier assumptions: that there is supposed to be no surrender or transfer of sovereignty; and that occupation should be an ‘essentially provisional’ state of affairs: *ibid*, at 159. For pacific occupation, see also Yoram Dinstein, ‘The International Legal Status of the West Bank and the Gaza Strip – 1998’, (1998) 28 *Israel Yearbook on Human Rights* 37, at 42.

authority, which takes place during a temporary intermission of the normal stabilized order of relations among the sovereign states. Accordingly, the nature of belligerent occupation is most aptly characterized as a ‘sovereign suspension’.³⁹ At the Brussels Conference (1874), such an idea was favoured over the perspective that viewed occupation as analogous to the state of blockade suggested by some delegates.⁴⁰

The most axiomatic legal principle of belligerent occupation that came to be widely recognized by the Brussels Conference (1864) is that the occupying power does not gain sovereignty over the occupied territory.⁴¹ The sovereignty in juridical sense remains always vested in the occupied state (or people). Writing in the aftermath of the Franco-Prussian War (1870), Loening rejected the notion of transfer of sovereignty. He stated that :

As regards the power of the enemy that occupies the territory, we are today in agreement to recognize that it does not replace the power of the vanquished state. As the occupied territory is not yet separated from the state to which it appertains, and the inhabitants remain citizens of that country, there is no change in the sovereignty’.⁴²

Most writers since the Hague Regulations made clear that ‘the sovereignty of the old government remains in legal existence, even though it cannot be exercised’.⁴³ Along this line, the United States military manual of 1914 stated that:

³⁹ Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli ‘Illegal Occupation: Framing the Occupied Palestinian Territory’, (2005) 23(3) *Berkeley Journal of International Law* 551, at 562 and 592. See also *ibid.*, at 608. The coinage ‘sovereign suspension’ is a good summation of what the classic authors have argued since the second half of the nineteenth century. See, for instance, Charles M. Calvo, *Le Droit International Théorique et Pratique*, 4th ed., (Paris: Guillaumin et Cie, 1888), Tome Quatrième, at 212, para. 2166.

⁴⁰ Ministère des Affaires Étrangères, *Documents Diplomatiques - Actes de la Conférence de Bruxelles*, (Brussels: F. Hayez, 1874), at 106 (Colonel fédéral Hammer of Switzerland proposing the application, by analogy, of the law on blockade to situations of occupation). See also Calvo, *ibid.*, at 213, para. 2168 (favourably commenting on this proposal).

⁴¹ Calvo, *ibid.*, at 212, para. 2166 (‘Quant au pouvoir de l’ennemi qui occupe le territoire, il est bien entendu qu’il ne remplace pas celui de l’État vaincu, lequel n’est que suspendu et ne saurait passer dans toute son étendue à l’envahisseur, qui n’est nullement investi de la souveraineté; (...) il n’y a donc pas changement de souveraineté’) (‘Regarding the power of the enemy that occupies the territory, it is well understood that it does not replace the power of the vanquished state, which is only suspended and cannot pass in all its extent to the invader, which is never invested with the sovereignty;...there is hence no change in sovereignty’: English translation by the present author); Oppenheim (1917), *supra* n. 9, at 363-364 (‘...through military occupation the authority over the territory and the inhabitants only de facto, and not by right, and only temporarily, and not permanently, passes into the hands of the occupant’); Hall, *supra* n. 8, at 469, para. 154.

⁴² The original in French stated that:

‘Quand au pouvoir de l’ennemi qui occupe le territoire, on est aujourd’hui d’accord pour reconnaître qu’il ne remplace pas celui de l’État vaincu. Le territoire occupé n’est pas encore séparé de l’État auquel il appartenait, les habitants sont demeurés citoyens de celui-ci, il n’y pas eu changement de souveraineté’.

Loening, *supra* n. 29, at 651-652; translation by the present author.

⁴³ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914*, (New York: Columbia University Press, 1949), at 52.

Being an incident of war, military occupation confers upon the invading force the right to exercise control for the period of occupation. *It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty*'.⁴⁴

It can hence be suggested that the nature of occupation is most aptly characterised as a 'suspended sovereign'.

As a corollary of no transfer of sovereignty, the doctrines in the 'formative period' of the laws of war (1863-1949) came to suggest that the public authority exercised by an occupying power over the occupied territory and population ought to be provisional or 'transient', and never permanent.⁴⁵ The occupying power's exercise of governmental power was confined *temporally* to the period until the role of the territorial administration was handed over to the legitimate sovereign.⁴⁶ According to the doctrines of 'classic' writers, occupation gave an invading power only a temporary (and non-permanent) status

⁴⁴ United States War Department, Rules of Land Warfare, (1914), p. 105, para. 287, emphasis added.

⁴⁵ Hall, *supra* n. 8, at 470, para. 155; Oppenheim (1917), *supra* n. 9, at 363-364 ('through military occupation the authority over the territory and the inhabitants only *de facto*, and not by right, and only temporarily, and not permanently, passes into the hands of the occupant').

⁴⁶ To support this in the classic text, see Calvo, *supra* n. 39, at 212, para. 2166 ('elle [l'occupation] subsiste en fait mais c'est un fait d'un caractère provisoire, qui se transforme [sic] ou disparaît à la conclusion de la paix. (...) le territoire occupé n'est que transitoirement soumis au pouvoir de l'ennemi, qui y établit la loi martiale, c'est-à-dire une administration temporaire ayant pour base l'autorité militaire et les lois de la guerre tels que l'usage les a sanctionnées ou que les a consacrées l'opinion des publicistes qui font autorité en cette matière' ('The occupation subsists in the fact, but this is a fact of a provisional character, which is transformed or disappears at the conclusion of peace (...) the occupied territory is only transitionally subject to the power of the enemy, which establishes therein the martial law, that is, the temporary administration having as a basis such military authority and laws of war, as the usages have sanctioned or the opinion of the publicists that form the authority on this matter have consecrated'; translation by the present author).

of factual nature.⁴⁷ Such a provisional nature was considered a special hallmark of occupation that marked a contrast to the notion of conquest.⁴⁸

Writing during World War II, Feilchenfeld averred that '[t]he application of ...regulatory powers [of the occupant] extends over practically all fields of life...*if an occupation lasts for any length of time*'.⁴⁹ This might be read as implying the possibility of long-running occupation that was hardly considered temporary. However, what Feilchenfeld contended was that the length of occupation depended on the duration of warfare in which both armies were still fighting.⁵⁰ Hence, this contention was based on the idea that occupation was limited to the period of hostilities.⁵¹ Feilchenfeld took pains to emphasize repeatedly the precarious nature of belligerent occupation.⁵² He stated that '[t]he special rules applied to belligerent occupation of an enemy state during a war...set up a special system under which the territorial changes of belligerent occupation, even if likely to be permanent, is treated as precarious as long as the war continues'.⁵³

⁴⁷ Writing prior to the Brussels Declaration (in 1872), Loening made clear that:

The occupation is a simple fact *of a provisional character*. Until the war finishes, a conquest in the juridical sense of the word cannot take place. That is what the vanquished as well as the invading power must recognize. The occupied territory is *only provisionally subjected to the enemy's power*.

His contention of the relevant passage in original French read that:

L'occupation est un simple fait *d'un caractère provisoire*. Jusqu'à ce que la guerre finisse, une conquête dans le sens juridique du mot ne peut avoir lieu. C'est ce que l'État vaincu doit reconnaître aussi bien que la puissance envahissante. Le territoire occupé n'est *que provisoirement soumis au pouvoir de l'ennemi*.

Loening, *supra* n. 29, at 652, footnote omitted, emphasis added; English translation by the present author. See also Percy Bordwell, *The Law of War Between Belligerents – A History and Commentary*, (Chicago: Callaghan and Co., 1908), p. 299; Graber, *supra* n. 43, at 66.

⁴⁸ See G. Rolin-Jacquemyns, 'Chronique du Droit International. La Guerre Actuelle', (1870) 2 *Revue de Droit International et de Législation Comparée* 643 at 690-693. He stated that 'Assurer un certain ordre dans les pays occupés de force, garantir l'administration régulière de la justice, la police, les communications, les transactions privées, en un mot, gouverner provisoirement ces pays occupés, est autant le devoir que le droit du vainqueur' ('Assuring a certain order in the countries occupied by force, guaranteeing the regular administration of justice, the police, the communications, the private transactions, in one word, governing provisionally the occupied states, is as much as the duty as the right of the vanquisher; translation by the present author). He explained how the Prussian policy was generally to conserve the local laws and governmental institutions. See also *ibid.*, at 660-666, 676-685, and 690-693.

For the literature supporting the temporary nature of belligerent occupation, see also Calvo, *supra* n. 39, at 212, para. 2166; and Loening, *supra* n. 29, at 626-634, 650; Oppenheim (1917), *supra* n. 9, at 363-364; Graber, *supra* n. 43, at 41 and 56-57.

⁴⁹ Feilchenfeld, *supra* n. 25, at 86, emphasis added.

⁵⁰ He emphasised that the length of occupation depended on the duration of warfare in which both armies were still fighting: *ibid.*, at 7.

⁵¹ Such 'occupation during hostilities' can be presumably understood as narrower than military operations.

⁵² See, for instance, *ibid.*, at 11-12, paras 44-46.

⁵³ *Ibid.*, at 5, para. 11. His rejection of any change of permanent nature by occupation implies that such drastic change had to be based on some form of a post-war settlement.

Further, from the non-transfer of sovereignty to the occupying power can be inferred the unlawfulness of any unilateral and permanent step taken by the occupant, such as the annexation of occupied areas before the conclusion of peace.⁵⁴ Related to this is what some scholars label as the ‘principle of preservation’ or ‘conservationist principle’.⁵⁵ According to this principle, the legal system of the occupied territory should be conserved,⁵⁶ save in exceptional circumstances.⁵⁷ The occupying power’s exceptional possibility of modifying local laws may be explained by the concept of ‘military necessity’.⁵⁸ Fraenkel invoked the doctrine of ‘incidental or implied powers’ to justify the exceptional power accorded to the occupant.⁵⁹ When undertaking sweeping forms of transformations in local administrative or political structures, the occupying power must discharge the onus of adducing rationales

⁵⁴ Graber, *supra* n. 43, at 68-69 (discussing also measures to extend the temporal scope of its laws beyond the occupation period, irrespective of the intention of the displaced sovereign government). As known, since 1945, this principle has been subsumed in the ban on annexing a territory by use or threat to use force laid down in Article 2(4) of the UN Charter. See also Article 1 of the UN Charter which sets forth that one of the UN purposes is to prohibit aggression.

⁵⁵ See Ando, *supra* n. 24, and Gregory H. Fox, ‘The Occupation of Iraq’, (2005) 36 *Georgetown Journal of International Law* 195. Benvenuti’s study shows that this principle owes to the Italian jurist Pasquale Fiore: Benvenuti (2008), *supra* n. 31, at 632, referring to: Pasquale Fiore, *Nuovo diritto internazionale pubblico* (Milan: Casa Ed. e Tip. degli autori-ed, 1865), at 443-444. Another prominent classic scholar who advocated this ‘principle’ was Charles Calvo: Charles M. Calvo, *Le Droit International Théorique et Pratique*, 4th ed., (Paris: Guillaumin et Cie, 1888), Tome Quatrième, *supra* n. 39, Vol. 4, at 220, para. 2181 (‘Le droit international ne reconnaît pas à l’occupant la faculté de changer les lois civiles et criminelles des territoires sur lesquels se trouvent ses troupes, ni d’y faire administrer la justice en son nom’).

⁵⁶ Writing in the wake of the Franco-Prussian War, Rolin-Jaequemyns confidently affirmed that the Prussian policy in the context of the Franco-Prussian War generally met such a principle by retaining the local French laws and governmental institutions: Rolin-Jaequemyns, *supra* n. 48, at 690-693.

⁵⁷ Bluntschli argued that ‘Sie [die Kriegsgewalt] hat sich aber bis zu definitiver Regelung der Statsverhältnisse die Verfassung ändernder und gesetzgeberischer Acte möglichst zu enthalten und darf die hergebrachte Rechtsordnung nur aus dringenden Gründen ausser Wirksamkeit setzen’ (‘Nevertheless, the war-authority has possibly to conserve the constitution-changing and legislative acts and may set aside the existing legal order only on imminent ground’; English translation by the present author): Johaan Kasper Bluntschli, *Das Moderne Kriegsrecht der Civilisierten Staaten*, (Nördlingen: C.H. Beck, 1866), at p. 8, para. 36. See also *ibid.*, at p. 9, para. 40 (‘Die Kriegsgewalt darf alles das thun, was die militärische Nothwendigkeit erfordert, d. h. soweit ihre Massregeln als nöthig erscheinen, um den Kriegszweck mit Kriegsmitteln zu erreichen und in Uebereinstimmung sind mit dem allgemeinen Recht und dem Kriegsgebrauch der civilisierten Völker’ (‘The war-authority allows all to be done that the military emergency demands, that is, insofar as its measures seem necessary in order to achieve the war-aim with war measures and as they are in agreement with the general right and war-usage of the civilised nations’; translation by the present author). See also Hall, *supra* n. 8, at 470, para. 155.

⁵⁸ Hall, *ibid.*, at 469 and 470, para. 155. For a considerably elaborate examination of how the concept of military necessity has transformed its understanding among the scholars, see Etienne Henry, *Le Principe de nécessité militaire – Histoire et actualité d’une norme fondamentale du droit international humanitaire*, (Paris: A. Pedone, Paris, 2016).

⁵⁹ Ernst Fraenkel, *Military Occupation and the Rule of Law -Occupational Government in the Rhineland 1918-1923*, (London: Oxford University Press, 1944), at 193.

for this within the (elastic) notion of military necessity as exceptions to the ‘general principle’.⁶⁰ The principle that the legal systems of the occupied territory⁶¹ should be preserved as much as possible had the benefit of maintaining orderliness of social life among the local inhabitants under occupation.⁶² In a more macroscopic standpoint, this was conveniently attuned to preserve the stability of the European political order in the nineteenth century.⁶³

4. Rationalizing the Recourse to the *Travaux Préparatoires*

Exploring how the drafters of the legal instruments on the laws of war or IHL understood the temporal span of occupation is the primary objective of this paper. For that purpose, it is essential to examine at length the *travaux préparatoires* of the relevant legal instruments. These are: the Brussels Declaration (1874); the Hague Regulations (1899/1907); the Geneva Civilians Convention (1949); and the API (1977).

Before perusing the minute details of the historical documents, it is first of all essential to defend such a methodology. To begin with, Article 31 of the Vienna Convention on the Law of Treaties (VCLT) proclaims that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. The key elements stated in Article 31 of the VCLT are the ordinary meaning of the text, its context, and the object and purpose of the treaty in question.⁶⁴ Then Article 32 of the VCLT prescribes that ‘[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable’.⁶⁵ Hence, in case no appropriate meaning emerges by way of interpretation according to Article 31 VCLT, the preparatory work constitutes the

⁶⁰ As the practice evolved through WWI to the Inter-War period, and to the end of the twentieth century, scholarly opinions came to accommodate expansive remit of power exercised by an occupying power in reliance on the malleable notion of ‘military necessity’. See Feilchenfeld, *supra* n. 25, at 86. For a more recent literature that suggests a wider scope of prescriptive and administrative power of the occupant on the basis of the notion of military necessity, see Bhuta, *supra* n. 28, at 728.

⁶¹ See Calvo, *supra* n. 39, at 213, para. 2167 (describing the nature of belligerent occupation as similar to that of prisoners of war that conserved their liberty on parole and highlighting the need for the occupying power to respect ‘les principes du droit naturel’).

⁶² Giladi (2012), *supra* n. 21, at 86

⁶³ Bhuta, *supra* n. 28, at 740. The conservationist principle is incorporated into Article 43 Hague Regulations and Article 64 GCIV. Its relevancy in the recent practice in Iraq, see, for instance, Robert Kolb, *Ius in bello, Le droit international des conflits armés*, précis 2nd ed. (Basle: Helbing and Lichtenhahn, 2009), at 313; Fox, *supra* n. 55.

⁶⁴ The customary law nature of this principal means of interpretation is recognised most recently by the ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Preliminary Objections*, Judgment, 2 February 2017, para. 64.

⁶⁵ For reliance on the *travaux préparatoires* to ‘confirm the meaning’ of the interpretation reached by the means of interpretation pursuant to Article 31 of the Vienna Convention, see *ibid.*, paras 99-105.

means to be invoked.⁶⁶ Unlike state practice or the circumstances existing at the time of the conclusion of a treaty, the *travaux préparatoires* have advantage of being ‘tangible’ and ‘concrete’.⁶⁷ As noted by the International Law Commission (ILC),⁶⁸ the rationale for relying on the preparatory work can be summarized in a three-fold way. Their use can serve to: (1) confirm the meaning of a treaty text;⁶⁹ (2) determine the meaning that remains indefinite or obscure;⁷⁰ and (3) search for the meaning in the event that the ‘general rule’ of interpretation in Article 31 of the VCLT yields irrational outcomes.⁷¹ Under Article 32 VCLT, the weight of drafting records for the purpose of interpreting a treaty is understood as ‘supplementary’.⁷² The International Court of Justice (ICJ) has routinely recognised the importance of resorting to the preparatory work of the treaty.⁷³

Admittedly, the classification of the *travaux* as the ‘supplementary’ means, which may indicate a crude ‘hierarchical structure’ of Articles 31 and 32 VCLT,⁷⁴ do not suggest that they can be called into play only *subsequent to* the general means of interpretation enumerated in Article 31 VCLT. In the practice, they are taken into account often concurrently with the general means of interpretation under Article 31 VCLT. As noted by Shabtai Rosenne, in the legal proceedings it is hard to know by what processes and how much the *travaux préparatoires* have actually contributed to the judges of international tribunals in arriving at particular opinions on the meaning of a treaty text that they regard as clear.⁷⁵ In his view, claiming that recourse to the preparatory work can be justified only

⁶⁶ Yves Le Bouthillier, ‘Article 32 – Supplementary Means of Interpretation’, in O. Corten and Pierre Klein, *The Vienna Convention on the Law of Treaties – A Commentary*, (Oxford: Oxford University Press, 2011), 841, at 846.

⁶⁷ *Ibid.*, at 855.

⁶⁸ See the International Law Commission’s Report 1966 in (1966) *Yearbook of International Law Commission*, Vol. II, at 223, para. 19.

⁶⁹ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Brill, 2009), at 447.

⁷⁰ See Australia, High Court, *Commonwealth of Australia et al. v. Tasmania et al.* (‘*Tasmanian Dam case*’), [1983] HCA 21; (1983) 158 CLR 1 (1 July 1983); (1985) 68 ILR 304 (*per* Gibbs C.J.), para. 77 (available online at <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1983/21.html> - last accessed on 26th September 2018).

⁷¹ Villiger, *supra* n. 69 at 447.

⁷² The wording ‘supplementary’ corresponds to the French term ‘complémentaire’. Neither of them suggests the subsidiary nature. See *ibid.*, at 446.

⁷³ See, *inter alia*, ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, paras 20 and 46; and *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections), Judgment of 15 December 2004, para. 100.

⁷⁴ See Stephen M. Schwebel, ‘May Preparatory Work be Used to Correct Rather Than Confirm the “Clear” Meaning of a Treaty Provision?’, in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the Twenty-first Century*, (The Hague: Kluwer, 1996) 541-547, at 543.

⁷⁵ Shabtai Rosenne, (1964) *Yearbook of International Law Commission*, Vol. I, 766th meeting, 15 July 1964, p. 283, para. 17.

after the meaning obtained by the interpretation based on the text of the treaty turns out to be unclear verges on a ‘legal fiction’.⁷⁶

Further, the role and weight of the *travaux* in confirming the meaning obtained by the means of interpretation under Article 31 VCLT is not entirely evident. One salient question in this regard is what an interpreter has to do in case there is a discordance between the ordinary meaning of the treaty text and the meaning extrapolated from the *travaux préparatoires*.⁷⁷ On one hand, there is a proposition that the allegedly clear meaning arrived at under Article 31 should be followed.⁷⁸ On the other hand, Schwebel, the former judge of the ICJ, underscored the meaning revealed by the *travaux* as the evidence of the intention of the parties. He even endorsed the possibility of ‘correcting’ the ordinary meaning.⁷⁹

This paper contends that the text of Article 6(3) GCIV, while not obscure, leaves much of incoherence in the sense of sub-paragraph (a) of Article 32 VCLT. A greater cause of perplexity is that Article 6(3) GCIV, if construed pursuant to the primary methods of interpretation under Article 31 VCLT, may lead even to a possibly unreasonable result within the meaning of sub-paragraph (b) of Article 32 VCLT. Article 6(3) GCIV provides that:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

This paragraph mandatorily (‘shall’) ends the legal effect of nearly one-third of the rules on occupation contained in Part III of GCIV, one year after the general end of military operations. Those provisions that will cease to operate after the passage only of one year include basic rules affecting daily lives of civilians under occupation (Articles 50 and 55

⁷⁶ *Ibid* (adding that recourse to the preparatory works should be deemed as the acceptable means of interpretation).

⁷⁷ Le Bouthillier, *supra* n. at 847-848.

⁷⁸ Eric Canal-Forgues, ‘Remarques sur le recours aux travaux préparatoires dans le contentieux international’, (1993) *Revue Generale de Droit International Public* 901-937, at 913.

⁷⁹ See also the dissenting opinion of Judge Schwebel in ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment of 15 February 1995, ICJ Reports 1995, p. 28, at p. 39 (holding that ‘[t]he *travaux préparatoires* are no less evidence of the intention of the parties when they contradict as when they confirm the allegedly clear meaning of the text or context of treaty provisions’). See also Schwebel, *supra* n. 73, at 545-546 (arguing that otherwise, Article 32 would risk being consigned to ‘surplusage’).

GCIV),⁸⁰ and internment or administrative detention (Article 78 GCIV).⁸¹ As will be explored in section 7 below, such an ‘exclusionary clause’ seems to contradict the humanitarian object and purpose of the GCIV overall. The limited temporal applicability of those provisions in case of protracted occupation also seems to be incongruent in the light of the underlying objective of Article 8 GCIV. According to this provision, the protected persons in occupied territory are not supposed to renounce in part or in whole the rights guaranteed under the GCIV.⁸²

Such a one-year temporal delimitation laid down in Article 6(3) GCIV is markedly distinguishable from other legal instruments that include no such equivalent clause. As will be examined below, Article 3(b) API reverts to the pre-1949 customary rule, prescribing that both the GCIV and the API ‘shall cease...on the termination of the occupation’. The question is how to explain coherently such perceived inconsistency between Article 6(3) GCIV on one hand and the pertinent provisions of the 1907 Hague Regulations and of the API on the other. Such ambiguity furnishes additional ground to justify relying on the *travaux préparatoires* pursuant to Article 32 VCLT.

The inquiries into the intention and understanding of the drafters were forcefully defended by one of the prominent scholars of international law in the twentieth century. Writing decades before the ILC’s draft texts of VCLT emerged, Hersch Lauterpacht argued that ‘the object of interpretation is to arrive at the intention of the parties *ex signis maxime probabilibus*’.⁸³ He made plain that ‘the intention of the parties must be the paramount factor in the interpretation of treaties’, warning against recourse to technical rules of interpretation or presumptions that ‘may play havoc with the intentions of the parties’.⁸⁴ In his later work, Lauterpacht highlighted that the *travaux préparatoires* constituted even ‘a fundamental element, maybe the most important, in the matter of interpretation of treaties’.⁸⁵ As if to evoke semiotics, he considered the text of a treaty as a sign which can

⁸⁰ Such rules include those concerning education for children (Article 50 GCIV), food and medical supplies for the civilian population (Article 55 GCIV). See Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 595-6.

⁸¹ Yoram Dinstein, *The International Law of Belligerent Occupation*, (Cambridge: Cambridge University Press, 2009), at 283, para. 677.

⁸² Such an entrenched nature of protection is reinforced by Articles 7 and 47 GCIV.

⁸³ Hersch Lauterpacht, ‘Some Observations on Preparatory Work in the Interpretation of Treaties’, (1935) 48 *Harvard Law Review* 549 at 571. Premised on the critique of *Begriffsjurisprudenz*, he added that ‘[t]he first and principal lesson which can be deduced from their practice is that in no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself’: *ibid.*

⁸⁴ H. Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, 26 *BYIL* 48 (1949), at 75. See also *ibid.*, at 52 (‘the principal aim of interpretation, namely, the discovery of the intention of the parties’), 55 (‘the main task of interpretation, namely, the discovery of the intention of the parties’), 73 (‘the primary object of interpretation, namely, the revealing of the intention of the parties’) at 83 (‘It is the duty of the judge to resort to all available means...to discover the intention of the parties’).

⁸⁵ Hersch Lauterpacht, *De L’interprétation des traités*, (1950-II) 43 *Annuaire de L’institut de Droit International* 366-434, and 457-60, especially at 390-402 (the original in French stated ‘un élément fondamental, peut-être le plus important, en matière d’interprétation des traités’; translation by the present author). See also Martin Ris, ‘Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a

acquire substantive meanings when read together with the drafting history.⁸⁶ Admittedly, the ‘intentionalist’ thesis defended by Hersch Lauterpacht was premised on ‘the fragile assumption that the drafting process was neatly documented and readily available’.⁸⁷ Further, Philip Allott goes to the length of affirming that ‘[a] treaty is a disagreement reduced to writing’.⁸⁸ Bearing those general caveats in mind, this author still defends the method of diagnosing the *travaux préparatoires* of the legal instruments on belligerent occupation. This is because its aim is not to find any ‘common or uniform’ understanding among the framers (the attainment of which, to this author’s mind, seems illusory). Instead, this paper seeks to examine how (differently) the question of long-running occupation was perceived among the drafters.⁸⁹ It should also be ascertained if the drafters envisaged protracted occupation of decades-length duration.

It might be countered that those questions are not directly related to the text of the treaties in question. Yet, this paper considers that these are points of substantive nature affecting the interpretation of the treaty-based rules on the legal regime of occupation. Even Gerald Fitzmaurice, whose opinion was at odds with the intentionalist theory represented by Hersch Lauterpacht,⁹⁰ recognized a supplementary function of the *travaux préparatoires*. It is well-known that as one of the rapporteurs of the International Law Commission (ILC), Fitzmaurice contributed, together with Waldock, to shaping the current texts of the VCLT (including Articles 31 and 32). In addition to the situations covered by Article 32 VCLT, Fitzmaurice rationalized a ‘legitimate’ recourse to the preparatory work also where ‘the object is not the interpretation of the text as such, *but the ascertainment or establishment of a point of substance* in relation to the Treaty’.⁹¹ In this light, to recall, in the case of *Reservations to the Genocide Convention*, the ICJ had recourse to the preparatory work of the Genocide Convention not for the purpose of elucidating any particular provision of the Genocide Convention but of ascertaining if there existed any right of the parties to enter unilateral reservations to it. The *travaux* were scrutinized with a view to assessing the existence of any implied or tacit understanding to that effect. Accordingly, for the purpose

Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’, 14 *Boston College International and Comparative Law Review* 111 (1991), at 113.

⁸⁶ Lauterpacht (1950), *ibid.*, at 397. See also Jan Klabbers, ‘International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?’, (2003) 50(3) *Netherlands International Law Review* 267-288 at 277; and Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, (Oxford: Oxford University Press, 2012), at 3.

⁸⁷ Venzke, *ibid.*

⁸⁸ P. Allott, ‘The Concept of International Law’, (1999) 10 *EJIL* 31-50, at 43.

⁸⁹ Hence, any disagreements on this question among the drafters are of special pertinence.

⁹⁰ Lauterpacht argued that:

There is latent in any consistent doctrine of ‘plain meaning’ the danger of the substitution of the will of the judge for that of the parties. (...) The law-creating autonomy and independence of judicial activity may be an unavoidable and beneficent necessity. But they are so only on condition that the judge does not consciously and deliberately usurp the function of legislation.

Lauterpacht (1949), *supra* n. 84, at 83.

⁹¹ Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points’, (1957) 33 *British Yearbook of International Law* 203-293, at 218, emphasis added.

of verifying the nature and temporal length of occupation, it is legitimate to explore the preparatory work of the laws of war.

As briefly discussed above, this paper considers that explorations of the drafting records of the classic legal landscape, ranging from the Brussels Declaration to the Hague Regulations, can help obtain the drafters' intention and understanding as to the temporal parameters of occupation. In view of special importance of the Brussels Declaration as the model for the subsequent Hague Regulations, in the following section, much of in-depth examinations will be expended on this aborted legal instrument. The ambit of those examinations will encompass the Lieber Code (1863) and the *Oxford Manual on the Laws of War on Land (1880)*. The former, which constituted the first effort to codify the laws of war, was prepared during American Civil War by Francis Lieber, then the legal advisor to the United States (or Union) Force. The latter was adopted by the Institute of International Law (1880) as a crystallization of the leading academic opinions on the laws of war at that time. Admittedly, neither of those documents was purported as treaties. Yet, they have been referenced as the authoritative source in the doctrines and practice. Hence, it is warranted to include those documents together with the relevant legal instruments on laws of war.

5. The Temporary Nature of Occupation That Can be Ascertained from the Legal Text of the Laws of War and Their *Travaux Préparatoires*

5.1. The Lieber Code (1863) and the Provisional Nature of Occupation

Article 3(1) of the Lieber Code proclaims that '[m]artial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, 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'. By referring to the *suspension* of the local laws of the occupied land, Article 3(1) of the Lieber Code implicitly certifies the interim nature of occupation.⁹² Further, the last clause of Article 32 of the Lieber Code makes plain that any permanent change must await the conclusion of peace. Hence, this corroborates the basic understanding that any suspension, change or abolition of legal relationships done during the period of occupation is precarious.⁹³ Such transient and provisional nature of occupation was made express in the subsequent United States military manuals. For instance, the military manual of 1914 stated that '[m]ilitary occupation is based upon the fact of possession and is *essentially provisional* until the conclusion of peace or the annihilation of the adversary, when...military occupation technically ceases'.⁹⁴ The temporary nature of occupation as a

⁹² Article 3(1) proclaims that the '[m]artial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, 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'.

⁹³ It provides that 'the commander must leave it to the ultimate treaty of peace to settle the permanency of this change'.

⁹⁴ United States War Department, *Rules of Land Warfare*, (1914), p. 106, para. 289, emphasis added.

general principle is reaffirmed in the most recent *United States Law of War Manual* (2015),⁹⁵ the approach that is in line with the 1880 Oxford Manual, as will be seen below.

5.2. The *Travaux Préparatoires* of the Brussels Declaration – the Temporariness of Occupation as a Corollary of the Non-Transfer of Sovereignty

Article 2 of the Brussels Declaration proclaims that ‘[t]he authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety’.⁹⁶ The word ‘suspended’ in Article 2 of the Brussels Declaration suggests a provisional nature of belligerent occupation.

The closer look at the records of the Brussels Conference (1874) shows that when its earlier draft texts were compared to the final one, the clear change in the tenor of the relevant texts occurred during the drafting process. The gravity was shifted to emphasize the temporal nature of occupation and the thrust that belligerent occupation would bring about no handing down of sovereignty (at least during the period of occupation and until the conclusion of a treaty of peace). Article 1 of the very first draft text, which had been prepared by the Russian delegate for the purpose of a commission’s discussions,⁹⁷ provided that ‘[t]he occupation by the enemy of a part of the territory of a state in war with the former suspends, by the fact itself, the authority of the legitimate power of that [occupied] state therein and substitute the authority of the military power of the occupying state [with that of the occupied state]’.⁹⁸ On the one hand, this provision contained the verb ‘suspend’, which, as in the case of Article 2 of the Brussels Declaration,⁹⁹ indicated the temporary character of the occupying power’s authority. On the other, that verb ‘substitute’ included in that provision might be considered redolent of the doctrine of ‘substituted sovereignty’ examined above. Still, this should not be viewed as conceding the transfer of sovereignty, an option that the Lieber Code suggested as a possibility of post-war settlement.

⁹⁵ See United States Department of Defence, *Law of War Manual* (2015), at 735, para. 11.1 (‘Military occupation is a *temporary* measure for administering territory under the control of invading forces, and involves a complicated, trilateral set of legal relations between the Occupying Power, the *temporarily* ousted sovereign authority, and the inhabitants of occupied territory’), emphasis added. See also *ibid*, paras 11.4 (‘The fact of occupation gives the Occupying Power the right to govern enemy territory *temporarily*, but does not transfer sovereignty over occupied territory to the Occupying Power’); and 11.4.2 (‘Occupation is essentially *provisional*’), emphasis added.

⁹⁶ Translation into English by the ICRC. The authentic French text reads that ‘L’autorité du pouvoir légal étant suspendue et 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 publique’.

⁹⁷ This should not be conflated with the text of Article 1 of the revised draft text presented by Baron Jomini of Russia at the Plenary, which is discussed above.

⁹⁸ The original text in French read that ‘L’occupation par l’ennemi d’une partie du territoire de l’État en guerre avec lui y suspend, par le fait même, l’autorité du pouvoir légal de ce dernier et y substitute l’autorité du pouvoir militaire de l’État occupant’: Ministère des Affaires Étrangères, *supra* n. 109, at 9 (translation by the present author).

⁹⁹ The text of Article 1 of this very first draft text presented by Russia was realigned when incorporated into the text of Article 2 of the final text with modifications.

In the following plenary session convened on 5 August 1874, Baron Jomini of the Russian delegation, who acted as the President of the Conference, presented his own amended text.¹⁰⁰ When putting forward another draft text on 11 August 1874, he changed the wording of Article 1 of the Russian draft text (which was renumbered as Article 2). This might otherwise have appeared to be a ‘slight’ textual amendment. Yet, on closer inspection, in that process, the tenor of the relevant text was transformed in such a manner that shed any implication of a transmission of sovereignty. Following the further modification made by the Commission, Article 2 of the final draft came to read that ‘[t]he authority of the legitimate Power being suspended *and having in fact passed into the hands of the occupants, the latter shall take* all the measures in his power to restore and ensure, as far as possible, public order and safety’.¹⁰¹

There were two main changes that had special bearing on the question of attribution of sovereignty. First, after amendment, the text of what had been Article 1 of the original Russian draft text (renumbered as Article 2) came to confirm that the effect of belligerent occupation was the suspended sovereign.¹⁰² The introductory phrase of this provision (‘the authority of the legitimate Power being suspended, and having in fact passed into the hands of the occupants’)¹⁰³ was bereft of the word ‘substitute’. Second, the text was modified to elucidate only the *factual* control assumed by an occupying power, and not legal title to the occupied territory.¹⁰⁴ The wording ‘...was suspended by the fact of occupation, the

¹⁰⁰ Ministère des Affaires Étrangères, *supra* n. 40, at 277 (‘Nouvelle rédaction proposée par M. le Président dans la séance plénière du 5 août’). See also *ibid.*, 284 (‘Nouveau texte proposé par M. le Président dans la séance du 11 août’). Jomini inserted a new provision (new Article 1), which consisted of two sentences and defined occupied territories.

¹⁰¹ The original French text provided that ‘L’*autorité du pouvoir légal étant suspendue et 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*’: *ibid.*, at 288 ; English translation by the ICRC; emphasis added to indicate the change introduced by the Commission. In its earlier draft text amended by the Commission on 12-14 August 1874, two factual elements of being suspended and having in fact passed into the hands of the occupant were put in an alternative manner. The text read ‘L’*autorité du pouvoir légal étant suspendue ou 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’ (‘The authority of the legal power being suspended *or* having passed in fact between the hands of the occupant, the latter shall take all the measures that depend on him in order to establish and ensure, as much as possible, the public order and safety’; translation by the present author; emphasis added). Later at the Conference, two editorial changes were further entered in the wording. Apart from these, Article 2 of the final text was identical to the Commission’s text: *ibid.*, at 297. The text reverted to the phrase ‘l’ordre et la vie publique’.

¹⁰² This had already been mentioned in Article 1 of the first original draft text: *ibid.*, at 277 (Jomini’s draft text of 5 August 1874).

¹⁰³ Translation by ICRC.

¹⁰⁴ Another change that intervened with respect to Article 2 was that the reference to ‘the duty’ of an occupant to take all measures to restore and ensure order and public life was added to Article 2. This provision read that ‘L’*autorité du pouvoir légal étant suspendue de fait par l’occupation, il est du devoir de l’État occupant de prendre* toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publique’: Ministère des Affaires Étrangères, *supra* n. 40, at 277 (‘The authority of the legitimate power having been suspended in fact by the occupation, it is the duty of the occupying power to

occupying power takes...’ was replaced by the phrase ‘... was suspended and passed in fact into the hands of the occupant, the latter takes...’¹⁰⁵ Accordingly, it became clearer that after a series of modifications, the text that was finally adopted as Article 2 highlighted no transfer of sovereignty of the occupied state.¹⁰⁶

5.3. Indications for the Possibility of Protracted Occupation in the *Travaux Préparatoires* of the Brussels Declaration

Notwithstanding the foregoing examinations that indicated the provisional nature of occupation understood by the drafters of the Brussels Declaration, at the Brussels Conference, there were some indicia that might be read as recognizing the possibility of long-spanning occupation. At one point in the complex process of amendment, the text of Article 1(2) of the Brussels Declaration was formulated in such a manner as to come close to allowing for such a possible reading. At the Plenary session of the Brussels Conference, Baron Jomini of Russia introduced an amendment to the earlier draft text of Article 1(2) of the Brussels Declaration.¹⁰⁷ The revised draft text provided that ‘[t]he occupation extends only to the territory where such authority has been established and lasts only so long as it (‘aussi longtemps qu’elle’) is able to be exercised’.¹⁰⁸ This paragraph highlighted that occupation depended on both spatial and temporal scope of ‘authority’ to be exercised.¹⁰⁹ It may have been construed as authorizing an occupying power to prolong its occupation insofar as it had the *capacity* to exert territorial control (and this, even when there was no actual control). As will be examined below, a similar text that addressed both the spatial

take all the measures in his power to restore and ensure, as far as possible, the public order and safety; translation by the present author). Yet, in his draft of 11 August 1874, Baron Jomoni deleted any reference to the ‘duty’ of the occupant, presumably to fend off any repercussions of introducing such positive duty: *ibid.*, at 284. After the reading before the Commission, this text was slightly modified to the wording that corresponds to the text of Articles 43 Hague Regulations (1899/1907): *ibid.*, at 285 and 288.

¹⁰⁵ The original wording reads that : ‘...étant suspendue de fait par l’occupation, l’État occupant prend...’ was replaced by the phrase ‘...étant suspendue et passée de fait entre les mains de l’occupant, celui-ci prend...’(translation by the present author).

¹⁰⁶ As an aside, the word ‘actually’ in the unofficial English translation corresponds to the French words ‘de fait’. A closer equivalent would be the Latin ‘de facto’: Graber, *supra* n. 43, at 46-47.

¹⁰⁷ Baron Jomini modified the original Russian draft text twice prior to the Commission’s session on 12 August 1874: In his draft presented in the plenary on 5 August 1874, new provision (Article 1) that defined occupied territory was introduced. Part of what had been Articles 1 and 2 of the original Russian draft text was amalgamated into Article 2 of the modified draft text: Ministère des Affaires Étrangères, *Documents supra* n. 40, at 277.

¹⁰⁸ The original French text prescribed that ‘L’occupation ne s’étend qu’aux territoires où cette autorité est établie et ne dure qu’aussi longtemps qu’elle est en mesure de l’exercer’: *ibid.*, at 277, emphasis added, translation by the present author.

¹⁰⁹ See Article 1(2) of the draft text proposed by President of the Conference (Baron Jomini, Russia) on 5 August 1874. This read that ‘L’occupation ne s’étend qu’aux territoires où cette autorité est établie et ne dure qu’aussi longtemps qu’elle est en mesure de l’exercer’ (‘The occupation extends only to the territories where that authority is established and endure only so long as it is in a position to exercise it’): *ibid.*, at 277 (translation by the present author). As discussed above, the Swedish and Norwegian joint delegation supported the retention of this text.

and temporal ambit of occupation was introduced as the last sentence of Article 41 of the Oxford Manual (1880).

Following further amendments,¹¹⁰ the text of Article 1(2) of the Brussels Declaration that was finally agreed upon stipulates that '[t]he occupation extends only to the territory where such authority has been established and can be exercised'.¹¹¹ In short, this text stopped short of *expressly* characterizing occupation as an interim or precarious arrangement.¹¹² Nor did the text indicate any temporal parameters of occupation. The drafters of the Brussels Declaration understood the legal regime of occupation to be cognizable on the basis of the factual situation of control. This was the case, even though in the Commission's session, Baron Jomini explained that in his new text of Article 1(2), the temporal aspect was still implicit in his revised text.¹¹³ He pointed out that 'the occupation *lasts as it ('en tant qu'elle')* is exercised by fact'.¹¹⁴ One might be tempted to contend that both the drafting records and the final text of Article 1(2) of the Brussels Declaration did not entirely exclude the possibility of the legal regime of occupation lasting for so long as the factual state (or capacity) of control persisted. However, even if this reading may be accepted, it seems far-fetched to maintain that the drafters of the Brussels Declaration envisaged a protracted form of occupation that would endure for decennia. Further, the intention of the drafters of the Brussels Declaration may be evaluated alongside the text of the *Oxford Manual*, which was, as will be discussed immediately below, crafted only six years after the adoption of the former.

¹¹⁰ Subsequent to Baron Jomini's further amendment to Article 1(2), which was introduced on 11 August 1874, this paragraph read that '[t]he occupation extends only to the territory where such authority is established *and as it ('en tant qu'elle')* can be exercised': *ibid.*, at 284. The original text in French proclaimed that 'L'occupation ne s'étend qu'aux territoires où cette autorité est établie et *en tant qu'elle est en mesure de s'exercer*': *ibid.*, at 284, emphasis added, translation by the present author.

¹¹¹ The original French text reads that 'L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer'.

¹¹² It should be noted that the deletion of any reference to the temporal factor was motivated not for the reason related to any considerations of temporal length of occupation. Instead, this expurgation was done lest such a clause might imply that physical presence of troops in occupied region was indispensable for belligerent occupation: Graber, *supra* n. 43, at 53. Compare Ministère des Affaires Étrangères, *supra* n. 40, at 105 (General de Leer of Russia stressing the need for a part of the occupying army to secure its position and line of communication with other corps) and 106 (Federal Colonel Hammer of Switzerland arguing that 'Pour pourvoir la maintenir, d'ailleurs, il n'est pas nécessaire de disposer de grandes troupes; il suffit d'un homme, pourvu qu'il soit respecté, d'un bureau de poste, de télégraphes, d'une Commission quelconque établie dans la localité et fonctionnant sans opposition') ('For the purpose of maintaining the occupation, it is not necessary to have at disposal grand troops; it is sufficient to have a man, provided that he is respected, or a post office, or a telegram office, or any other commission established in the locality and functioning without opposition'; translation by the present author).

¹¹³ *Ibid.*, at 106 (lieutenant-colonel Staaff, the co-representative of Sweden and Norway; 12 August 1874).

¹¹⁴ The original French statement read that '*l'occupation dure tant qu'elle s'exerce de fait*': *ibid.*, at 107, emphasis added, translation by the present author. See also *ibid.*, at 277 and 284. This phrase might be taken as endorsing the view that as long as the factual situation of a foreign military control lasts, occupation continues concordantly, so that prolonged occupation would be justified. Yet, from the discussions of the Commission, it was clear that his statement was purported merely to accentuate the purely factual nature of occupation.

5.4. The *Oxford Manual* (1880) – the Approach of Setting the Temporary Nature of Occupation as a ‘General Principle’ While Exceptionally Recognizing a Possibility of Prolonged Occupation

The *Oxford Manual* is distinguishable in making it explicit and unambiguously clear that belligerent occupation is an interim arrangement. Article 6 of the *Manual* reads that ‘[n]o 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*’.¹¹⁵ So far, this provision constitutes the only major *legal document* that *expressly* recognizes the temporary nature of occupation as a general rule.

Nevertheless, two qualifications ought to be made. First, the qualifying word ‘essentially’ in Article 6 suggests that no-interim occupation is exceptionally permissible. Second, Article 41 of the *Oxford Manual* (1880), which corresponds to Article 1 of the Brussels Declaration, seems to recognize the potentially longer occupation in tune with the duration of a foreign power’s control. Article 41 of the *Oxford Manual* stipulates that:

A territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there. *The limits within which this state of affairs exists determine the extent and duration of the occupation.*¹¹⁶

¹¹⁵ Oxford Manual (1880), Article 6, English translation by ICRC, emphasis added. The original in French provided that ‘Aucun territoire envahi n'est considéré comme conquis avant la fin de la guerre ; jusqu'à ce moment l'occupant n'y exerce qu'un pouvoir de fait *essentiellement provisoire*’.

¹¹⁶ Oxford Manual (1880), Article 41, English translation by the ICRC, emphasis added. The original in French reads that ‘Un territoire est considéré comme occupé lorsque, à la suite de son invasion par des forces ennemies, l'État dont il relève a cessé, en fait, d'y exercer une autorité régulière, et que l'État envahisseur se trouve être seul à même d'y maintenir l'ordre. *Les limites dans lesquelles ce fait se produit déterminent l'étendue et la durée de l'occupation.*

Apart from Articles 6 and 41 discussed here, see also a note preceding section C(a) (public property) that contains Articles 50-53. This suggests that the occupant’s power over property may be constrained. It reads that:

Si l'occupant est substitué à l'Etat ennemi pour le gouvernement des territoires envahis, il n'y exerce point cependant un pouvoir absolu. Tant que le sort de ces territoires est en suspens, c'est-à-dire jusqu'à la paix, l'occupant n'est pas libre de disposer de ce qui appartient encore à l'ennemi et ne peut servir aux opérations de la guerre.

(If the occupant is substituted for the enemy State for the government of the invaded territories, s/he still does not exercise any absolute power. So long as the fate of these [occupied] territories is in suspense, that is until peace, the occupant is not free to dispose of what appears still to the enemy and cannot make use of them for the war operation).

Institut de Droit International, ‘Réglementation des Lois et Coutumes de la Guerre. Manuel des Lois de la Guerre’ (Rapporteur: M. Gustave Moynier), (1881-1882) 5 *Annuaire de l'institut de Droit International* 168 (translation by the present author).

The last sentence of Article 41 makes plain that the temporal sweep (alongside geographical reach) of occupation rests upon the factual nature of occupation, which is defined in the first sentence. The gist is that by making the determination of the duration of occupation contingent upon the factual situations (the aspect that is more clearly articulated by the original French text), Article 41 of the *Oxford Manual* may be read as admitting of a lengthier period of occupation as an exception. In this light, there is a measure of coherence in the use of the qualifying word ‘essentially’ in Article 6 of the *Oxford Manual*. This adverb can be taken as qualifying the general requirement that occupation be ‘provisional’.

5.5. The *Travaux Préparatoires* of the Hague Regulations and the Provisional Nature of Occupation

Article 43 of the Hague Regulations (1899/1907) reads that ‘[t]he authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.¹¹⁷ As briefly noted above, this provision is the consolidation of Articles 2 and 3 of the Brussels Declaration.¹¹⁸ When Article 43 Hague Regulations is compared with the earlier equivalent provisions of the Brussels Declaration, one may discern two salient differences, which are of special relevance to ascertaining the temporal length of occupation. They are: (1) the omission of Article 43 Hague Regulations to mention expressly the *suspended* nature of the authority of the legitimate Power; and (2) the obliteration of references to the exceptional power of the occupant to ‘modify, suspend and replace’ the local laws, which was, under the Brussels Declaration, exercisable in case of necessity.¹¹⁹

With respect to point (2), the deletion of the extensive power granted to the occupant to change the laws in force in the occupied territory may be considered to reflect the drafters’ due recognition of the precarious character of the legal regime of occupation. This issue will be addressed in section 6 below. Turning to point (1), when adopting Article 43 of the 1899 Hague Regulations, the delegates to the 1899 Hague Conference trimmed the text of Article 2 of the Brussels Declaration (‘the authority of the legitimate power being

¹¹⁷ Translation into English by the ICRC. The authentic French text stipulates that ‘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’.

¹¹⁸ Article 3 of the Brussels Declaration reads that ‘[w]ith 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’. Translation into English by the ICRC. The authentic French text provides that ‘À cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ne les remplacera que s’il y a nécessité’.

¹¹⁹ As an aside, another key difference introduced by the Hague Regulations is the paraphrasing of the term ‘nécessité’ (‘necessity’) by the wording ‘empêchement absolu’ (‘unless absolutely prevented’) which had no exact and elegant English equivalent.

suspended and having in fact passed into the hands of the occupant...').¹²⁰ In so doing, they expunged the phrase that was indicative of the provisional effect of occupation, namely, the phrase 'being suspended and'.¹²¹ It was the Belgian delegate that proposed such deletion at a sub-commission meeting on 8th June 1899.¹²² Unfortunately, the minutes of the meeting show no indication as to his rationale.¹²³

In retrospect, the deletion of the key word 'suspended' in the drafting stage might be read as suggesting a change in the drafters' opinion as to the temporal span. This might be taken as allowing room for protracted occupation. Nevertheless, as noted above, Article 43 Hague Regulations was based on the amalgamation of the texts of Articles 2 and 3 Brussels Declaration. Contrary to Article 1(2), Article 2 of the Brussels Declaration expressly indicated the suspended nature of territorial sovereignty. Hence, one may still hypothesize that when adopting the text of Article 43 Hague Regulations, the drafters assumed the temporariness of occupation. Surely, for all such drafting records, it remains true that nothing in the text of the Hague Regulations spells out expressly the temporary nature of occupation. At least, one can claim that the applicability of the Hague Regulations to cases of prolonged occupation is not precluded.

6. The Traditional Laws of War and the Correlation between the Provisional Nature of Occupation and the Limited Degree of Power Exercisable by the Occupying Power – the *Travaux Préparatoires* and the Doctrines

6.1. Overview

Admittedly, there is no logical correlation between the provisional nature of occupation and the limited degree of power with which an occupier is endowed.¹²⁴ Hence, it may be contended that measuring the power of the occupant is not decisive for ascertaining the length of occupation. Still, if the pivotal logic of occupation demands abstention from undermining the sovereignty of the displaced government of the occupied state, it seems reasonable that the power exercisable by the occupant in transforming local laws and administrative structure should be generally restrained. The lengthier the temporal span of occupation, the greater the need for the occupier to take appropriate administrative and legislative measures to secure the wellbeing of the inhabitants.¹²⁵ In view of these, the

¹²⁰ The translation by the ICRC. The original text in French read 'L'autorité du pouvoir légal étant suspendue et ayant passé de fait entre les mains de l'occupant...'

¹²¹ The translation by the ICRC. The original text in French mentioned 'étant suspendue et'.

¹²² This was proposed by Beernaert (Belgium): James Brown Scott, *The Proceedings of the Hague Peace Conference, The Translation of the Official Texts, The Conference of 1899*, (New York: Oxford University press, 1920) at 512.

¹²³ Conférence Internationale de la Paix; La Haye, 18 Mai-29 Juillet, 1899, 1899, Part I, p. 119; Scott, *ibid.*

¹²⁴ See Giladi (2012), *supra* n. 21, at 114 (arguing that for Francis Lieber, the transient character of occupation did not suggest any limitation on the occupying power's authority).

¹²⁵ Along this line, Loening asserted that '[w]hen the occupation prolongs, the occupant will also have to accommodate the pressing needs of the population': Loening, *supra* n. 29, at 634. In the present-day context, see ICRC's Report, *Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory* (2012), at 72 ('In fact, the duration of the occupation was a factor that could lead to transformations and changes in the occupied territory that would normally not be necessary during short-term occupation').

conferral only of the limited degree of power upon the occupier may be read as an indicator for the presumably interim nature of occupation.

6.2. The *Travaux Préparatoires* of the Brussels Declaration and the Limited Power to be Exercised by the Occupying Power

With respect to Article 3 of the Brussels Declaration, it should be noted that its original text¹²⁶ had expressly recognized that as a general rule, the occupying power was invested with broad or even almost unencumbered latitudes to alter the local laws. According to this first draft text, '[t]he enemy that occupies a territory may, according to the exigencies of the war and in view of the public interest, either maintain the binding force of the laws that were in effect in time of peace, *or modify them in part, or suspend them entirely*'.¹²⁷ However, following drastic changes introduced at the hands of both the President and the Commission,¹²⁸ the occupant's such power to modify the local laws was transformed into the exception that could be exercised only in case of necessity.¹²⁹ Article 3 came to highlight instead the principle of preserving local laws and the ban on modifying them.¹³⁰

To obtain more insight into such drastic changes, it is crucial to investigate how this came about in the drafting process. At Brussels, by the proposal of Baron Jomini (Russia), Article 2 of the first draft text was split¹³¹ into two provisions: (1) Article 2, which allowed an occupying power to suspend the local authority and to take all measures to restore and ensure 'l'ordre et la vie publique'; and (2) Article 3 that, while proclaiming the idea of

¹²⁶ The very first draft text was proposed by Russia and initially numbered as Article 2.

¹²⁷ The original French text read that 'L'ennemi qui occupe un territoire peut, selon les exigences de la guerre et en vue de l'intérêt public, soit maintenir la force obligatoire des lois qui étaient en vigueur en temps de paix, soit les modifier en partie, soit les suspendre entièrement': Ministère des Affaires Étrangères, *supra* n. 40, at 9, emphasis added, translation by the present author.

Article 2 of the original Russian draft text read that 'l'ennemi qui occupe un territoire peut, selon les exigences de la guerre et en vue de l'intérêt public', soit maintenir la force obligatoire des lois qui étaient en vigueur en temps de paix, soit les modifier en partie, soit les suspendre entièrement' ('The enemy that occupies a territory can, according to the exigencies of the war and in view of the public interest, either maintain the mandatory force of the law that was in effect in time of peace, modify them in part, or suspend them entirely'; translation by the present author).

¹²⁸ As a first step of change, the President of the Conference, Baron Jomini (Russia), revised a draft text in the plenary session, introducing, for the first time, a provision (new Article 1) that defined what was an 'occupied territory': Ministère des Affaires Étrangères, *supra* n. 40, at 277 (new draft text proposed by the President in the plenary session on 5 August 1874).

¹²⁹ Article 3 of the draft text proposed by the President on 11 August 1874 provided that 'À cet effet, il maintient les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifie, ne les suspend ou ne les remplace que s'il y est obligé' ('To this effect, s/he [the enemy occupant] maintains the laws that were in force in the country in time of peace, and modifies, suspends or replaces them only where it is obliged to do so'): Ministère des Affaires Étrangères, *supra* n. 106, at 284 (translation by the present author). The text was slightly changed by the Commission with the last phrase 'que s'il y est obligé' replaced by the words 'que si il y a nécessité': *ibid.*, at 285-286. The final wording reverted to the phrase 'que s'il y est obligé' while changing the tense from the present to future: *ibid.*, at 288 and 297.

¹³⁰ *Ibid.*, at 239 (Baron Blanc of Italy, expressing this view as personal capacity).

¹³¹ This process was to be reversed at the subsequent Hague Conference (1899) to form one united provision (Article 43 of the Hague Regulations).

preserving the local laws, made the possibility of modifying, suspending or replacing local laws the exception that could be allowed only in case of necessity.¹³² Article 3 stipulated that '[w]ith 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'.¹³³ Hence, this provision gravitated toward emphasizing the limited and exceptional nature of the legislative power of the occupant. It was the German delegation that motioned to amend the original text that had recognised a wide power of modifying local laws by changing the phrase ('either modify them in part, or suspend them entirely').¹³⁴ He proposed that this wording be substituted by the phrase that would confine the occupier's legislative power only to the case of necessity ('neither modify them, nor suspend them, nor replace them except in case of necessity').¹³⁵ The result of this amendment was to turn around the whole interpretive dynamic of this provision. As a result of such alterations, in the final draft text the occupying power's possibility of assuming a wide range of legislative and administrative powers was posited only as an exception.

6.3. The Doctrines on the Correlation between the Limited Degree of Power Conferred upon the Occupying Power and the Temporary Nature of Occupation

Writing in 1872, two years before the Brussels Declaration, Loening suggested that the scope and kind of powers to be wielded by an occupying power should depend on the length of occupation.¹³⁶ Many scholars of the laws of war in the period between the late

¹³² Ministère des Affaires Étrangères, *supra* n. 40, at 9, 110, 239, 277, 284, 288 and 297. As explained in the previous sub-sections, after some further changes were introduced into the text of Article 2, the final version reads that 'L'autorité du pouvoir légal étant suspendue et ayant passée de fait entre les mains de o'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 publique' ('The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety'): *ibid.*, at 297, English translation by the ICRC.

¹³³ The original French text proclaimed that 'À cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifier, ne les suspendra ou ne les remplacera que s'il y a nécessité' : English translation by the ICRC).

¹³⁴ The original French wording read 'soit les modifier en partie, soit les suspendre entièrement', translation by the present author.

¹³⁵ The original French version read 'ne les modifier, ne les suspendra ou ne les remplacera qu'en cas de nécessité': Ministère des Affaires Étrangères, *supra* n. 40, at 110. This proposal was supported by Mr de Lansberge (the Netherlands) and Colonel Count Lanza (Italy): *ibid.*, at 110-111.

¹³⁶ On this, see Loening, *supra* n. 29, at 634 (stating that in case of 'short occupation', the occupying power had to take measures relating to the safety of the occupation army while in case of 'a long occupation', its power could turn to general legislation). The relevant part of his original text is worthy of citation here:

L'occupation n'est-elle que passagère, *de courte durée*, il [l'ennemi] se contentera de prendre les dispositions nécessitées par les exigences de la guerre et par sa propre sûreté. L'occupation *se prolonge-t-elle*, l'occupant aura aussi à faire droit aux besoins pressants de la population. (...) Le pouvoir de l'État vaincu étant suspendu et toute tentative faite pour l'exercer étant menacée de peine, l'ennemi occupant doit, autant que le permettent la guerre et ses nécessités, compenser cet état de choses. Il exerce, *bien que ce ne soit qu'à titre provisoire*, les droits éminents de l'État, il perçoit les impôts, il est donc tenu par contre de remplir les devoirs inhérents à ces droits.

nineteenth century and early twentieth century seemed to emphasize the correlation between the relatively limited degree of power bestowed upon the occupant and the provisional nature of occupation.¹³⁷ They seemed to read the generally circumscribed nature of the occupier's power as an indication for the transient nature of its control. In 1890, Hall contended that '...the invader, having only a right to such control as is necessary for his safety and the success of his operations, must use his power within the limits defined by the fundamental notion of occupation, *and with due reference to its transient character*'.¹³⁸ Similarly, according to Graber (1949), '[t]he modern law of belligerent occupation is anchored in the concept that occupation differs in its nature and legal consequences from conquest. (...). She added that 'the early definition of the modern concept of occupation are [sic] chiefly concerned with the main aspects of this difference, namely the *temporary* nature of belligerent occupation as contrasted with the permanency of conquest, and the *limited*, rather than the full powers which belligerent occupation entails for the occupant'.¹³⁹

6.4. Minority of 'Classic' Scholarly Opinions – the Extensive Power of the Occupant and the Possibility of Prolonged Occupation

(When the occupation is only temporary, of short duration, the enemy is satisfied to make the arrangements necessitated by the exigencies of the war and by its own security. When the occupation prolongs, the occupant will also have to accommodate the pressing needs of the population. (...) The power of the State vanquished was suspended and all the attempt to exercise it was threatened with punishment, the enemy occupant must compensate for that state of affairs, as long as the war and its necessity allows it. The occupant can exercise, though only provisionally, the eminent rights of the state, collects the taxes, and s/he is by contrast, obliged to fill the duties inherent in those rights).

Emphasis added; translation by the present author.

¹³⁷ Rolin-Jaequemyns, *supra* n. 48, at 660-666, 675-685, 690-693. See also Calvo, *supra* n. 39, at 212, para. 2166; and Loening, *supra* n. 29, at 626-634, 650. For the argument that while occupation was a temporary state of affairs, the occupier had the extensive right to change the local laws, see Halleck, *supra* n. 27, at 775-776 and 781. He observed that:

The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by the *temporary rights of military occupation*. He nevertheless has all the powers of a *de facto* government, and can, at his pleasure, either change the existing laws, or make new ones. Such changes, however, are, in general, *only of a temporary character*, and end with the government which made them. (...) Neither the civil nor the criminal jurisdiction of the conquering state is considered, in international law, as extending over the conquered territory during military occupation.

Ibid., at 781, para. 5, emphasis added.

¹³⁸ Hall, *supra* n. 8, at 470, para. 155, emphasis added. See also Oppenheim (1917), *supra* n. 9, at 364.

¹³⁹ Graber, *supra* n. 43, at 37 (emphasis added).

Some American ‘classic’ writings in the late nineteenth century and the early twentieth century suggested the extensive power of the occupant and a possibility of occupation of relatively lengthy duration. Wheaton’s treatise, published during the American Civil War, admitted the ‘indefinite’ nature of belligerent occupation even after fighting ceased. One caveat is that this was contemplated only so long as the legal state of war continued.¹⁴⁰ Accordingly, Wheaton envisaged post-hostilities occupation which may have been protracted until the final status of the occupied territory was settled by an agreement (such as a treaty of peace). Needless to say, the adjective ‘indefinite’ was not synonymous with the qualifier ‘permanent’. Wheaton made plain that the occupying power would ‘not become the *permanent* civil sovereign of the country’.¹⁴¹ In his view, the occupying power would not acquire any abiding title to the immovable property.¹⁴² Overall, it is unclear if Wheaton, even when conceding a possibility of a longer occupation of territory of a sovereign state, envisaged the protracted kind that would endure for decades after ceasefire.

One may surmise that Wheaton’s inclination toward relatively long-spanned occupation may be coterminous with the influential American doctrine that endorsed an occupier’s wide range of powers. Lieber implicitly recognized the exceptional possibility of annexing an occupied land even prior to the conclusion of peace.¹⁴³ In his view, the occupant was granted the ‘full power’ in case of military necessity.¹⁴⁴ Akin to Lieber, Hall¹⁴⁵ tinkered with the thesis that a large scope of powers might be reserved to the occupying power. Their views went further than what was contemplated by contemporary scholars in Europe. For instance, Bluntschli was disposed to qualify the ambit of the war-authority of the

¹⁴⁰ Henry Wheaton, *Elements of International Law*, 8th edition by Richard Henry Dana Jr, (London: Sampson Low, 1866), at Part IV, para. 347, at pp. 436-439. According to him, ‘Belligerent occupation implies a firm possession, so that the occupying power can execute its will either by force or by acquiescence of the people, and for an indefinite future, subject only to the chances of war. On the other hand, it implies that the *status of war continues between the countries, whether fighting has ceased or not....*’: *ibid.*, at 436, emphasis added.

¹⁴¹ *Ibid.*, at 436, emphasis added.

¹⁴² *Ibid.*, at 437-438.

¹⁴³ Article 33 of the Lieber Code proclaims that ‘[i]t is no longer considered lawful -on the contrary, it is held to be a serious breach of the law of war -to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country’. See Graber, *supra* n. 43, at 40 (explaining that Article 33 was drafted by Lieber ‘with the Civil War in mind’).

¹⁴⁴ This can be inferred from the reading of Articles 1 and 2 of the Code. See also Bluntschli, *supra* n. 57, at p. 8, para. 36 and at p. 9, para. 40.

¹⁴⁵ Hall observed that the rights which the occupier possessed over the inhabitants of the occupied territory included the ‘*general right to do whatever acts are necessary for the prosecution of his war*’, and that with the scope of such rights delimited only by the ambiguous notion of military necessity, ‘the rights acquired by an invader in effect amount to the momentary possession of *all ultimate legislative and executive power*’. He adds that ‘[o]n occupying a country an invader at once invests himself with *absolute authority*, and the fact of occupation draws with it as of course the substitution of his will for previously existing law whenever such substitution is reasonably needed....’: Hall, *supra* n. 8, at 469-470, para. 155, emphasis added.

occupier by ‘the need of continuation of war, or by the need of occupied area or of the population’.¹⁴⁶ It is plausible that many American writers were influenced by (or purported to give legitimacy to) the previous practice of the United States during the Anglo-American War (War of 1812, 1812-1815)¹⁴⁷ and the Mexican American War (or American Intervention in Mexico, 1846-48).¹⁴⁸ Even after the Brussels Conference, the United States’ practice, markedly different from the European views, conferred an avowedly wide range of powers upon an occupying power.¹⁴⁹ This can be discerned in relation to the annexationist practice of the United States during the Spanish-American War (1898).¹⁵⁰

¹⁴⁶ Bluntschli explained that ‘Die Kriegsgewalt kann allgemeine Verordnungen erlassen, Einrichtungen treffen, Polizeigewalt und Steuerhoheit ausüben, so weit solches durch das Bedürfnis der Kriegsführung geboten ist, oder durch die Bedürfnisse der besetzten Gebiete und seiner Bewohner erfordert wird. (‘The war-authority can proclaim general directives, set up institutions, exercise the police authority and tax sovereignty, insofar as this is demanded by the need of continuation of war, or by the need of occupied area or of the population’; translation by the present author): Bluntschli, *supra* n. 57, at 8, para. 36.

¹⁴⁷ See *United States v. Rice*, 4 *Wheaton* 254, 1819 (relating to the city of Castine occupied by the British in the war of 1812). Justice Story held that:

By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise *the fullest right of sovereignty* over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose.

Emphasis added. See also *The Foltina*, 1 *Dodson* 451 (1813) (‘No point is more clearly settled in courts of common law than that a conquered territory forms immediately part of the King’s dominions’).

¹⁴⁸ See the statement of President Polk addressed to the House of Representatives on 24 July 1848:

In prosecuting a foreign war thus duly declared by Congress, we have the right, by ‘conquest and military occupation’, to acquire possession of the territories of the enemy, and, during the war, to ‘exercise the fullest rights of sovereignty over it’. The sovereignty of the enemy is in such case ‘suspended’, and his laws can ‘no longer be rightfully enforced’ over the conquered territory ‘or be obligatory upon the inhabitants who remain and submit to the conqueror. By the surrender the inhabitants pass under a temporary allegiance’ to the conqueror, and are ‘bound by such laws, and such only, as’ he may choose to recognize and impose. ‘From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience’. These are well-established principles of the laws of war, as recognized and practiced by civilized nations, and they have been sanctioned by the highest judicial tribunal of our own country.

James D. Richardson (ed.), *A Compilation of Messages and Papers of the Presidents, 1789-1897*, Vol. IV, (Washington D.C.: The Government Printing Office, 1897), 595. See also *Fleming et al. v. Page*, 1 January 1850, 50 U.S. (9 How.) 603, at 615 (*per* Chief Justice Taney) (‘by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country’).

¹⁴⁹ According to Benvenisti, the Americans, when expanding the western frontier territories, closely followed the British practice, ‘which did not distinguish between occupation and conquest’ in non-Western world, ‘whereby mere occupation was an effective way of expanding its dominion to occupied territories and their inhabitants’: Benvenisti (2008), *supra* n. 31, at 635-636. See also *ibid.*, at 639.

¹⁵⁰ See the Executive Order addressed to The Secretary of War on 19 May 1898. In this, President McKinley made a declaration in relation to the United States occupation of the Philippines:

7. Temporariness of Occupation and Prolonged Occupation in the *Travaux Préparatoires* of the GCIV

7.1. Overview: The Relevance of Article 6(3) GCIV to the Question of Prolonged Occupation

Having obtained insights into how the drafters of the ‘classic’ texts of the laws of war and the doctrinal discourses in the corresponding period (1863-1949) conceived the temporal aspect of the legal regime of occupation, the examinations now turn to the question of prolonged occupation in the mind of the framers of modern IHL: the GCIV and the API. Starting with the GCIV, this section will focus on the draft records of the GCIV (1949), especially with respect to Article 4 of the Stockholm draft text of the GCIV¹⁵¹ (which corresponded to Article 6 GCIV). A closer perusal of the draft records reveals that the evidence for recognizing the possibility of decades-long protracted occupation is minimal and, at best, inconclusive.¹⁵²

7.2. Interpretation of Article 6(3) GCIV in Accordance with the General Rule of Interpretation

As succinctly discussed in Section 4 above, Article 6(3) GCIV contains the so-called ‘one-year rule’, which delimits the temporal span of applicability of the GCIV (save for the core forty-three provisions expressly spelt out). Evidently, Article 6(3) GCIV contains an important exception that is applicable to the post-belligerent phase, namely what Dinstein

Though *the powers of the military occupant are absolute and supreme* and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, *so far as they are compatible with the new order of things*, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation.

Emphasis added. See also Benvenisti (2008), *supra* n. 31, at 638 (discussing how the United States doctrine allowed the occupation and the use of force to acquire sovereign title over the territory through a sovereign act, such as annexation or incorporation, even though this, failing an act of the Cognree, still had yet to make the territory in question subject to the United States law). See also Benvenisti, *ibid.*, at 641.

¹⁵¹ Article 4 of the Stockholm draft text, which was approved by the XVIIth International Red Cross Conference at Stockholm, was entitled ‘beginning and end of application’. It did not contain the ‘one-year rule’, as this was introduced at the subsequent Geneva Conference. Article 4 read that:

The present Convention shall apply from the outset of any conflict covered by Article 2. The application thereof shall cease on the close of hostilities or of occupation, except as regards protected persons whose release, repatriation or re-establishment may take place subsequently and who, until such operations are terminated, shall continue to benefit by the present Convention.

Final Record, ibid, Vol. I, at 114.

¹⁵² See, e.g., ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14-26, 1947*, (Geneva: ICRC, 1947); and the *Final Record of the Diplomatic Conference of Geneva of 1949* (hereinafter referred to as *Final Record*), (Bern: Federal Political Department, 1949; hereinafter *Final Record*).

calls ‘post-belligerent occupation’¹⁵³ or ‘post-hostilities belligerent occupation’.¹⁵⁴ This exception relates to forty-three provisions that are considered to be ‘hard core’ and of fundamental importance for the occupied population.¹⁵⁵ These provisions retain validity throughout the duration of occupation.¹⁵⁶ Still, with regard to Part III of GCIV, which specifically addresses occupation, only 23 out of its 32 provisions will outlast the passage of one year after the general close of military operations and continue to apply in the entire phase of post-belligerent occupation.

The term ‘the general close of military operations’ raises some interpretative issues. One immediate question may be the meaning of the concept ‘military operations’. It seems widely recognized that this concept is broader than that of ‘active hostilities’ used in Article 118 GCIII.¹⁵⁷ Along this line, some authors consider the former concept sufficiently broadly to include even the construction of a wall in occupied territories.¹⁵⁸ Nevertheless, such understanding was not necessarily shared in the past. The draft records of the 1949 Geneva Conference reveal that some delegates conflated the two concepts ‘military operations’ and ‘active hostilities’. When evaluating the temporal juncture from which the one year should run under Article 6(3) GCIV, several delegates equated the close of hostilities to the conclusion of military operations.¹⁵⁹

¹⁵³ Dinstein (1998), *supra* n. 38, at 42-43. He explains that ‘[w]hen the war has taken place and is terminated by a peace treaty - or by any other arrangement embedded in consent – an occupation prolonged beyond the end of the war cannot erase its origin which were non-pacific. The best term in the opinion of the present writer is “post-belligerent occupation”’: *ibid.*, at 42.

¹⁵⁴ Dinstein (2009), *supra* n. 81, at 280-283, paras 674-680.

¹⁵⁵ Yoram Dinstein, ‘Autonomy and Legal Status: A Rejoinder’, (1995) 26 *Security Dialogue* 185, at 188; and Knut Dörmann and Hans-Peter Gasser, ‘Protection of the Civilian Population’, in Dieter Fleck, *The Handbook of International Humanitarian Law*, 3rd ed., (Oxford University Press, 2013), para. 537.

¹⁵⁶ After one-year time span, occupation draws to a close in various forms or patterns. For the purpose of the non-application of those 43 fundamental provisions, it does not matter if a handover of governmental authority may take place in one single day by an official and solemn proclamation, or by the progressive phrasing out of foreign forces.

¹⁵⁷ Clearly, the coinage ‘active hostilities’ is much narrower than the concept of ‘hostilities’. The *ICRC’s Commentary to APs* states that:

The general close of military operations may occur after the ‘cessation of active hostilities’ referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations. Whatever the moment of the general close of military operations, repercussions of the conflict may continue to affect some persons who will be dealt with below.

ICRC’s Commentary to APs at 68, para. 153.

¹⁵⁸ Ben-Naftali, Gross, and Michaeli, *supra* n. 39, at 595; Julia Grignon, *L’applicabilité temporelle du droit international humanitaire*, (Zurich: Schulthess, 2014), at 315. Elsewhere, Grignon ponders over the question whether a manoeuvre deployed by a foreign army to effectuate the instance of occupation without armed resistance in a manner described in Article 2(2) common to the GCs may or may not constitute military operations: *ibid.*, at 322-323.

¹⁵⁹ This was the case, despite the difference in the two concepts of ‘hostilities’ and ‘military operations’. The Italian delegate considered the term ‘end of hostilities’ as indicating the ‘termination of military operations’,

Another question that has raised much of doctrinal controversy is if the term ‘military operations’ points to those that temporarily and causally precede the occupation in question. This narrow reading is precisely the one adopted by the ICJ in its Advisory Opinion in *Wall*. In that case, the Court held that Article 6(3) GCIV set the one-year rule running from ‘the general close of military operations leading to the occupation’.¹⁶⁰ Yet, as critics claim,¹⁶¹ the qualifying words ‘leading to the occupation’, which shows a causal connection, were absent under Article 6(3) GCIV but appended by the Court.¹⁶²

One may ask if Article 6(3) GCIV is tailored only to historical circumstances of the Allied post-hostilities belligerent occupation in Germany, Austria and the American occupation of Japan.¹⁶³ If an answer to this question is in the affirmative, the relevance of that paragraph to other instances of occupation in general might be discounted. Yet, the ordinary meaning of Article 6(3) GCIV makes it unmistakably clear that its scope of application *ratione materiae* and *ratione loci* is purported to be general. Accordingly, by delimiting the temporal parameters of many provisions, Article 6(3) GCIV is marked off

adding that ‘[a]n occupation which lasted beyond the date of cessation of hostilities only entailed obligations which were to be lifted progressively, as and when the local authority took over administrative powers’: *ibid.*, at 625. Later, the *Report of the Rapporteur of Committee III to the Plenary Assembly* explained that the text of Article 4 of the Stockholm Draft was amended to use the phrase ‘general conclusion of military operations’, instead of the words ‘conclusion of hostilities’ with a view to avoiding any confusion in countries such as France where under national legislation, ‘the conclusion of hostilities’ was determined by decree, which would repeal all internal war legislation and restore peacetime legislation: *ibid.*, at 815. The Rapporteur understood the notion ‘military operations’ in a manner that was very narrow and synonymous to the notion of ‘active hostilities’. He stated that ‘the general conclusion of military operations means when the last shot has been fired’. See also the views expressed by the Monaco delegation and the Chairperson (the French delegate) at the Third Meeting: *ibid.*, at 624.

¹⁶⁰ The Court held that:

A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. (...) Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall Advisory Opinion), 9 July 2004, para. 125. See also Dinstein (1998), *supra* n. 38, at 41-44 (arguing that only the Israeli occupation of Golan Heights constituted ‘belligerent’ occupation in strict sense, while the nature of occupation of the both West Bank and the Gaza Strip has been transformed by various agreements).

¹⁶¹ Ardi Imseis, ‘Critical Reflections on the International Humanitarian Aspects of the ICJ *Wall* Advisory Opinion’, (2005) 99 AJIL 102, at 106; Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 595-596 (However, the present writer disagrees over their wider interpretation, according to which the term ‘military operation’ is understood as encompassing *all* ‘the circumstances surrounding the construction of the wall’). See also *Final Record*, *supra* n. 61, Vol. II-A, at 623-25;

¹⁶² *Wall* Advisory Opinion, *supra* n. 77, para. 125. See also *ibid.*, para. 135 (‘the general close of military operations that led to their occupation’). See Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 595-6.

¹⁶³ See Gross, *supra* n. 3, at 43.

from the Hague Regulations. As discussed above, the latter do not set any temporal limit on the applicability of their rules on occupation.¹⁶⁴

7.3. Continued Applicability of the Law of Occupation to Occupied Territory Where There is no Armed Resistance

According to *Pictet's Commentary* (1958), Article 6(3) GCIV, when regulating the temporal ambit of the GCIV, is 'deliberate' in omitting to refer to one situation of occupied territory covered by Article 2(2) common to the GCs, namely, the territory that has fallen into occupation where an occupant does not encounter any armed resistance, state of war or armed conflict (hence, absence of any hostilities).¹⁶⁵ In such situations, *Pictet's Commentary* considers that the basis for the 'one-year rule' is moot. Hence, contrary to the temporal scope of application of most provisions of the GCIV, 'the Convention will be fully applicable... so long as the occupation lasts.'¹⁶⁶ On this reading, it can be suggested that the GCIV implicitly recognizes long-spanning occupation in the cases 'where there has been no military resistance, no state of war and no armed conflict', as covered by common Article 2(2) GCs.¹⁶⁷

In those situations, according to *Pictet's Commentary*, there is no doubt about the applicability of the GCIV.¹⁶⁸ The continued validity of the GCIV in such types of occupied territory may be aptly depicted as 'the exception to the exception' of the one-year rule laid down in Article 6(3) GCIV.¹⁶⁹

As an alternative, in such instances of occupation where an occupying power has not met with any armed resistance, it may be suggested that the act of forcible incorporation and occupation itself should be considered a 'military operation' in the sense of IHL.¹⁷⁰ On this

¹⁶⁴ This is true even though Article 154 GCIV underscores the 'supplementary' nature of the GCIV in relation to Section III of the Hague Regulations that governs the occupied territory. At the Diplomatic Conference (1949), some influential delegates insisted on the meaning of occupation laid down by the Hague Regulations: *Final Record*, Vol. II-A, at 624-625 (United Kingdom and Italy). The United Kingdom delegate even stressed that any new rule under GCIV that would be inconsistent with the rules of occupation under the Hague Regulations was unacceptable to his delegation: *ibid.*, at 775-776.

¹⁶⁵ *Pictet's Commentary to GCIV*, at 63.

¹⁶⁶ *Ibid.* The Commentary adds that in the absence of a political act, such as the annexation of the territory or its incorporation in a federation, recognized by the international community, 'the provisions of the Convention must continue to be applied'. Still, it may be argued that what *Pictet's Commentary* is purported to suggest is to highlight the protection of the civilian population under occupation (whose meaning is understood in tune with common Article 2 GCs as encompassing the situation where there is no armed resistance), rather than to address the specific question of the temporal span of occupation.

¹⁶⁷ *Ibid.* Still, it quickly adds that because of the termination of hostilities, there is no justification for maintaining stringent measures against the civilian population: *ibid.*

¹⁶⁸ *Ibid.* (adding that the exception to this may arise in the case of any political act recognized by the international community, such as the annexation of the territory or its incorporation in a federation).

¹⁶⁹ Grigon, *supra* n. at 322.

¹⁷⁰ For this view, see Robert Kolb and Silvain Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, (Brussels: Bruylant, 2009), at 161.

reading, in line with Article 6(3) GCIV, the ‘one-year rule’ will duly apply after the termination of the ‘military operation’ (that is, taking control over a foreign territory).¹⁷¹

7.4. The *Travaux Préparatoires* of Article 6(3) GCIV and Their Implications on Prolonged Occupation

At the Diplomatic Conference at Geneva (1949), Article 4 of the Stockholm Draft provided the basis for hammering out the text of Article 6 GCIV. The second sentence of this draft provision read that ‘[t]he application thereof shall cease on the close of hostilities or of occupation, except as regards protected persons whose release, repatriation or re-establishment may take place subsequently and who, until such operations are terminated, shall continue to benefit by the present Convention’.

When examining Article 4 of the Stockholm Civilians Draft, some delegates contemplated a relatively protracted case of occupation. Still, while referring expressly to ‘a prolonged military occupation’, the United States delegate was swift in proclaiming that a long-term pattern of occupation had to be attended by ‘a progressive return of governmental responsibility to local authorities’.¹⁷² Other delegates were reluctant to endorse prolonged occupation. They proposed to set a time limit on the applicability of the draft text of the GCIV. They feared that otherwise occupation might elapse for a ‘considerable time’, or even ‘indefinitely’ in a post-belligerent situation.¹⁷³ They highlighted the need to enumerate which obligations should cease after the time limit.¹⁷⁴ This was because of the widely shared conviction that the administrative power should be handed over progressively to the local authority, with the gradual diminution of the occupying power’s obligations.¹⁷⁵

¹⁷¹ Grignon, *supra* n. 158, at 323. See also the United States Military Tribunal, Nuremberg, Judgment of *Wilhelm List and Others (The Hostages Trial)*:

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

8 *Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission*, (London: HMSO, 1948-1949) at 55-56.

¹⁷² *Final Record*, *supra* n. 61, Vol. II-A, at 623. With respect to the temporal length of applicability of the proposed Civilians Convention, the United States representative emphasized that ‘[t]he Occupying Power should be bound by the obligations of the Convention only during such time as the institutions of the occupied territory were unable to provide for the needs of the inhabitants’. Implicitly underlying this was the idea of occupying power as the trustee for the territory and population under occupation: *ibid.* He then referred to the inadequacy of the rules governing the responsibility of the occupying power for the welfare of the local populations: *ibid.*

¹⁷³ See the views expressed by the Bulgarian, United Kingdom and Norwegian delegations: *Final Record*, *supra* n. 61, Vol. II-A, at 624.

¹⁷⁴ *Ibid.* (a Norwegian suggestion).

¹⁷⁵ *Ibid.*, at 625 (an Italian proposal).

At the Third Meeting of Committee III,¹⁷⁶ the United States delegate submitted the amendment to Article 4 of the Stockholm Draft text.¹⁷⁷ He distinguished between the obligations of the occupying power that were applicable during the period of hostilities and those during ‘the period of disorganization following on the hostilities’. He pointed out that the nature and duration of the latter period of occupation (‘post-hostilities belligerent occupation’ in Dinstein’s term) would vary.¹⁷⁸ By referring to the Allied occupation of Germany and the American occupation of Japan, he expressly suggested the possibility of a ‘prolonged military occupation’. He nonetheless contended that even in such a case, the governmental responsibility should be returned progressively to local authorities. The draft records indicate that other delegates at the Geneva Conference also contemplated the possibility of a protracted occupation.¹⁷⁹ The United States’ proposal that the obligations under the GCIV should be gradually handed over to local administrations was accepted by several delegates.¹⁸⁰ Still, it was felt by some representative that the essence was not the time-limit of one year, but ‘which obligations should cease (for example, those concerning food supplies) and which should be maintained (for example, those concerning justice)’.¹⁸¹

At the same Third Meeting of Committee III, the ICRC delegate proposed to distinguish two cases: (1) the national territory where the GCIV would cease to apply ‘at the end of hostilities’; and (2) the occupied territory where its applicability would terminate ‘at the end of occupation’.¹⁸² For the purpose of examining such distinction and other proposals (above all, the scope of the obligations that would cease to apply), the revision of Article 4 of the Stockholm Draft was entrusted to the Drafting Committee. At the Forty-fourth meeting of Committee III, the revised text of Article 4 of the Working Draft was presented together with a separate clause (the third paragraph), which addressed specifically the question of the end of application of the GCIV in occupied territory.¹⁸³ This clause incorporated the United States’ proposal on the time-limit of one year after the termination of military operations.¹⁸⁴ Nevertheless, two influential delegates objected to this paragraph.

¹⁷⁶ This committee was responsible for drafting the Civilians Convention.

¹⁷⁷ Final Record, Vol. II-A, at 623.

¹⁷⁸ *Ibid.* According to the ICRC delegate, the Conference of Experts, which had been responsible for drawing up part of the pre-Stockholm draft text, drew on the provisions of the POW Convention which considered the end of captivity of POWs upon the ‘cessation of hostilities’ as the basis for ascertaining the termination of internment of civilians: *ibid.*, at 624. Yet, this obviously did not contemplate the possibility of administratively detaining civilians during the period of occupation subsequent to the end of (active) hostilities.

¹⁷⁹ See the delegates of Bulgaria, United Kingdom, and Norway. The Bulgarian representative stated that ‘[a] considerable time might elapse before an occupation ended’ while referring to six months or two years at the cutting period for the applicability of the GCIV: *ibid.*, at 624.

¹⁸⁰ See the delegates of the United States, Norway, and Italy, *ibid.*, at 623-625.

¹⁸¹ *Ibid.*, at 624 (the suggestion by Norway).

¹⁸² *Ibid.*, at 625.

¹⁸³ *Ibid.*, at 775.

¹⁸⁴ The one-year time limit was inserted also in relation to the text of the second paragraph (governing the end of application of the GCIV for the territory of Parties to the conflict), which had been initially prepared

The United Kingdom, wary of any departure of the GCIV provisions from the notion of occupation defined in the Hague Regulations, suggested that the Stockholm Draft text be restored.¹⁸⁵ Similarly, the USSR delegate proposed that ‘all reference to a prolongation of the application of the Convention should be omitted from Article 4’.¹⁸⁶ What was plausible was that the USSR delegate excluded any notion of prolonged occupation as a matter of law. He may have been concerned that the text of Article 6(3) would legitimize protracted occupation. Together with other delegates, in the mind of the USSR delegation, the instances of post-WWII Allied occupation may have been understood as of the *sui generis* kind¹⁸⁷ that should not be repeated. Hence, the USSR may have thought that no specific rule tailored to such exceptional cases should be formulated. In the end, the text of Article 4(3) of the Working Draft was adopted by Committee III.¹⁸⁸ Subsequently, the final text of this paragraph, which became identical to the current text of Article 6(3) GCIV, was endorsed by the Plenary Assembly.¹⁸⁹

One remaining question was which provisions were to be maintained in force throughout the period of occupation as the exception to the ‘one-year rule’. On this question, the *Report of Committee III to the Plenary Assembly* explained that the key to determining this question was to focus on those provisions relating to ‘the right [of the occupied population] to be protected against arbitrary acts’. On the *Report’s* suggestion, those rights ought to be distinguished from the provisions that had bearings more on the exercise of powers by the occupying power.¹⁹⁰

7.5. Evaluating the Implications of the ‘One-Year Rule’ under Article 6(3) GCIV

When inserting the ‘one-year rule’ in the text of Article 6(3) GCIV,¹⁹¹ there is every reason to believe that the drafters of the GCIV had largely in mind the then ongoing, post-WWII Allied occupation of Germany and Austria,¹⁹² and the United States’ occupation of

by the Drafting Committee. Yet, this was amended by the United Kingdom proposal. See Final Record, Vol. II-B, at 189 (Drafting Committee) and 386-388 (plenary).

¹⁸⁵ *Ibid.*, at 775-776. See also the same point made earlier at the Third Meeting of Committee III, *ibid.*, at 624.

¹⁸⁶ *Ibid.*, at 776.

¹⁸⁷ See the opinion of the Monaco delegate (‘The present occupation of Germany was an entirely different case’): *ibid.*, at 624.

¹⁸⁸ *Ibid.*, at 776 (by sixteen votes to eight).

¹⁸⁹ *Final Record*, Vol. II-B, at 388 (Twenty-fourth Plenary Session).

¹⁹⁰ *Final Record*, Vol. II-A, at 815-816. See also *ibid.*, at 776 (the view expressed by the Rapporteur, the Swiss delegate); and Final Record, Vol. II-B, at 386-388 (exchange of views between the USSR delegation and the United Kingdom representative at twentieth-fourth plenary meeting).

¹⁹¹ *Final Record*, Vol. II-A, at 776.

¹⁹² The Allied occupation of Germany can be explained by the doctrine of *debellatio*: Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., (Oxford: Oxford University Press, 2012), at 161-162.

Japan.¹⁹³ The Allied' avowed policy of 'transformative occupation',¹⁹⁴ in those countries and in other post-WWII occupied territories¹⁹⁵ was perceived to justify longer occupation than the previous instances of occupation of which they were cognizant. By specifically pinning down the extent of the applicability of the GCIV within a defined temporal limit and envisaging the gradual transfer of administrative responsibility to local authorities, the drafters must have contemplated that those instances of the Allied occupation would (or should) come progressively to an end.¹⁹⁶ Confronted with those cases of occupation that might potentially endure, the delegates may have seen advisable to contemplate a phased transfer of the responsibility for meeting the needs of the local population to the local authorities.¹⁹⁷ The analyses of the draft records show that Article 6(3) GCIV is never meant to throttle the protections of the occupied population. Viewed in that specific historical context, it does not seem unreasonable¹⁹⁸ to stipulate that in case of occupation likely to be protracted exceptionally, the responsibility for the wellbeing of civilians is to be progressively handed over to the local authorities.¹⁹⁹

On reflection, it is not unsound to suggest that in case of volatile occupation riven by short but intense fighting, each time a military operation is undertaken to address surge in fighting until it peters out, the calculation of the temporal period under Article 6(3) GCIV

¹⁹³ *Pictet's Commentary to GCIV*, at 62; Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts*, (The Hague: Martinus Nijhoff, 1982) (hereinafter, Bothe/Partsch/Solf), at 59, para. 2.8.; and Roberts (1990), *supra* n. 4, at 56. As an aside, the special circumstances of the Allied occupation in Germany, Austria and Japan also explained the introduction of the phrases 'within its territory and subject to its jurisdiction' under Article 2(1) of the International Covenant on Civil and Political Rights. Summary Record of the Hundred and Ninety-Third Meeting, U.N. ESCOR, Human Rights Commission, 6th session, 193rd meeting, UN Doc. E/CN.4/SR.193, at 13, para. 53. (1950) (reference to those three countries by Eleanor Roosevelt).

¹⁹⁴ For explorations of this concept, see Bhuta, *supra* n. 28; and Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', (2006) 100(3) *AJIL* 580-622; and ICRC's Report, *Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory* (2012), at 67-72.

¹⁹⁵ See the Anglo-American occupation of Italy in 1943-48; the Soviet Union's occupation of Northern Korea (1945-48); and the United States' occupation of Southern Korean (1945-48): David M. Edelstein, *Occupational Hazards – Success and Failure in Military Occupation*, (Ithaca: Cornell Univ. Press, 2008), at 27, 57-86, 183 and 186-187.

¹⁹⁶ In the same year of the Diplomatic Conference at Geneva (1949), the Allied occupation of Italy, and the United States occupation of Korea (which, like Taiwan, was liberated from the Japanese colonialism), just came to an end.

¹⁹⁷ Grignon, *supra* n. 158, at 311.

¹⁹⁸ Compare Orna Ben-Naftali, "'A La Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion', 38 *Israel Law Review*, (2005) at 211-229; and Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 596 (claiming that such an arrangement of transfer seems 'absurd'). Even so, the mandatory term 'shall' under Article 6(3) GCIV, used to indicate the termination of key provisions of the applicability of the GCIV, seems to go too far.

¹⁹⁹ Grignon, *supra* n. 158, at 311.

should resume from the outset.²⁰⁰ In other words, according to Dinstein's 'metaphor of an accordion', whenever a short-term military operation is undertaken, this, in tune with Article 6(3) GCIV, triggers the renewed praxis of the GCIV *in toto*.²⁰¹

On closer inspection, the view that prolonged occupation was unfamiliar in 1949 was only partially tenable. At first sight, the delegates seemed to exclude the case of decade-length occupation among sovereign states, other than the case of pacific occupation (*occupatio pacifica*) that was predicated on an armistice or other post-war agreements.²⁰² However, several non-Western states did undergo occupation of protracted kind, as in the case of the United Kingdom occupation of Egypt (1882-1954).²⁰³ It may well be that precisely because those non-Western episodes of occupation were excluded from the application of the law of occupation, the delegates to the 1949 Geneva Conference (where few non-Western states were represented) discounted their implications as precedent. With respect to the United States occupation of Japan,²⁰⁴ Edelstein's study reveals that in the very year of 1949 when the Geneva Conference was convened, the United States authority ruled out any prospect of protracted occupation.²⁰⁵ In view of these considerations, it seems far-fetched to argue

²⁰⁰ Dinstein compares the reactivation of the GCIV and the re-operation of Article 6(3) GCIV to an accordion which 'may be compressed (one year after the general close of military operations), stretched out in full (if and when hostilities resume), recompressed, re-stretched, and so on': Dinstein (2009), *supra* n. 81 at 283, para. 680. See also Dinstein (1995), *supra* n. 162, at 187-8; and *idem*, 'The International Legal Status of the West Bank and the Gaza Strip-1998', (1998) 28 *Israel Yearbook on Human Rights* 37, at 42-44.

²⁰¹ Roberts (1990), *supra* n. 4, at 55; Dinstein (2009), *supra* n. 81, at 282, para. 678.

²⁰² Edelstein refers to the cases of post-WWI occupation of Rhineland by France, United Kingdom and USA (1918-30), and of the French occupation of Saar (1920-35): Edelstein, *supra* n. 195, at 27.

²⁰³ *Ibid.*, at 105-122. Edelstein also refers, as other instances of 'occupation', to the French occupation of Mexico (1861-67), the British 'occupation' of Iraq (1918-32) and Palestine (1919-1948) under the League of Nations' mandate, and the United States occupation of Cuba (1898-1902 and 1906-9), Haiti (1915-34), the Dominican Republic (1916-24), and the Philippines (1898-1945): *ibid.*, at 27, 39-47, and 176-182. It can be argued that the legal nature of the British occupation of Egypt should have been characterized as that of belligerent occupation. After the third year of occupation, there was an attempt to agree on the Anglo-Turkish agreement (the 1887 Drummond Wolff Convention), but this was aborted. Egypt was formally incorporated into the system of the British protectorate in 1914: *ibid.*, at 112 and 117. In so doing, Britain declared sovereignty over Egypt (as it did over Cyprus) late as 1914: Benvenisti (2008), *supra* n. 31, at 636. See also M.P. Hornik, 'The Mission of Sir Henry Drummond-Wolff to Constantinople, 1885-1887', (1940) 50 *The English History Review* 597-623.

²⁰⁴ It can be argued that the United States occupation of Japan was based on the Instrument of Surrender accepted by the then Imperial Japanese government. See: Ando, *supra* n. 24, at 87; M.J. Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law', (2003) 6 *Yearbook of International Humanitarian Law* 127, at 157-158; Benvenisti (2012), *supra* n. 192, at 162. See also R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study', (2006) 11 *Journal of Conflict and Security Law* 239, at 241, n. 14.

²⁰⁵ Edelstein, *supra* n. 195, at 134 (noting that '[b]y May 1949, leaders in Washington had further begun to recognize that the continuation of the occupation, with little end in sight, might endanger the very purpose of the occupation', referring to the warning by the United States Secretary of State Dean Acheson that 'an indefinite occupation would make Japan 'easy prey to Commie ideologies', and to the statement of General MacArthur that '[a]fter about the third year [of occupation], any military occupation begins to collapse of its own weight': *ibid.*, referring to Secretary of State Dean Acheson to Certain Diplomatic Officers in Foreign

that when adopting the text of Article 6(3) GCIV, the framers of the GCIV envisaged the length of belligerent occupation to be stretched for decades rather than for years.²⁰⁶ It is likely that even though clearly cognizant of the cases of Allied post-WWII occupation, they may not have intended to deviate essentially from the traditional presumption that the occupation should remain a temporary state of affairs. It is suggested that most scholars in the aftermath of two World Wars endorsed the basic tenet that belligerent occupation ought to be an interim state of affairs.²⁰⁷

The drafters' working assumption was that the legal regime of occupation be of relatively short duration. Unless built on that premise, it is hard to explain why the responsibility for the general wellbeing of the occupied population is supposed to be transferred gradually to the local authority. That assumption can be bolstered by the interpretation of Article 6(3) GCIV. Otherwise, confronted with the case of prolonged occupation where the occupying power refuses to hand over the responsibility to the local organ,²⁰⁸ the textual interpretation may lead to an unreasonable outcome: by virtue of the exclusionary clause contained in that paragraph, the local population would be denied basic needs relating to care and education for children, and food and medical supplies.²⁰⁹ Hence, any proposal to accommodate decades-long form of occupation within the normative structure of the GCIV seems to risk running counter to the object and purpose of the GCIV.

On the other hand, *prima facie*, nothing in the positivised text of IHL overall seems to exclude prolonged occupation, much less the application of the law of belligerent occupation to such a protracted pattern.²¹⁰ The implications of the latter aspect will be briefly explored below.²¹¹ This author agrees that the question of the end of occupation should not be confounded with that of the temporal scope of application of GCIV. Indeed, it is suggested that Article 6(3) GCIV is 'not intended to provide a criterion for assessing the...end of occupation, but only to regulate the end or the extent of the Convention's applicability *on the basis that occupation would still continue*'.²¹²

Relations of the United States, 1949, vol. 7, *The Far East and Australasia*, Part 2, 736-37; and Robert B. Textor, *Failure in Japan* (New York: John Day, 1951), at 340.

²⁰⁶ Note that the local authorities in Germany, Austria and Japan were already given substantive portion of governmental responsibility by 1949, with the end of occupation in respective territories (save for Berlin which was then under the Soviet blockade) foreseeable in some years ahead (1952 or 1955 for the two former states, and 1951 for Japan).

²⁰⁷ See Benvenisti (2012), *supra* n. 192, at 164-166.

²⁰⁸ The refusal may occur not least for the reason of its non-commitment to the withdrawal from the occupied territory. Or, it may well be that there is yet to emerge any effective local authority to which the responsibility should be handed over for addressing social and economic needs of the occupied population.

²⁰⁹ Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 595-596.

²¹⁰ See also Roberts (1990), *supra* n. 4 at 55 (referring to the possibility of military occupation or administration that endures 'indefinitely').

²¹¹ See subsection below 'Post-1949 Practice and Doctrines in relation to the Provisional Nature of Occupation'.

²¹² ICRC, *Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory, Report*, (2012), at 30, emphasis added.

8. Article 3(b) API and Issues of Temporariness of Occupation and Prolonged Occupation

8.1. Overview

Article 3(b) API stipulates that ‘the application of the Conventions and of this Protocol shall cease...in the case of occupied territories, on the termination of the occupation’.²¹³ As is clear from the text, the API does not replicate the one-year limitation rule contained in Article 6(3) GCIV. Article 3(b) API jettisons any notion that the applicability of both the API and the GCIV hinges on a definite temporal limit. It sets forth the principle that the law of occupation enunciated in both the GCIV and the API will remain in force, so long as occupation endures (and until the disappearance of either the effective control on the ground or of its capacity to exert this by a foreign power).²¹⁴ Unmistakably, under this provision, the temporal scope of the law of occupation is extended ‘beyond what is laid down in the Fourth Convention’.²¹⁵ Accordingly, it is possible to contend that the API is equipped to address scenarios of prolonged occupation,²¹⁶ however *indefinite* the length of occupation may be.

8.2. The *Travaux Préparatoires* of Article 3(b) API

The *travaux préparatoires* of the API reveal that its drafters were generally dissatisfied with the one-year rule contained in Article 6(3) GCIV. In 1972, when the Conference of Government Experts (CGE) was convened, Commission IV, which was responsible for Part I (‘General Provisions’) of the draft API, assigned a working group to prepare the text of Article 5 (entitled ‘Beginning and end of application’) in the absence of any concrete proposals by the ICRC.²¹⁷ The working group, failing to muster consensus, proposed two

²¹³ The exceptions are recognized for those persons whose final release, repatriation or re-establishment takes place thereafter. Such persons ‘shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment’.

²¹⁴ Robert Kolb, ‘Étude sur l’occupation et sur l’article 47 de la IVème Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d’intangibilité des droits en territoire occupé’, (2002) 10 *African Yearbook of International Law* 267, at 291 and 295.

²¹⁵ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *ICRC Commentary to AP*, para. 151.

²¹⁶ See Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 596 (arguing that Article 3(b) API reflects customary law, on the ground that this is recognised by Israeli High Court and other states in cases of prolonged occupation). See also Israel, HCJ, H.C. 7015/02, *Ajuri v. Commander of the IDF in the Judea and Samaria*, 56(6) P.D. 352 (suggesting the application of Article 78 GCIV, notwithstanding Article 6). For the commentaries of this judgment, see Daphne Barak-Erez, ‘Assigned Residence in Israel’s Administered Territories: The Judicial Review of Security measures’, (2003) 33 *Israel Yearbook on Human Rights* 303; and Eyal Benvenisti, ‘Ajuri et al. Israel High Court of Justice, 3 September 2002’, (2003) 9(4) *European Public Law* 481-492.

²¹⁷ ICRC, *Conference of Governmental Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd session (3 May-3 June 1972), Report on the Work of the Conference*, Vol. I, (Geneva: ICRC, 1972), at 178. Note that in its Report of the Conference of the Governmental Experts (the first session, 1971), there had been no remark on the rule governing the end of applicability of the API: *Conference of the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May - 12 June 1971), Report*

solutions: the first option that made references to the relevant provisions of the GCs; and the second one, which elaborated new rules that would even modify certain provisions of the Conventions, in particular the one-year limit in Article 6(3) GCIV.²¹⁸ The fourth paragraph of the second proposed text provided, akin to the current text of Article 3(b) API, that '[i]n the case of occupied territories, the application of the present Protocol and the Conventions shall cease on the termination of the occupation'.²¹⁹ The majority of the governmental experts in 1972 favoured the second option, including the proposal to scrap any time limit of the applicability of the GCs and API.²²⁰ Thereafter, the second proposal was incorporated into the text of Article 3(3) of the draft API text prepared by the ICRC.²²¹ However, unlike the subsequent text that was adopted as Article 3(b) API, the ICRC text notably omitted any reference to the Geneva Conventions. This reflected the ICRC's desire then that the effect of Article 6(3) GCIV should be undisturbed by the new provision of the API. It is reasonable to hypothesize that many experts represented at the CGE (1972), like the drafters of the GCIV, thought that Article 6(3) GCIV was *sui generis* and tailor-made only to the specific cases of the post-WWII Allied occupation of relatively protracted nature.²²² The cogency of such a hypothesis can be bolstered by the fact that by the time of the CGE, there were already several cases of prolonged occupation that endured over decades.²²³ Those phenomena must have outright challenged the presumption that occupation should be of provisional nature, and that this would come to an end progressively (regardless of the fact that most occupying powers failed to recognize the juridical status of occupation).

on the Work of the Conference, (Geneva: ICRC, 1971) (focusing on such issues as requisition, protection of medical and relief activities, civil defence organisations).

²¹⁸ ICRC, *Conference of Governmental Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd session (3 May-3 June 1972), Report on the Work of the Conference*, Vol. I, (Geneva: ICRC, 1972), at 178.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ It provided that 'In the case of occupied territory, the application of the present Protocol shall cease on the termination of the occupation': ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary*, (Geneva, ICRC, 1973), at 9. The *Commentary* to this paragraph states that '[f]ollowing the wish of a majority of the experts, the text of this paragraph as regards the time-limit differs from that of Article 6 (3) of the Fourth Convention, relating to the end of the application of the Convention in occupied territory': *ibid.*, at 10. See also *ibid.*, at 84 (commentary to Article 65(5) of the draft API, which corresponds to Article 75(6) API).

²²² See European Court of Human Rights, *Von Maltzan and Others v. Germany*, Admissibility Decision of 2 March 2005, para. 80 (with the Grand Chamber holding that the USSR occupation of Germany between 1945 and 1949 was 'not an "ordinary" war-time occupation, but an occupation *sui generis*, following a war and an unconditional capitulation, which conferred powers of "sovereignty" on the occupying forces'). See also Benvenisti (2012), *supra* n. 192, at 162.

²²³ Such instances are already included in the list of the examples described in n. 2, above. By 1972, the representatives must have been aware at least of the cases of occupation of the Palestinian territories by Egypt, Israel and Jordan between 1948-67, and the Israeli occupation of the West Bank, the Gaza Strip, the Golan Heights, and East Jerusalem after Six-Day War in 1967. Indeed, the Israeli occupation cases provided one of the political momentums behind the adoption of Article 1(4) API.

Subsequently at the Diplomatic Conference in Geneva (1974-77),²²⁴ a number of delegates²²⁵ requested that the reference to the Geneva Conventions should be reinstated in the text of Article 3(3) of draft API. This led to the textual formulation now seen in Article 3(b) API.²²⁶ As known, this harmonizes the temporal understanding on the termination of the occupation in relation to both the GCIV and the API.²²⁷

At the Diplomatic Conference of 1974-77, the delegates assumed that the GCIV would operate in parallel to the API and continue governing the occupied territory. Accordingly, overall, debates did not turn to issues of occupation frequently. If they ever did, they fixated on two questions: (1) the meaning of a quasi-neology ‘alien occupation’, which indicates one of the scenarios contemplated by Article 1(4) API, and which was understood as different from the traditional notion of belligerent occupation;²²⁸ and (2) the vexed question

²²⁴ For the examination, see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977 (Bern: Federal Political Department, 1978) (hereinafter, O.R.). See also Bothe/Partsch/Solf, *supra* n. 193, at 42, 51-52, 56, 59, 112-123, 125-126, 129, 136, 173-174, 177, 251-258, 390, 405, 408, 424, 509.

²²⁵ See the amendment proposed jointly by Algeria, Arab Republic of Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab republic, Mauritania, Mongolia, Morocco, Pakistan, Qatar, Saudi Arabia, Sudan, Sultanate of Oman, Syrian Arab Republic, Tunisia, United Arab Emirates, Yugoslavia (CDDH/I/48 and Corr.1 and CDDH/I/48/add.1 and Add.1/Corr.1, 18 March 1974); United States of America (CDDH/I/49), 18 March 1974); and Australia (CDDH/I/213, 13 February 1975): O.R. Vol. III, at 15-18. See also the explanation of vote by Cyprus concerning Article 3 API: *ibid.*, O.R. Vol. VI, at 60.

Compare the statement of the Israeli delegation (Mr. Shabtai Rosenne) that ‘all the provisions concerning the application *ratione temporis* of the provisions of draft Protocol I should be aligned on the corresponding provisions of the [Geneva] Conventions’: O.R. Vol. VIII, at 194, para. 20.

²²⁶ The entire text of Article 3 API was adopted by Committee I by consensus at twenty-sixth meeting: O.R. Vol. VIII, at 247-248. It was then endorsed by the Conference again by consensus at the thirty-sixth plenary meeting: O.R., Vol. III, at 15; and *ibid.*, Vol. VI, at 4 and 57.

²²⁷ See Grignon, *supra* n. 158, at 317.

²²⁸ See G. Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’, (1979-IV) 165 *Recueil des Cours* 353, at 394-396 (stressing the colonial context with reference to ‘colonies of settlement’); Bothe/Partsch/Solf, *supra* n. 193, at 51-52, para. 2.22 (explaining that the term ‘alien’ is synonymous with ‘colonial’, and that the phrase ‘colonial or alien domination’ was suggested in lieu of the words ‘alien occupation’); Allan Rosas, *The Legal Status of Prisoners of War* (Helsinki: Institute for Human Rights, Abo Akademi University, 1976), section 7.4.6.2, at 272-273 (claiming that the term ‘alien occupation’ excludes the case of belligerent occupation because this is already covered by common Article 2(2) GCs, and that the former refers to the territories whose title is disputed, such as the South African occupation of Namibia and the Israeli occupation of the Palestinian territories); Sivakumaran, *supra* n. 36, at 217.

Note that the Report of the Conference of the Government Experts (the first session in 1971) refers to the remark made by one experts:

During the Second World War, it was agreed that conflicts involving the expulsion of an occupant were of an international nature. Should a distinction be made between *occupation that had lasted since the end of the XIXth century* and that which had lasted only 4 or 5 years? Would the criteria for defining the conflict really be so different if the *occupation* had lasted a long time? The expert considered that it sufficed for the people to take up arms against an occupying State regardless of the length of the occupation.

of guerrilla fighters' entitlement to prisoners of war status in occupied territories under Article 44(3) API.

8.3. Doctrinal Discourse: the Legal Nature of Article 3(b) API and its Relationship with Article 6(3) GCIV

One thorny question relating to Article 3(b) API is its relationship with, and its effect on, the so-called 'one-year rule' laid down in Article 6(3) GCIV. Some authors argue that Article 3(b) API is designed to 'abrogate' the 'one-year' rule insofar as concerns the states parties to the API. This contention is supported by the draft records. This is the case even though the API assumes its relation to the GCIV to be 'supplementary'.²²⁹

The view that Article 3(b) API should supersede Article 6(3) GCIV can be sustained by assuming that the latter provision is conceived only as 'a special ad hoc provision',²³⁰ which is designed, as discussed above, to deal chiefly with the cases of post-WWII Allied occupation.²³¹ As a corollary, it is contended that Article 6(3) GCIV has become 'outdated' (*désuet*).²³² To bolster this contention, some authors argue that Article 3(b) API has come to express a customary rule,²³³ or to reinstate its pre-1949 customary rule.²³⁴ According to such a putative rule of general international law, the temporal scope of application of the law of occupation should hinge on the duration of occupation.²³⁵ This reading has an advantage of overcoming the question of non-applicability of the rule embodied in Article 3(b) API to states not parties to the API. Yet, the only caveat is that both in the doctrines and practice, the very customary law status of Article 3(b) API has yet to be conclusively settled.²³⁶ In *Wall*, the ICJ relied on this paragraph as a positivized text rather than on any customary rule that might mirror Article 3(b) API. This may be read as suggesting that in the ICJ's opinion, Article 6(3) GCIV is yet to become obsolete.²³⁷

ICRC, *Conference of the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May - 12 June 1971*, Report on the Work of the Conference, (Geneva: ICRC, 1971), at 54, para. 323.

²²⁹ API, Article 1(3).

²³⁰ Bothe/Partsch/Solf, *supra* n. 193, at 57, para. 2.2. and 59, para. 2.8; Adam Roberts, 'Occupation, Military termination of', in Ruediger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008), para. 13.

²³¹ See also Gross, *supra* n. 3, at 43.

²³² Kolb (2009), *supra* n. 63, at 226.

²³³ Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 596.

²³⁴ Kolb (2009), *supra* n. 63, at 225-226.

²³⁵ *Ibid.*

²³⁶ *The ICRC's Customary IHL Study* does not address the question of customary law status of the rule contained in Article 3(b) API: J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2005). See also The UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford: Oxford University Press, 2004), at 277-278, para. 11.8 (referring to the two parallel rules without stating the customary law status or otherwise of Article 3(b) API: the 'one-year rule' for states parties only to the GCIV; and the continued applicability of the GCIV and API for states parties to the API); and Grignon, *supra* n. 158, at 322 (noting difficulty of identifying unambiguous state practice and *opinio juris* on this matter).

²³⁷ See also Grignon, *ibid.*, at 321.

9. Brief Overview of Post-1949 Practice and Doctrines in Relation to the Provisional Nature of Occupation

With respect to the ‘classic’ documents on the laws of war, this paper has already explained that the Brussels Declaration and the Hague Regulations neither expressly mention the provisional nature of occupation nor delineate any temporal scope of belligerent occupation. Nevertheless, the foregoing examinations reveal that the drafters of those classic instruments seemed to be more or less united in comprehending the legal regime of occupation as an interim state of affairs. This understanding was widely shared by most scholars.²³⁸ As discussed above, according to Article 6 of the *Oxford Manual* (1880) and the *United States Law of War Manual* (2015),²³⁹ the temporary nature of occupation is expressly stated as a *general* rule. Further, the foregoing analyses of the preparatory work of Article 6(3) GCIV have also suggested the drafters’ thought based on the generally transitional nature of occupation.

This section will succinctly ascertain how the post-1949 case-law and academic doctrines that have been evolving can be compared diachronically to the ‘original’ assumption that occupation is supposed to be temporary. The preceding examinations have already explained that the plethora of instances of protracted occupation that came to be observable by the time of the proclamation of the API seems to have had special bearings on the mind of the drafters of the API. This accounts for their decision to remove any temporal limit to recognize the ambit of occupation for so long as occupation endures. With the primary focus of this paper fixated on the historical prisms (the ‘original’ intention of the traditional laws of war and the concurrent scholarly discourses), this section will be confined to briefly evaluating if and how the contemporary doctrines and practice have departed from the intention of the drafters of the ‘classic’ documents on the laws of war.

Starting with the case-law, as well-known, as recently as 2004, some judges of the ICJ in the *Wall* Advisory Opinion reaffirmed the interim nature of occupation as one of the basic tenets of IHL.²⁴⁰ In *Naletilić and Martinović*, when referring to Article 6 GCIV, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) defined occupation as ‘a transitional period following invasion and preceding the agreement on the cessation of the hostilities’.²⁴¹ Accordingly, the Trial Chamber fixed the end point of

²³⁸ As discussed above, it is doubtful that most writers in the ‘early formative period’ of the laws of war (namely, in the second half of the nineteenth century) recognized such a prolonged form of occupation as that of decades-length: Loening, *supra* n. 29, at 626-634, 650.

²³⁹ United States Department of Defence, *Law of War Manual* (2015), at 735, paras 11.1, 11.4 and 11.4.2.

²⁴⁰ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Separate Opinion of Judge Koroma, para. 2. See also Separate Opinion of Judge Elaraby, para. 3.1; and Separate Opinion of Judge Kooijmans para. 30 (implicitly recognising the temporary nature of belligerent occupation when expressing concern over *fait accompli* of the separation/security fences).

²⁴¹ ICTY, *Prosecutor v. Maladen Naletilic and Vinko Martinovic*, 2003 IT-98-34-T, Judgment of 31 March 2003, para. 214.

occupation at the conclusion of such agreement.²⁴² Admittedly, by making the duration of occupation pending the termination of hostilities and the agreement to that effect, the ICTY Trial Chamber's approach in *Naletilić and Martinović* may be read as recognizing longer occupation that may last for years.²⁴³ Nevertheless, the *Naletilić and Martinović* dictum excludes the genre of post-hostilities occupation. This approach is akin to Feilchenfeld's view discussed above.²⁴⁴ It is even more doubtful that *Naletilić and Martinović* can be taken as endorsing the post-hostilities occupation of the kind that may be protracted for decades. Hence, this dictum should be still understood as adhering to the traditional doctrine based on the general principle of the provisional nature of occupation.

With regard to the state practice, as discussed above, the most recent edition of the United States military manual (2015)²⁴⁵ follows the step of its predecessor and the *Oxford Manual* in declaring occupation to be a provisional regime. Still, fine-tuning this stance, one may still maintain that the tenor of the United States manual does not entirely exclude a possibility of a long-term occupation as an exception. Further, a more far-fetched 'interpretive strategy' may be marshalled to justify long-spanned occupation within a legal framework on occupation. There has been a proposal to finesse the meaning of the adjective 'provisional' or 'temporary' by arguing that such an adjective (equivalent to 'non-permanent') is 'relative' and not synonymous with 'short'. On this reading, it is said that long-term occupation is not contradictory to the requirement that occupation be transient.²⁴⁶ However, a serious problem with this approach is that the dictionary understanding of the adjective 'provisional' is equivalent to the word 'temporary', which is in turn defined as 'lasting or meant to last only for a limited time'.²⁴⁷

Turning to the doctrines, many contemporary writers tend toward the view that while the legal regime of occupation is supposed to be interim, the law of occupation will continue to apply for so long as the factual state of occupation lasts. Confronted with the post-1949

²⁴² Such an agreement doubtless includes an armistice. Further, this paper proposes that 'the cessation of the hostilities' be determined by a unilateral proclamation by a belligerent that has assumed the duty as an occupying power. Still, the timing of such an agreement or proclamation ought to be verified on factual ground.

²⁴³ Still, on this reading, post-armistice occupation seems to be excluded (at least unless and until another hostility erupts in and around occupied territory to resume a scenario as portrayed by Dinstein's metaphor of an accordion).

²⁴⁴ Feilchenfeld, *supra* n. 25, at 86.

²⁴⁵ See United States Department of Defence, Law of War Manual (2015), at 735, paras 11.1, 11.4, and 11.4.2.

²⁴⁶ See Israel, HCJ 351/80 etc, *Jerusalem District Electricity Co. Ltd v. Minister of Energy and Infrastructure et al.*, 35(2) PD 673, at 690; excerpted in English in (1984) 14 *Israel Yearbook on Human Rights* 301. See Dinstein (2009), *supra* n. 81, at 119-120. *Contra*, Meir Shamgar, 'Legal Concepts and Problems of the Israeli Military Government – The Initial Stage', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967-1980* (Jerusalem: Alpha Press, 1982), 13-59, at 43 (contending that 'the exercise of the right of military administration over the territory and its inhabitants had *no time-limit*', and 'because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue *indefinitely*'; emphasis added). For criticisms of Shamgar's view, see Ben-Naftali, Gross and Michaeli, *supra* n. 39, at 597-598.

²⁴⁷ *The Concise Oxford Dictionary of Current English*.

political reality of the plenitude of prolonged occupation, what seems to have acquired an air of normalcy in the scholarly arguments is the exception to the general principle that occupation ought to be provisional. According to the International Committee of the Red Cross and Red Crescent (ICRC)'s Report, *The Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory*,²⁴⁸ 'the participants agreed that IHL did not set any limits to the time span of an occupation...[so] that nothing under IHL would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances'.²⁴⁹ This quoted sentence suggests two different points: (1) the legality of the occupying power in engaging in an instance of protracted occupation; and (2) the continued applicability of the law of occupation to such an instance. This paper does not challenge point (2). In contrast, what may be considered objectionable is point (1). This would entail the risk that IHL would be devoid of its prescriptive force in disincentivizing a state from initiating a long-term (if not entirely irreversible) occupation. This would fundamentally change the axiomatic assumption that occupation ought to be (viz, essentially, or generally) provisional in principle, even though there *may* be allowance for exceptions.

10. Blurring the Line between Conquest and Occupation

It should be noted that it was even not until the 1929 Kellogg-Briand Pact (or at latest by the 1945 UN Charter) that conquest (with the ineluctable effect of transferring sovereignty over the occupied land) was outlawed. Hence, it was not unusual for the scholars even in the second half of the nineteenth century²⁵⁰ to propose that occupation was transformed into conquest by a post-armistice political decision (most paradigmatically, by a treaty of peace). The same can be said of the suggestion that in such cases, the sovereignty over occupied territory would have to be ceded to the occupying authority.²⁵¹

²⁴⁸ ICRC, *The ICRC's Report of the Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory*, (Geneva: ICRC, 2012), at 13 et al.

²⁴⁹ *Ibid.*, at 72.

²⁵⁰ For instance, Loening argued that 'le traité de paix confère à l'occupant la souveraineté sur le territoire occupé, cette acquisition du pouvoir souverain agit rétroactivement sur les actes faits et les lois promulguées par lui pendant l'occupation' ('the treaty of peace confers on the occupant the sovereignty over the occupied territory, this acquisition of the sovereign power becomes effective retroactively on the acts done and the law promulgated by the latter during the occupation'; translation by the present author): Loening, *supra* n. 29, at 633. In this respect, he referred to Halleck, *supra* n. 27, at 815, para. 4. See also *ibid.*, at 635-636. According to Loening, Bluntschli rejected any acquisition of the territory under belligerent occupation, summarizing three of Bluntschli's principles on belligerent occupation as follows: (1) after the occupation, the occupying power does not have to tolerate the continuing exercise of the political authority in the occupied territory; (2) the occupying power possesses the right to exercise on its part the sovereign power as much as it is necessary for the security of the army and for the purpose of maintaining public order; and (3) the occupying power does not have the right to treat the occupied territory as a part definitively acquired for its state and consider its inhabitants as its subjects: Loening, *ibid.*, at 628.

²⁵¹ In the aftermath of two World Wars, Julius Stone questioned the continued viability of sovereignty as the foundational idea of the law of belligerent occupation. This was because the sovereign-occupant distinction with regard to the transfer or non-transfer of sovereignty was considered reflective of political, economic and social conditions, and ideologies of the nineteenth century. Nevertheless, in his view, the sense of (political) expedience and the dictates of realism accounted for the resilience of the law of belligerent occupation which

It is set against such backdrop that one can grasp why the Lieber Code (1863) seems to blur the line between occupation and conquest. Article 33 of the Lieber Code alludes to the possibility of annexing territory ‘after a fair and complete conquest of the hostile country or district’. The porous nature of the boundaries between occupation and conquest is also reflected in the second sentence of Article 1 of the Lieber Code. This sentence states that ‘[m]artial Law is the immediate and direct effect and consequence of occupation or conquest’. According to Giladi, by employing the terms ‘occupation’ and ‘conquest’ almost interchangeably in substance, Lieber considered the provisional nature of occupation ‘not preparatory to the possible reversion of the territory to the original sovereign [but] [r]ather...to making conquest complete’, if the victor preferred that option.²⁵² It is even suggested that Lieber endorsed the ‘unlimited’ nature of the right of conquest.²⁵³

It has been argued that both belligerent occupation and pacific occupation (*occupatio pacifica*) were deemed ‘essentially provisional’. Still, there seemed to be greater tolerance for prolonging the temporal span of the latter genre of occupation, which ‘may last for a very long time’.²⁵⁴ Generally, the scope of pacific occupation was determined for a definite period by the relevant treaty. Yet, in some cases, treaties failed to fix any term and the occupation lasted for decades. The United States occupation of Cuba pursuant to the Spanish-American Treaty of 1898 and the Austrian occupation of Bosnia-Herzegovina (the territories that had been formerly administered by the Ottoman Empire,) in tune with the Treaty of Berlin of 1878 were the cases in point.²⁵⁵ In those instances, pacific occupation took on indefinite and more protracted nature. There was even barely concealed intention to transfer sovereignty over the territory,²⁵⁶ which came to bear much of epistemic similarity to the case of colonialism.

was conceptually tethered to the doctrine of sovereignty: Julius Stone, *Legal Controls of International Conflict* (London: Stevens & Sons, 1954), at 727. See also Feilchenfeld, *supra* n. 25, at 24, para. 100 (explaining that even the most egregious kind of the occupying power such as the Nazi, and the total warfare, ‘do not obviate the analytical distinction between sovereigns and mere occupants’ because of its pragmatic importance of differentiating between ‘provisional’ nature of occupation and ‘final annexation’ based on the transfer of sovereignty).

²⁵² Giladi (2012), *supra* n. 21, at 113-114.

²⁵³ *Ibid.*

²⁵⁴ In his view, this marked a contrast to the former that ‘is generally precarious, and, as a rule, of comparatively short duration...[which] comes to an end with the end of hostilities’: Jones, *supra* n. 38, at 159. For the pacific occupation, he referred to the case of occupation of Germany for fifteen years prescribed by the Treaty of Versailles: *ibid.*

²⁵⁵ *Ibid.*, at 159. Compare also the British ‘occupation’ of Iraq (1918-32) and Palestine (1919-1948) under the League of Nations’ mandate, and the treaty-based United States occupation of Haiti (1915-34) and Philippines (1898-1945): Edelstein, *supra* n. 195, at 27, 39-47.

²⁵⁶ As Jones noted, ‘as a matter of fact this [the Austrian occupation of Bosnia] is a veiled case of annexation, and in 1908, after thirty years’ occupation, Austria claimed full sovereign rights over Bosnia’: *ibid.*, at 159.

11. Conclusion: the Paradox of Normalization of Prolonged Occupation in the IHL's Argumentative Structure

This paper has delved into the drafting records of the documents of both classic laws of war and of modern IHL with a view to discerning the 'original' intention or understanding on the temporal length of belligerent occupation. Those examinations have unveiled how the conceptualization of the law of belligerent occupation was contingent upon particular social and historical contexts and minds of nineteenth-century Europe. The legal regime of occupation was contemplated as an interim regulatory framework purported to maintain order and stability of the occupied territory until there was a political decision on the disposal of that territory.²⁵⁷ The law of occupation placed a 'procedural' and temporal restriction on the occupier exercising the displaced sovereign's power (albeit without title), including the power to dispose of the territory at its will.²⁵⁸

It can be submitted that the modern law of belligerent occupation proves to be paradoxical, insofar as the temporal length of occupation is concerned. The paradox is that modern academic discourse on IHL, having duly achieved its 'conceptual decolonization' by ditching the colonial/non-colonial division, has come to grapple with the 'legal stasis' of a considerably spun-out pattern of administering foreign territories²⁵⁹ within the explanatory framework on the law of occupation.²⁶⁰ Confronted with the post-1949 political reality of several instances of prolonged occupation,²⁶¹ both the practice and scholarly discourse tolerate and even 'normalize' a phenomenon of considerably protracted occupation (that come to resemble colonialism), instead of advocating a unified standard that condemns it

²⁵⁷ See Giladi (2012), *supra* n. 21, at 86 (discussing in detail the basic understandings of Vattel and other classic writers as to the importance of the notion of occupation in securing order and stability). It was conceived as an aversion to disorder and chaos of the kind seen in the Napoleonic War. This understanding was shared, notwithstanding a plethora of colonial and imperialist wars that were often fought with harshness, or at times even brutally with scant regard for the laws of war.

²⁵⁸ During the period of occupation, the exercise of such a right by the occupying power was suspended. The gradual acceptance of such thinking by the second half of the nineteenth century can be explained by the sovereign states' aversion to disorder. On this matter, compare Ian Duncanson, 'Law as Conversation', in Orford (ed.), *supra* n. 7, 57-84, at 79 (commenting on Hume's underlying thought that '[d]isorder arises from the intolerable impossibility of certainty in questions of knowledge and justice, an impossibility whose intolerability seems soluble by the imposition of authority').

²⁵⁹ East Timor (between 1975-2000); Western Sahara; Palestine by Israel and surrounding Arab states between 1948-1967; the West Bank, the Gaza Strip, East Jerusalem and the Golan Height by Israel since 1967; and by Israel since 1967); Northern Cyprus by Turkey; Nagorno-Karabakh by Armenia, and arguably Tibet.

²⁶⁰ Dinstein (2009), *supra* n. 81, at 120, para. 279. It does not matter that in almost all such instances (save for the notable exception of Israel), there has been an outright refusal to acknowledge such control as occupation.

²⁶¹ At present, the paradigm of 'colonial' domination through the system of occupation now takes another paradoxically 'universal' mantle: control by a de-colonized state or formerly semi-colonized state over territories of another 'new' or 'still-born' state. See for instance, the Gaza Strip by Egypt between 1959-1967; the large segments of the West Bank by Jordan between 1948-1967; Tibet by China since 1950; the Western Sahara under gradual Moroccan occupation since 1975; East Timor occupied by Indonesia between 1975-1999.

as contrary to the general assumption of the law of occupation.²⁶² Such ‘normalization’ or ‘mainstreaming’ of the regime of belligerent occupation that was previously understood as analogous to the emergency state of affairs (and hence more as exceptional matter) in the traditional laws of war may be a familiar feature of the argumentative structure of international law. It remains to be seen if this should be comprehended as a necessary adjustment due to the defiance of the reality against the hitherto valid assumption of the law (namely, the provisional nature of occupation),²⁶³ or as an apologetic slide into the geopolitical reality (that is, inclination toward protracted occupation).²⁶⁴

²⁶² As discussed, within the pre-1949 framework of traditional laws of war, the dominant understanding was that belligerent occupation had to be essentially provisional.

²⁶³ Compare Ben-Naftali, Gross and Michaelie, *supra* n. 39, at 596 (discussing how the reality has challenged the underlying assumption behind the text of Article 6(3) GCIV).

²⁶⁴ This may be considered to divulge the latent permutation in the conceptual premise: the law’s prescriptive force (in demanding interim or temporary nature of occupation) have been redefined at the quest for an apologetic endorsement of factual reality (several instances of prolonged occupation). See Koskenniemi’s analysis of how the argumentative structure of international law oscillates between apology and utopia: Martti Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument*, (Helsinki: Finnish Lawyers’ Publishing, 1989), *idem*, ‘Politics of International Law’, (1990) 1 *European Journal of International Law* 4.