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Unearthing the Problematic Terrain of Prolonged Occupation

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This article will explore the travaux préparatoires *of the key legal instruments on the laws of war and international humanitarian law (IHL) with a view to obtaining crucial insight into the 'original' understandings of their drafters as to the provisional nature and the temporal length of occupation. The findings of the* travaux *show the general premise of the framers of the 'classic' instruments on the laws of war that the legal regime of occupation should be provisional. In the concurrent doctrinal discourses this premise was endorsed by most scholars. Examination of the records of the negotiations on the drafting of the Fourth Geneva Convention of 1949 reveals that even the proponents of 'transformative occupation' did not seem to envisage occupation that would endure for decades. Nevertheless, by the time the 1977 Additional Protocol I was drafted, several instances of protracted occupation already existed, which seems to have led to a decisive shift in the argumentative structure. There is no disputing the applicability of IHL to any occupied territory, irrespective of the length of the occupation. Yet the suggestion that nothing under IHL would forestall an occupying power from engaging in protracted occupation departs from the traditional premise that occupation ought to be provisional. This also seems to be paradoxical in historical perspectives.*

Keywords: prolonged occupation, *travaux préparatoires*, Lieber Code, Brussels Declaration, Oxford Manual, Hague Regulations, Geneva Civilian Conventions, First Additional Protocol, sovereignty, 'one-year' rule

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 tangled question of how to rationalise a relatively lengthy pattern of occupation.[1] Since the adoption of the Geneva Conventions of 1949,[2] the factual

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[1] In this article, the term 'prolonged occupation' is understood as referring to a protracted form of occupation that stretches over decades.

[2] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV). The decades-long instances of occupation include (but are not limited to) (i) the Palestinian territories occupied by neighbouring states at different temporal phases since 1948 (the Gaza Strip by Egypt 1959–67; the large segments of the West Bank by Jordan 1948–67; the Gaza Strip by Israel 1967–2005, or until now; and the West Bank, East Jerusalem and the Golan Heights by Israel since 1967); (ii) Tibet by China since 1950; (iii) Northern Cyprus by Turkey since 1974; (iv) the Western Sahara under gradual Moroccan occupation since 1975; (v) East Timor occupied by Indonesia 1975–99.

phenomenon[3] of prolonged occupation[4] can be seen in several places. The primary purpose of this article is to explore how the drafters of the documents of the laws of war and of international humanitarian law (IHL) comprehended the temporal length of occupation and how this question has been addressed in the trajectory of doctrinal discourse. Special focus will be placed on the original intention of the traditional laws of war – such as the Brussels Declaration (1874)[5] and the Hague Regulations (1899/1907)[6] – as these have provided the fundamental basis for the legal regime of belligerent occupation.

The article begins by tracing the historical evolution of the legal concept of occupation and evaluating the nature of the legal regime of occupation that has crystallised 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. During 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),[7] and nurtured by the Brussels Declaration (1874), the Oxford Manual (1880)[8] and the Hague Regulations (1899/1907). Investigation into the preparatory works of the relevant legal instruments will help in better grasping 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 whether 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 with modern practice and doctrines of IHL that have unfolded since the adoption of the Geneva Conventions (1949). Detailed queries will be made of the preparatory work of the Fourth Geneva Convention and Additional Protocol I.[9] These will be followed by succinct evaluations of modern doctrinal discourse, which seems to depart from the classic emphasis of the law of war regarding the temporary nature of occupation. In the final section, the article will engage briefly in critical examinations of the argumentative structures surrounding the protracted form of occupation in the light of the historical and political context.

[3] For a suggestion of an emerging conceptualisation of 'occupation as a normative phenomenon', see Yaël Ronen, 'A Century of the Law of Occupation' (2014) 17 *Yearbook of International Humanitarian Law* 169, 184–85; and Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 2–4, 6 and Ch 1.

[4] Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84 *American Journal of International Law* 44.

[5] Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, art 1, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=337371A4C94194E8C12563CD005154B1 (Brussels Declaration).

[6] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461.

[7] Instructions for the Government of Armies of the United States in the Field, General Orders No 100: The Lieber Code, War Department, Washington DC, 24 April 1863 (Lieber Code).

[8] *The Oxford Manual on the Laws of War on Land* (Institute of International Law 1880) (Oxford Manual).

[9] GC IV (n 2); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I).

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2. THE HISTORICAL EVOLUTION OF THE LAW OF BELLIGERENT OCCUPATION

2.1. FROM THE NOTION OF 'SUBSTITUTED SOVEREIGNTY' TO A RUDIMENTARY LEGAL CONCEPT OF OCCUPATION

The factual phenomena of invasion, conquest and temporary military occupation have been observable in various parts of the world for centuries throughout human history, whenever rivalling states vied for territorial aggrandisement. Yet, as will be explained below, it was not until after the Napoleonic Wars 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 European warfare until the Seven Years' War (1763) was the doctrine of 'substituted sovereignty'.[10] According to this doctrine, invaders were considered to replace the local sovereignty of the invaded territory and to assume full sovereign power during the invasion phase.[11] Hall argued that this doctrine fell into disuse only after the middle of the eighteenth century.[12]

As indicated by Verzijl's historical survey, a rudimentary fragment of the law of occupation alongside a qualified understanding of 'substituted sovereignty' appeared after the Treaty of Utrecht (1713).[13] The effective occupation of territory was comprehended as 'operating a change of sovereignty under the *condition suspensive* … of a peace treaty with retroactive effect'.[14] Later, writing during the Seven Years' War, Vattel was instrumental in recognising the legal effect of occupation as a provisional state of affairs, which was to be distinguished from conquest.[15] It was

[10] William Edward Hall, *Treatise on International Law* (3rd edn, Clarendon Press 1890) 463–64, 466, 469 para 154.
[11] For instance, the invader was authorised to demand impressment (forcing an oath of allegiance from 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 463–64 para 154, 416–17; Thomas Baty, 'The Relations of Invaders to Insurgents' (1927) 36 *Yale Law Journal* 966, 966–67, 972–73. See also Lassa Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 *Law Quarterly Review* 363, 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).
[12] Hall (n 10) 464 para 153. Baty challenged this historical timeline, arguing that any theory of 'substituted sovereignty' had become 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 (n 11) 972.
[13] Jan Hendrik Willem Verzijl, *International Law in Historical Perspective*, *Vol IX-A: The Laws of War* (Sijthoff & Noordhoff 1978) 151.
[14] ibid (emphasis in original).
[15] Vattel observed that '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 principes de la loi naturelle, appliqués à la conduite et aux affaires et des nations et des souverains [The Law of Nations or Principles of the Law of Nature, as Applied to the Conduct of Affairs of Nations and Sovereigns]*, *Vol II, livre III* (Aux Dépens de la Compagnie 1758) 147 paras 197–98 (Joseph Chitty tr, 6th edn, T&J Johnson 1844) 386 paras 197–98.

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understood that the nature of the occupying power was turned into a quasi-sovereign[16] or a 'trustee'.[17] According to Hall, 'the invader was invested with 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'.[18] In terms of special importance attached to the rights of private property of civilians under occupation, the notion of quasi-sovereignty resembled the concept of occupation that has crystallised since the second half of the nineteenth century.[19] What made the doctrine of substituted sovereignty distinguishable from the modern concept of occupation is that the former granted the invader considerably more extensive powers of the kind reserved to sovereign states.[20] 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.[21] According to Hall,[22] 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.[23] Writing in 1858, Georg Friedrich de Martens explained that the 'conqueror' ('*vainqueur*') can substitute itself for the vanquished government and exercise sovereign power until enactment of the peace treaty.[24]

[16] 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 (n 10) 464–65. See also Baty (n 11) 973.

[17] Baty (n 11) 979. 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; 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 University Press 2011) 129, 140 text at fn 63.

[18] Hall (n 10) 464–65 para 154.

[19] GF de Martens, *Précis du droit des gens moderne de l'Europe*, *Vol II* (Guillaumin et Cie 1858) 254–55 para 280 (referring to the restrictions on private property only in the case where this was 'impérieusement préscript par les nécessités de la lutte'). See also Jean-Louis Klüber, *Droit des gens moderne de l'Europe*, *Vol II* (JP Aillaud 1831) 40–42 paras 255–56.

[20] Hall (n 10) 466–70 paras 154, 155.

[21] Baty (n 11) 973.

[22] Hall (n 10) 466–68 para 154 (referring to Klüber (n 19) 42 para 256, as indicating an example of the residual influence of the doctrine of substituted sovereignty. Yet, as will be explained at n 28 below, this is a flawed reading of his work).

[23] 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 it is 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. This exchanged temporary obedience for protection: Rotem Giladi, 'A Different Sense of Humanity: Occupation in Francis Lieber's Code' (2012) 94 *International Review of the Red Cross* 81, 114.

[24] De Martens (n 19) 254–55 para 280 (but note his caveat that occupation does not allow taking possession of public and private property of the occupied). See also Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, *Vol II* (Oxford University Press 1861) 122 para 64 (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').

2.2. THE EMERGENCE OF BELLIGERENT OCCUPATION AS A DISTINCT LEGAL CONCEPT

The emergence of belligerent occupation as a distinct legal concept, wholly set apart from the right of conquest (and from the doctrine of substituted sovereignty), was most marked in the wake of the Napoleonic Wars.[25] The post-war settlement raised various problems, including the need to distinguish between temporary and permanent conquest,[26] the ability (or lack thereof) of temporary conquerors to acquire title to assets of the occupied or conquered territories, and the question of how to reconcile those economic and financial transactions with the post-war problems of the *jus postliminii*.[27] By the mid-nineteenth century, the *law* of belligerent occupation as a distinct legal category (within the laws of war) had taken its embryonic shape and started to grow in gestation.[28] As claimed by Korman, the notion of *occupatio bellica* developed as a legal category separate from the idea of *debellatio*.[29] In this context, an occupying power was perceived as a non-sovereign, temporary holder of power, equipped with specific rights and obligations.[30] According to Loening[31] and Lauterpacht,[32] in academic discourse it was August

[25] Peter MR Stirk, *History of Military Occupation from 1792 to 1914* (Edinburgh University Press 2016) 89–91.
[26] Conquest is defined as acquiring enemy territory by military means with the intention of enlarging national territory: Rotem Giladi, 'The *Jus ad Bellum/Jus in Bello* Distinction and the Law of Occupation' (2008) 41 *Israel Law Review* 246, 273. This should be distinguished from military occupation, 'a yet undecided phase of war': Nisuke Ando, *Surrender, Occupation and Private Property in International Law: An Evaluation of US Practice in Japan* (Clarendon Press 1991) 35.
[27] Ernst H Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Johnson 1942) 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: Paul Fauchille, *Traité de droit international public*, *Vol II* (Rousseau 1921) 1058–59; and George Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, *Vol II: The Law of Armed Conflict* (Stevens & Sons 1968) 199, 201, 204, 346.
[28] See Klüber (n 19) 40–42 paras 255–56 (whose work showed a transition from the earlier doctrine of substituted sovereignty to one akin to the modern legal notion of occupation as we understand it today. Klüber argued that while the conqueror takes the 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: Disputes, War and Neutrality* (7th edn, Longmans, Green and Co 1952) 437 para 169 (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').
[29] Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law* (Clarendon Press 1996) 110. See also Henry Wager Halleck, *International Law* (Van Nostards 1861) 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 (*debelatio* [sic] *ultima victoria*)').
[30] Nehal Bhuta, 'The Antinomies of Transformative Occupation' (2005) 16 *European Journal of International Law* 721, 725.
[31] 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, 626–27 (referring to three basic principles on belligerent occupation that Heffter summarised: (i) 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; (ii) during the occupation of a territory by the enemy the previous government is suspended; but (iii) 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 sovereignty) (English translation by the present author). See also D August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* (EH Schroeder 1844).
[32] Oppenheim (n 28) 432–33 para 166.

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Wilhelm Heffter who pioneered the development of the legal doctrine of 'belligerent occupation' as separate from the notion of conquest.[33] In his treatise of 1844, Heffter had already set out 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.[34]

The foundational ideas of the law of belligerent occupation, as developed later, reflected the legal consciousness of European legal advisers in the mid-nineteenth century. It is suggested that Francis Lieber tried to acquire 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).[35] The Lieber Code (1863), which is the earliest text to enunciate the law of belligerent occupation,[36] proclaims the introduction of 'martial law' in the area under occupation. Furthermore, the drafters of the Brussels Declaration, which provided the prototype for the subsequent treaties on the laws of war, drew out many of its normative dividends from the Lieber Code.[37]

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.[38] This was achieved 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'.[39] This two-tier definition of 'occupation' was subsequently incorporated into Article 42 of the Hague Regulations (1899/1907). This positive rule, one of the achievements of codifying the laws of war in the second half of the nineteenth century, has proved to be

[33] See also Eyal Benvenisti, 'The Origins of the Concept of Belligerent Occupation' (2008) 26 *Law and History Review* 621, 630–32. Nevertheless, Heffter did not fully recognise another special principle of belligerent occupation – namely, the requirement of minimum interference with local laws: ibid 631.

[34] 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 (n 31) 220–21 para 131 (translation by the present author). See also ibid 307–09 para 185; Halleck (n 29) 777, 781 paras 2, 5 (discussing the doctrines among European writers, who highlighted the temporary character of military occupation). As will be discussed later, Halleck stresses 'a different rule' followed by the US practice: ibid 784–87 paras 8–9.

[35] Frédéric Mégret, 'From "Savages" to "Unlawful Combatants"' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2009) 265, 316.

[36] Giladi (n 23) 82, 87. While the ideas relating to occupation were derived from European practice and doctrine, the Lieber Code was considered to be novel as presenting the basis of a treaty: Benvenisti (n 33) 640–41.

[37] Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford University Press 1999) 158–66.

[38] Art 1(1) of the Lieber Code (n 7) 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'.

[39] Brussels Declaration (n 5).

remarkably resilient over the vicissitudes of war and occupation. It remains relevant to situations of occupation in the present day.

3. THE NATURE OF OCCUPATION AS UNDERSTOOD IN THE 'CLASSIC' DOCTRINES

It is of particular importance to summarise the distinct features of the legal regime of belligerent occupation[40] that have come to be recognised 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 to be a simulative exercise of state sovereign authority, which takes place during a temporary intermission in the normal stable order of relations among sovereign states.[41] Accordingly, the nature of belligerent occupation is most aptly characterised as a 'sovereign suspension'.[42] At the Brussels Conference in 1874, such an idea was favoured over the view of occupation as analogous to the state of blockade, suggested by some delegates.[43]

The most axiomatic legal principle of belligerent occupation that came to be widely recognised by the Brussels Conference is that the occupying power does not gain sovereignty over the occupied territory.[44] Sovereignty in the juridical sense remains 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:[45]

> As regards the power of the enemy that occupies the territory, we are today in agreement to recognise that it does not replace the power of the vanquished state. As the occupied territory is not yet separated

[40] Apart from belligerent occupation (*occupatio bellica*), it is possible to contemplate two further genres of occupation: (i) *occupatio mixta – bellica pacifica* (mixed occupation), which refers to the state of occupation that can come into existence between an armistice and the conclusion of a peace treaty among the belligerents; and (ii) *occupatio pacifica*, which addresses the case of military occupation of foreign territory in time of peace, which is based on the consent, or at least the acquiescence, of the territorial state: F Llewellyn Jones, 'Military Occupation of Alien Territory in Time of Peace' (1924) 9 *Transactions of the Grotius Society* 149, 149–50. These two other forms of occupation are intended to share with belligerent occupation the two-tier assumptions: (i) that there should be no surrender or transfer of sovereignty; and (ii) that occupation should be an 'essentially provisional' state of affairs: ibid 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, 42.

[41] Oppenheim (n 11) 363–64.

[42] Orna Ben-Naftali, Aeyal M Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551, 562, 592, 608. The term 'sovereign suspension' is a good summation of what the classic authors have argued since the second half of the nineteenth century: see, eg, M Charles Calvo, *Le droit international théorique et pratique*, *Vol IV* (4th edn, Guillaumin et Cie 1888) 212 para 2166.

[43] Brussels Conference on the Rules of Military Warfare, *Actes de la Conférence de Bruxelles* (F Hayez 1874) 106 (Colonel Fédéral Hammer of Switzerland proposing the application, by analogy, of the law relating to blockade to situations of occupation). See also Calvo, ibid 213 para 2168 (commenting favourably on this proposal).

[44] Calvo (n 42) 212 para 2166 ('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)).

[45] Loening (n 31) 631–32 (English translation by the present author).

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> from the state to which it appertains, and the inhabitants remain citizens of that country, there is no change in the sovereignty.

Most writers since the Hague Regulations have made clear that 'the sovereignty of the old government remains in legal existence, even though it cannot be exercised'.[46] Along this line, the United States Military Manual of 1914 stated:[47]

> 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.*

As a corollary of the non-transfer of sovereignty, the doctrines during the formative period of the laws of war (1863–1949) suggest that the public authority exercised by an occupying power over the occupied territory and population should be provisional or transient, and never permanent.[48] 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.[49] According to the doctrines of 'classic' writers, occupation gave an invading power only a temporary (and non-permanent) status of a factual nature.[50] Such provisional nature was considered a special hallmark of occupation, which marked a contrast to the notion of conquest.[51]

Writing during the Second World War, Feilchenfeld averred that '[t]he application of … regulatory powers [of the occupant] extends over practically all fields of life … *if an occupation lasts*

[46] Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863–1914: A Historical Survey* (Columbia University Press 1949) 52.

[47] United States War Department, *Rules of Land Warfare* (1914) 105 para 287 (emphasis added).

[48] Hall (n 10) 470 para 155; Oppenheim (n 11) 363–64 ('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').

[49] To support this in the classic text, see Calvo (n 42) 212 para 2166 ('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' (English translation by the present author)).

[50] Writing prior to the Brussels Declaration (in 1872), Loening made clear that '[t]he 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 recognise. The occupied territory is *only provisionally subjected to the enemy's power*': Loening (n 31) 632 (footnote omitted, emphasis added; English translation by the present author). See also Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (Callaghan and Co 1908) 299; Graber (n 46) 66.

[51] See G Rolin-Jaequemyns, 'Chronique du droit international. La guerre actuelle' (1870) 2 *Revue de droit international et de législation comparée* 643, 690–91 (stating that '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' (English translation by the present author), and explaining how the Prussian policy was generally to conserve the local laws and governmental institutions); see also ibid 660–66, 676–85, 690–93. For the literature supporting the temporary nature of belligerent occupation, see also Calvo (n 42) 212 para 2166; Loening (n 31) 626–34, 650; Oppenheim (n 11) 363–64; Graber (n 46) 41, 56–57.

for any length of time'.[52] This might be read as implying the possibility of long-running occupation that could hardly be considered temporary. However, what Feilchenfeld contended was that the length of occupation depended on the duration of warfare in which the opposing armies were still fighting.[53] Hence, this contention was based on the idea that occupation was limited to the period of hostilities.[54] Feilchenfeld took pains to emphasise repeatedly the precarious nature of belligerent occupation.[55] He stated:[56]

> The 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.

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.[57] Related to this is what some scholars label the 'principle of precariousness'[58] or the 'conservationist principle'.[59] According to this principle, the legal system of the occupied territory should be conserved,[60] save in exceptional circumstances.[61] The exceptional possibility for the occupying power to modify local laws may be

[52] Feilchenfeld (n 27) 86 (emphasis added).
[53] ibid 7.
[54] Such 'occupation during hostilities' can presumably be understood as being narrower than military operations.
[55] See, eg, Feilchenfeld (n 27) 11–12 paras 44–46.
[56] ibid 5 para 11. Feilchenfeld's rejection of any change in the permanent nature of occupation implies that such a drastic change had to be based on some form of post-war settlement.
[57] Graber (n 46) 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 is known, since 1945 this principle has been subsumed in the prohibition on annexing territory by the use of, or the threat to use force laid down in art 2(4) of the Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter); see also UN Charter, art 1, which sets out that one of the purposes of the United Nations is to prohibit aggression.
[58] See Feilchenfeld (n 27) 11–12; Ando (n 26) Ch 4, section 1; and Nisuke Ando, 'Surrender, Occupation, Private Property in International Law (1)' (1986) 20 *Kobe University Law Review* 1, 38.
[59] See Gregory H Fox, 'The Occupation of Iraq' (2005) 36 *Georgetown Journal of International Law* 195, 199–201, 234–78, 282, 289, 295–97. Benvenisti's study shows that this principle owes to the Italian jurist Pasquale Fiore: Benvenisti (n 33) 632 (referring to Pasquale Fiore, *Nuovo dritto internazionale pubblico* (Presso la Casa Editrice e Tipog, degli Autori-Editori 1865) 443–44). Another prominent classic scholar who advocated this 'principle' was Calvo (n 42) 220 para 2181 ('Le droit international ne reconnaît pas à l'occupant la faculté de changer les lois civiles et criminelles des territories sur lesquels se trouvent ses troupes, ni d'y faire administrer la justice en son nom').
[60] 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: Rolin-Jaequemyns (n 51) 690–93.
[61] Bluntschli argued that '[n]evertheless, the war authority has possibly to conserve the constitution-changing and legislative acts and may set aside the existing legal order only on imminent grounds' (English translation by the present author): Johann Caspar Bluntschli, *Das moderne Kriegsrecht der zivilisierten Staaten* (CH Beck 1866) 8 para 36. He added that '[t]he 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': ibid 9 para 40 (English translation by the present author). See also Hall (n 10) 470.

explained by the concept of 'military necessity'.[62] Fraenkel invoked the doctrine of 'incidental or implied powers' to justify the exceptional power accorded to the occupant.[63] When undertaking sweeping forms of transformation in local administrative or political structures, the occupying power must discharge the onus of adducing rationales for this within the (elastic) notion of military necessity as exceptions to the 'general principle'.[64] The principle that the legal systems of the occupied territory[65] should be preserved as much as possible had the benefit of maintaining orderliness of social life among the local inhabitants under occupation.[66] This system of law duly mirrored and fed the then prevalent social and political consciousness of the so-called 'civilised' nations in North America and Europe, including the primordial importance of private property based on the idea of a *laissez-faire* economy.[67] Overall, this was conveniently attuned to preserve the stability of the European political order in the late nineteenth century.[68]

4. RATIONALISING RECOURSE TO THE *TRAVAUX PRÉPARATOIRES*

Exploring how the drafters of the key legal instruments on the laws of war or IHL understood the temporal scope of occupation is the primary objective of this article. For this 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 Fourth Geneva Convention (1949) (GC IV); and Additional Protocol I (1977) (AP I).

Before perusing the minute details of the historical documents, the present writer defends such a methodology. To begin with, Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides 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'.[69] Article 32 of the VCLT prescribes that recourse may be had to:

[62] Hall (n 10) 469–70 para 155. For a considerably elaborate examination of how the concept of military necessity has transformed its understanding among scholars, see Etienne Henry, *Le principe de nécessité militaire: Histoire et actualité d'une norme fondamentale du droit international humanitaire* (A Pedone 2016).

[63] Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918–1923* (Oxford University Press 1944) 193.

[64] As the practice evolved through the First World War to the interwar period and to the end of the twentieth century, scholarly opinions came to accommodate an expansive remit of power exercised by an occupying power in reliance on the malleable notion of 'military necessity': Feilchenfeld (n 27) 87 para 316. For 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 (n 30) 728.

[65] See Calvo (n 42) 213 para 2167 (describing the nature of belligerent occupation as similar to that of prisoners of war who conserved their liberty on parole, and highlighting the need for the occupying power to respect 'les principes du droit naturel').

[66] Giladi (n 23) 86.

[67] See, eg, Hall (n 10) 470.

[68] Nabulsi (n 37) 172–74; see also Bhuta (n 30) 740. The 'conservationist' principle is incorporated into the Hague Regulations (n 6) art 43 and GC IV (n 2) art 64. For its relevance in recent practice in Iraq see, eg, Robert Kolb, *Ius in bello: Le droit international des conflits armés*: *précis* (2nd edn, Helbing and Lichtenhahn 2009) 313; Fox (n 59).

[69] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT). The customary law nature of this principal means of interpretation was recognised most recently by the International

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> 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.[70]

Hence, where no appropriate meaning emerges by way of interpretation according to Article 31 of the VCLT, the preparatory work constitutes the means to be invoked.[71] Unlike state practice or the circumstances existing at the time of the conclusion of a treaty, the *travaux préparatoires* have the advantage of being 'tangible' and 'concrete'.[72] As noted by the International Law Commission (ILC),[73] the rationale for relying on the preparatory work can be summarised in a two-fold way. Their use can serve both to confirm the meaning of a treaty text,[74] and to determine a meaning which remains indefinite or obscure,[75] or which would yield irrational outcomes in the event of the application of the 'general rule' of interpretation in Article 31 of the VCLT.[76] Under Article 32, the weight of drafting records for the purpose of interpreting a treaty is understood to be 'supplementary'.[77] Still, the International Court of Justice (ICJ) has routinely recognised the importance of resorting to the preparatory work of the treaty.[78]

Admittedly, the classification of the *travaux* as 'supplementary' means, which may indicate a crude 'hierarchical structure' of Articles 31 and 32 of the VCLT,[79] suggests that they may be called into play *only subsequent to* the general means of interpretation enumerated in Article 31 of the VCLT. Yet, in practice, they are taken into account often concurrently with the general means of interpretation under Article 31. As noted by Shabtai Rosenne, in legal proceedings it is hard to know by what processes and how much the *travaux préparatoires* have actually

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Court of Justice (ICJ) in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Preliminary Objections, Judgment [2017] ICJ Rep 3, [63]–[64].

[70] For reliance on *travaux préparatoires* to 'confirm the meaning' of the interpretation reached by the means of interpretation pursuant to art 31 VCLT, see *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* ibid [99]–[105].

[71] Yves Le Bouthillier, 'Article 32: Supplementary Means of Interpretation' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, *Vol I* (Oxford University Press 2011) 841, 846–47.

[72] ibid 855.

[73] ILC, Report of the International Law Commission on the Work of its Eighteenth Session, UN Doc A/CN.4/SER. A/1966/Add l, 1966(II) *Yearbook of the International Law Commission* 172 para 19.

[74] ibid paras 27, 99, 101, 181, 218. See also Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 447.

[75] See *Commonwealth of Australia and Others v Tasmania and Others* [1983] 158 CLR 1, para 77 (Chief Justice Gibbs), http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1983/21.html.

[76] Villiger (n 74) 447.

[77] The wording 'supplementary' corresponds with the French term '*complémentaire*', neither of which suggests a subsidiary nature: Villiger (n 74) 446.

[78] See, inter alia, *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, Judgment [1994] ICJ Rep 6, [41]; *Kasikili/ Sedudu Island (Botswana v Namibia)*, Judgment [1999] ICJ Rep 1045, [20], [46]; and *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections, Judgment [2004] ICJ Rep 279, [100].

[79] 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* (Kluwer 1996) 541, 543.

contributed to judges of international tribunals in arriving at particular opinions on the meaning of a treaty text that they regard as clear.[80] In his view, claiming that recourse to preparatory works can be justified only after the meaning obtained by the interpretation based on the text of the treaty turns out to be unclear verges on a 'legal fiction'.[81]

Further, the role and weight of the *travaux* in confirming the meaning obtained by the means of interpretation in Article 31 of the VCLT is not entirely evident. A salient question in this regard is what an interpreter has to do if there is discordance between the ordinary meaning of the treaty text and the meaning extrapolated from the *travaux préparatoires*.[82] On the one hand, it is proposed that the allegedly clear meaning should be followed,[83] while on the other hand, Schwebel, former judge of the ICJ, has underscored the meaning revealed by the *travaux* as evidence of the intention of the parties. In his analysis, the *travaux* may be invoked as a gateway to 'correcting' the ordinary meaning.[84]

This article contends that the text of GC IV Article 6(3), while not obscure, leaves much incoherence in terms of Article 32(a) of the VCLT. A greater cause of perplexity is that GC IV Article 6(3), if construed in accordance with the primary methods of interpretation under Article 31 of the VCLT may even lead to an unreasonable result within the meaning of Article 32(b) of the VCLT. Article 6(3) of GC IV provides:

> 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 of occupation contained in Part III of GC IV, one year after the general end of military operations. Those provisions that will cease to operate after the passage of only one year include basic rules that affect the daily lives of civilians under occupation (GC IV Articles 50 and 55),[85] and internment or administrative detention (GC IV Article 78).[86] As will be explored in Section 7 below, such an 'exclusionary clause' seems to contradict the humanitarian object and overall purpose of GC IV.

[80] 766th Meeting, UN Doc A/CN.4/SER.A/1964, 1964(I) *Yearbook of the International Law Commission*, para 17.
[81] ibid (adding that recourse to the preparatory works should be deemed the acceptable means of interpretation).
[82] Le Bouthillier (n 71) 847–48.
[83] Eric Canal-Forgues, 'Remarques sur le recours aux travaux préparatoires dans le contentieux international' (1993) 97 *Revue générale de droit international public* 901, 913.
[84] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, Judgment [1995] ICJ Rep 6, dissenting opinion of Vice-President Schwebel, [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 (n 79) 545–46 (arguing that otherwise art 32 would risk being consigned to 'surplusage').
[85] GC IV (n 2). Such rules include those concerning education for children (art 50), food and medical supplies for the civilian population (art 55): Ben-Naftali, Gross and Michaeli (n 42) 595–96.
[86] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 282 para 677.

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The limited temporal applicability of those provisions in the event of protracted occupation also seems to be incongruent in the light of the underlying objective of GC IV Article 8. According to this provision, the protected persons in occupied territory are not intended to renounce in part or in whole the rights guaranteed under GC IV.[87]

The one-year temporal delimitation laid down in Article 6(3) of GC IV is markedly distinguishable from other legal instruments that include no such equivalent clause. As will be examined below, AP I Article 3(b) reverts to the pre-1949 customary rule, prescribing that both GC IV and AP I 'shall cease … on the termination of the occupation'. The question is how to explain coherently such apparent inconsistency. This furnishes an additional ground to justify reliance on the *travaux préparatoires*.

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 emergence of the ILC's draft texts of the VCLT, Hersch Lauterpacht 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'.[88] He highlighted that the *travaux préparatoires* constituted even 'a fundamental element, maybe the most important, in the matter of interpretation of treaties'.[89] As if to evoke semiotics, he saw the text of a treaty as a sign which can acquire substantive meanings when read together with the drafting history.[90] Admittedly, the 'intentionalist' thesis defended by Lauterpacht was premised on 'the fragile assumption that the drafting process was neatly documented and readily available'.[91] Further, Philip Allott goes as far as affirming that a treaty is 'a disagreement reduced to writing'.[92] Notwithstanding these general caveats this article argues that the *travaux préparatoires* of the legal instruments on occupation remain significant. This is because the 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, the article seeks to examine how (differently) the question of long-running occupation was perceived among the

[87] GC IV (n 2). Such an entrenched nature of protection is reinforced by arts 7 and 47.

[88] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Year Book of International Law* 48, 75. See also ibid 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'), 83 ('It is the duty of the judge to resort to all available means … to discover the intention of the parties'). See also Hersch Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1935) 48 *Harvard Law Review* 549, 571.

[89] Hersch Lauterpacht, 'De l'interpretation des traités: Rapport et projet de Résolutions' (1950) 43(1) *Annuaire de l'Institut de Droit International* 366, 397 (English translation by the present author); see also ibid 366–434, 457–60, especially at 390–402. See also Martin Ris, 'Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires:* Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 *Boston College International and Comparative Law Review* 111, 113.

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

[91] Venzke, ibid.

[92] Philip Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, 43.

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drafters.[93] It should also be ascertained if the drafters envisaged protracted occupation lasting for decades.

It might be countered that those questions are not related directly to the text of the treaties in question. Yet, this article considers that these are points of a substantive nature that affect 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,[94] recognised a supplementary function of the *travaux préparatoires*. It is well known that as one of the rapporteurs of the 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 of the VCLT, Fitzmaurice rationalised a 'legitimate' recourse to preparatory works 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'.[95] In this light, in the case of *Reservations to the Genocide Convention*, the ICJ had recourse to the preparatory works of the Genocide Convention not to elucidate any particular provision of that Convention, but to ascertain if the parties had any right to formulate unilateral reservations to it. The *travaux* were consulted to evaluate any implied understanding to support such a right.[96] Accordingly, for the purpose of verifying the nature and temporal length of occupation, it is legitimate to explore the preparatory works of the laws of war.

In view of the special importance of the Brussels Declaration as the model for the subsequent Hague Regulations, much of the 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 (1880). The former, which constituted the first effort to codify the laws of war, was prepared during the American Civil War by Francis Lieber, then legal adviser to the United States (or Union) forces. The latter was adopted by the Institute of International Law (1880) as a crystallisation of the leading academic opinions on the laws of war at that time. Neither document purported to have the status of a treaty, but they have been referenced as authoritative sources in the doctrines and practice. Hence, it is reasonable to include those documents together with the relevant legal instruments on the laws of war.

[93] Hence, any disagreements on this question among the drafters are of special pertinence.

[94] Lauterpacht argued that '[t]here 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) (n 88) 83 (author's translation).

[95] Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: Treaty Interpretation and Other Treaty Points' (1957) 33 *British Yearbook of International Law* 203, 218 (emphasis added).

[96] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951 [1951] ICJ Rep 15, 22–23, 25–26.

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5. THE TEMPORARY NATURE OF OCCUPATION ASCERTAINABLE FROM THE LEGAL TEXT OF THE LAWS OF WAR AND THEIR *TRAVAUX PRÉPARATOIRES*

5.1. THE LIEBER CODE (1863)

Article 3(1) of the Lieber Code provides:[97]

> Martial 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 temporary nature of occupation. Further, the last clause of Article 32 of the Lieber Code makes plain that any permanent change must await the conclusion of peace. This corroborates the basic understanding that any suspension of, change in, or abolition of legal relationships made during the period of occupation is precarious.[98] The transient and provisional nature of occupation was made express in subsequent United States military manuals. For instance, the 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'.[99] The temporary nature of occupation as a general principle is reaffirmed in the most recent United States *Law of War Manual* (2016).[100]

5.2. THE *TRAVAUX PRÉPARATOIRES* OF THE BRUSSELS DECLARATION

Article 2 of the Brussels Declaration provides:[101]

> 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.

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[97] Lieber Code (n 7).
[98] ibid, art 32(2) provides that 'the commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change'.
[99] *Rules of Land Warfare* (n 47) 106 para 289 (emphasis added).
[100] See United States Department of Defense, *Law of War Manual* (2016) 754 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 771 para 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 ibid 772 para.11.4.2 ('Occupation is essentially *provisional*' (emphasis added)).
[101] Brussels Declaration (n 5).

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The word 'suspended' in Article 2 suggests the provisional nature of belligerent occupation.

A closer look at the records of the Brussels Conference shows that a clear change in the tenor of the relevant texts occurred during the drafting process. The emphasis shifted to the temporal scope of occupation and to the notion that belligerent occupation would bring about no handing down of sovereignty (at least during the period of occupation and until the conclusion of a peace treaty). Article 1 of the very first draft text, which had been prepared by the Russian delegate for the purpose of a commission's discussions,[102] provided:[103]

> The 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 substitutes the authority of the military power of the occupying state [with that of the occupied state].

On the one hand, this provision contained the verb 'suspends', which – as in the case of Article 2 of the Brussels Declaration as ultimately adopted[104] – indicated the temporary character of the occupying power's authority. On the other hand, the verb 'substitutes' 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.

In the following plenary session convened on 5 August 1874, Baron Jomini of the Russian delegation, who acted as President of the Conference, presented his own amended text.[105] When putting forward a further draft text on 11 August 1874, he changed the wording of Article 1 of the Russian draft text (which was renumbered Article 2) to read:[106]

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[102] This should not be conflated with the text of art 1 of the revised draft text presented by Baron Jomini of Russia at the plenary, which is discussed at subs 6.2 below.

[103] The authentic text in French read: 'L'occupation par l'ennemi d'une partie du territoire de l'Ētat 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'Ētat occupant': Brussels Conference on the Rules of Military Warfare (n 43) 9 (English translation by the present author).

[104] The text of art 1 of this very first draft text presented by Russia was realigned when incorporated into the text of art 2 of the final text, with modifications.

[105] Brussels Conference on the Rules of Military Warfare (n 43) 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 art 1), which consisted of two sentences and defined 'occupied territories'.

[106] The authentic French text provided: '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*': Brussels Conference on the Rules of Military Warfare (n 43) 288 (English translation by the International Committee of the Red Cross (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 had been 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, public order and safety' (English translation by the present author; emphasis added)): ibid 285–86. Later at the Conference, two further editorial changes

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> 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.

There were two main changes that had special bearing on the question of sovereignty. First, following the amendment, the text confirmed that the effect of belligerent occupation was that of suspended sovereignty.[107] 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')[108] was bereft of the word 'substitute'. Second, the phrase 'was suspended by the fact of occupation, the occupying power takes' is replaced by the phrase 'being suspended and having passed in fact into the hands of the occupant, the latter shall take'.[109] This clarified that only *factual* control was assumed by an occupying power, and not any legal title to the occupied territory.[110] Accordingly, the text that was finally adopted as Article 2 highlighted that there was no transfer of sovereignty over the occupied territory.[111]

5.3. INDICATIONS FOR THE POSSIBILITY OF PROTRACTED OCCUPATION IN THE *TRAVAUX PRÉPARATOIRES* OF THE BRUSSELS DECLARATION

Notwithstanding the foregoing examinations that indicate 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 recognising the possibility of long-running 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 Conference, Baron Jomini of Russia introduced an

were made to the wording. Apart from these, art 2 of the final text was identical to the Commission's text: ibid 297. The text reverted to the phrase 'l'ordre et la vie publique'.

[107] This had already been mentioned in art 1 of the first original draft text: Brussels Conference on the Rules of Military Warfare (n 43) 277 (Jomini's draft text of 5 August 1874).

[108] English translation by the ICRC.

[109] See Brussels Conference on the Rules of Military Warfare (n 43) 110 and 284 (recording the interim amendment; English translation by the present author). For the final version of art 2, the latter wording appearing at p 110 was only cosmetically changed to: 'étant suspendue et ayant passé de fait entre les mains de l'occupant, celui-ci prendra': ibid 288 and 297.

[110] Another change that intervened with respect to art 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 art 2 of the draft text. This provision read: 'L'autorité du pouvoir légal étant suspendue de fait par l'occupation, il est du devoir de l'Ētat 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': Brussels Conference on the Rules of Military Warfare (n 43) 277 ('The authority of the legitimate power having been suspended in fact by the occupation, it is the duty of the occupying power to take all the measures in his power to restore and ensure, as far as possible, the public order and safety' (English 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 a positive duty: ibid 284. After the reading before the Commission, this text was modified slightly to the wording that corresponds with the text of art 43 Hague Regulations (1899/1907): ibid 285, 288.

[111] As an aside, the word 'actually' in the unofficial English translation corresponds with the French '*de fait*'. A closer equivalent would be the Latin 'de facto': Graber (n 46) 46–47.

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amendment to the earlier draft text of Article 1(2) of the Brussels Declaration.[112] 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'. This paragraph highlighted that occupation depended on both the spatial and temporal scope of 'authority' to be exercised.[113] It may have been construed as authorising an occupying power to prolong the occupation in so far 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 and temporal ambit of occupation was introduced as the last sentence of Article 41 of the Oxford Manual.

Following further amendments,[114] the text of Article 1(2) of the Brussels Declaration that was finally agreed stipulates that '[t]he occupation extends only to the territory where such authority has been established and can be exercised'.[115] This text stopped short of *expressly* characterising occupation as an interim or precarious arrangement.[116] Nor did the text indicate any temporal parameters of occupation. The drafters of the Brussels Declaration understood the legal regime of occupation to be cognisable on the basis of the factual situation of control. This was the case even though, during 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.[117] He pointed out that 'the occupation *lasts so long as it* ('*tant qu'elle*') is exercised by fact'.[118] One might be

[112] Baron Jomini modified the earlier 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, a new provision (art 1) that defined 'occupied territory' was introduced. Part of what had been arts 1 and 2 of the original Russian draft text was amalgamated into art 2 of the modified draft text: Brussels Conference on the Rules of Military Warfare (n 43) 277.

[113] ibid 277 (English translation by the present author). As discussed above, the Swedish and Norwegian joint delegation supported the retention of this text.

[114] Subsequent to Baron Jomini's further amendment to art 1(2), which was introduced on 11 August 1874, this paragraph read: 'L'occupation ne s'étend qu'aux territoires où cette autorité est établie et *tant qu'elle est en mesure de s'exercer*' ('[t]he occupation extends only to the territory where such authority has been established *and to the extent that/so long as it ('tant qu'elle')* can be exercised'): Brussels Conference on the Rules of Military Warfare (n 43) 284 (emphasis added, English translation by the present author).

[115] The original French text reads: 'L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer': ibid 288. Compared with the interim version of art 1(2) shown in the footnote above, this final version, which was only cosmetically different, seems nonetheless to have discarded emphasis on temporal or geographical limitation implied by 'tant qu'elle est en mesure de s'exercer'.

[116] 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 the physical presence of troops in the occupied region was indispensable for belligerent occupation: Graber (n 46) 53; cf Brussels Conference on the Rules of Military Warfare (n 43) 105 (General de Leer of Russia stressing the need for 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 '[f]or 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' (English translation by the present author)).

[117] ibid 106 (Lieutenant-Colonel Staaff, co-representative of Sweden and Norway, 12 August 1874).

[118] The original French statement read that 'l'*occupation dure* tant qu'elle s'exerce de fait': ibid 107 (emphasis added, English translation by the present author); see also ibid 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.

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 as 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 decades. Further, the intention of the drafters of the Brussels Declaration may be evaluated alongside the text of the Oxford Manual, which was formulated only six years later.

5.4. THE OXFORD MANUAL (1880): THE APPROACH OF SETTING THE TEMPORARY NATURE OF OCCUPATION AS A 'GENERAL PRINCIPLE' WHILE EXCEPTIONALLY RECOGNISING THE POSSIBILITY OF PROLONGED OCCUPATION

The Oxford Manual is distinguishable in making it explicit and unambiguously clear that belligerent occupation is an interim temporary 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'.[119] Until now, this provision constitutes the only major legal document that *expressly* recognises the temporary nature of occupation as a general rule.

Nevertheless, two qualifications should be made. First, the qualifying word 'essentially' in Article 6 suggests that a non-interim occupation is exceptionally permissible. Second, Article 41 of the Oxford Manual, which corresponds with Article 1 of the Brussels Declaration, seems to recognise a potentially longer occupation in tune with the duration of a foreign power's control. Article 41 of the Oxford Manual stipulates:[120]

> A territory is regarded as occupied when, following its invasion by enemy forces, the State to which it belongs has ceased, in fact, to exercise 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*.

The last sentence of Article 41 makes it clear that the temporal sweep (alongside the geographical reach) of occupation rests upon the factual nature of occupation, which is defined in the first sentence. Article 41 of the Oxford Manual may therefore be read as admitting a lengthier period of occupation as an exception.

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[119] Oxford Manual (n 8) art 6 (English translation by ICRC; emphasis added).

[120] ibid art 41 (English translation by the ICRC; emphasis added). Apart from arts 6 and 41 discussed here, see also a note preceding section C(a) (public property) which contains arts 50–53. This suggests that the occupant's power over property may be constrained. It reads: 'If the occupant is substituted for the enemy State for the government of the invaded territories, he still does not exercise any absolute power. So long as the fate of these [occupied] territories is in suspension, that is until peace, the occupant is not free to dispose of what still belongs to the enemy and cannot be of use for the war operation': Institut de Droit International, 'Réglementation des lois et coutumes de la guerre : Manuel des lois de la guerre' (1881–82) 5 *Annuaire de l'Institut de Droit International* 168 (English translation by the present author).

5.5. THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE REGULATIONS AND THE PROVISIONAL NATURE OF OCCUPATION

Article 43 of the Hague Regulations (1899–1907) reads:[121]

> The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This provision is the consolidation of Articles 2 and 3 of the Brussels Declaration.[122] There are two salient differences between the two instruments, which are of special relevance to ascertaining the temporal length of occupation. They are (i) the omission in Article 43 of the Hague Regulations of an express mention of the *suspended* nature of the authority of the legitimate power; and (ii) 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 the case of necessity.[123]

With regard to the latter point, 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 the first point, 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 suspended and having in fact passed into the hands of the occupant …').[124] In so doing, they expunged the phrase that was indicative of the provisional effect of occupation – namely, the phrase 'being suspended and'.[125] It was the Belgian delegate who proposed this deletion at a sub-commission meeting on 8 June 1899[126] but, unfortunately, the minutes of the meeting show no indication of his rationale.[127]

In retrospect, the deletion of the key word 'suspended' in the drafting stage might suggest a change in the drafters' opinion as to the temporal span, allowing room for protracted occupation. Nevertheless, since (as noted above) Article 43 of the Hague Regulations was based on the

[121] Hague Regulations (n 6).
[122] The Brussels Declaration (n 5) art 3 reads: 'With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary' (English translation by the ICRC). The authentic French text provides: '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'.
[123] 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.
[124] English 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 …'.
[125] English translation by the ICRC. The original text in French referred to 'étant suspendue et'.
[126] This was proposed by Beernaert (Belgium): James Brown Scott, *The Proceedings of the Hague Peace Conference: Translation of the Official Texts – The Conference of 1899* (Oxford University Press 1920) 512.
[127] Conférence International de la Paix; La Haye, 18 May–29 July 1899, Pt I, 119; Scott, ibid 512.

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amalgamation of the texts of Articles 2 and 3 of the Brussels Declaration, the drafters of Article 43 may simply have assumed the temporariness of occupation.

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 necessary correlation between the provisional nature of occupation and the limited degree of power with which an occupier is endowed.[128] Hence it may be contended that measuring the power of the occupant is not decisive in 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 the administrative structure should generally be restrained. The lengthier the temporal span of the occupation, the greater the need for the occupier to take appropriate administrative and legislative measures to secure the well-being of the inhabitants.[129] Accordingly, the conferral only of a 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

The original text of Article 3 of the Brussels Declaration expressly recognised that, as a general rule, the occupying power was invested with broad, or even almost unencumbered latitude to alter the local laws. According to this first draft text:[130]

> The 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.*

[128] Giladi (n 23) 114 (arguing that, for Francis Lieber, the transient character of occupation did not suggest any limitation on the authority of the occupying power).
[129] 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 (n 31) 634. In the present-day context, see ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory', March 2012, 72 (ICRC Expert Meeting) ('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').
[130] The very first draft text was proposed by Russia and was initially numbered art 2: Brussels Conference on the Rules of Military Warfare (n 43) 9 (emphasis added; English translation by the present author).

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However, following drastic changes introduced by both the President and the Commission,[131] the power of the occupier to modify local laws became an exception that could be exercised only in the event of necessity.[132] Instead Article 3 came to highlight the principle of preserving local laws and the prohibition on modifying them.[133]

To obtain more insight into such drastic changes, it is crucial to investigate how this came about in the drafting process. At Brussels, following the proposal of Baron Jomini (Russia), Article 2 of the first draft text was split[134] into two provisions: 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 Article 3, which – while proclaiming the idea of preserving the local laws – made the possibility of modifying, suspending or replacing local laws the exception that could be allowed only in the case of necessity.[135] 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'.[136] This provision gravitated towards emphasising the limited and exceptional nature of the legislative power of the occupant. It was the German delegate who motioned an amendment of the original text, which had recognised a wide power to modify local laws, by changing the phrase ('either modify them in part, or suspend them entirely').[137] 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').[138] 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 the ability of the occupying power to assume a wide range of legislative and administrative powers was posited only as an exception.

[131] As a first step towards change, the President of the Conference, Baron Jomini (Russia), revised a draft text in the plenary session, introducing a provision (new art 1) which defined an 'occupied territory': Brussels Conference on the Rules of Military Warfare (n 43) 277 (new draft text proposed by the President in the plenary session on 5 August 1874).

[132] Art 3 of the draft text proposed by the President on 11 August 1874 provided: 'À cet effet, il maintient les lois qui étaient en viguer 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, [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'): Brussels Conference on the Rules of Military Warfare (n 43) 284 (English translation by the present author). The text was changed slightly by the Commission, with the last phrase 'que s'il y est obligé' replaced by the words 'que si il y a nécessité', while changing the tense from the present to the future: ibid 286, 288, 297.

[133] ibid 239 (Baron Blanc of Italy, expressing this view in a personal capacity).

[134] This process was to be reversed at the subsequent Hague Conference (1899) to form one united provision (Hague Regulations, art 43), as discussed above at subs 5.5.

[135] Brussels Conference on the Rules of Military Warfare (n 43) 9, 110, 239, 277, 284, 288, 297. As explained in the previous sub-sections, after some further changes were introduced into the text of art 2, the final version reads: '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 297 (English translation by the ICRC).

[136] ibid.

[137] ibid 9.

[138] ibid 110. This proposal was supported by Mr de Lansberge (the Netherlands) and Colonel Count Lanza (Italy): ibid 110–11.

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 nature of the powers to be wielded by an occupying power should depend on the length of occupation.[139] Many scholars in the area of the laws of war between the late nineteenth century and early twentieth century seemed to emphasise the correlation between the relatively limited degree of power bestowed upon the occupier and the provisional nature of occupation.[140] They seemed to read the generally circumscribed nature of the occupier's power as an indicator for the transient nature of its control. Writing in 1890, Hall contended:[141]

> 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*.

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:[142]

> The early definitions of the modern concept of belligerent occupation are 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 full powers which belligerent occupation entails for the occupant.

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[139] On this, see Loening (n 31) 634 (stating that in the case of a 'short occupation', the occupying power is required to take measures relating to the safety of the occupying army, while in the case of a 'long occupation', its power could turn to general legislation). The relevant part of his original text is worthy of citation here: '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' (English translation by the present author).

[140] Rolin-Jaequemyns (n 51) 660–66, 675–85, 690–93; see also Calvo (n 42) 212 para 2166; and Loening (n 31) 626–34, 650. For the argument that while occupation was a temporary state of affairs, the occupier had the extensive right to change local laws, see Halleck (n 29) 775–76, 781 ('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 781 para 5 (emphasis added).

[141] Hall (n 10) 470 (emphasis added). For a similar understanding, see Oppenheim (n 11) 364.

[142] Graber (n 46) 37 (emphasis added).

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6.4. A MINORITY OF 'CLASSIC' SCHOLARLY OPINIONS: THE EXTENSIVE POWER OF THE OCCUPANT AND THE POSSIBILITY OF PROLONGED OCCUPATION

Some American 'classic' writings in the late nineteenth and early twentieth centuries suggested the extensive power of the occupant and the 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 for only as long as the legal state of war continued.[143] 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 peace treaty). 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'.[144] In his view, the occupying power would not acquire any abiding title to immovable property.[145] Overall, it is unclear if Wheaton, even when conceding the possibility of a longer occupation of the territory of a sovereign state, envisaged the protracted kind that would endure for decades after ceasefire.

Wheaton's inclination towards relatively long-running occupation may have been coterminous with the influential American doctrine that endorsed an occupier's wide range of powers. Lieber implicitly recognised the exceptional possibility of annexing an occupied land even before the conclusion of peace.[146] The occupant, in his view, was granted 'full power' in the event of military necessity.[147] Akin to Lieber, Hall tinkered with the thesis that a wide scope of powers might be reserved to the occupying power.[148] Their views went further than those contemplated by contemporary scholars in Europe. For instance, Bluntschli was disposed to qualify the ambit

[143] Henry Wheaton, *Elements of International Law* (8th edn, Richard Henry Dana Jr ed; Little, Brown, and Company 1866) 436–39 para 347, text at fn. According to Wheaton, '[b]elligerent 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 436, text at fn (emphasis added).
[144] ibid 436, text at fn (emphasis added).
[145] ibid 437–38, text at fn.
[146] The Lieber Code (n 7) art 33 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 (n 46) 40 (explaining that art 33 was drafted by Lieber 'with the Civil War in mind').
[147] This can be inferred from arts 1 and 2 of the Lieber Code; see also Bluntschli (n 61) 8 para 36, and 9 para 40.
[148] 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 (n 10) 469–70 para 155 (emphasis added).

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of the war authority of the occupier by 'the need of continuation of war, or by the need of occupied area or of the population'.[149] 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 (wars of 1812, 1812–15)[150] and the Mexican-American War (1846–48).[151] Even after the Brussels Conference, the practice of the United States, markedly different from European views, conferred an avowedly wide range of powers upon an occupying power.[152] This can be discerned in relation to the annexationist practice of the United States during the Spanish-American War (1898).[153]

[149] Bluntschli explained that '[t]he war authority can proclaim general directives, set up institutions, exercise police authority and tax sovereignty, in so far as this is demanded by the need for continuation of war, or by the need for occupied area or for the population' (English translation by the present author): Bluntschli (n 61) 8 para 36.

[150] See *United States v Rice* 17 US (4 Wheat) 246 (1819) (relating to the city of Castine occupied by the British during the war of 1812). Justice Story held: '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* [1814] 165 ER 1374, 1375 ('No point is more clearly settled in the Courts of Common Law than that a conquered country forms immediately part of the King's dominions').

[151] 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*, *Vol IV*, *Pt 3* (The Government Printing Office 1897) 595. See also *Fleming v Page* 50 US 603 (1850) 615 ('By the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country').

[152] According to Benvenisti, the Americans, when expanding the Western frontier territories, closely followed British practice, 'which did not distinguish between occupation and conquest' in the non-Western world, 'whereby mere occupation was an effective way of expanding its dominion to occupied territories and their inhabitants': Benvenisti (n 33) 635–36; see also ibid 639.

[153] See the Executive Order of President McKinley to the Secretary of War, 19 May 1898, http://presidency.proxied.lsit.ucsb.edu/ws/index.php?pid=69291 (in which President McKinley made a declaration in relation to the US occupation of the Philippines: '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 (n 33) 638 (discussing how US 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 Congress, still had yet to make the territory in question subject to US law); see also ibid 641.

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7. THE TEMPORARINESS OF OCCUPATION AND PROLONGED OCCUPATION IN THE *TRAVAUX PRÉPARATOIRES* OF GC IV

7.1. OVERVIEW: THE RELEVANCE OF ARTICLE 6(3) GC IV 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 during the corresponding period (1863–1949) conceived the temporal aspect of the legal regime of occupation, the examination now turns to the question of prolonged occupation in the minds of the framers of modern IHL: GC IV and AP I. This section will focus on the draft records of GC IV (1949), especially with regard to Article 4 of the Stockholm draft text of GC IV[154] (which corresponded with GC IV Article 6). A closer perusal of the draft records reveals that the evidence for recognising the possibility of protracted occupation lasting for decades is minimal and, at best, inconclusive.[155]

7.2. INTERPRETATION OF ARTICLE 6(3) GC IV IN ACCORDANCE WITH THE GENERAL RULE OF INTERPRETATION

As succinctly discussed in Section 4 above, GC IV Article 6(3) contains the so-called 'one-year' rule, which delimits the temporal span of applicability of GC IV (save for the core 43 provisions expressly spelt out). Evidently, GC IV Article 6(3) contains an important exception that applies to the post-belligerent phase, namely what Dinstein refers to as 'post-belligerent occupation'[156] or 'post-hostilities belligerent occupation'.[157] This exception relates to the 43 provisions that are considered to be 'hard core' and of fundamental importance for the occupied population.[158]

[154] The Stockholm draft text at art 4, 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. Art 4 read: '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 of the Diplomatic Conference of Geneva of 1949, Vol I* (Federal Political Department 1949) (Final Record Vol I) 114.

[155] See, eg, ICRC, 'Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims', Geneva, 14–26 April 1947; and Final Record Vol I ibid.

[156] Dinstein (n 40) 42–43 (explaining that '[w]hen 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 origins which were non-pacific. The best term, in the opinion of the present writer, is "post-belligerent occupation"').

[157] Dinstein (n 86) 280–83 paras 674–80.

[158] Yoram Dinstein, 'Autonomy and Legal Status: A Rejoinder' (1995) 26 *Security Dialogue* 185, 188; and Hans-Peter Gasser and Knut Dörmann, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 231, 281 para 537.

These provisions retain validity throughout the duration of the occupation.[159] Still, with regard to Part III of GC IV, 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 of 'military operations'. It seems widely recognised that this concept is broader than that of 'active hostilities' used in the Third Geneva Convention, Article 118.[160] Along this line, some authors consider the former concept to be sufficiently broad to include even the construction of a wall in an occupied territory.[161] 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 of 'military operations' and 'active hostilities'. When evaluating the temporal juncture from which the one year period should run under Article 6(3) GC IV, several delegates equated the close of hostilities with the conclusion of military operations.[162]

Another question that has raised much doctrinal controversy is whether the term 'military operations' points to those that temporarily and causally precede the occupation in question. This narrow reading is precisely that adopted by the ICJ in its Advisory Opinion in *Wall*. In that case, the ICJ held that Article 6(3) of GC IV set the one-year rule running from 'the general

[159] After a 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 phasing out of foreign forces.

[160] Clearly, the term 'active hostilities' is much narrower than the concept of 'hostilities'. As stated in ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) (ICRC Commentary on the Additional Protocols) 68 para 153, '[t]he 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'.

[161] Ben-Naftali, Gross and Michaeli (n 42) 595; Julia Grignon, *L'applicabilité temporelle du droit international humanitaire* (Schulthess 2014) 315. Elsewhere, Grignon ponders the question whether a manoeuvre deployed by a foreign army to effectuate the instance of occupation without armed resistance in a manner described in art 2(2) common to the Geneva Conventions may constitute military operations: ibid 322–23.

[162] 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', 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': *Final Record of the Diplomatic Conference of Geneva of 1949*, *Vol IIA* (Federal Political Department 1949) 625 (Final Record Vol IIA). Later, the Report of the Rapporteur of Committee III to the Plenary Assembly explained that the text of art 4 of the Stockholm Draft was amended with the phrase 'general conclusion of military operations' replacing 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 815. The Rapporteur understood the notion 'military operations' in a manner that was very narrow and synonymous with 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 624.

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close of military operations leading to the occupation'.[163] Yet, as critics claim,[164] the qualifying words 'leading to the occupation', which shows a causal connection, were absent under Article 6(3) of GC IV but were appended by the court.[165]

One may ask if GC IV Article 6(3) is tailored only to the historical circumstances of the Allied post-hostilities belligerent occupation of Germany and Austria, and of the American occupation of Japan.[166] 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 GC IV Article 6(3) 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, GC IV Article 6(3) is marked off from the Hague Regulations. As discussed above, the latter do not set any temporal limit on the applicability of their rules on occupation.[167]

7.3. The Continued Applicability of the Law of Occupation to Occupied Territory where There Is No Armed Resistance

According to Pictet's Commentary (1958), when regulating the temporal ambit of GC IV, Article 6(3) 'deliberately' omits reference to one situation of occupied territory covered by Article 2(2) common to the Geneva Conventions – namely, territory that has fallen into occupation where an occupant does not encounter any armed resistance, state of war or armed conflict (hence the absence of any hostilities).[168] 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

[163] The ICJ held: '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': *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 (*Wall* Advisory Opinion), [125]. See also Dinstein (n 40) 41–44 (arguing that only the Israeli occupation of Golan Heights constituted 'belligerent' occupation in the strict sense, while the nature of the occupation of the both West Bank and the Gaza Strip has been transformed by various agreements).

[164] Ardi Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion' (2005) 99 *American Journal of International Law* 102, 106; Ben-Naftali, Gross and Michaeli (n 42) 595–96. 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 Vol IIA (n 162) 623–25.

[165] *Wall* Advisory Opinion (n 163) [125]; see also ibid [135] ('the general close of military operations that led to their occupation'). See Ben-Naftali, Gross and Michaeli (n 42) 595–96.

[166] See Gross (n 3) 43.

[167] This is true even though GC IV (n 2) art 154 underscores the 'supplementary' nature of GC IV in relation to Section III of the Hague Regulations, which 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 IIA (n 162) 624–25 (United Kingdom and Italy). The UK delegate even stressed that any new rule under GC IV that would be inconsistent with the rules of occupation under the Hague Regulations was unacceptable to his delegation: ibid 775–76.

[168] Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, *Vol IV* (International Committee of the Red Cross 1958) 63 (Pictet's Commentary).

most provisions of GC IV, 'the Convention will be fully applicable … so long as the occupation lasts'.[169] On this reading, it may be suggested that GC IV implicitly recognises long-running occupation in cases 'where there has been no military resistance, no state of war and no armed conflict', as covered by common Article 2(2) of the Geneva Conventions.[170]

In those situations, according to Pictet, there is no doubt about the applicability of GC IV.[171] The continued validity of GC IV 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) GC IV.[172]

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.[173] On this reading, in line with Article 6(3) of GC IV, the 'one-year' rule will duly apply after the termination of the 'military operation' (that is, taking control of a foreign territory).[174]

7.4. THE *TRAVAUX PRÉPARATOIRES* OF GC IV ARTICLE 6(3) AND THEIR IMPLICATIONS FOR PROLONGED OCCUPATION

At the Diplomatic Conference in Geneva (1949), Article 4 of the Stockholm Draft provided the basis for hammering out the text of Article 6 of GC IV. The second sentence of this draft provision read:

> 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.

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

[169] 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', recognised 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 (the meaning of which is understood to be in tune with common art 2 of the Geneva Conventions as encompassing the situation where there is no armed resistance, rather than to address the specific question of the temporal span of occupation).

[170] ibid.

[171] ibid (adding that the exception to this may arise in the case of any political act recognised by the international community, 'such as the annexation of the territory or its incorporation in a federation').

[172] Grignon (n 161) 322.

[173] For this view, see Robert Kolb and Sylvain Vit, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuels* (Bruylant 2009) 161.

[174] Grignon (n 161) 323. See also the United States Military Tribunal at Nuremberg, *United States v Wilhelm List and Others (The Hostages Trial)*, Judgment, Case No 47, 8 July 1947 to 19 February 1948, in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol VIII (1949) 34, 55–56 ('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').

occupation', the US 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'.[175] Other delegates were reluctant to endorse prolonged occupation. They proposed setting a time limit on the applicability of the draft text of GC IV, fearing that otherwise occupation might elapse for a 'considerable time', or even 'indefinitely' in a post-belligerent situation.[176] They highlighted the need to enumerate which obligations should cease after the time limit.[177] This was because of the widely shared conviction that administrative power should be handed over progressively to the local authority, with the gradual diminution of the occupying power's obligations.[178]

At the Third Meeting of Committee III,[179] the US delegate submitted the amendment to Article 4 of the Stockholm Draft text.[180] He distinguished between the obligations of the occupying power that were applicable during the period of hostilities and those applicable 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' to adopt Dinstein's term) would vary.[181] By referring to the Allied occupation of Germany and the American occupation of Japan, he expressly suggested the possibility of a 'prolonged military occupation'.[182] He nonetheless contended that even in such a case, government 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.[183] The United States proposal that the obligations under GC IV should be gradually handed over to local administrations was accepted by several delegates.[184] Still, it was felt by some representatives 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)'.[185]

[175] Final Record Vol IIA (n 162) 623. With respect to the temporal length of applicability of the proposed Civilians Convention, the US representative emphasised 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 the occupying power as the trustee for the territory and population under occupation: ibid. He then referred to the inadequacy of the rules governing the occupying power's responsibility for the welfare of the local population: ibid.

[176] See the views expressed by the Bulgarian, UK and Norwegian delegations: Final Record Vol IIA (n 162) 624.

[177] ibid (a Norwegian suggestion).

[178] ibid 625 (an Italian proposal).

[179] This committee was responsible for drafting the Civilians Convention.

[180] Final Record Vol IIA (n 162) 623.

[181] 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 Prisoners of War Convention, which considered the end of captivity of prisoners of war upon the 'cessation of hostilities' as the basis for ascertaining the termination of interning civilians: ibid 624. Yet, this obviously did not contemplate the possibility of administratively detaining civilians during the period of occupation following the end of (active) hostilities.

[182] ibid 623.

[183] See the delegates of Bulgaria, the 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 cut-off period for the applicability of GC IV: ibid 624.

[184] See the delegates of the United States, Norway and Italy: ibid 623–25.

[185] ibid 624 (the suggestion by Norway).

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At the same Third Meeting of Committee III, the ICRC delegate proposed distinguishing two cases: (i) the national territory where GC IV would cease to apply 'at the end of hostilities'; and (ii) the occupied territory where its applicability would terminate 'at the end of occupation'.[186] For the purpose of examining this 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 44th 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 GC IV in occupied territory.[187] This clause incorporated the US proposal on the time limit of one year after the termination of military operations.[188] Nevertheless, two influential delegates objected to this paragraph. The United Kingdom, wary of any departure of GC IV provisions from the notion of occupation defined in the Hague Regulations, suggested that the Stockholm Draft text be restored.[189] Similarly, the USSR delegate proposed that 'all reference to a prolongation of the application of the Convention should be omitted from Article 4'.[190] 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 legitimise protracted occupation. Together with other delegates, in the mind of the USSR delegation the instances of post-Second World War Allied occupation may have been understood as of the *sui generis* kind,[191] which 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.[192] Subsequently, the final text of this paragraph, which became identical to the current text of Article 6(3) GC IV, was endorsed by the Plenary Assembly.[193]

A 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

[186] ibid 625.
[187] ibid 775.
[188] The one-year time limit was inserted also in relation to the text of the second paragraph (governing the end of the application of GC IV for the territory of the parties to the conflict), which had been prepared initially by the Drafting Committee. Yet, this was amended by the United Kingdom proposal: see *Final Record of the Diplomatic Conference of Geneva of 1949*, *Vol IIB* (Federal Political Department 1949) (Final Record Vol IIB) 189 (Drafting Committee) and 386–88 (plenary).
[189] Final Record Vol IIA (n 162) 775–76; see also the same point made earlier at the Third Meeting of Committee III: ibid 624.
[190] ibid 776.
[191] See the opinion of the Monaco delegate ('The present occupation of Germany was an entirely different case': ibid 624).
[192] ibid 776 (by 19 votes, while the Soviet amendment was rejected by 16 votes to 8).
[193] Final Record Vol IIB (n 188) 388 (24th Plenary Session).

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against arbitrary acts'. At the suggestion of the Report, those rights should be distinguished from the provisions that had bearing more on the exercise of powers by the occupier.[194]

7.5. EVALUATING THE IMPLICATIONS OF THE 'ONE-YEAR' RULE UNDER ARTICLE 6(3) OF GC IV

When inserting the 'one-year' rule into the text of GC IV Article 6(3),[195] there is every reason to believe that the drafters of GC IV had largely in mind the then ongoing, post-Second World War Allied occupation of Germany and Austria,[196] and the US occupation of Japan.[197] The Allies' avowed policy of 'transformative occupation'[198] in those countries and in other post-Second World War occupied territories[199] was perceived to justify longer occupation than the previous instances of occupation of which they were aware. By specifically pinning down the extent of the applicability of GC IV 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.[200] Confronted with those cases of occupation that might potentially endure, the delegates may have deemed it advisable to contemplate a phased transfer to the local authorities of the responsibility for meeting the needs of the local population.[201] The analyses of the draft records show that GC IV Article 6(3) is never meant to throttle the protection of the occupied population. Viewed in that specific historical context, it does not seem unreasonable[202] to stipulate that in

[194] Final Record Vol IIA (n 162) 815–16; see also ibid 776 (the view expressed by the Rapporteur, the Swiss delegate); and Final Record Vol IIB (n 188) 386–88 (exchange of views between the USSR delegation and the UK representative at the 24th plenary meeting).
[195] Final Record Vol IIA (n 162) 775–76.
[196] The Allied occupation of Germany can be explained by the doctrine of *debellatio*: Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 161–62.
[197] Pictet (n 168) 62; Michael Bothe, Karl Josef Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 59 para 2.8; and Roberts (n 4) 56. As an aside, the special circumstances of the Allied occupation of Germany, Austria and Japan also explained the introduction of the phrase 'within its territory and subject to its jurisdiction' under art 2(1) of the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR); UN Economic and Social Council, Commission on Human Rights, 6th Session – Summary Record of the 193rd Meeting (26 May 1950), UN Doc E/CN.4/SR.193, 13 para 53 (reference to those three countries by Eleanor Roosevelt).
[198] For explorations of this concept, see Bhuta (n 30); Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *American Journal of International Law* 580; and ICRC Expert Meeting (n 129) 67–72.
[199] See the Anglo-American occupation of Italy in 1943–48; the Soviet Union's occupation of Northern Korea (1945–48); and the US occupation of Southern Korea (1945–48): David M Edelstein, *Occupational Hazards: Success and Failure in Military Occupation* (Cornell University Press 2008) 27, 57–86, 183, 186–87.
[200] In the same year as the Diplomatic Conference at Geneva (1949), the Allied occupation of Italy and the US occupation of Korea (which, like Taiwan, was liberated from Japanese colonialism) had just come to an end.
[201] Grignon (n 161) 310–11.
[202] cf 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' (2005) 38 *Israel Law Review* 211, and Ben-Naftali, Gross and Michaeli (n 42) 595 (claiming that such an arrangement of transfer seems 'absurd'). Even so, the mandatory term 'shall' in art 6(3) GC IV, used to indicate the termination of key provisions of the applicability of the GC IV, seems to go too far.

the event of an occupation that is likely to be protracted exceptionally, the responsibility for the well-being of civilians is to be progressively handed over to the local authorities.[203]

As an aside, it is not unsound to suggest that in the case of a volatile occupation riven by short but intense fighting, each time a military operation is undertaken to address a surge in fighting until it peters out, the calculation of the temporal period under Article 6(3) of GC IV should resume from the outset.[204] 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) of GC IV, triggers the renewed praxis of the GC IV *in toto*.[205]

Returning to the draft records, 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-long occupation among sovereign states, other than the case of pacific occupation (*occupatio pacifica*) that was predicated on an armistice or other post-war agreement.[206] However, several non-Western states did undergo occupation of a protracted nature, as in the case of the United Kingdom occupation of Egypt (1882–1954).[207] 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 regard to the United States occupation of Japan,[208] Edelstein shows that in the very year of 1949 when the Geneva Conference was convened, the United States authority ruled out any prospect of protracted occupation.[209] In view of these considerations, it seems far-fetched to argue that when adopting the

[203] Grignon (n 161) 310–11.

[204] Dinstein compares the reactivation of GC IV and the re-operation of art 6(3) of GC IV with 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, restretched, and so on': Dinstein (n 86) 283 para 680; see also Dinstein (n 158) 187–88; and Dinstein (n 40) 42–44.

[205] Roberts (n 4) 55; Dinstein (n 86) 282 para 678.

[206] Edelstein refers to the cases of post-First World War occupation of Rhineland by France, the UK and the US (1918–30), and the French occupation of Saar (1920–35): Edelstein (n 199) 27.

[207] ibid 105–122. For criticism of the inconsistency in the British prolonged occupation of Egypt and Cyprus, see Baty (n 11) 976. 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 (1919–48) under the League of Nations' Mandate, and the US occupation of Cuba (1898–1902 and 1906–09), Haiti (1915–34), the Dominican Republic (1916–24), and the Philippines (1898–1945): Edelstein (n 199) 27, 39–47, 176–82. It can be argued that the legal nature of the British occupation of Egypt should have been characterised 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 112, 117. In so doing, Britain declared sovereignty over Egypt (as it did over Cyprus) in as late as 1914: Benvenisti (n 33) 636. See also MP Hornik, 'The Mission of Sir Henry Drummond-Wolff to Constantinople, 1885–1887' (1940) 55 *The English History Review* 598.

[208] It can be argued that the US occupation of Japan was based on the Instrument of Surrender accepted by the then Imperial Japanese government: see Ando (n 26) 87; Michael J Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law' (2003) 6 *Yearbook of International Humanitarian Law* 127, 157–58; Benvenisti (n 196) 162. See also Robert 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, 241 fn 14.

[209] Edelstein (n 199) 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 US Secretary of State Dean Acheson that 'an indefinite occupation would make Japan

text of Article 6(3) of GC IV, the framers of GC IV envisaged the length of belligerent occupation to be stretched for decades rather than for years.[210] It is likely that, even though clearly cognisant of the cases of Allied post-Second World War occupation, they may not have intended to deviate essentially from the traditional presumption that 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.[211]

These assessments bring to the fore the working assumption of the drafters that the legal regime of occupation should be of relatively short duration. Unless built on that premise, it is hard to explain why the responsibility for the general well-being 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) of GC IV. Otherwise, confronted with the case of prolonged occupation where the occupying power refuses to hand over responsibility to the local authority,[212] 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.[213] Hence, any proposal to accommodate a decades-long form of occupation within the normative structure of GC IV seems to risk running counter to the object and purpose of GC IV.

On the other hand, prima facie, nothing in the text of IHL overall seems to exclude prolonged occupation, much less the application of the law of belligerent occupation to such a protracted pattern.[214] The implications of the latter aspect will be explored briefly below.[215] This author agrees that the question of the end of occupation should not be confused with that of the temporal scope of application of GC IV. Indeed, it is suggested that Article 6(3) of GC IV 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*'.[216]

"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', referring to Secretary of State Dean Acheson to Certain Diplomatic Officers in Foreign Relations of the United States, 1949, Vol 7, *The Far East and Australasia*, Pt 2, 736–37; and Robert B Textor, *Failure in Japan* (John Day 1951) 340).

[210] Note that the local authorities in Germany, Austria and Japan had already been given a 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).

[211] See Benvenisti (n 196) 164–66.

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

[213] Ben-Naftali, Gross and Michaeli (n 42) 595–96.

[214] See also Roberts (n 4) 55 (referring to the possibility of military occupation or administration that endures 'indefinitely').

[215] See Section 9 below.

[216] ICRC Expert Meeting (n 129) 30 (emphasis added).

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8. ARTICLE 3(B) OF ADDITIONAL PROTOCOL I AND ISSUES OF TEMPORARINESS OF OCCUPATION AND PROLONGED OCCUPATION

8.1. OVERVIEW

Article 3(b) of Additional Protocol I (AP I) 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'.[217] As is clear from the text, AP I does not replicate the one-year limitation rule contained in Article 6(3) of GC IV. Article 3(b) jettisons any notion that the applicability of both AP I and GC IV hinges on a definite temporal limit. It sets out the principle that the law of occupation enunciated in both GC IV and AP I will remain in force for as long as the occupation endures (and until the disappearance of either effective control on the ground or of the capacity to exert this by a foreign power).[218] Unmistakably, under this provision, the temporal scope of the law of occupation is extended 'beyond what is laid down in the Fourth Convention'.[219] Accordingly, it is possible to contend that AP I is equipped to address scenarios of prolonged occupation,[220] however *indefinite* the length of occupation may be.

8.2. THE *TRAVAUX PRÉPARATOIRES* OF ARTICLE 3(B) OF ADDITIONAL PROTOCOL I

The *travaux préparatoires* of AP I reveal that its drafters were generally dissatisfied with the one-year rule contained in GC IV Article 6(3). In 1972, when the Conference of Government Experts (CGE) was convened, Commission IV – which was responsible for Part I ('General Provisions') of the draft AP I – 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.[221] The working

[217] The exceptions are recognised 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'.

[218] Robert Kolb, 'Étude sur l'occupation et sur l'article 47 de la IV^{ème} 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, 291, 295.

[219] ICRC Commentary on the Additional Protocols (n 160) 67 para 151.

[220] See Ben-Naftali, Gross and Michaeli (n 42) 596 (arguing that AP I art 3(b) reflects customary law, on the ground that this is recognised by the Israeli High Court and other states in cases of prolonged occupation). See also HCJ 7015/02 *Ajuri v IDF Commander in West Bank and Gaza Strip* 2002 PD 56(6) 352 (suggesting the application of art 78 GC IV, notwithstanding art 6). For commentaries on this judgment, see Daphne Barak-Erez, 'Assigned Residence in Israel's Administered Territories: The Judicial Review of Security Measures (Review of HCJ 7016/02, *Ajuri v IDF Commander*)' (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.

[221] ICRC, 'Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts', Second Session, 3 May–3 June 1972, Vol I, 178 (ICRC Report on the Work of the CGE 1972). Note that in its earlier Report of the CGE (the first session in 1971), there had been no remark on the rule governing the end of the applicability of AP I: ICRC, 'Report on the Work of the Conference of the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts', 24 May–12 June 1971 (ICRC Report on the Work of the CGE 1971) (focusing on such issues as requisition, the protection of medical and relief activities, civil defence organisations).

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group, failing to muster consensus, proposed two solutions: the first option made references to the relevant provisions of the Geneva Conventions; the second option elaborated new rules that would even modify certain provisions of the Conventions, in particular the one-year limit in GC IV Article 6(3).[222] The fourth paragraph of the second proposed text provided, akin to the current text of Article 3(b) of AP I, 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'.[223] The majority of the governmental experts in 1972 favoured the second option, including the proposal to scrap any time limit for the applicability of the Geneva Conventions and AP I.[224] Thereafter, the second proposal was incorporated into the text of Article 3(3) of the draft text of AP I prepared by the ICRC.[225] However, unlike the subsequent text that was adopted as AP I Article 3(b), the ICRC text notably omitted any reference to the Geneva Conventions. This reflected the ICRC's desire then that the effect of GC IV Article 6(3) should be undisturbed by the new provision of AP I. It is reasonable to hypothesise that many experts represented at the CGE in 1972, like the drafters of GC IV, thought that GC IV Article 6(3) was *sui generis* and tailor-made only for the specific cases of post-Second World War Allied occupation of a relatively protracted nature.[226] 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 had lasted for decades.[227] Those phenomena must have challenged outright the presumption that occupation should be of a provisional nature, and that this would come to an end progressively (regardless of the fact that most occupying powers failed to recognise the juridical status of occupation).

Subsequently, at the Diplomatic Conference in Geneva (1974–77),[228] a number of delegates[229] requested that the reference to the Geneva Conventions should be reinstated in the

[222] ICRC Report on the Work of the CGE 1972, ibid Vol I, 178.
[223] ibid.
[224] ibid.
[225] It provided that '[i]n 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', October 1973, 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 10; see also ibid 84 (commentary to art 65(5) of the draft AP I, which corresponds with art 75(6) AP I).
[226] See ECtHR, *Von Maltzan and Others v Germany*, App nos 71916/01, 71917/01 and 10260/02, 2 March 2005, para 80 (with the Grand Chamber holding that the USSR occupation of Germany between 1945 and 1949 was 'not an "ordinary" wartime 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 (n 196) 162.
[227] 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 (1948–67), and the Israeli occupation of the West Bank, the Gaza Strip, the Golan Heights, and East Jerusalem after the Six-Day War in 1967. Indeed, the Israeli occupation cases provided a political momentum behind the adoption of art 1(4) AP I (n 9).
[228] For the examination, see 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts', Geneva (1974–77) (Federal Political Department 1978) (1974–77 Diplomatic Conference). See also Bothe, Partsch and Solf (n 197) 42, 51–52, 56, 59, 112–23, 125–26, 129, 136, 173–74, 177, 251–58, 390, 405, 408, 424, 509.
[229] See the amendment proposed jointly by Algeria, the Arab Republic of Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Republic, Mauritania, Mongolia, Morocco, Sultanate of Oman, Pakistan, Qatar, Saudi Arabia,

text of Article 3(3) of draft AP I. This led to the textual formulation now seen in Article 3(b) of the Protocol.[230] As is known, this harmonises the temporal understanding of the termination of occupation in relation to both GC IV and AP I.[231]

At the Diplomatic Conference of 1974–77, the delegates assumed that GC IV would operate in parallel with AP I and continue to govern occupied territory. Accordingly, the debates overall tended not to turn to issues of occupation. If they did, they focused on two questions: (i) the meaning of a quasi-neology 'alien occupation', which indicates one of the scenarios contemplated by Article 1(4) of AP I, and which was understood to be different from the traditional notion of belligerent occupation;[232] and (ii) the vexed question of the entitlement of guerrilla fighters to prisoner of war status in occupied territories under AP I Article 44(3).

8.3. DOCTRINAL DISCOURSE: THE LEGAL NATURE OF ARTICLE 3(B) AP I AND ITS RELATIONSHIP WITH ARTICLE 6(3) OF GC IV

One thorny question relating to AP I Article 3(b) is its relationship with, and its effect on, the one-year rule laid down in GC IV Article 6(3). Some authors argue that AP I Article 3(b) is designed to 'abrogate' this rule in so far as it concerns the states parties to AP I. This contention is supported by the draft records, and it is the case even though AP I assumes its relation to GC IV to be supplementary.[233]

Sudan, the Syrian Arab Republic, Tunisia, United Arab Emirates, Democratic Yemen, Yugoslavia (CDDH/I/48 and Corr.1 and CDDH/I/48/add.1 and Add.1/Corr.1, 18 March 1974, in 1974–77 Diplomatic Conference, ibid Vol III, 16); United States of America (CDDH/I/49, 18 March 1974, in ibid 16–17); and Australia (CDDH/I/213, 13 February 1975, in ibid 17–18). See also the explanation of the vote by Cyprus concerning art 3 AP I: ibid Vol VI, 60; Compare the statement of the Israeli delegation (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': ibid Vol VIII, 194 para 24.

[230] The entire text of art 3 AP I was adopted by Committee I by consensus at the 26th meeting: ibid Vol VIII, 247–48. It was then endorsed by the Conference again by consensus at the 36th plenary meeting: ibid Vol III, 15; and ibid Vol VI, 57.

[231] See Grignon (n 161) 317.

[232] See Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165 *Recueil des Cours* 353, 394–96 (emphasising the colonial context with reference to 'colonies of settlement'); Bothe, Partsch and Solf (n 197) 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* (Institute for Human Rights, Abo Akademi University 1976) 272–73 (claiming that the term 'alien occupation' excludes the case of belligerent occupation because this is already covered by common art 2(2) of the Geneva Conventions, and that the former refers to the territories title to which is disputed, such as the South African occupation of Namibia and the Israeli occupation of the Palestinian territories); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 217. Note that the ICRC Report of the Conference of the Government Experts (the first session in 1971) refers to the remark made by one expert regarding colonialism: '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': ICRC Report on the Work of the CGE 1971 (n 221) 54 para 323.

[233] AP I (n 9) art 1(3).

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The view that AP I Article 3(b) should supersede GC IV Article 6(3) can be sustained by assuming that the latter provision is conceived only as 'a special ad hoc provision',[234] which is designed (as discussed above) to deal chiefly with cases of post-Second World War Allied occupation.[235] As a corollary, it is contended that GC IV Article 6(3) has become 'outdated' (*désuet*).[236] To bolster this contention, some authors argue that AP I Article 3(b) has come to express a customary rule,[237] or to reinstate its pre-1949 customary rule.[238] 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.[239] This reading has the advantage of overcoming the question of the non-applicability of the rule embodied in AP I Article 3(b) to states not parties to AP I. The only caveat is that in both the doctrines and practice, the very customary law status of Article 3(b) of AP I has yet to be conclusively settled.[240] In the *Wall* case, the ICJ relied on this paragraph as a decisive text rather than on any customary rule that might mirror Article 3(b) of AP I. This may suggest that in the opinion of the ICJ, Article 6(3) of GC IV is yet to become obsolete.[241]

9. A Brief Overview of Practice and Doctrines in relation to the Provisional Nature of Occupation since 1949

With respect to the 'classic' documents on the laws of war, this article has already explained that the Brussels Declaration and the Hague Regulations neither expressly mention the provisional nature of occupation nor delineate any temporal scope for belligerent occupation. Nevertheless, the foregoing examinations reveal that the drafters of those classic instruments seemed to be more or less united in understanding the legal regime of occupation to be an interim state of affairs. This understanding was widely shared by most scholars.[242] As discussed earlier, according to Article 6 of the Oxford Manual (1880) and the United States Law of War Manual

[234] Bothe, Partsch and Solf (n 197) 57 para 2.2, 59 para 2.8; Adam Roberts, 'Occupation, Military, Termination Of' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 13.
[235] See also Gross (n 3) 43.
[236] Kolb (n 68) 226.
[237] Ben-Naftali, Gross and Michaeli (n 42) 596.
[238] Kolb (n 68) 225–26.
[239] ibid.
[240] The customary IHL study by the ICRC does not address the question of the customary law status of the rule contained in art 3(b) AP I: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005, revised 2009). See also UK Ministry of Defence, *JSP 383: The Joint Service Manual of the Law of Armed Conflict* (Defence Storage & Distribution Centre 2004) 277–78 para 11.8 (referring to the two parallel rules without stating the customary law status or otherwise of art 3(b) AP I: the 'one-year' rule for states parties only to GC IV; and the continued applicability of GC IV and AP I for states parties to AP I); and Grignon (n 161) 322 (noting the difficulty of identifying unambiguous state practice and *opinio juris* on this matter).
[241] See also ibid 321.
[242] As discussed above, it is doubtful that most writers in the 'early formative period' of the laws of war (the second half of the nineteenth century) recognised such a prolonged form of occupation as that lasting for decades: Loening (n 31) 626–34, 650.

(2016),[243] the temporary nature of occupation is expressly stated as a *general* rule. Further, the foregoing analyses of the preparatory works for Article 6(3) of GC IV also indicated that the thoughts of the drafters were based generally on the transitional nature of occupation.

This section will ascertain briefly how the case law and academic doctrines that have evolved since 1949 can be compared diachronically with the 'original' assumption that occupation is intended 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 enactment of AP I seem to have had a special bearing on the minds of the drafters of AP I. This accounts for their decision to remove any temporal limit in recognising the ambit of occupation for as long as the occupation lasts. With the primary focus of this article on the historical prisms (the 'original' intention of the traditional laws of war and the concurrent scholarly discourses), this section will be confined to evaluating concisely if and how 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 is 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.[244] In *Naletilić and Martinović*, referring to GC IV Article 6, 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'.[245] Accordingly, the Trial Chamber fixed the end point of occupation at the conclusion of such agreement.[246] Admittedly, by making the duration of occupation dependent on the termination of hostilities and agreement to that effect, the approach of the ICTY Trial Chamber in that case could be read as recognising more lengthy occupation that may last for years.[247] Nevertheless, the dictum in the case seems to exclude the genre of post-hostilities occupation. This approach is akin to Feilchenfeld's view discussed above.[248] It is even more doubtful that *Naletilić and Martinović* can be taken to endorse post-hostilities occupation of the kind that may be protracted for decades. Hence, this dictum should be understood as confirming the general principle of the provisional nature of occupation.

With regard to state practice, as discussed above, the most recent edition of the United States military manual (2016)[249] follows in the steps of its predecessor and the Oxford Manual in

[243] US Department of Defense, *Law of War Manual* (n 100) 754, 771–73, paras 11.1, 11.4, 11.4.2.
[244] See *Wall* Advisory Opinion (n 163) separate opinion of Judge Koroma, [2]; separate opinion of Judge Elaraby, [3.1]; separate opinion of Judge Kooijmans, [30] (implicitly recognising the temporary nature of belligerent occupation when expressing concern over *fait accompli* of the separation/security fences).
[245] ICTY, *Prosecutor v Mladen Naletilić and Vinko Martinović*, Judgment, IT-98-34-T, Trial Chamber, 31 March 2003, [214].
[246] Such an agreement undoubtedly includes an armistice. Further, this article proposes that 'the cessation of the hostilities' be determined by a unilateral declaration by a belligerent that has assumed the duty as an occupying power. The timing of such an agreement or declaration should be verified on factual grounds.
[247] On this reading, post-armistice occupation seems to be excluded (at least unless and until another hostility erupts in and around the occupied territory to resume a scenario as portrayed by Dinstein's metaphor of an accordion (n 86) 283 para 680.
[248] Feilchenfeld (n 27) 86.
[249] See US Department of Defense, *Law of War Manual* (n 100) 754, 771–73, paras 11.1, 11.4, 11.4.2.

declaring occupation to be a provisional regime. Fine-tuning this stance, one may still maintain that the tenor of the United States manual does not entirely exclude the possibility of long-term occupation as an exception. Further, a more far-fetched 'interpretive strategy' may be marshalled to justify long-running occupation within a legal framework on occupation. There has been a proposal to finesse the meaning of 'provisional' or 'temporary' by arguing that such a term (in the sense of 'non-permanent') is 'relative' and not synonymous with 'short'. On this reading, it is said that long-term occupation does not contradict the requirement that occupation be transient.[250] 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'.[251]

Turning to the doctrines, many contemporary writers lean towards the view that while the legal regime of occupation is intended to be of an interim nature, the law of occupation will continue to apply for as long as the factual state of occupation lasts. Confronted with the post-1949 political reality of the plenitude of prolonged occupations, what seems to have acquired an air of normality in the scholarly arguments is the exception to the general principle that occupation should be provisional. According to the ICRC Report of 2012,[252]

> [t]he 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.

This extract suggests two different points: (i) the legality of the occupying power in engaging in an instance of protracted occupation; and (ii) the continued applicability of the law of occupation to such an instance. This article does not challenge point (ii). In contrast, what may be considered objectionable is point (i). This would entail the risk that IHL would be devoid of its prescriptive force in disincentivising a state from initiating a long-term (if not entirely irreversible) occupation. This would fundamentally change the axiomatic assumption that occupation ought to be (that is, essentially or generally) provisional in principle, even though allowances may be made for exceptional circumstances.

[250] See HCJ 351/80 *Jerusalem District Electricity Company Ltd v Minister of Energy and Infrastructure* 1981 PD 35(2) 673, 690 (Israel); excerpted in English in 11 *Israel Yearbook on Human Rights* (1981) 354. See Dinstein (n 86) 119–20; in contrast see 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: The Legal Aspects*, *Vol I* (Hebrew University of Jerusalem, Faculty of Law 1982) 13, 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 (n 42) 597–98.

[251] Della Thompson (ed), *The Concise Oxford Dictionary of Current English* (9th edn, Clarendon Press 1995) 1103, 1435.

[252] ICRC Expert Meeting (n 129) 72.

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10. CONCLUSION

On reflection, it was not until the 1929 Kellogg-Briand Pact[253] (or at the latest by the time of the UN Charter in 1945[254]) that conquest (with the unavoidable effect of transferring sovereignty over the occupied land) was outlawed. Hence, it was not unusual for scholars even in the second half of the nineteenth century[255] to propose that occupation was transformed into conquest by a post-armistice political decision (typically by a peace treaty). The same can be said of the suggestion that in such cases sovereignty over occupied territory would have to be ceded to the occupying authority.[256]

It is against this 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, which 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 as '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.[257] It is even suggested that Lieber endorsed the 'unlimited' nature of the right of conquest.[258]

[253] General Treaty for Renunciation of War as an Instrument of National Policy (entered into force 24 July 2019) 94 LNTS 57 (No 2137).
[254] UN Charter (n 57).
[255] For instance, Loening argued that the peace treaty confers on the occupant sovereignty over the occupied territory; this acquisition of sovereign power becomes effective retroactively on the acts carried out and the law promulgated by the occupant during the occupation (English translation by the present author): Loening (n 31) 633. In this respect, he referred to Halleck (n 29) 815 para 4. See also Loening (n 31) 635–36 (noting that Bluntschli rejected any acquisition of the territory under belligerent occupation, and summarising three of Bluntchli's principles on belligerent occupation as follows: (i) after the occupation, the occupying power does not have to tolerate the continuing exercise of the political authority in the occupied territory; (ii) the occupying power has the right to exercise on its part sovereign power as much as is necessary for the security of the army and for the purpose of maintaining public order; and (iii) the occupying power does not have the right to treat the occupied territory as definitively acquired for its state and consider its inhabitants as its subjects: Loening, ibid 628).
[256] In the aftermath of the 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 to reflect 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 was conceptually tethered to the doctrine of sovereignty: Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (Stevens & Sons Ltd 1954) 727. See also Feilchenfeld (n 27) 24 para 100 (explaining that even the most egregious kind of occupying power (such as the Nazis) and total warfare 'do not obviate the analytical distinction between sovereigns and mere occupants' because of the pragmatic importance of differentiating between the 'provisional' nature of occupation and 'final annexation' based on the transfer of sovereignty).
[257] Giladi (n 23) 113.
[258] ibid.

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It has been argued that belligerent occupation was deemed to be 'essentially provisional'. Nevertheless, there seemed to be greater tolerance for prolonging the temporal span of pacific occupation, which 'may last for a very long time'.[259] Generally, the scope of pacific occupation was determined for a definite period by the relevant treaty, although in some cases treaties failed to fix a term and the occupation lasted for decades. Cases in point include the United States occupation of Cuba pursuant to the Spanish-American Treaty of 1898 and the Austrian occupation of Bosnia-Herzegovina (which had been administered formerly by the Ottoman Empire) in tune with the Treaty of Berlin of 1878.[260] In those instances, pacific occupation took on an indefinite and more protracted nature. There was even a barely concealed intention to transfer sovereignty over the territory,[261] which came to bear much epistemic similarity to colonialism.

This article 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 of the temporal length of belligerent occupation. These examinations have unveiled how the conceptualisation of the law of belligerent occupation was contingent upon particular social and historical contexts and the minds of nineteenth-century Europe. The legal regime of occupation was contemplated as an interim regulatory framework purported to maintain order and the stability of the occupied territory until a political decision on the disposal of that territory was reached.[262] The law of occupation placed a 'procedural' and temporal restriction on the ability of the occupier to exercise the power of the displaced sovereign (albeit without title), including the power to dispose of the territory at its will.[263]

It can be submitted that the modern law of belligerent occupation proves to be paradoxical in so far as the temporal length of occupation is concerned. The paradox is that modern academic discourse on IHL, having duly achieved its 'conceptual decolonisation' by ditching the colonial/non-colonial division, has come to grapple with the 'legal stasis' of a considerably spun-out

[259] In Jones' view, this marked a contrast to the former situation, which 'is generally precarious, and, as a rule, of comparatively short duration … [which] comes to an end with the end of hostilities': Jones (n 40) 159. In respect of pacific occupation, he referred to the occupation of Germany for 15 years prescribed by the Treaty of Versailles: ibid.

[260] ibid. cf also the British 'occupation' of Iraq (1918–32) and Palestine (1919–48) under the League of Nations' Mandate, and the treaty-based US occupation of Haiti (1915–34) and the Philippines (1898–1945): Edelstein (n 199) 27, 39–47.

[261] As noted by Jones (n 40) 159, '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'.

[262] See Giladi (n 23) 85–86 (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 Wars. 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).

[263] 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 sovereign states' aversion to disorder. On this matter, cf Ian Duncanson, 'Law as Conversation' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006) 57, 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').

pattern of administering foreign territories[264] within the explanatory framework of the law of occupation.[265] Confronted with the post-1949 political reality of several instances of prolonged occupation,[266] both the practice and scholarly discourse tolerate and even 'normalise' a phenomenon of considerably protracted occupation (which has come to resemble colonialism) instead of advocating a unified standard that condemns it as contrary to the general assumption of the law of occupation.[267] Such 'normalisation' or 'mainstreaming' of the regime of belligerent occupation – which was previously understood as analogous to an emergency state of affairs (and hence more a matter of an exceptional nature) in the traditional laws of war – may be a familiar feature of the argumentative structure of international law. It remains to be seen whether this should be seen as a necessary adjustment as a result of the defiance of the reality against the hitherto valid assumption of the law (namely, the provisional nature of occupation),[268] or as an apologetic slide into the geopolitical reality (the inclination towards protracted occupation).[269]

[264] East Timor (1975–2000); Western Sahara; Palestine by Israel and surrounding Arab states (1948–67); the West Bank, the Gaza Strip, East Jerusalem and the Golan Heights by Israel since 1967; Northern Cyprus by Turkey; Nagorno-Karabakh by Armenia, and arguably Tibet by China.

[265] Dinstein (n 86) 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.

[266] At present, the paradigm of 'colonial' domination through the system of occupation now takes another paradoxically 'universal' mantle: control by a de-colonised state or formerly semi-colonised state over territories of another 'new' or 'stillborn' state. See, eg, the Gaza Strip by Egypt (1959–67); the large segments of the West Bank by Jordan (1948–67); Tibet by China since 1950; the Western Sahara under gradual Moroccan occupation since 1975; East Timor occupied by Indonesia (1975–99).

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

[268] cf Ben-Naftali, Gross and Michaeli (n 42) 596 (discussing how the reality has challenged the underlying assumption behind the text of GC IV art 6(3)).

[269] This may be seen to reveal the latent permutation in the conceptual premise: the prescriptive force of the law (in demanding an interim or temporary nature of occupation) has 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* (2nd edn, Cambridge University Press 2006); Martti Koskenniemi, 'Politics of International Law' (1990) 1 *European Journal of International Law* 4.

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