

Preoccupied with occupation: critical examinations of the historical development of the law of occupation

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Abstract

This article examines the historical evolution of the law of occupation from two angles. First, it analyses scholarly discourse and practice with respect to the general prohibition on the Occupying Power making changes to the laws and administrative structure of the occupied country, as embodied in Article 43 of the 1907 Hague Regulations. Many Occupying Powers and scholars have endeavoured to rationalize exceptions to this 'general principle' governing the entire corpus of the law of occupation. Their studies support the contingent nature of the law of occupation, with its interpretation being dependent on different historical settings and social context. The second part of the article focuses on how the law of occupation that evolved as a European project has rationalized excluding the system of colonialism from the framework of that law. The historical assessment of this body of jus in bello would be incomplete and biased if it did not address the narratives of such structural exclusivity.

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This article examines the evolution of doctrines on the law of occupation in the course of its history from the late eighteenth century to the present day. While it highlights salient changes that have impinged upon the normative framework of the law of occupation, it is beyond its scope to undertake a comprehensive historical survey. Instead, the analysis will focus specifically on two main features underlying the historical development of the law of occupation: first, legal discourses on the Occupying Power's limited legislative authority under Article 43 of the 1899/1907 Hague Regulations¹ (and later under Article 64 of the 1949 Fourth Geneva Convention), and the concept of 'necessity' that operates as an exception to this principle under these provisions; and second, the narratives and discourse on justifying the exclusion of 'colonial occupations' from the normative framework of the law of occupation.

As will be discussed below, the first issue relates to the exceptions that are essentially recognized as being built in to the normative framework of international humanitarian law. In contrast to those exceptions, the second issue concerns the institutional paradigm of colonialism that was made exceptional to the entire corpus of the law of occupation. Two reasons can be put forward for justifying the combined historical survey of these two *prima facie* discrete issues. First, the systemic inapplicability of the law of occupation (and the entire body of *jus in bello*) to colonialism (invasions and occupations of non-Western territories) was observable from the nineteenth century until the wave of decolonization after 1945, the period that coincided with the most important epoch for the consolidation of the law of occupation. Second, the systemic exclusion of colonialism from the compass of the laws of war epitomizes the binary opposition of the law as it is and the law as it ought to be (or, in this case, between the law of occupation as it has been and the law of occupation as it ought to have been).²

- 1 The authentic French text of Article 43 is identical in both the 1899 and the 1907 Hague Regulations. It reads that: '*L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*'. However, there is a slight difference in the English texts. While Article 43 of the 1899 Hague Regulations provides that: 'The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country', the same article of the 1907 Hague Regulations stipulates that: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.
- 2 On the epistemological level, the dualism based on this distinction is considered to derive from the Western philosophical tradition that has been premised upon the binary scheme (mind/body, objective/subjective, empirical/metaphysical, reality/appearance, and us/they). See Marianne Constable, 'Genealogy

The main body of the article is divided into two parts. The first part examines the historical development of the general corpus of the law of occupation from its nascent period in the wake of the Napoleonic Wars until the present day. In so doing, it will focus specifically on the interplay between the general rule predicated on the 'conservationist' principle and the concept of 'necessity', both of which are drawn from Article 43 of the 1899/1907 Hague Regulations (and later Article 64 of the 1949 Fourth Geneva Convention). Under the 'conservationist' principle, Occupying Powers cannot make changes to the local laws and administrative authorities of the occupied state.³ However, exceptions to this general principle are allowed if an Occupying Power is 'absolutely prevented' from respecting the local laws. This is considered to embody the concept of 'necessity'. Further, the two-tier approach inherent in this provision (the 'conservationist' principle as the general rule, with the 'concept of necessity' providing grounds for exceptions to that rule) is also discernible under Article 64 of the Fourth Geneva Convention, albeit with some changes.

In contrast, the second part critiques the historical discourses that have been presented to justify the system of colonialism as operating *outside* the normative regime on occupation. It will highlight how the mainstream doctrines on occupation overlooked a side current of anti-colonialist ethos on the part of the colonized peoples during the colonial era. It is the present writer's belief that, in our post-colonial world, the historical examinations of the law of occupation would be incomplete without analysing how the occupations that led to colonial control were placed outside the constraints of the law of occupation. It ought to be highlighted again that, while the 'necessity' grounds as exceptions to the general principle under Article 43 of the Hague Regulations (and Article 64 of the Fourth Geneva Convention) are 'endogenous' elements contemplated *within* the framework on the law of occupation, the debarring of the colonial context from the realm of the law of occupation was the structural issue of inequity underlying this body of law. This part is intended to challenge the effect of narrowly compartmentalizing our analytical framework in the existing study of the law of occupation.

Historical evolution of the law of occupation with special regard to the 'conservationist principle'

Overview

In this part, we will explore the genesis and the historical evolution of the normative framework of the law of occupation with special regard to the 'conservationist' principle. As outlined above, this is one of the general principles that have governed the entire normative edifice of the law of occupation. It indicates that Occupying

and jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law', in *Law & Social Inquiry*, Vol. 19, No. 3, 1994, pp. 555–556.

3 Gregory H. Fox, 'The Occupation of Iraq', in *Georgetown Journal of International Law*, Vol. 36, No. 1, 2005, p. 195.

Powers are generally not entitled to modify local laws and administrative structures in the occupied territories. Clearly, this flows from the underlying assumptions of the law of occupation. The Occupying Power does not acquire sovereignty of the ousted occupied state. Instead, its role is to act only as a temporary custodian of the territory until the end of occupation.⁴ The interaction between the conservationist principle and the concept of ‘necessity’ as an exception to this principle provides the microcosm for scholarly discourses and propositions on the law of occupation as a whole.⁵ As will be discussed below, the parameters of ‘necessity’ grounds can be (over-)stretched with a view to claiming expanded legislative authority to enforce policy objectives in occupied territories, or merely for the purpose of justifying disregarding specific rules of the law of occupation.

The genesis of the legal regime of occupation

In the Enlightenment period, classic scholars such as Vattel,⁶ Jean-Jacques Rousseau,⁷ and Georg F. von Martens⁸ advocated some elementary principles of

- 4 See, for instance, Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp. 27–37; and G. H. Fox, above note 3, p. 199.
- 5 The rule embodied in Article 43 of the Hague Regulations is a general rule in relation to the more detailed ones enumerated in the ensuing provisions of Section III of the Regulations. Even so, judicial practice and scholarly writings have occasionally invoked this general rule to deal with a particular issue that is governed by the specific provision. For instance, in the *Value Added Tax* case judgment, the Supreme Court of Israel ruled that, even if the general ban on introducing new taxes may be inferred from Articles 48 and 49 of the Hague Regulations, exceptions can be made by applying the ‘necessity’ ground of maintaining ‘orderly government’ under Article 43, and this without needing to classify such taxes under the rubric of ‘other money contributions’ under Article 49: HCJ 69+493/81, *Abu Aita [or Abu Itaj] et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) *Piskei Din* 197 (1983); English excerpt in *Israel Yearbook of Human Rights*, Vol. 13, 1983, p. 348 (hereafter *Abu Aita* case); and in *Palestinian Yearbook of International Law*, Vol. 4, 1987–1988, pp. 186–209. See also Yoram Dinstein, ‘Taxation under Belligerent Occupation’, in Jürgen Jekewitz, Karl H. Klein, Jörg D. Kühne, Hans Petersmann, and Rüdiger Wolfrum (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Josef Partsch zum 75. Geburtstag*, Duncker & Humblot, Berlin, 1989, pp. 122–123; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 128.
- 6 Emmerich de Vattel, *Le droit des gens ou principes de la loi naturelle*, J. P. Aillaud, Paris, 1835, pp. 178–179 and 230, paras. 150 (humane treatment of prisoners of war) and 200 (noting that, despite the right of the conqueror to seize the public property, the individuals retain their property). However, the law of occupation, as distinguished from the right of conquest, was yet to evolve. Nowhere in this treatise can we find any reference to the legal terminology of occupation. See also Eyal Benvenisti, ‘The Origins of the Concept of Belligerent Occupation’, in *Law and History Review*, Vol. 26, No. 3, 2008, pp. 622, 624–625 (discussing Vattel’s absence of distinction between an occupier and a conqueror).
- 7 While not providing a distinct legal regime of occupation as such, Rousseau considered war as a phenomenon that could only exist between governments, and stressed the immunity of the lives and property of private persons. He argued that: ‘War is therefore in no way a relation between a man and another man, but a relation between a state and another state, in which the individual persons are enemies only accidentally, not as men, nor even as citizens, but as soldiers. . . . Even in full-blown war, a just prince surely seizes, in an enemy state, all that appertains to public life, but he respects the person and property of the individuals’. Jean-Jacques Rousseau, *Contrat social ou principes du droit politique*, 2nd edition, Bureaux de la Publication, Paris, 1865, Livre 1, IV (‘De l’esclavage’), p. 24 (translation from French by the present author). The original French text reads: ‘La guerre n’est donc point une relation d’homme à homme, mais une relation d’Etat à Etat, dans laquelle les particuliers ne sont ennemis qu’accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats. . . . Même en pleine guerre, un

the laws of war, including the distinction between combatants and non-combatants, and the sparing of the lives and property of non-combatants from the scourges of war.⁹ The so-called Rousseau–Portalis doctrine suggests that war was characterized as a relationship between states, not between individuals.¹⁰ Admittedly, this doctrine was developed at a time when jurists made little distinction between the notion of occupation and that of conquest.

The ensuing French Revolution and the Napoleonic War, and the seeds of revolution and (romanticized) nationalism that were sown by the former across western Europe from the end of the eighteenth century well into the first half of the nineteenth century, challenged the conservative monarchical foundation of the political and constitutional orders in continental Europe.¹¹ The rudimentary building block of the law of belligerent occupation can be considered as having emerged as a technique of managing such chaotic territorial and constitutional/administrative orders.¹² In other words, it was the fruit of the geopolitical and constitutional changes that swept throughout western Europe at the turn of the nineteenth century.¹³ Revolutionaries declared and waged wars on absolute monarchies in other countries while acting to liberate the oppressed local populations. They did so while firmly convinced of the benefits to the populace. Indeed, the French Constitution of 3 September 1791 specifically declared that ‘the French nation renounces the undertaking of any war with a view of making conquests, and it will never use its forces against the liberty of any people’.¹⁴ Many such revolutionaries acted for the purpose of emancipating populations oppressed by their monarchs.¹⁵

prince juste s'empare bien, en pays ennemi, de tout ce qui appartient au public, mais il respecte la personne et les biens des particuliers’.

- 8 Georg F. von Martens, *Precis du droit des gens moderne de l'Europe*, J. C. Dieterich, Göttingen, 1789, Vol. II, Livre VIII, in particular Chapter III, para. 234, pp. 343–344 (prohibition of attacks against women, children, and the aged), and para. 235, pp. 345–346 (protection of rights as prisoners of war for the vanquished soldiers, except by way of retaliation against ‘barbaric peoples’).
- 9 See, however, Karma Nabulsi’s critique of the prevailing understanding that Rousseau was the founder of this key principle of the modern laws of war (distinction between combatants and non-combatants): Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law*, Oxford University Press, Oxford, 1999, pp. 184–203 (arguing that Rousseau considered patriotism essential in his advocacy of the civil participation in just wars of self-defence).
- 10 This doctrine is named after J.-J. Rousseau and the French jurist Jean-Etienne-Marie Portalis. It was also advocated by the French diplomat Talleyrand: E. Benvenisti, above note 6, p. 626. For Rousseau’s argument, see J.-J. Rousseau, above note 7, Livre I, IV, p. 24.
- 11 Paul W. Schroeder, *The Transformation of European Politics: 1763–1848*, Clarendon Press, Oxford, 1994, p. 72; Nehal Bhuta, ‘The antinomies of transformative occupation’, in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 721, 730.
- 12 See Fyodor F. Martens, *La paix et la guerre: la Conférence de Bruxelles 1874; Droit et devoirs des belligérants (leur application pendant la guerre d'Orient 1874–1878); La Conférence de La Haye 1899*, translated from Russian into French by Le Comte N. de Sancé, Arthur Rousseau, Paris, 1901, pp. 274–275.
- 13 N. Bhuta, above note 11; Martti Koskeniemi, ‘Occupied zone: “a zone of reasonableness”’, in *Israel Law Review*, Vol. 41, 2008, pp. 13, 30.
- 14 The French Constitution of 3 September 1791, Title VI, first paragraph, available in English at: <http://www.duke.edu/web/secmod/primarytexts/FrenchConstitution1791.pdf> (last visited 13 April 2012).
- 15 M. Koskeniemi, above note 13, p. 30. However, this received understanding may be qualified by some unsavoury stories buried in archives. See Timothy C. W. Blanning, *The French Revolution in Germany: Occupation and Resistance in the Rhineland 1792–1802*, Oxford University Press, New York, 1983, p. 148

What emerged in the wake of the conservative European order restored by Metternich's Congress of Vienna were the 'principles' of the maintenance (or restoration) of sovereignty and independence of the states occupied during the Napoleonic Wars, despite many territorial alterations.¹⁶ Admittedly, these principles were ingrained in the well-established 'right to security' and independence of sovereign states.¹⁷ However, they were yet to be recognized as discrete principles of the law of occupation. The principles befitted the reactionary inclination of the Holy Alliance of 1815, premised on the delicate balance of power. With the ideas of liberalism and national self-determination already disseminated across Europe by the French Revolution and the Napoleonic Wars, the two other revolutions originating from France in 1830 and 1848 triggered popular revolts to demand constitutional reforms and political realignments throughout the Continent. This gradually contributed to the emerging European order of ethno-linguistic nation-states based on the idea of national sovereignty, an idea that can arguably be traced back to the post-Westphalian European order.¹⁸ It is in this transformative period in Europe that the legal regime of occupation came to be separated conceptually from that of conquest.¹⁹ Unlike the notion of conquest, which gave valid sovereign title to conquered territories, occupation was understood as leaving the sovereignty of the ousted government intact.

Tracing the origin of the 'conservationist' premise of the law of occupation at a scholarly level

The historical origin of the 'conservationist' premise of the law of occupation²⁰ can be traced through examinations of classic treatises. Both Hersch Lauterpacht²¹ and

(discussing pillage, vandalism, and rape as booty of war in occupied Rhineland and Spain); Marc Blancpain, *La vie quotidienne dans la France du Nord sous les occupations (1814–1944)*, Hachette, Paris, 1983, p. 21 (describing crimes of rape, pillage, and vandalism that were returned in kind by the Cossacks and the Asian cavalry of the occupying Russian army in northern France), as cited in K. Nabulsi, above note 9, p. 24.

16 In the post-Napoleonic period, for some German states that had formed part of the Holy Roman Empire – such as Hanover, Hesse-Kassel, and Oldenburg – the new era provided the much-needed opportunity to restore political sovereignty and territories lost during the *Rheinbund* years. For other states, the era gave occasion to proceed with the integration of German-speaking states through the German Confederation. The Confederation model was favoured by states such as Saxony, particularly because it guaranteed the independence and sovereignty of its members: see Lawrence J. Flockert, 'State-building and nation-building in the "Third Germany": Saxony after the Congress of Vienna', in *Central European History*, Vol. 24, No. 3, 1991, pp. 268, 276.

17 See E. de Vattel, above note 6, Livre 2, para. 49.

18 E. Benvenisti, above note 6, pp. 623, 628. However, Croxton argues that the concept of sovereignty remained ambiguous for centuries after that point: Derek Croxton, 'The Peace of Westphalia of 1648 and the origins of sovereignty', in *International History Review*, Vol. 21, No. 3, 1999, pp. 569–591.

19 It ought to be added that, in view of the element of effective control, the legal regime of occupation was considered analogous to the much older legal regime of blockade: James M. Spaight, *War Rights on Land*, Macmillan, London, 1911, p. 328.

20 For the term 'conservationist' principle, see G. H. Fox, above note 3, pp. 199, 234–240.

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

Benvenisti²² suggest that the doctrinal refinement on the law of occupation owes much to August Wilhelm Heffter's treatise of 1844. Heffter suggested that, save in the case of *debellatio*, occupation was merely the form of temporary control that suspended the exercise of sovereign rights of the occupied state, without bringing about the transfer of sovereignty as such.²³ Further, a close look at Georg Friedrich von Martens' *Précis du droit des gens modernes de l'Europe* (1789)²⁴ corroborates the thesis that the basic normative framework on occupation, including the conservationist principle, did not evolve until after the Congress of Vienna (1814–1815). As Bhuta notes,²⁵ the conservationist premise was conspicuously absent in this classic German author's text. This treatise, published in the same year as the French Revolution, neither mentioned the legal concept of 'belligerent occupation' nor recognized the rights of occupiers, as distinct from those of conquerors, in land warfare.²⁶ Von Martens even argued that:

The reason why one has occupied an enemy province determines, above all, whether one is allowed to alter, to a greater or lesser extent, the form of the government. The enemy is not obliged to conserve the constitution of the conquered country. Nor is it obliged to leave to that country the rights & privileges that its Sovereign has accorded. . . .²⁷

22 E. Benvenisti, above note 6, p. 630.

23 Heffter observed that: 'Only 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'. D. August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart*, E. H. Schroeder, Berlin, 1844, pp. 220–221 (translation from German by the present author). The original text reads: 'Erst wenn eine vollständige Besiegung der bekriegten Staatsgewalt (*debellatio*) eingetreten und dieselbe zu fernem Widerstande unfähig gemacht ist, kann sich der siegreiche Theil auch der Staatsgewalt bemächtigen, und nun ein eigenes, wiewohl usurpatorisches, Staatsverhältniß mit dem besiegten Volke beginnen. . . . Bis dahin findet lediglich eine thatsächliche Beschlagnahme der Rechte und des Vermögens der inzwischen suspendirten bisherigen Staatsgewalt Statt' (all spellings as in the original).

24 G. F. von Martens, above note 8.

25 N. Bhuta, above note 11, pp. 726–727, n. 30.

26 See G. F. von Martens, above note 8, Livre VIII, Chapters III ('De la manière de faire la guerre') and IV ('Des conventions qui se font avec l'ennemi dans le cours de la guerre'), pp. 339–369.

27 *Ibid.*, Livre VIII, Chapter III, para. 238, pp. 348–349 (translated into English by the present author). The original French text reads: 'Le motif pour lequel on a occupé une province ennemie décide surtout, si l'on se permet d'altérer plus ou moins le forme du gouvernement. L'ennemi n'est pas obligé de conserver la constitution du pays conquis, ni de lui laisser les droits & les privilèges que son Souverain lui a accordés. . . .'. See also the extensive rights to take the property of the occupied or conquered territories: *ibid.*, para. 239, p. 349, arguing that 'the enemy is equally authorized to seize the property of their enemy . . . either the immovable property (*Conquête, Eroberung*) or the movable property (*Butin, Beute*), not only 1) to obtain what is owed to it or an equivalent, but also 2) to compensate for the cost of the war, and 3) to oblige the enemy to consent to an equitable peace, and finally 4) to deprive the enemy of the desire or the forces to renew the insults that gave rise to the war' (translated into English by the present author); the original reads: 'L'ennemi est également autorisé à s'emparer des biens de l'ennemi . . . soit des biens immeubles (*Conquête, Eroberung*), soit des biens meubles (*Butin, Beute*), tant 1) pour obtenir ce qui lui est dû ou un équivalent, que 2) pour se dédommager des frais de la guerre & 3) pour obliger l'ennemi à donner les mains à une paix équitable, enfin 4) pour ôter à l'ennemi l'envie ou les forces de renouveler les injures qui ont donné lieu à la guerre'.

Contrary to the preservationist tenet of the later Hague Regulations, the conqueror was ‘not obliged to preserve the constitution of a conquered country or province, nor to leave the subjects in possession of the rights and privileges granted them by their former sovereign’.²⁸ Many scholars agree that the hallmarks of the conservationist principle, such as the limitations on the Occupying Power’s right to amend local legislation in occupied territories and their right to administer public property,²⁹ were gradually recognized in the period of social transformation in Europe in the early to mid-nineteenth century.

Drafting the law of occupation and the consolidation of the conservationist principle in the late nineteenth century

In the political climate of post-1848 Europe, the ‘conservationist’ principle became a suitable normative vehicle not only for the conservative status quo for the powerful states but also for emerging nation-states, which favoured the protection of the lives and property of their citizens while being keen to keep their laws intact in the eventuality of occupation by another state.³⁰ Later, from the mid-nineteenth century onward, the principle of preservation of (or minimum disturbance to) laws and administrative structures of occupied territories matched the interests of the rising bourgeoisie as well. Consistent with *laissez-faire* philosophy,³¹ this principle was deployed to minimize any adverse impact of occupation on the rights of private individuals’ (including the right to private property).³² According to Karma Nabulsi, the conservationist premises of the law of occupation were consolidated by the moderate conservative instinct of the mainstream (bourgeois) international lawyers who played a crucial role in drafting key legal texts on the laws of war in the second half of the nineteenth century.³³ These texts include the 1863 *Instructions for the Government of Armies of the United States in the Field* (the Lieber Code), the 1874 Brussels Declaration (or Brussels Project),³⁴ the 1880 *Manual on the Laws of War on Land* (the *Oxford Manual*), and the Hague Law as the culmination of the treaty-making efforts at the two Peace Conferences of 1899 and 1907. These lawyers

28 N. Bhuta, above note 11, pp. 726–727, n. 30.

29 Paul Challine, *Le droit international public dans la jurisprudence française de 1789 à 1848*, Domat-Montchrestien, Paris, 1934, pp. 122–124 (referring to the Cour de cassation’s ruling in 1841, according to which occupation could not abrogate the laws in force in the occupied territory), as cited in E. Benvenisti, above note 6, p. 628.

30 E. Benvenisti, above note 6, p. 634.

31 By the mid-nineteenth century, this ideology had become prevalent in most western European countries, with an emphasis on unencumbered rights of private property and free market: see Marion W. Gray, ‘“Modifying the traditional for the good of the whole”: commentary on state-building and bureaucracy in Nassau, Baden, and Saxony in the early nineteenth century’, in *Central European History*, Vol. 24, No. 3, 1991, pp. 293, 301.

32 See, for instance, Article 46 of the 1907 Hague Regulations (respect for private property and the prohibition on confiscating private property).

33 K. Nabulsi, above note 9, pp. 158–174.

34 See *Actes de la Conférence de Bruxelles de 1874 sur le projet d’une convention internationale concernant la guerre, protocoles des séances plénières, protocoles de la Commission déléguée par la conférence, annexes* (1874). As is well known, this humanitarian initiative made by Czar Alexander II of Russia was not ratified in the end.

favoured a law-and-order approach and the preservation of the status quo of the local territory (the approach underlying what Nabulsi dubs the ‘Grotian tradition of war’).³⁵

Across the Atlantic, when providing regulations on the Union’s occupation of Confederate territories during the American Civil War, Francis Lieber confined the prescriptive capacity of the occupier to the case of ‘military necessity’ under Article 3 of the 1863 Code. This provision read that:

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*. The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.³⁶

Given the close friendship between this German émigré and Johan Caspar Bluntschli, it is very likely that the textual structure of this provision influenced the framing of the corresponding provisions on the occupier’s legislative power in the subsequent Brussels Declaration and *Oxford Manual*, of which Bluntschli was one of the key architects.³⁷

The origin of Article 43 of the 1899/1907 Hague Regulations

To understand how the conservationist principle and the ‘concept of necessity’ exception to this were embodied in Article 43 of both the 1899 and the 1907 Hague Regulations,³⁸ it is important to look briefly at their precursors: Articles 2 and 3 of the Brussels Declaration of 1874. Article 2 of the Brussels Declaration states that:

The authority of the legitimate Power being suspended and having in fact passed into the hands of the Occupying Power, the latter shall take all the measures in its power to restore and ensure, so far as possible, public order and safety.³⁹

35 K. Nabulsi, above note 9, p. 172. When employing the term ‘Grotian tradition of war’, she focuses her analysis on the making of laws of war from 1874 to 1949. Hence, she does not suggest that the seed for the conservationist principle of the law of occupation had already been sown in the aftermath of the Peace of Westphalia (1648).

36 Instructions for the Government Armies in the Field, issued as General Orders No. 100 of 24 April 1863 (Lieber Code), Article 3, (emphasis added).

37 See Betsy Baker Röben, ‘The method behind Bluntschli’s “modern” international law’, in *Journal of the History of International Law*, Vol. 4, No. 2, 2002, pp. 249, 250–256 (exploring Lieber’s influence on Bluntschli in devoting research to laws of war, and even to international law as a whole).

38 This analysis focuses on the negotiations that led to the adoption of the 1899 Hague Regulations, because Article 43 of the 1907 Hague Regulations is identical to Article 43 of the 1899 Regulations in the authentic French text, though there are minor differences in the two English versions. See above note 1.

39 Authentic French text: ‘L’autorité du pouvoir légal étant suspendue et ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publique’.

Article 3 of this aborted treaty then provides that: “To this end, it 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.”⁴⁰ *Prima facie*, these two provisions seem incoherent. While Article 2 appears to accord the occupiers a wide range of legislative authority, Article 3 makes the exercise of this competence conditional on the concept of necessity. Nevertheless, when Articles 2 and 3 of the Brussels Declaration are considered in conjunction, it becomes clear that both the power to modify, suspend, or replace under Article 3 and also the power to enact (*‘prendra toutes les mesures’*) under Article 2 can be exercised in case of necessity.⁴¹ While the Brussels Declaration never entered into force, the normative contents and textual structure (the general rule on the occupant’s legislative authority, qualified by the exception to this rule in case of necessity) were grafted onto Articles 43–44 of the *Oxford Manual*, which was adopted by the Institut de Droit International in 1880.⁴²

Subsequently, the two apparently incongruous provisions of the Brussels Declaration were eventually integrated into the single provision in the 1899 Hague Regulations. This was prompted by the need to resolve the main controversy among the delegates of the First Peace Conference at The Hague (1899), where it was severely disputed whether Article 3 of the Brussels Declaration should be retained to prevent sweeping changes in the law of an occupied territory. At the seventh session of the Hague Conference, on 8 June 1899, some representatives highlighted the importance of this provision for small powers in view of the constraints imposed on the belligerent Occupying Power by the words *‘que s’il y a nécessité’*. In contrast, the alternative proposal was to delete this provision and to give Occupying Powers greater scope for legislative capacity in return for certain specific obligations.⁴³ When the vote was taken, this provision was maintained by a narrow margin (13 votes against 10 and one abstention), at least until further discussion at a later session.⁴⁴ At the Eighth Session, Mr. Bihourd, the representative of France,

40 The authentic French reads: *‘A 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 ni les remplacera que s’il y a nécessité’*.

41 As an aside, the textual interpretation of Article 43 of the 1899/1907 Hague Regulations can lead to the view that constraints on the legislative power might apply only to such legislative measures to restore public order and civil life, but not to other measures. However, most writers agree that the limitations on the occupier’s prescriptive powers under Article 43 relate to the entire gamut of legislation. See Edmund H. Schwenk, ‘Legislative power of the military occupant under Article 43, Hague Regulations’, in *Yale Law Journal*, Vol. 54, 1945, p. 395.

42 Article 43 of *The Oxford Manual of Land War* (1880) provides that: *‘L’occupant doit prendre toutes les mesures qui dépendent de lui pour rétablir et assurer l’ordre et la vie publique’* ([t]he occupant should take all due and needful measures to restore and ensure public order and public safety’). Article 44 of the *Manual* stipulates that: *‘L’occupant doit maintenir les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifier, ne les suspendre ou ne les remplacer que s’il y a nécessité’* ([t]he occupant should maintain the laws which were in force in the country in time of peace, and should not modify, suspend, or replace them, unless necessary’; available at the International Committee of the Red Cross (ICRC)’s database: <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> (last visited 13 April 2012).

43 See the statement of the Baron de Bildt (Sweden and Norway), who referred to de Marten’s view that it was important ‘to make sure that the obligations of the conqueror were limited and circumscribed’ (*de trouver les obligations du vainqueur limitées et circonscrites*): *Conférence Internationale de la Paix – La Haye 18 mai–29 juillet 1899* (1899), *Sommaire général, troisième partie* [Deuxième Commission], p. 120.

44 *Ibid.*, pp. 120–121.

suggested a compromise. He proposed that, while Article 3 should be eliminated, its spirit should be integrated into Article 2. The relevant part of his proposal read ‘*en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*’ (‘respecting, unless absolutely prevented, the laws in force in the country’).⁴⁵ It was therefore due to Bihourd’s proposal that the key phrase ‘*sauf empêchement absolu*’ (‘unless absolutely prevented’) was introduced in the authentic French text of the 1899/1907 Hague Regulations⁴⁶ in lieu of the wording ‘*s’il y a nécessité*’ that had appeared in Article 3 of the Brussels Declaration and Article 44 of the *Oxford Manual*. In any event, the difference in terminology was only semantic. Jurists have come to interpret the term ‘*sauf empêchement absolu*’ as embodying the concept of ‘necessity’,⁴⁷ a concept that has become the subject of much debate in scholarly legal study.⁴⁸

The law of occupation during World War I

Many occupation measures taken during World War I constituted the first challenges to the interpretation of Article 43 of the Hague Regulations. This was discernible mainly in relation to the two diametrically opposed positions: the measures adopted by the German occupying authorities in Belgium during the war; and the post-war Belgian decisions of invalidating the laws promulgated during the period of occupation. Charles Rousseau notes that the general rule on legislative authority was also bent by the British commander-in-chief as the occupying authority of Ottoman Turkey’s Mesopotamia (the area in which the British later created the Kingdom of Iraq).⁴⁹ Further, the sketchy provision in the Hague Regulations regarding protection of the civilian population under occupation proved inadequate in dealing with the deportation of civilians in occupied Belgium and northern France during World War I.⁵⁰ This was one of the reasons for the International Committee of the Red Cross (ICRC) preparing in the

45 At the 8th session, held on 10 June 1899, unanimity was achieved with respect to the compromise clause proposed by Mr. Bihourd; *ibid.*, pp. 126–127.

46 Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land, annexed to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899; and Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land, annex to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

47 See, *inter alia*, Christian Meurer, *Die Völkerrechtliche Stellung der vom Feind Besetzten Gebiete*, Mohr, Tübingen, 1915; and E. H. Schwenk, above note 41, p. 393.

48 E. H. Schwenk, above note 41, p. 393. For state practice, see the German occupation measures in Belgium during World War I, which were justified by interpreting the ‘concept of necessity’ exception very broadly. In a more recent example, this necessity ground was invoked by the Supreme Court of Israel to justify the introduction of VAT as a new tax in the occupied Palestinian territories, overriding the implications of Articles 48 and 49 of the Hague Regulations: *Abu Aita* case, above note 5, pp. 274 ff.

49 The ‘Iraq Occupied Territories Code’ (1915) that the British commander-in-chief promulgated was based on the civil and criminal codes of India. This initiated profound changes in the local laws and judiciary, which Rousseau described as ‘errements’ (‘errors’): Charles Rousseau, *Le droit des conflits armés*, Pédone, Paris, 1983, p. 153, para. 99.

50 *Ibid.*, p. 1258, para. 101C. See also Matthew Stibbe, ‘The internment of civilians by belligerent states during the First World War and the responses of the International Committee of the Red Cross’, in *Journal of Contemporary History*, Vol. 41, No. 1, 2006, pp. 5–19.

interwar period the Tokyo draft text dealing with protection of civilian populations, which would provide the basis for the later Fourth Geneva Convention.⁵¹

During World War I, the German occupying authorities in Belgium discarded all the constraints imposed by the Hague Regulations in order to undertake a wholesale change in administrative and legal structures.⁵² They construed Article 43 of the Hague Regulations as authorizing the transfer of the expanded legislative authority to the German ‘Government General’.⁵³ The implementation of this policy included such far-reaching administrative changes as the attempted alterations in occupied Belgium’s political framework in favour of the then disadvantaged Flemish.⁵⁴ Charles de Visscher considered that the German measures amounted to abuse of the occupant’s power in a manner analogous to the doctrine of French administrative law, *‘l’excès de pouvoir et le détournement de pouvoir’* (‘acting in excess of authority and the abuse of power’).⁵⁵

In contrast, the post-war practice of the Belgian courts was that *any* act passed by the German occupying authorities was illegal.⁵⁶ German interpretation designed to justify their extensive prescriptive power during World War I was vehemently contested in a number of Belgian court decisions.⁵⁷ In the

51 The ICRC’s Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who are on Territory Belonging to or Occupied by a Belligerent, which was submitted to the XVth International Red Cross Conference, Tokyo, in 1934: see Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 4–5. The Tokyo Draft Convention was adopted unanimously in Resolution XXXIX, entitled *Projet de convention concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d’un belligérant ou sur un territoire occupé par lui*: see *La Quinzième Conférence Internationale de la Croix-Rouge, tenue à Tokio, du 20 au 29 octobre 1934, Compte Rendu*, pp. 262, 203–209 (for the full text of this draft Convention).

52 See Eyal Benvenisti, *The International Law of Occupation*, 2nd edition, Princeton University Press, Princeton, 2004, pp. 32–44; Annette Becker, ‘The dilemmas of protecting civilians in occupied territory: the precursory example of World War I’, forthcoming issue.

53 C. Rousseau, above note 49, p. 140, para. 93; Michael Ottolenghi, ‘The Stars and Stripes in Al-Fardos Square: the implications for the international law of belligerent occupation’, in *Fordham Law Review*, Vol. 72, 2003–2004, pp. 2177 and 2188.

54 According to Charles Rousseau, the German occupying power issued the decree (*arrêté*) on 27 March 1917, which introduced the separation of administration between Flanders and Wallonia and created the Council of Flanders. He also refers to another anomalous practice of the Central Powers in Russia during World War I: the creation of the Council of Regency, which exercised the supreme power and which consisted of the Archbishop of Warsaw and two secular citizens; and the proclamation of independence of Ukraine by the pro-German Rada of Kiev: C. Rousseau, above note 49, p. 140, para. 93.

55 Charles de Visscher, ‘L’occupation de guerre d’après la jurisprudence de la Cour de cassation de Belgique’, in *Law Quarterly Review*, Vol. 34, 1918, pp. 72–81, observing that ‘abuse [committed by the Occupying Power] does not exist only when, enacting the measures that exceeds its competence, the Occupying Power oversteps the objective limits of its provisional attributions: it also arises when the Occupying Power uses its powers for a purpose extraneous to the true objective of its mission in an occupied country’ (translated into English by the present author; the French text reads: ‘L’abus [commis par l’occupant] n’existe pas seulement quand, édictant des mesures qui excèdent sa compétence, l’occupant dépasse les limites objectives de ses attributions provisoires: il se présente également lorsque l’occupant use de ses pouvoirs dans un but et pour des motifs étrangers à l’objet véritable de sa mission en pays occupé’).

56 E. Benvenisti, above note 52, pp. 44–46.

57 See, for instance, Court of Appeal of Brussels, *De Brabant and Gosselin v. T. & A. Florent*, 22 July 1920, (1919–1922) 1 AD 463, No. 328; Court of Appeal of Liège, *Mathot v. Longué*, 19 February 1921, 1 AD 463, No. 329. Compare these with Court of Appeal of Liège, *Bochart v. Committee of Supplies of Corneux*, 28 February 1920, 1 AD 462, No. 327.

case of *Mathot v. Longué*,⁵⁸ the Court of Appeal of Liège, contrary to some decisions,⁵⁹ rejected any room for legislative manoeuvre on the part of the Occupying Power. It ruled that ‘the orders of the occupying Power . . . are not laws, but simply commands of the military authority of the occupant’,⁶⁰ and that the German order had therefore possessed ‘no legal value’.⁶¹ Underlying the Belgian courts’ decisions was the so-called ‘Belgian school’,⁶² according to which legislative and administrative acts adopted by the Occupying Power are only *de facto* commands, without any legal effect.⁶³ Benvenisti criticizes this view as ‘extreme’.⁶⁴ As he notes,⁶⁵ the Belgian judicial approach underwent an uneven change. During the German occupation in World War II, the Court of Cassation reverted to the judicial tendency, prevalent during World War I, to reject handing down a judgment on legislative measures issued by the Occupying Power.⁶⁶

In the aftermath of World War I, the Allies occupied the Rhineland through the Inter-Allied Rhineland High Commission (1919–1930). However, as its legal basis lay in the Treaty of Versailles, this can be viewed as a case of non-belligerent occupation (*occupatio pacifica*).⁶⁷ In the legal discourse of the interwar period, despite the deviations from the general rules on occupiers’ legislative power during World War I, the normative framework on occupation remained intact. Writing during World War II, Feilchenfeld commented that the survival of the law of occupation between 1918 and 1935 owed much to the absence of major

58 *Mathot v. Longué* case, above note 57.

59 See, for instance, the *Bochart* case, above note 57 (upholding the Occupying Power’s legislative measure, the German Order of 8 August 1918, which was, even if taken pursuant to a personal profit of its own nationals, designed to regulate the high price of vegetables); and *City of Malines v. Société Centrale pour l’Exploitation du Gaz*, Belgian Court of Appeal, Brussels, 25 July 1925, reported in Arnold D. McNair and H. Lauterpacht (eds), *Annual Digest of Public International Law Cases: 1925–1926*, No. 362, (1929), p. 475 (recognizing the legal authority of the Occupying Power to issue administrative decrees, which were partly responsible for increase in gas supply, as measures justified by the necessity for providing for the needs of the civilian population).

60 *Mathot v. Longué* case, above note 57, p. 464.

61 *Ibid.* The Court added that: ‘. . . it is unacceptable to say that by virtue of the [Hague] Convention the Occupying Power has been given any portion whatever of the legislative power . . . it appears from the text of the Convention itself and from the preliminary work that all that was intended . . . was to restrict the abuse of force by the Occupying Power and not to give him or recognize him as possessing any authority in the sphere of law . . . The law remains the apportion of the national authority exclusively, the Occupying Power possessing *de facto* power and nothing more’. See also *De Brabant and Gosselin v. T. and A. Florent* case, above note 57.

62 C. de Visscher, above note 55, pp. 72–81; E. Benvenisti, above note 52, pp. 44–47, 194.

63 C. Rousseau, above note 49, pp. 139 and 153, paras. 92 and 99, and the cases cited therein.

64 E. Benvenisti, above note 52, p. 46.

65 *Ibid.*, pp. 194–195.

66 See, for instance, Belgian Court of Cassation, *In re Anthoine*, 24 October 1940, [1919–1922] AD Case No. 151.

67 Article 428 of the Treaty of Versailles (1919). See Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, p. 36 (contending that even the first phase of this occupation, which was predicated on the Armistice agreement, could be categorized as a ‘pacific (non-belligerent) occupation’). See also *ibid.*, p. 270 (discussing the French and Belgian claim that their joint re-occupation of the Ruhr Valley in 1923 was based on Article 430 of the Treaty of Versailles).

occupations during this period, which would have severely tested the normative requirements.⁶⁸

The law of occupation in relation to World War II

As noted by Benvenisti, during World War II, the three main Axis powers – Germany, Italy, and Japan – as well as the USSR, were engaged in a practice of occupation that completely disregarded and rejected the fundamental tenets of the law of occupation. These countries attempted to effectuate perpetual control by way of the annexation of occupied territories or through the establishment of puppet states.⁶⁹ As is widely known, a spate of atrocities committed in the occupied territories during World War II demonstrated a barbaric form of occupation, as exemplified by the Nazi's ideology-based practice designed to implement the Holocaust.⁷⁰

The International Military Tribunal at Nuremberg (IMT) provided the famous dictum that the rules embodied in the Hague Regulations were declaratory of customary international law by 1939.⁷¹ A closer inspection reveals, however that this dictum ought to be carefully analysed to grasp the process of such evolution. The relevant part reads:

The rules of land warfare expressed in the [1907 Hague] Convention undoubtedly represented *an advance over existing international law at the time of their adoption*. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the [IMT] Charter.⁷²

68 Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington DC, 1942, p. 23, para. 93. According to Bhuta, 'Feilchenfeld commented that the "old rules" [on occupation in the Hague Law] were essentially defunct by 1914, and that the only reason they were not denounced between 1918 and 1935 was that "they were not tested again through major occupations resulting from major wars": N. Bhuta, above note 11, p. 733. However, the present author argues that this is an inaccurate understanding of Feilchenfeld's work: Feilchenfeld did not go so far as to contend that the Hague Law on occupation was obsolete by the start of World War I. What he emphasized was the absence in practice of the application of this normative framework in the interwar period.

69 E. Benvenisti, above note 52, pp. 60–72.

70 Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden, 2009, pp. 328–329. Julius Stone contends that the Hague law of occupation survived the two world wars mainly because of 'two contending imperatives: Allies' concern in both world wars to fix Germany with guilty violations of the rules, and Germany's desire . . . to exploit the great leeway for occupation *machtpolitik* [sic] left by the rules': Julius Stone, *Legal Controls of International Conflict*, Rinehard, New York, 1954, p. 727.

71 IMT, *The Trial against Goering, et al.*, Judgment of 1 October 1946, International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals*, (1947), Vol. 1, at 64–65; reprinted in 'Judicial decisions, International Military Tribunal (Nuremberg), judgment and sentences', in *American Journal of International Law*, Vol. 41, 1947, pp. 172, 248–249.

72 *Ibid.*, (emphasis added).

If we take the view that the bulk of the law of occupation under the 1899/1907 Hague Regulations was not declaratory of customary laws when adopted as treaty-based rules, it must have undergone the process of hardening into customary law somewhere in the period between 1899 and 1939. However, it is not possible to pinpoint the moment at which the rules on occupation prescribed in the 1899 Hague Regulations matured into customary rules.⁷³ Nevertheless, one can contend that, by the time all the relevant rules under the 1899 Hague Regulations were reiterated in the 1907 Hague Regulations, the *gist* of the doctrines on occupation had ‘crystallized’.⁷⁴ This view can be borne out by the wording of the preamble of the Second Hague Convention of 1899, whose identical counterpart in the preamble of the Fourth Hague Convention of 1907 was quoted by the IMT: ‘Thinking it important . . . to revise the laws and general customs of war, either *with the view of defining them more precisely* or of laying down certain limits for the purpose of modifying their severity as far as possible’.⁷⁵ It ought to be recalled that both the conservationist principle and the ‘concept of necessity’ exception stipulated in Article 43 of the 1899/1907 Hague Regulations found equivalents in their antecedents (the Lieber Code, the *Oxford Manual*, and the Brussels Declaration). As discussed in the preceding sections, we can at least surmise that the conservationist principle that was already fleshed out in legal discourses of the mid-nineteenth century has been anchored in the bedrock of customary law longer than other detailed rules on occupation.

The Allied occupations in the immediate aftermath of World War II

Following World War II, the Allied and Soviet occupations of territories of Germany, Italy, Austria, other Axis countries in Europe, and Japan foreshadowed the already nascent Cold War rivalry. They furnished experimental grounds for two competing economic and political ideologies,⁷⁶ which provided much of the *political* impetus to throw away the Hague Regulations’ conservationist baggage.⁷⁷ In essence, these occupations were the first prototypes of ‘transformative’ occupation geared toward democratization. The joint Allied occupation of southern and central Italian territories, unlike the regimes of belligerent occupation established in Sicily and northern Italy, can be explained on the basis of the armistice agreement.⁷⁸ Irrespective of the legal bases, the Allied authorities undertook to rescind fascist laws. The United States’ occupation of post-war Japan, with its wide range of

73 E. Benvenisti, above note 52, p. 8; and G. von Glahn, above note 4, pp. 10–12.

74 E. Benvenisti, above note 6, p. 642.

75 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, preamble, third paragraph (emphasis added).

76 Stalin was said to have asserted candidly that ‘whoever occupies a territory also imposes on it his own social system. Everyone imposes his own system as far as his army can reach’: Simon Chesterman, ‘Occupation as liberation: international humanitarian law and regime change’, in *Ethics & International Affairs*, Vol. 18, No. 3, 2004, p. 51.

77 N. Bhuta, above note 11, p. 734.

78 E. Benvenisti, above note 52, pp. 84–91.

prescriptive powers, was predicated on the Instrument of Surrender.⁷⁹ This allowed the US to pursue wholesale democratic reforms of Japan's imperial and militarist legacies while unchecked by the conservationist principle and other constraints of the 1907 Hague Regulations.

In contrast, there has been a cacophony of justifications for the Allied policy-oriented objective of carrying out de-Nazification and radical democratic reforms in West Germany. In anticipation of their occupations and policy of implementing sweeping reforms in laws and institutions, the western Allies insisted on unconditional surrender so that they could be exempt from the conservationist principle and other constraints of the Hague Regulations. One might argue that, while sovereignty continued to be vested in the German population, the Allied powers exercised 'sovereign rights' that they conferred upon themselves.⁸⁰ Despite the Allies' avowed intention to exclude the law of occupation as the source of their authority, some commentators explain the Allies measures within the framework of the Hague Regulations. Their methodology is to infer justifications from the 'necessity' exceptions under Article 43. The thrust of their argument is that retaining the Nuremberg race laws and other Nazi enactments would have endangered the security of the Occupying Power.⁸¹ On the other hand, other writers regard the Allied occupation of Germany⁸² as the typical example of *debellatio* (subjugation), following the total collapse of effective government and the complete control effected by the occupying armed forces.⁸³ Hans Kelsen expressly contended that Germany as a sovereign state ceased to exist,⁸⁴ not least because of the total collapse

79 See Niisuke Ando, *Surrender, Occupation, and Private Property in International Law: An Evaluation of US Practice in Japan*, Oxford University Press, Oxford, 1991, p. 87; E. Benvenuti, above note 52, pp. 92–93; Robert Cryer, 'Of custom, treaties, scholars, and the gavel: the influence of the international criminal tribunals on the ICRC customary law study', in *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, p. 241, n. 14.

80 M. Koskeniemi, above note 13, p. 34.

81 Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press, New Haven, CT, 1961, p. 770. See also the previous UK Military Manual: United Kingdom War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, HMSO, London, 1958, p. 143, n. 1.

82 The juridical state of occupation was considered to have ended in 1952, when the legal character of the foreign (US)-stationed armed forces changed: after the status of forces agreement reached between West Germany and US, the continued stationing of the latter's army can be considered to have been based on the consent of the territorial government: S. Chesterman, above note 76, p. 55.

83 G. von Glahn, above note 4, pp. 276–285. Compare, however, Lassa Oppenheim, *International Law: A Treatise*, 7th edition by H. Lauterpacht, Longmans, London, 1952, p. 553, para. 237a; Paul Guggenheim, *Traité de droit international public*, Vol. II, Librairie de l'Université, Geneva, 1954, pp. 468–469; Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 32–33.

84 Kelsen argued that: 'By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz Government, Germany has ceased to exist as a state in the sense of international law. . . . the status of war has been terminated, because such a status can exist only between belligerent states'. Hans Kelsen, 'The legal status of Germany according to the Declaration of Berlin', in *American Journal of International Law*, Vol. 39, No. 3, 1945, p. 519. In another article, Kelsen reinforced his view: '. . . the four occupant Powers have assumed sovereignty over the former German territory and its population, though the term "sovereignty" was not used in the text of the Declaration [of Berlin, June 5, 1945]. . . . All this is in complete conformity with general international law, which authorizes a victorious state, after so-called *debellatio* of its opponent, to establish its own sovereignty over the territory and population of the subjugated state. *Debellatio* implies automatic termination of the state of war. Hence, a

of the central and local governments in their entirety (*debellatio*).⁸⁵ Empirically, it was the crumbling of the Nazi government that was pivotal for the Allies assuming the authority for occupation,⁸⁶ and this without awaiting Doenitz's signing of unconditional surrender proclaimed by the Declaration of Berlin of 5 June 1945.⁸⁷ In the present writer's opinion, it seems formalistic to attach much normative weight to that Declaration, given that none of the German governmental machinery existed by that time.

However, in developments after World War II, the doctrine of *debellatio* soon became archaic. As Benvenisti notes,⁸⁸ it was deemed irreconcilable with the ideas of peoples' sovereignty and self-determination embodied in the UN Charter.⁸⁹ Further, Article 2(2) Common to the four Geneva Conventions of 1949 contemplates the broad applicability of the Fourth Geneva Convention without considering the exceptional case of *debellatio*. Accordingly, if the Allied occupation of Germany had taken place after 1949, this would have been fully governed by the Fourth Geneva Convention.⁹⁰ Subject to Articles 47 and 6(3) of that Convention,⁹¹ the Allies' transformative policies would have been defended more cogently on the basis of the broader parameters of what constitutes necessity set out in Article 64 of the Convention.

Article 64 of the fourth Geneva Convention

Since 1949, Article 64 of the Fourth Geneva Convention has served as a complement to Article 43 of the Hague Regulations. It has been widely noted by earlier writers that the structure of the former provision is designed as 'an amplification and clarification' of the latter,⁹² and not as a revision of the terms for legislative power of the Occupying Power.⁹³ Even so, the language of Article 64 clearly suggests that it

peace treaty with Germany is legally not possible. For a peace treaty presupposes the continued existence of the opponent belligerents as subjects of international law and a legal state of war in their mutual relations.' Hans Kelsen, 'Is a peace treaty with Germany legally possible and politically desirable?', in *American Political Science Review*, Vol. 41, No. 6, 1947, p. 1188.

- 85 For a similar argument, see S. Chesterman, above note 76, p. 54; G. von Glahn, above note 4, pp. 275–286.
- 86 The Allies' confidence in the total defeat of Nazi Germany upon crossing the German border was partly accountable for their decision not to treat the law of occupation as the authority for occupation: E. Benvenisti, above note 52, p. 91.
- 87 In contrast, Hersch Lauterpacht attached importance to this unconditional surrender: L. Oppenheim, above note 83, p. 553, para. 237a.
- 88 E. Benvenisti, above note 52, pp. 94–95.
- 89 UN Charter, Articles 1(2) and 55.
- 90 Adam Roberts, 'What is a military occupation?', in *British Yearbook of International Law*, Vol. 55, 1985, pp. 249, 270–271; E. Benvenisti, above note 52, pp. 95–96.
- 91 For a detailed analysis of Article 47 of Fourth Geneva Convention, see 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', in *African Yearbook of International Law*, Vol. 10, 2002, p. 267; Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009.
- 92 Joyce A. C. Gutteridge, 'The Geneva Conventions of 1949', in *British Yearbook of International Law*, Vol. 26, 1949, p. 324.
- 93 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 2: *The Law of Armed Conflict*, Stevens & Sons, London, 1968, p. 194.

broadens the prescriptive power of the Occupying Power by articulating specific objectives underlying the notion of necessity.⁹⁴ Further, in establishing a more elastic dimension of the occupier's legislative power, Article 64 gives primacy to the necessity of securing the rights and wellbeing of the occupied population. This is supported by a profusion of positive duties incumbent on occupiers under the Fourth Convention. In this respect, it should be remembered that one of the main contributions of this treaty is to furnish a 'bill of rights' for the local population.⁹⁵ Presumably, such a shift in emphasis in favour of the rights of the local population mirrors the evolution of international human rights law and the rise of the welfare states in Europe (and the New Deal thinking of the United States administration before and during World War II). In essence, under the Fourth Geneva Convention the primary beneficiaries of the necessity grounds are switched from the political and military elites of the ousted sovereign state, who were anxious to see their laws and institutions preserved upon their return, to the occupied population with whom sovereignty is endowed.⁹⁶ This point can be of special pertinence to cases of 'prolonged occupation',⁹⁷ where necessity grounds can be invoked to justify novel laws to address the evolving social needs of the civilian population.⁹⁸

Failure to acknowledge the status of occupation and non-application of the law of occupation during the Cold War

In post-1949 academic discourse, while the 'demise' of Article 43 of the Hague Regulations has never been declared,⁹⁹ scholarly discussion of the legislative capacity of the Occupying Power under this provision (and under Article 64 of the Fourth Geneva Convention) has been subdued, save in the case of the Israeli occupation of the Palestinian territories.¹⁰⁰ This can partly be explained by the

94 This can be demonstrated by the enumeration of the grounds of security of the Occupying Power, of giving effect to the obligations of the Geneva Conventions (and to those of other rules of international humanitarian law), and of addressing the humanitarian needs of the civilian population under occupation: Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 112–116. See also Yoram Dinstein, 'Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding', Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Fall 2004, No. 1; and Marco Sassòli, 'Legislation and maintenance of public order and civil life by Occupying Powers', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 661.

95 E. Benvenisti, above note 52, p. 105.

96 *Ibid.*

97 For analysis of 'prolonged occupation' in respect of the Palestinian occupied territories, see Adam Roberts, 'Prolonged military occupation: the Israeli-occupied territories since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103.

98 Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 116–120.

99 E. Benvenisti, above note 52, p. 31.

100 See the case law of the Israeli Supreme Court (sitting as a High Court of Justice): HCJ 390/79, *Mustafa Dweikat et al. v. Government of Israel et al.* (Elon Moreh case), 34(1) *Piskei Din* 1, excerpted in *Israel Yearbook on Human Rights*, Vol. 9, 1979, p. 345; HCJ 393/82, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region et al.* (Teachers' Housing Cooperative Society case), 37(4) *Piskei Din* 785, English excerpt in *Israel Yearbook on Human Rights*, Vol. 14, 1984, pp. 301, 302; and HCJ 61/80, *Haetzni v. Minister of Defence et al.*, 34(3)

fortuitous ground that the law of occupation has rarely been relied upon by the relevant states. Most have failed to recognize the applicability of the law of occupation to *de facto* occupied territories,¹⁰¹ irrespective of whether or not these resulted from proxy wars of the two superpowers during the Cold War.¹⁰² This left debates both on the prescriptive power of the Occupying Power and indeed on the entire normative framework of the law of occupation nearly dormant for several decades. The law of occupation was excluded because the concept of occupation as such was mistakenly associated with a 'defunct' or even illegal regime.¹⁰³ This can be partly accounted for in the light of the special normative importance attached to the right to self-determination of peoples during and after the process of decolonization.¹⁰⁴ Furthermore, reluctance of the potential or *de facto* occupiers to recognize the status of occupation can be explained by a litany of onerous positive duties that the Fourth Geneva Convention would impose on them.¹⁰⁵

The occupation of Iraq: the law of occupation 'resuscitated' and the broad legislative authority of the occupiers

The occupation of Iraq,¹⁰⁶ which was led by the Anglo-American forces,¹⁰⁷ has awoken from 'hibernation' the law of occupation and confirmed the continued validity of many rules originating from the Hague Regulations,¹⁰⁸ while witnessing

Piskei Din 595, English excerpt in *Israel Yearbook on Human Rights*, Vol. 11, 1981, pp. 358, 359 (per Landau JP).

101 N. Bhuta, above note 11, p. 734.

102 A. Roberts, above note 90, pp. 299–301.

103 See Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 2–3. Compare, however, Orna Ben-Naftali, Aeyal M. Gross, and Keren Michaeli, 'Illegal occupation: framing the occupied Palestinian territories', in *Berkeley Journal of International Law*, Vol. 23, 2005, pp. 551, 609–612; Orna Ben-Naftali, 'Pathological 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 – Pas de Deux*, Oxford University Press, Oxford, 2011, pp. 129, 161–162.

104 Assessment of the implication of the principle of self-determination of peoples and its peremptory status on the legality of *prolonged* occupation is beyond the ambit of this article. On this matter, see Yaël Ronen, 'Illegal occupation and its consequences', in *Israel Law Review*, Vol. 41, 2008, p. 201; O. Ben-Naftali, above note 103, pp. 129–200.

105 M. Koskeniemi, above note 13, p. 16.

106 For assessment, see, *inter alia*, S. Chesterman, above note 76, p. 61; Marten Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, p. 745; Kaiyan Homi Kaikobad, 'Problems of belligerent occupation: the scope of powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004', in *International and Comparative Law Quarterly*, Vol. 54, No. 1, 2005, p. 253; M. Sassòli, above note 94. It is widely recognized that Security Council Resolution 1546 (8 June 2004), adopted under Chapter VII of the UN Charter, formally ended the status of occupation by the coalition forces at the end of June 2004, even though there was hardly any change on the ground: K. H. Kaikobad, this note, p. 273; M. Sassòli, above note 94, p. 684. See, however, Adam Roberts, 'The end of occupation: Iraq 2004', in *International and Comparative Law Quarterly*, Vol. 54, No. 1, 2005, pp. 27, 37–39.

107 For detailed assessment of the legal status of many other troop-contributing states, see Siobhán Wills, 'Occupation law and multi-national operations: problems and perspectives', in *British Yearbook of International Law*, Vol. 77, No. 1, 2006, p. 256.

108 Compare UN Security Council Resolution 674 of 29 October 1990, which condemned acts of the Iraqi occupying forces in Kuwait that violated Fourth Geneva Convention: UNSC Res. 674, 29 October 1990 (adopted under Chapter VII of the UN Charter), operative paras. 1 and 3, and preamble, para. 3.

wide latitudes of legislative power conferred upon the Coalition Provisional Authority (CPA). Security Council Resolution 1483 (22 May 2003), adopted under Chapter VII of the UN Charter, expressly recognized the United States and the United Kingdom as the Occupying Powers that were duty bound to abide by the ‘obligations under applicable international law’.¹⁰⁹ The broad parameters of the legislative authority given to the Occupying Powers can be explained by the peculiar normative framework for occupied Iraq. This framework was provided by the laws of occupation and the Council’s Resolutions 1483 and 1511.¹¹⁰ Put differently, these mandatory resolutions gave a normative superstructure to the underlying edifice comprised of the law of occupation.¹¹¹ Yet, while allowing the possibility of modifying the Occupying Powers’ obligations under existing international humanitarian law, in accordance with Article 103 of the UN Charter,¹¹² these Chapter VII-based resolutions did not ‘supersede’ the traditional law of occupation comprising the Hague and Geneva laws.¹¹³ As the primary concern of the law of occupation is to secure the rights and wellbeing of inhabitants in occupied territories, it is essential that any modifications to this body of international humanitarian law be made in a clear and explicit manner.¹¹⁴ While the relevant Council resolutions accorded the CPA wide legislative authority to implement ‘transformative’ objectives in political and economic fields in a manner unchecked by the constraints of the laws of occupation,¹¹⁵ the CPA’s legislative measures were not free from controversy.¹¹⁶

Clearly, the Iraqi experience has contributed to obliterating any political inhibition in recognizing the status of occupation. Since then, the international authorities have been willing to acknowledge such status in a variety of scenarios. Aside from its Advisory Opinion in the *Wall* case,¹¹⁷ the International Court of Justice, in its contentious case of the *Armed Activities on the Territory of Congo*, recognized Uganda as the Occupying Power in the Ituri region.¹¹⁸ Similarly, the Eritrea/Ethiopia Claims Commission found cases of belligerent occupation in the

109 UN Security Council Resolution 1483, 22 May 2003, preamble, para. 13.

110 UN Security Council Resolution 1511, 6 October 2003, adopted under Chapter VII of the UN Charter.

111 David Scheffer comments that blending the law of occupation with the Council’s Chapter VII powers was ‘both unique and exceptionally risky’: David J. Scheffer, ‘Beyond occupation law’, in *American Journal of International Law*, Vol. 97, No. 4, 2003, pp. 842, 846.

112 S. Chesterman, above note 76, p. 52.

113 K. H. Kaikobad, above note 106, p. 264.

114 M. Sassòli, above note 94, pp. 681–682; UN Security Council Resolution 1483, 22 May 2003, para. 8(e).

115 This issue is beyond the scope of the present article. See the article by Gregory H. Fox in this issue.

116 The measures that can be considered to go beyond the grounds of necessity included the simplification of the procedure of concluding public contracts, the amendment of Iraqi company law, the liberalization of trade and foreign investment, and allowing foreign investors to own Iraqi companies with no duty to return profits to Iraq. See also M. Zwanenburg, above note 106, pp. 757–759; M. Sassòli, above note 94, p. 679; Jordan J. Paust, ‘The United States as Occupying Power over portions of Iraq and special responsibilities under the laws of war’, in *Suffolk Transnational Law Review*, Vol. 27, 2003, pp. 12–13 (criticizing privatization’ of the Iraqi oil production and distribution industry).

117 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136.

118 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 178. See also *ibid.*, paras. 216–217 (application of the International Covenant on Civil and Political Rights to the occupied territory in question).

territories adjacent to the border between the countries.¹¹⁹ These episodes mark a striking contrast with the tendency in the preceding decades to avoid acknowledging states of occupation openly.¹²⁰ However, they have yet to raise any major issues of the legislative competence of the respective Occupying Powers.

Concluding observations of the historical survey of the law of occupation

In the period between 1815 and 1949, many Occupying Powers flouted their obligations or claimed exceptional broader legislative authority by citing diverse justifications. Nevertheless, the conservationist principle as a general rule governing the entire corpus of the law of occupation has largely resisted historical vicissitudes. The primary reason for the longevity of this principle underlying Article 43 of the Hague Regulations lies in the application of the ‘necessity’ grounds as malleable exceptions. Similarly, the broadened parameters of the necessity grounds under Article 64 of the Fourth Geneva Convention are likely to sustain the general rule on the Occupying Power’s legislative authority under this provision.¹²¹ The provision is sufficiently elastic and well equipped to justify legislative measures to address a variety of political realities and reform agenda in occupied territories.¹²² As an ancillary ground, one can add that to call into question the conservationist premise of the law of occupation would result in challenging the transient nature of this normative regime. This would be at variance not only with the sovereignty of the occupied populace but also with their right to self-determination.

In essence, the legal regime of occupation is no exception to the thesis that law is a social construct contingent on divergent social realities. Hence, scholarly

119 See, for instance, Eritrea Ethiopia Claims Commission, *Partial Award: Central Front – Eritrea’s Claims 2, 4, 6, 7, 8 & 22, 28 (between The State of Eritrea and The Federal Democratic Republic of Ethiopia)*, 28 April 2004, para. 57. Further, the Russian skirmishes with Georgia and the former’s intervention in South Ossetia in 2008 may be described as occupation, although disputes remain because of the degree of control exerted by Russian forces: see Independent International Fact-Finding Mission on the Conflict in Georgia, appointed by the Council of the EU on 2 December 2008, *Report*, Vol. II, September 2009, p. 311. The *Report* notes that the law of occupation ‘applies to all the areas where Russian military actions had an impact on protected persons and goods’. However, it quickly adds that ‘the extent of the control and authority exercised by Russian forces may differ from one geographical area to another’, referring to the South Ossetian and Abkhazian territories that are administered by the *de facto* authorities and are much ‘freer’ than other areas. For support of this view, see Kristen E. Boon, ‘The future of the law of occupation’, in *Canadian Yearbook of International Law*, Vol. 46, 2009, pp. 107, 109.

120 M. Koskenniemi, above note 13, p. 16 (referring to the anxiety of international lawyers over the ‘breakdown’ of the law of occupation in view of the paucity of acknowledged occupation since 1945, except in the case of the Israeli occupation and the Anglo-American occupation of Iraq in 2003).

121 See, in particular, Israeli Supreme Court of Israel, HCJ 337/71, *Christian Association for the Holy Places v. Minister of Defence et al.*, 26(1) *Piskei Din* 574, pp. 581–582, excerpted in English in *Israel Yearbook on Human Rights*, Vol. 2, 1972, p. 354 (invoking the necessity ground of securing wellbeing of the local population to justify the legislative measure on a labour dispute). Admittedly, the Court referred only to the necessity ground under Article 43 of the Hague Regulations, as it recognized the applicability of the customary law equivalent rules of Fourth Geneva Convention but not the applicability of the Convention as such: *ibid.*, p. 580, English excerpt in: *Israel Yearbook on Human Rights*, Vol. 2, 1972, pp. 354, 356 (per Sussman J.). However, it can be inferred that as Article 64 of Fourth Geneva Convention embodies the necessity grounds geared more strongly towards the wellbeing of the civilian population, the rationale of this decision would be more cogently applicable with respect to this provision.

122 Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 110–116.

discourses surrounding this legal regime are amenable to different contemporary ideas and to political realities.¹²³

The exclusion of ‘colonial occupation’ from the normative corpus of the law of occupation

Overview

Our examinations now turn to the criticism that, until the process of decolonization unfolded, the law of occupation was largely the ‘European project’¹²⁴ and was never contemplated as applicable to ‘colonial occupation’.¹²⁵ This part critiques the historically iniquitous feature of the law of occupation during the colonial period. As seen in the preceding part, the law of occupation has been marred by many instances in which the ‘concept of necessity’ exception was invoked to justify deviating from the general rule as predicated on the conservationist idea. Yet these exceptions have always operated within the normative parameters of the law of occupation. In contrast, the inapplicability of the law of occupation to colonial control was none other than an exception made to the entire corpus of this body of *ius in bello*.

The proposed analysis of this part goes beyond examining the law of occupation as it has been in the past. As far back as the early nineteenth century, Jeremy Bentham implicitly recognized the framework of tripartite conceptualization (the law as it has been; the law as it is; and the law as it ought to be).¹²⁶ This analytical structure has recently been given fresh insight by Anthea Roberts.¹²⁷ Working along similar lines, it is proposed in this part that the parameters of our inquiry should be expanded to go beyond *the law of occupation as it has been* and to encompass the normative projection in retrospect of *the law of occupation as it ought to have*

123 E. Benvenisti, above note 6, p. 648.

124 See *ibid.*, p. 647. For the full exploration, see N. Bhuta, above note 11.

125 For the scholarly recognition of this term, see, *inter alia*, M. Koskeniemi, above note 13, p. 34; Sean Watts, ‘Combatant status and computer network attack’, in *Virginia Journal of International Law*, Vol. 50, No. 2, 2010, pp. 436; Joseph P. Fishman, ‘Locating the international interest in international cultural property’, in *Yale Journal of International Law*, Vol. 35, No. 2, 2010, p. 400; and Susan H. Williams, ‘Democracy, gender equality, and customary law: constitutionalizing internal cultural disruption’, in *Indiana Journal of Global Legal Studies*, Vol. 18, No. 1, 2011, p. 80.

126 Bentham argued that the characters of law can be divided into the role of the ‘Expositor’ and that of the ‘Censor’. He explained that: ‘To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law is: to that of the *Censor*, to observe to us what he thinks it [the Law] *ought to be*. The former, therefore, is principally occupied in stating, or in enquiring after *facts*: the latter, in discussing *reasons*.’ Jeremy Bentham, *A Fragment on Government*, ed. F. C. Montague, Clarendon Press, Oxford, 1891, pp. 98–99, emphasis in original, footnote omitted. With respect to the Expositor, Bentham added that he is assigned two tasks: the ‘business of history’, namely, demonstrating the history of law (‘to represent the Law in the state it *has been*’; and the ‘business of simple demonstration’ (‘to represent the Law in the state it *is in for the time being*’), which is based on ‘*arrangement, narration and conjecture*’: *ibid.*, pp. 116–117, emphasis in original.

127 Roberts furnishes a tripartite analysis of the law as it has been (‘descriptive’); the law as it is (‘normative’); and the law as it ought to be (‘prescriptive’): Anthea Elizabeth Roberts, ‘Traditional and modern approaches to customary international law: a reconciliation’, in *American Journal of International Law*, Vol. 95, No. 4, 2001, p. 761.

been.¹²⁸ Such critical analysis will help to elucidate different narratives and rationalizations regarding the ways in which the law of occupation has failed to be applied in the colonial context. This critical and contextual prism can also be of help in assessing how the application of today's law of occupation is vulnerable to the charge of 'political subjectivity'.¹²⁹ This part argues that, behind its façade of innocuous value-neutrality, the law of occupation had long hidden a tacit dichotomy: on the one hand, the application of this normative framework (and the entire corpus of *jus in bello*) only among 'civilized' nations capable of exercising sovereignty in international relations; and, on the other, the system of colonialism imposed upon the vast majority of non-Western nations bereft of sovereignty.

The methodology of this part is built on the underlying assumptions of the critical legal studies (CLS) movement. We should remember that, while proposing the (re-)unification of the law as it is and the law as it ought to be in its legal discourse, CLS highlights a *contextual* critique of the existing international legal structure. It advocates pursuing the anti-foundationist objective of unearthing heterogeneous identities and conflict of interests as the reality of international society.¹³⁰ Further, CLS's inclusive and culturally sensitive approach,¹³¹ alongside its proposal to lift the 'veil of power',¹³² reinforces our retrospective critique of the historically exclusive nature of the law of occupation. Spurred on by this methodology, this part aims to unmask the thinly veiled, binary assumption on which the whole gamut of *jus in bello* was based.

128 It is appropriate to recall that one of Koskenniemi's two principles for construing international law is precisely related to the question of what the law ought to be. He proposes that the principle of the reflection of subjective values, such as what is just, reasonable, and in good faith, should be employed in tandem with the principle of concordance with states' will: Martti Koskenniemi, 'The politics of international law', in *European Journal of International Law*, Vol. 1, No. 1, 1990, pp. 4, 21, 23. See, however, *ibid.*, p. 24, where he argues that the normative content of what is just is far from determinable. See also Ralph Wilde, 'Are human rights norms part of the *jus post bellum*, and should they be?', in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace*, TMC Asser Press, The Hague, 2008, p. 164.

129 This is linked to the argument that law as a social construct can be described as 'a form of congealed politics': Kader Asmal, 'Truth, reconciliation and justice: the South African perspective', in *Modern Law Review*, Vol. 63, No. 1, 2000, p. 15, n. 72. Compare Hersch Lauterpacht's famous statement that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law': Hersch Lauterpacht, 'The problem of the revision of the law of war', in *British Yearbook of International Law*, Vol. 29, 1952, p. 382.

130 Anthony Carty, 'Critical international law: recent trends in the theory of international law', in *European Journal of International Law*, Vol. 2, No. 1, 1991, pp. 1, 66.

131 *Ibid.*, pp. 67–68, 71. This is no doubt influenced by the CLS movement inaugurated earlier in US legal culture, which highlighted a 'diversity of cultural responses': Robert W. Gordon, 'Critical legal histories', in *Stanford Law Review*, Vol. 36, 1984, pp. 57, 70–71, 112. This line of critique resonates further in theories of the Third World Approach to International Law (TWAAIL): see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge, 2004; Bhupinder S. Chimni, 'The past, present and future of international law: a critical Third World approach', in *Melbourne Journal of International Law*, Vol. 8, No. 2, 2007, p. 499. See also the methodological affinity of feminism in international law: Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist approaches to international law', in *American Journal of International Law*, Vol. 85, No. 4, 1991, p. 613.

132 R. W. Gordon, above note 131, p. 109.

The era of imperialism and the exclusivity of the law of occupation

The century of ‘relative peace’ in (western) Europe between 1815 and 1914 coincided with the height of imperialism in its later period, with many European powers, small and large, vying for territorial aggrandizement and empire-building outside the continent. ‘Occupying’ and acquiring non-Western (or non-Christian) territories by aggression or coercion was hardly condemned as illegal. Many states firmly believed in their ‘*mission civilisatrice*’, despite ‘uncivilized’ practice against the indigenous populations.¹³³ Ralph Wilde observes that ‘the idea of the “civilizing mission”’, as one of the underlying rationales of colonialism, was designed ‘to address the perceived incapacity for self-government . . . and also to build up local capacities, sometimes with the goal of making self-administration, meeting the standard [of civilization], eventually possible’.¹³⁴ Such was the European *Zeitgeist* that the General Act of the Berlin Conference (1885) in effect legitimized the ‘Scramble for Africa’.¹³⁵

Admittedly, in the nineteenth century not all instances of acquiring sovereign rights and territories outside Western states were realized through aggression. Even so, what appeared to be cases of ‘pacific’ occupation (*occupatio pacifica*) based on agreements between native rulers and European powers, or even agreements between the former and European corporations,¹³⁶ were often carried out in coercive circumstances.¹³⁷ Furthermore, some instances of colonial rule, far from being a benign model marked by development of economic and social infrastructure, were tainted with what would have constituted very serious violations of human rights if committed in metropolitan territories of ‘civilized’ nations.¹³⁸ Note that, even in Victorian Britain, there was a binary assumption upon which the

133 Brett Bowden, ‘The colonial origins of international law, European expansion and the classical standard of civilization’, in *Journal of the History of International Law*, Vol. 7, No. 1, 2005, p. 2, who argues that: ‘On practically every front, European expansion was largely an aggressive act involving what was usually the violent conquest and suppression of indigenous peoples’. That said, he is not blind to the fact that non-Europeans were engaged in similarly violent confrontations among themselves in the same period: *ibid.*

134 Ralph Wilde, ‘From trusteeship to self-determination and back again: the role of the Hague Regulations in the evolution of international trusteeship, and the framework of rights and duties of occupying powers’, in *Loyola Los Angeles International and Comparative Law Review*, Vol. 31, 2009, p. 103.

135 The Conference also endorsed the Free State of the Congo as essentially the private colony of King Leopold II of Belgium. Controversially, the Conference praised Leopold II for his trustee role in ‘civilizing’ natives in Congo.

136 A. Anghie, above note 131, p. 233.

137 B. Bowden, above note 133, p. 1. See also A. Anghie, above note 131, pp. 73–74, discussing the example of the treaty of cession concluded between the Wyanasa Chiefs of Nyasaland (current Malawi) and the British Empire in the 1890s and at the beginning of the twentieth century. For discussions of the issue of ‘unequal treaties’ that were imposed on Ottoman Turkey, Siam, China, and Japan, see *ibid.*, pp. 72–73; and Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society*, Clarendon Press, Oxford, 1984, pp. 64–65.

138 See Jan-Bart Gewald, ‘Imperial Germany and the Herero of southern Africa: genocide and the quest for recompense’, in Adam Jones, *Genocide, War Crimes and the West: History and Complicity*, Zed Books, London, 2004, ch. 3, p. 59; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, Cambridge, 2003, p. 55; Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Macmillan, New York, 1998 (discussing King Leopold’s Congo); Larry May, *Genocide: A Normative Account*, Cambridge University Press, Cambridge, 2010, pp. 254, 262 (examining the implications of the extermination of indigenous Tasmanians and Torres Strait Islanders in British Australia). See also Robert

British *imperium et libertas* was built: liberal political principles and practices that were defining features of the British domestic infrastructure were by no means wholeheartedly extended to the colonial possessions.¹³⁹

The tacit dichotomy between the legal regime of occupation applied among ‘civilized’ nations and the system of colonialism imposed upon ‘uncivilized’ nations

This section aims to elaborate the thesis that the paradigms of the law of occupation essentially developed as a ‘European project’. It can be assumed that, until the decolonization process was set in motion, with respect to non-consensual control over a foreign territory there operated a tacit dichotomy between the legal regime of occupation that was applicable only among ‘civilized’ European states and the system of colonial rules over ‘uncivilized’ peoples. None of the corpus of *jus in bello* was considered applicable to ‘colonial occupation’ or forced annexation of non-European territories.¹⁴⁰ As a comparison, one can note that it was only in the case of *debellatio*¹⁴¹ that the normative paradigm of belligerent occupation was ruled out with respect to European powers.

This binary thinking was no doubt grounded on the idea that sovereignty was a ‘gift of civilization’.¹⁴² Sovereignty was almost always a privilege attributed only to members of the ‘European family of states’,¹⁴³ to the exclusion of non-European nations.¹⁴⁴ Because non-Western societies were not entitled to sovereignty, the invisible barrier that separated the ‘civilized’ from ‘uncivilized’ nations disabled the application of the entirety of *jus in bello* to armed conflict that led to ‘colonial occupation’ of non-Western societies.¹⁴⁵ Bhuta argues that

Gellately and Ben Kiernan (eds), *The Specter of Genocide: Mass Murder in Historical Perspective*, Cambridge University Press, Cambridge, 2003.

139 Hugh Cunningham, ‘Jingoism in 1877–78’, in *Victorian Studies*, Vol. 14, No. 4, 1971, p. 453, as referred to in K. Nabulsi, above note 9, p. 110.

140 Anthony Anghie and Bhupinder S. Chimni, ‘Third World approaches to international law and individual responsibility in internal conflicts’, in *Chinese Journal of International Law*, Vol. 2, No. 1, 2003, p. 77.

141 For examinations of the legal implications of the *debellatio* doctrine, see D. A. W. Heffter, above note 23, p. 220; J. M. Spaight, above note 19, pp. 330–332 (criticizing the British annexation of the Orange Free State and the Transvaal by way of a proclamation of 1 June 1900, despite the absence of *debellatio* at this time); E. H. Feilchenfeld, above note 68, p. 7, para. 25 (arguing that ‘If one belligerent conquers the whole territory of an enemy . . . the enemy state ceases to exist, rules on state succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation’); E. Benvenisti, above note 52, pp. 29, 92–93.

142 N. Bhuta, above note 11, p. 729. See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge University Press, Cambridge, 2001.

143 N. Bhuta, above note 11, p. 729, referring to P. W. Schroeder, above note 11, p. 9; Antony Anghie, ‘Finding the peripheries: sovereignty and colonialism in nineteenth-century international law’, in *Harvard International Law Journal*, Vol. 40, No. 1, 1999, p. 1.

144 For detailed analysis, see A. Anghie, above note 131, pp. 32–114.

145 See Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge, 2004, p. 20. Bhuta refers to the example of the Russian Empire expressly declaring non-applicability of the law of occupation to its seizure of Bulgaria from the Ottoman Empire: N. Bhuta, above note 11, p. 729. See also Dorris P. Graber, *The Development of the Law of Belligerent Occupation, 1863–1914*, Columbia University Press, New York, 1949, p. 133.

The anomalous (from the classical international law point-of-view) distinction between effective control and sovereign rights over territory which lies at the heart of the law of occupation, and the law's enjoining of fundamental constitutional change by the military occupant, had no application to colonial wars or 'police actions' against less civilized – and therefore non-sovereign – peoples and territories.¹⁴⁶

As a result, military occupation of non-European territories was sufficient for the European powers to claim sovereign rights over those territories.¹⁴⁷ Further, together with discovery, conquest, and cession, the occupation of *terra nullius* was one of the modalities that a 'civilized' nation was able to invoke to acquire sovereignty over the 'non-Christian world'.¹⁴⁸ As an ancillary argument, one can add that the temporary nature of the normative regime of occupation was unsuitable for the colonial powers' avowed intention to exert sovereignty over the colonized territories.¹⁴⁹

It should be borne in mind that, by the time imperialism held sway in the late nineteenth century, many rules relating to occupation were already embodied in the Lieber Code (1863), the aborted Brussels Project (1874), and the *Oxford Manual* (1880). Further, many 'occupations' of territories in the course of imperial adventures took place *after* the First Hague Peace Conference (1899).¹⁵⁰ Bhuta contends that 'As a matter of principle and practice, belligerent occupation in its 19th-century manifestation was applied exclusively to land wars between European sovereigns.'¹⁵¹ The conceptual chasm between the 'civilized' and 'uncivilized' nations can be readily discerned. During the Franco-Prussian War (1870–1871), the Prussians arguably applied the customary law of occupation, leaving the French laws relatively intact.¹⁵² Similarly, in the Spanish–American War

146 N. Bhuta, above note 11, p. 729; Sharon Korman, *The Right to Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford University Press, 1996, pp. 56, 61.

147 Such sovereign rights were understood as encompassing the right to demand allegiance. Note that the Occupying Power, according to Article 45 of the 1907 Hague Regulations, is forbidden to demand the oath of allegiance from a population of foreign nationality under its occupation. See also N. Bhuta, above note 11, p. 729.

148 E. Benvenisti, above note 6, p. 647. See also Malcolm N. Shaw, 'Territory in international law', in *Netherlands Yearbook of International Law*, Vol. 13, 1982, pp. 61, 79 ff.

149 M. N. Shaw, above note 148.

150 Among numerous examples that occurred after 1874, note, for instance, the Russian occupation of Bulgaria (1877–1878) and the 'transformative policy' based on '*un nouvel ordre de choses*' implemented there; the British policy of asserting sovereignty over Egypt and Cyprus by means of occupation in 1914 without being bound by the constraints of Article 43 of the Hague Regulations; and the US occupations and subsequent annexation of Hawaii (1898), The Philippines (1898), and Puerto Rico (1898). See E. Benvenisti, above note 6, pp. 636, 641, 645. Furthermore, even Feilchenfeld, a prominent jurist on the law of occupation, was sceptical of the applicability of the law of occupation to the Japanese occupation of China after 1937 (failing to mention the Japanese occupation and colonization of Manchuria in 1931). With respect to the Italian invasion of Abyssinia, he considered that this was 'a clear occupation', but withheld examination of the applicability of the law of occupation: E. H. Feilchenfeld, above note 68, p. 23, para. 94.

151 N. Bhuta, above note 11, p. 729.

152 J. M. Spaight, above note 19, pp. 323–330. However, there were a few cases of the suspension of the French laws: see F. F. Martens, above note 12, pp. 275–276. Furthermore, many of the Prussian measures, such as the requirement to pay extensive reparations under Article 11 of the General Armistice of 28 January 1871,

of 1898, the US occupying forces retained the Spanish functionaries in Manila.¹⁵³ During the Second Anglo-Boer War (1899–1902), it was the British occupying forces' deviation from the body of customary norms on occupation that prompted Spaight to criticize the measures taken against the Dutch-speaking populations.¹⁵⁴ In contrast, the cosmopolitan and once mighty Ottoman Empire was not considered fully 'civilized'. Accordingly, the Russian occupation of Bulgaria in 1877–1878 was excluded from the constraints of the occupation law, and this was pleaded by none other than Fyodor F. Martens.¹⁵⁵

Turning to the system of colonialism outside Europe, its exclusion from the legal regime of occupation matched a purported aim: the vast swathes of the landmass inhabited by 'uncivilized peoples' were poised for imperial spoils and conquest by European powers that were unshackled by the normative paradigm of *jus in bello* governing conduct of warfare and belligerent occupation, and possible war crimes.¹⁵⁶ Along these lines, Koskenniemi argues that 'the law of colonial occupation that emerged in the late-19th century' had an advantage of 'enabl[ing] the colonial powers to rule over non-Europeans without the administrative burdens of formal sovereignty'.¹⁵⁷ Many commentators argue that such an exclusion of the legal regime of belligerent occupation was sustained by the idea of racial hierarchy.¹⁵⁸

'Standard of civilization'

For Fyodor Fyodorovich Martens, the champion of the eponymous clause,¹⁵⁹ universalist conceptions of international law were only integrated among Western civilized peoples.¹⁶⁰ He was adamant that 'it would be impossible to expect Turks or Chinese to observe the laws and customs of war as elaborated by the common efforts of the Christian and civilised nations'.¹⁶¹ Francis Lieber's 'martialist'

were harsh, as noted by the *Revue de droit international et de législation comparée*, Vol. 3, 1871, pp. 377–379 (this was, however, replaced by a more moderate provision of Article 3 of the treaty concluded on 26 February 1871, purported to prolong the armistice: *ibid.*, p. 379). See J. M. Spaight, above note 19, p. 324.

153 J. M. Spaight, above note 19, p. 364. At Santiago de Cuba, General Shafter initially kept the municipal authorities intact. However, President McKinley later decided to replace the Spanish civilian authorities with a military administration: *ibid.*

154 Apart from the annexation of the territories, he referred to the harsh nature of its martial law regulations issued in May 1901, including punishment of women, the 'policy' of burning houses to intimidate the population, and the setting up of 'concentration camps': *ibid.*, pp. 332, 340–341, 343, 350–353.

155 F. F. Martens, above note 12, p. 279. This view was endorsed by Spaight: J. M. Spaight, above note 19, pp. 329, 357.

156 A. Anghie and B. S. Chimni, above note 140.

157 M. Koskenniemi, above note 13, p. 34; M. Koskenniemi, above note 142, pp. 112–178.

158 K. Nabulsi, above note 9, pp. 120, 141. See also John Vincent, 'Racial equality', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society*, Clarendon Press, Oxford, 1984, pp. 239–254.

159 For a detailed account of how the Russian jurist took credit for the draft of a preamble that had originally been prepared by the Belgian diplomat Baron Lambermont (the Belgian representative of the Brussels Conference in 1874, who sent the draft to the Belgian representative at the Hague Conference, M. de Beernaet), see K. Nabulsi, above note 9, p. 161.

160 *Ibid.*, p. 164. He even justified Russia's 'transformative' occupation ('*un nouvel ordre de choses*') of Bulgaria between 1877 and 1878: F. F. Martens, above note 12, pp. 267–296, esp. pp. 271–272, 278–280, 287, 289, 294.

161 F. F. Martens, above note 12, pp. 46–47 (English translation by the present author).

backbone, not dissimilar to his anti-abolitionist ethos in the United States domestic setting,¹⁶² was faithfully replicated in his understanding that ‘The fundamental idea of all international law is the idea that all civilized nations of our race form a family of nations’.¹⁶³ These views are closely intertwined with the idea of the ‘standard of civilization’.¹⁶⁴ This idea denotes the ‘legal mechanism’ by which nations have historically been admitted to or barred from the ‘international society of states’.¹⁶⁵ In Gerrit Gong’s thesis, the international society of European states was equated to ‘international society’ as a whole, because this was the only ‘society’ comprised of ‘civilized states’.¹⁶⁶ The assumption underlying this thesis is that, in encounters between European and non-European peoples and in the case of any ‘civilization clashes’, the European standard of civilization that bore ‘the hallmarks of the evolving Westphalian states’ system’ was deemed superior to standards of civilization espoused by non-Western peoples. As a corollary, the European standard of civilization constituted the benchmark against which different ‘levels of civilization’ attained by non-Western states were measured.¹⁶⁷

Concluding observations of the exclusivity of law of occupation

This part has demonstrated that, because the law of occupation was developed chiefly as a social construct among European powers entitled to sovereignty, it trivialized the fate of non-Western peoples divested of sovereignty. Remarkably, one of the few early Western publicists to voice concern about such a dichotomized understanding was Hersch Lauterpacht. While criticizing James Lorimer’s debarring of ‘barbarous, and savage societies’ from the application of both the concept of sovereignty and the general corpus of international law,¹⁶⁸ this erudite publicist asserted in 1947 that ‘Modern international law knows of no distinction, for the purposes of recognition, between civilized and uncivilized States or between States within and outside the international community of civilized States’.¹⁶⁹ The

162 K. Nabulsi, above note 9, pp. 164–165.

163 Francis Lieber, ‘Twenty-seven definitions and elementary positions concerning the laws and usages of war’, in *Miscellaneous Writings*, J. B. Lippincott, Philadelphia, 1881, Vol. II, pp. 223 and 125, as cited in K. Nabulsi, above note 9, pp. 159, 164–165.

164 Georg Schwarzenberger, ‘The Standard of Civilisation in International Law’, in George W. Keeton and Georg Schwarzenberger (eds), *Current Legal Problems*, Stevens & Sons Ltd, London, 1955, p. 220 (arguing that ‘The test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners’); G. W. Gong, above note 137. See also B. Bowden, above note 133.

165 B. Bowden, above note 133, p. 1.

166 G. W. Gong, above note 137, pp. 3–5.

167 Antony Anghie, ‘Francisco de Vitoria and the colonial origins of international law’, in *Social & Legal Studies*, Vol. 5, No. 3, 1996, pp. 322, 332. See also A. Anghie, above note 143.

168 James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, William Blackwood and Sons, Edinburgh and London, 1884, Vol. I, pp. 101–102, where he notes that ‘As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilised humanity, that of barbarous humanity, and that of savage humanity’.

169 Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947, p. 31, n. 1.

dichotomized framework that prevailed from the nineteenth century until the mid-twentieth century was normatively incongruent. As Anghie notes,¹⁷⁰ while non-Western nations were divested of sovereignty,¹⁷¹ many chartered corporations of Western powers designed for colonial enterprises¹⁷² were invested with the ‘sovereign’ rights to enter into treaties with non-Western nations to acquire ‘sovereignty’ over their land. Furthermore, and ironically, non-Western nations were considered ‘sovereigns’ only for the purpose of transferring their sovereignty to the corporation.¹⁷³ Indeed, in our post-colonial world the nations of the developing world are united in asserting that, far from having lacked sovereignty, their “‘native sovereignty’ survived the international system of colonialism’.¹⁷⁴ In conclusion, the exemption of ‘colonial occupation’ from the constraints of the law of occupation facilitated colonial control by European powers. While this was a serious cognitive disharmony, it was rationalized on the basis of the ‘standard of civilization’.

General conclusion

The first main part of this article surveyed the historical evolution of the law of occupation through the lens of the general rules relating to the Occupying Power’s legislative authority. It focused on the conservationist principle under Article 43 of the Hague Regulations and on the elastic ways in which the ‘concept of necessity’ exception has been construed in both practice and legal doctrines. It demonstrated how the concept of ‘necessity’ under Article 43 has served as the ‘fluid vocabulary’ in adjusting to differing needs of Occupying Powers.¹⁷⁵ When supplemented by Article 64 of the Fourth Geneva Convention of 1949, this concept has been adjusted in the direction of promoting the rights and wellbeing of civilian populations under occupation. The analyses undertaken in both parts of the article corroborate the thesis that law is ‘a form of congealed politics’,¹⁷⁶ and that the entirety of legal discourse as a social construct stresses the importance of contextual analysis and understanding.¹⁷⁷ This can be demonstrated by many doctrinal

170 A. Anghie, above note 131, p. 233.

171 If they were not fully colonized, they were subordinated to the half-colonial system of capitulation treaties, as in the case of Persia, Siam (Thailand), China, and Japan. See *ibid.*, pp. 84–86; and G. W. Gong, above note 137, p. 211.

172 See, for instance, the British East India Company, which ran India after the Battle of Plassey (1757) until 1857 (the Indian Revolt or the Sepoy Mutiny), and the Belgian King Leopold’s holding company for his private colony in Congo, which formed the basis of the later Congo Free State.

173 A. Anghie, above note 131, p. 233.

174 *Ibid.*, p. 212.

175 M. Koskenniemi, above note 13, p. 35.

176 K. Asmal, above note 129, p. 15, n. 72.

177 Descriptive sociologists hold that descriptions of social knowledge, including law, are ‘contingent’ and ‘the problematic outcome of intersubjective dialogue, translation, and projection’: see Christine B. Harrington and Barbara Yngvesson, ‘Interpretive sociological research’, in *Law & Social Inquiry*, Vol. 15, No. 1, 1990, pp. 135, 144.

endeavours, whether cogent or not, to rationalize what appear to be deviations from the general rule predicated on the conservationist ethos.

On the other hand, the second main part of the article, which critiqued issues of the exclusion of ‘colonial occupation’ from the law of occupation, lends succour to one of the main theses of the critical legal studies movement – that the law as the system of regulatory control is contingent upon, and parasitic on, ‘institutionalized social power’.¹⁷⁸ Until the period of decolonization, the entire conceptual edifice of the law of occupation remained embedded in the then exclusive ‘international society’, which, in the nineteenth and early twentieth centuries, comprised only the European and North American family of ‘civilized nations’. The law of occupation was the product of limited ‘interpretive communities’,¹⁷⁹ equipped with the enduring legacy of the concept of the ‘standard of civilization’. ‘Unearthing’ the hidden parallel process (the barring of ‘colonial occupation’ from the regulatory realm of the law of occupation) reveals how our social knowledge of this distinct branch of international humanitarian law has been contingent on particular historicity, inter-subjective dialogues, compromise, and normative projection of the privileged and exclusive circle of ‘civilized’ states.¹⁸⁰

178 Compare Gary Peller, ‘The metaphysics of American law’, in *California Law Review*, Vol. 73, 1985, pp. 1151, 1168, 1170.

179 The normative framework comprised of legal concepts, principles, doctrines, and practices of interpretation is ineluctably developed whenever ‘interpretive communities’ arise: Michael S. Moore, ‘Interpreting interpretation’, in Andrei Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy*, Clarendon Press, Oxford, 1995, pp. 1, 21.

180 See also the line of reasoning followed in US domestic laws: C. B. Harrington and B. Yngvesson, above note 177, pp. 147, 144; Austin Sarat ‘Leading law into the abyss: what (if anything) has sociology done to law?’, in *Law & Social Inquiry*, Vol. 19, No. 3, 1994, pp. 609, 620.