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I. INTRODUCTION

This article addresses the largely underexplored issue of the occupation of maritime territory during armed conflict.[1] By definition, situations of occupation are created by the occupying power exercising actual authority over a portion of territory outside its borders without the consent of the sovereign.[2] However, there are several issues related to armed conflict at sea that should be addressed within the legal framework offered by the law of occupation.

This article is particularly topical because most situations of occupation in recent times have concerned territories with access to the sea. On some occasions, the coastal and maritime dimension of the occupied territory has been at the center of debate concerning the lawfulness of the conduct of the occupying power. For instance, much attention has been devoted to the lawfulness of the naval control exercised by Israel over portions of the waters off the coast of the Gaza Strip.[3] In addition, the Court of Justice of the European Union (ECJ) has addressed the exploitation of natural resources in

1. To the best knowledge of this author, the only scholarly work published on this topic is the very recent contribution by Tassilo Singer. *See* Tassilo Singer, *Occupation of Sea Territory: Requirements for Military Authority and Comparison to Art. 43 of the Hague Convention IV*, *in* OPERATIONAL LAW IN INTERNATIONAL STRAITS AND CURRENT MARITIME SECURITY CHALLENGES 255 (Jörg Schildknecht, Rebecca Dickey, Martin Fink & Lisa Ferris eds., 2018). The title of an old monograph by Cansacchi on the occupation of sea is misleading since the book focuses on peacetime delimitation of territorial sea rather than on occupation during armed conflict. *See* GIORGIO CANSACCHI, L'OCCUPAZIONE DEI MARI COSTIERI: CRITICA DI UNA DOTTRINA DI DIRITTO INTERNAZIONALE (1936).

2. *See infra* Part II.

3. *See infra* notes 74–84, 181–85 and accompanying text. For the purposes of this article, the Gaza Strip is considered to be under occupation notwithstanding the withdrawal of the Israeli troops in 2005. This conclusion has been challenged. *See, e.g.*, HCJ 9132/07 Bassiouni v. Prime Minister, ¶ 12 (2008) (Isr.) (unpublished) (concluding that since its withdrawal in 2005 "the State of Israel bears no general obligation to concern itself with the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, according to the international law of occupation."); Hanne Cuyckens, *Is Israel Still an Occupying Power in Gaza?*, 63 NETHERLANDS INTERNATIONAL LAW REVIEW 275 (2016). However, most international institutions consider the Gaza Strip to be an area under an ongoing occupation. *See, e.g.*, S.C. Res. 1860, pmbl. (Jan. 8, 2009); G.A. Res. 64/94, ¶ 4 (Jan. 19, 2010); Report of the United Nations Fact-Finding Mission on the Gaza Conflict: Human Rights in Palestine and Other Occupied Arab Territories, ¶¶ 273–79, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, ¶¶ 63–66, U.N. Doc.

the seas off the Western Sahara coast.[4] Finally, the law of occupation may play a role in the exploitation of the maritime natural resources of Northern Cyprus, which has been under Turkish occupation since 1974.[5]

To address legal concerns arising from these and other cases of occupation, this article first provides a brief overview of the traditional territorial dimension of the law of occupation. It then explores whether State practice has extended the definition of "occupied territory" to encompass maritime territory and if so, the areas to which it would apply. The article analyses under what conditions maritime territory can be considered to be under occupation and concludes with an assessment of the relationship between the law of occupation and other rules of international humanitarian law applicable to armed conflict at sea.

A/HRC/15/21 (Sept. 27, 2010); Report of the Detailed Findings of the Commission of Inquiry on the 2014 Gaza Conflict, ¶¶ 26–31, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015); Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶¶ 61–67, U.N. Doc. A/HRC/40/CRP.2 (March 18, 2019); Office of the Prosecutor, International Criminal Court, Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report, ¶¶ 27–29 (Nov. 6, 2014), https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf; *see also* Peter Maurer, *Challenges to International Humanitarian Law: Israel's Occupation Policy*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 1504, 1506 (2012). Today, most authors consider the Gaza Strip to be under occupation since Israel still exercises actual authority on the area thanks to its control over the borders, airspace, and sea. *See* MARCO LONGOBARDO, THE USE OF ARMED FORCE IN OCCUPIED TERRITORY 36–38 (2018).

4. *See* Case T-512/12, Front Polisario v. Council, 2015, ECLI:EU:T:2015:953 (Dec. 10, 2015); Case C-104/16 P, Council v. Front Polisario, 2016, ECLI:EU:C:2016:973 (Dec. 21, 2016); Case C-266/16, Western Sahara Campaign UK v. Commissioners, 2018, ECLI:EU:C:2018:118 (Feb. 27, 2018). For more on this issue, see *infra* notes 174–80 and accompanying text.

5. On the occupied status of Northern Cyprus, see, for example, S.C. Res. 541, ¶ 2 (Nov. 18, 1982); S.C. Res. 550 (May 11, 1984); Loizidou v. Turkey, 1996-IV Eur. Ct. H.R. 2216, ¶ 56; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1, ¶ 77; *see also* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 188–94 (2d ed. 2012); MARIA CHIARA VITUCCI, SOVRANITÀ E AMMINISTRAZIONI TERRITORIALI 63–76 (2012).

II. THE TERRITORIAL DIMENSION OF THE LAW OF OCCUPATION

The law of occupation focuses on "territory" in defining occupation and the powers and duties of occupying powers.[6] The expression "occupation" refers to two different concepts that are distinct, albeit interrelated, in international humanitarian law. Occupation may refer both to a *situation*, a historical fact that exists in reality,[7] as well as to a *legal regime*, often labeled as the "law of occupation," which is applicable when there is a situation of occupation.[8] The situation of occupation must be assessed based on the relevant facts. The existence of the necessary factual conditions alone triggers the application of the law of occupation,[9] no proclamation nor acknowledgment of occupation is required of the belligerents.[10]

The factual situation giving rise to occupation is defined in Article 42 of the 1907 Hague Regulations, according to which "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[11] Scholars have written extensively on this

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6. *See* Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land § III, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War § III, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

7. This aspect is explored in LONGOBARDO, *supra* note 3, at 28–43; *see also* VAIOS KOUTROULIS, LE DÉBUT ET LA FIN DE L'APPLICATION DU DROIT DE L'OCCUPATION (2010); Marco Sassòli, *The Concept and the Beginning of the Occupation*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1389 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

8. LONGOBARDO, *supra* note 3, at 43–61. In addition, on the law of occupation, see ROBERT KOLB & SYLVAIN VITÉ, LE DROIT DE L'OCCUPATION MILITAIRE: PERSPECTIVES HISTORIQUES ET ENJEUX JURIDIQUES ACTUELS (2009); ALESSANDRA ANNONI, L'OCCUPAZIONE OSTILE NEL DIRITTO INTERNAZIONALE (2012); BENVENISTI, *supra* note 5; AEYAL GROSS, THE WRITING ON THE WALL (2017); HANNE CUYCKENS, REVISITING THE LAW OF OCCUPATION (2018); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2d ed. 2019).

9. *See* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 241, 250 (Emma Playfair ed., 1992).

10. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 11.2.4 (rev. ed., 2016) [hereinafter U.S. LAW OF WAR MANUAL].

11. Hague Regulations, *supra* note 6, art. 42.

definition,[12] which reflects customary international law.[13] In particular, a significant debate concerns the meaning of the expression "actual authority," one of the factual requirements for the existence of a situation of occupation and, thus, for triggering the application of the law of occupation. The other two factual requirements are the existence of armed conflict and that the occupying power exercises actual authority without a valid legal title.[14]

Article 42 is based on territorial considerations. Its first sentence restricts occupation to territory alone, thus defining the spatial scope of a situation of occupation. Its second sentence reinforces this restriction by limiting occupation to a specific territory. Accordingly, no scholar has ever challenged the territorial dimension of the definition of occupation. Indeed, the territorial dimension is central in the law of occupation, and it is impossible to envisage a "deterritorialized" law of occupation.[15]

Other rules of the Hague Regulations confirm the territorial dimension of the law of occupation since they are expressly applicable to occupied territory. For instance, Article 44 prohibits the occupying power from "forc[ing] the inhabitants of *territory* occupied by it to furnish information about the army of the other belligerent, or about its means of defense."[16] Likewise, Article 45 makes it unlawful to "compel the inhabitants of occupied *territory* to swear allegiance to the hostile power."[17] Additional provisions

12. *See supra* notes 7–8 and accompanying text.

13. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 79 (July 9) [hereinafter Wall Advisory Opinion]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 172 (Dec. 19) [hereinafter Armed Activities]; *see also* U.S. LAW OF WAR MANUAL, *supra* note 10, § 11.2.2.

14. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, EXPERT MEETING: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 17–23 (Tristan Ferraro ed., 2012) [hereinafter ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY].

15. On the popular contemporary discourse regarding the progressive "deterritorialization" of international law, see Catherine Brölmann, *Deterritorializing International Law: Moving Away from the Divide between National and International Law*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 84 (Janne E. Nijman & André Nollkaemper eds., 2007); see also the essays collected in A LACKLAND LAW? TERRITORY, EFFECTIVENESS AND JURISDICTION IN INTERNATIONAL AND EU LAW (Adriana Di Stefano ed., 2015).

16. Hague Regulations, *supra* note 6, art. 44 (emphasis added).

17. *Id.* art. 45 (emphasis added).

make similar references concerning the collection of taxes and other monetary levies.[18]

The 1949 Fourth Geneva Convention restates the territorial dimension of occupation, providing rules in Section III, which is entitled "occupied territories."[19] Specific provisions prohibit the alteration of occupied territory and provide for the rights of the local population *pendente occupatione*[20] and of aliens,[21] and the regulation of deportations, transfers, and evacuations of civilians all make specific reference to territory.[22]

Other provisions of the law of occupation refer to "country" rather than territory. For instance, the occupying power must respect the law in force in the occupied country under Article 43 of the Hague Regulations[23] and Article 52 requires that requisitions in kind and services shall be in proportion to the resources of the country and must not result in the local population's participation in military operations against their own country.[24] Finally, Article 55 protects public property in the occupied country.[25] This difference in terminology is not particularly meaningful and certainly does not change the conclusion that the law of occupation applies to territory.

III. THE SCOPE OF "OCCUPIED TERRITORY" UNDER ARTICLE 42 OF THE 1907 HAGUE REGULATIONS AND THE SEA

The first issue to explore with regard to the relationship between the law of occupation and the sea is whether it is possible to establish an occupation over the latter. In case of a positive answer, the consequence would be the applicability of a sophisticated body of rules to events occurring at sea during armed conflict. In this regard, the key provision is Article 42 of the Hague Regulations, which defines occupied territory. Since this provision contains no reference to the sea, the issue of whether "territory," which will generally be referred to as "maritime territory," encompasses maritime areas is addressed in this Part.[26] Here, I conclude that Article 42 properly interpreted,

18. *See id.* arts. 48, 49 (noting that both articles refer to "occupied territory").

19. GC IV, *supra* note 6, § III.

20. *See id.* art. 47.

21. *See id.* art. 48.

22. *See id.* art. 49.

23. Hague Regulations, *supra* note 6, art. 43.

24. *Id.* art. 52.

25. *Id.* art. 55.

26. On the technical notion of maritime territory, see DICTIONNAIRE DE LA TERMINOLOGIE DU DROIT INTERNATIONAL 599 (J. Basdevant ed., 1960); DICTIONNAIRE DE

relevant State practice, and the rationale behind the historical development of the law of occupation illustrate that nothing precludes the definition of occupied territory from encompassing portions of the sea.

Article 42 is analyzed under the rules of treaty interpretation in Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties.[27] Although the Convention does not formally apply to the Hague Regulations since it governs only treaties adopted after its entry into force in 1980,[28] the rules embodied therein codified preexisting customary international law,[29] and may be applied to the interpretation of treaties concluded before the Convention's entry into force.[30] The Convention requires simultaneous consideration of the text, context, and object and purposes of a treaty, while using preparatory works as supplementary means of interpretation.[31]

DROIT INTERNATIONAL PUBLIC 1078 (Jean Salmon ed., 2001). Part V explores which specific areas fall into this definition. *See infra* Part V.

27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

28. *Id.* art. 4.

29. See, for example, the case law of the International Court of Justice. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 53, ¶ 48 (Nov. 12); Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 41 (Feb. 3); Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. Rep. 1045, ¶ 18 (Dec. 13); LaGrand (Ger. v. U.S.), Judgment , 2001 I.C.J. Rep. 466, ¶ 99 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 83 (Mar. 31); Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, ¶ 47 (July 13); Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. Rep. 14, ¶ 65 (Apr. 20); Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. Rep. 3, ¶ 57 (Jan. 27); Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Preliminary Objections, 2017 I.C.J. Rep. 3, ¶ 63 (Feb. 2). See also the international and national case law analyzed by Santiago Torres Bernárdez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, *in* LIBER AMICORUM: PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY 721 (Gerhard Hafner et al. eds., 1998).

30. *See* Iron Rhine ("Ijzeren Rijn") Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 62 (Perm. Ct. Arb. 2005).

31. For more on this in recent scholarship, see ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES (2007); ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008); TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON (Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris eds., 2010); INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015); RICHARD GARDINER, TREATY INTERPRETATION (2d ed. 2015); CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES (2017).

The initial question is whether the ordinary meaning of territory encompasses sea areas. And here, there are conflicting definitions.[32] *Lexico* defines territory as "[a]n area of land under the jurisdiction of a ruler or state,"[33] apparently excluding the sea. Other definitions support the potential inclusion of portions of the sea. For instance, the *Cambridge Dictionary* defines territory as "(an area of) land, *or sometimes sea*, that is considered as belonging to or connected with a particular country or person."[34]

Similarly, in legal terminology territory includes waters such as internal waters and the territorial sea. For instance, even in 1885, the dictionary authored by Carlos Calvo defined territory as including areas of the sea.[35] Most contemporary dictionaries of international law confirm this view, considering territory as comprised of both land territory and sea areas.[36] Further, *Black's Law Dictionary* defines territory as "a geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control,"[37] thus encompassing the areas of the sea that are under the territorial sovereignty of the State.

Several official State publications concerning international humanitarian law support this conclusion. These include the U.S. *Law of War Manual*, which states that "'territory' is used to describe the land, waters, and airspace subject to the sovereignty of a state,"[38] and the U.K. *Manual on the Law of Armed Conflict*, according to which, "internal waters and the territorial sea . . . together with the land territories constitute the territory of a belligerent."[39]

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32. *See* DICTIONNAIRE DE LA TERMINOLOGIE DU DROIT INTERNATIONAL, *supra* note 26, at 597.

33. *Territory*, LEXICO, https://www.lexico.com/en/definition/territory (last visited Oct. 21, 2019).

34. *Territory*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/it/dizionario/inglese/territory (last visited Oct. 21, 2019) (emphasis added).

35. 2 CARLOS CALVO, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC ET PRIVÉ 253 (1885) ("Le territoire national comprend non seulement le sol sur lequel habitent les sujets les possessions que la nation a outre mer sous le nom de colonies, de comptoirs de commerce, ou sous toute autre dénomination, mais encore leurs dépendances, *telles que la partie de la mer qui les baigne, les lacs, les rivières, les plages, les golfes, etc. . . .*") (emphasis added).

36. *See* ENGLISH-FRENCH-SPANISH-RUSSIAN MANUAL ON THE TERMINOLOGY OF PUBLIC INTERNATIONAL LAW (LAW OF PEACE) AND INTERNATIONAL ORGANIZATIONS 152 (Isaac Peanson ed., 1983); DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC, *supra* note 26, at 1076.

37. BLACK'S LAW DICTIONARY 1611 (9th ed. 2009).

38. U.S. LAW OF WAR MANUAL, *supra* note 10, § 13.2.1.

39. *See* UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 13.6 (2004) [hereinafter U.K. LOAC MANUAL].

Moving to the context of Article 42, both the entire treaty,[40] and other applicable rules of international law,[41] must be considered. The title of the treaty itself—"Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land"[42]—suggests it is only applicable to land territory. Further, Article 1 states, "[t]he Contracting Powers shall issue instructions to their armed *land forces* which shall be in conformity with the Regulations."[43] The treaty title and Article 1's focus indicate the principal objective of the drafters was the regulation of conflicts occurring on land, not conflict at sea. This gives rise to a presumption that the rules therein apply only to land warfare.[44] Nonetheless, the provisions of the law of occupation regarding means of transport and communications do refer to the sea, contradicting the view that the drafters wanted the Hague Regulations to have no application at sea. Article 53 provides that "[a]ll appliances, whether on land, at *sea*, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized."[45] Article 54 states that "*[s]ubmarine* cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made."[46] The latter provision was at the center of significant debate during the preparatory works.[47] At the 1899 Hague Conference, objecting States were successful in excluding a similar provision from what became Convention No. II with Respect to the Laws and Customs of War on Land[48] because they

40. VCLT, *supra* note 27, art. 31(2).

41. *Id.* art. 31(3)(c).

42. Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Convention IV]; *see also* Singer, *supra* note 1, at 258 (discussing the use of the word land).

43. Hague Convention IV, *supra* note 42, art. 1 (emphasis added).

44. *See* Kubo Mačák, *Silent War: Applicability of the* Jus in Bello *to Military Space Operations*, 94 INTERNATIONAL LAW STUDIES 1, 20 (2018).

45. Hague Regulations, *supra* note 6, art. 53 (emphasis added). For more on this provision, see *infra* notes 204–07 and accompanying text.

46. *Id.* art. 54 (emphasis added).

47. *See* A. PIERCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES 271 (1909).

48. Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403.

wanted to avoid all regulation of naval warfare in a treaty that aimed at regulating land warfare.[49] On the contrary, in 1907, States accepted this rule while otherwise maintaining as minimal an incursion into the law of naval warfare as possible.[50] However, Article 53 and Article 54 unequivocally demonstrate that the 1907 Hague Regulations do apply to sea areas under certain circumstances. Accordingly, consideration of the entire text of the treaty confirms that Article 42 encompasses portions of the sea.

That the law of occupation applies at sea is also evidenced by Common Article 2 to the 1949 Geneva Conventions, according to which "[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[51] While the First Geneva Convention is applicable to land only,[52] and the Second Convention is applicable only to the sea,[53] there is no general specification in the other Conventions limiting their applicability to the land.[54] The Fourth Convention, which enshrines many rules on the protection of civilians in occupied territory, contains no language indicating its scope is limited to the land, nor is it suggested by the commentaries published under the auspices of the International Committee of the Red Cross.[55]

In addition, the duty of all States under Common Article 1 "to respect and ensure respect for the Geneva Conventions in all circumstances"[56] suggests that absent any textual limitation such as those in the First and Second Conventions, the Conventions apply to every situation of armed conflict,

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49. *See* PIERCE HIGGINS, *supra* note 47, at 271; DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 185 (1949).

50. For an overview of the debate, *see* KOUTROULIS, *supra* note 7, at 35–37.

51. *See, e.g.*, GC IV, *supra* note 6, art. 2.

52. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

53. Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

54. *See* Katja Schöberl, *The Geographical Scope of Application of the Conventions*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 7, at 67, 70.

55. This issue of occupied territory at sea is not addressed in the commentaries on Common Article 2 to the Geneva Conventions. *See* COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD. GENEVA (Jean Pictet ed., 1952); INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (2016).

56. *See, e.g.*, GC IV, *supra* note 6, art. 1.

including armed conflict at sea.[57] Accordingly, the notion of territory in the Fourth Convention encompasses land and maritime territory alike.[58]

The analysis of other rules of applicable international law demonstrates unequivocally that the normative context of Article 42 establishes that it refers to both land and maritime territory. Indeed, since the second half of the sixteenth century, there has been an emerging trend recognizing the full sovereignty of States in areas of the sea adjacent to their coasts, areas now known as the territorial sea.[59] Today, Article 2(1) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) recognizes this historical trend, stating, "[t]he sovereignty of a coastal state extends, *beyond its land territory and internal waters* and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."[60] Arguably, the development of the law of the sea shifted the focus from "marine spaces" to "marine territories."[61] This evolution is relevant to the interpretation of Article 42 in its normative context and reinforces the interpretation of territory under this provision as encompassing portions of the sea.[62]

Finally, to interpret Article 42 as including sea areas is consistent with the object and purpose of the Hague Regulations, whose primary aim in occupied territory is the protection of the sovereignty of the ousted sovereign while allowing the occupying power to maintain control over that territory.[63] As has been stated, it would be illogical for the law of occupation to differentiate between land territory and maritime territory in those instances when

57. Mačák, *supra* note 44, at 21.

58. *See* Singer, *supra* note 1, at 261.

59. For a historical overview, *see* R.R. CHURCHILL & A.V. LOWE. THE LAW OF THE SEA 71–75 (3d ed. 1999); DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 61–70 (2d ed. 2016); Sarah Wolf, *Territorial Sea*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Aug. 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1229.

60. United Nations Convention on the Law of the Sea art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (emphasis added).

61. Prosper Weil, *Des Espaces Maritimes aux Territoires Maritimes: Vers une Cinception Territorialiste de la Délimitation Maritime, in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES EN HOMMAGE À MICHEL VIRALLY 501 (A. Pédone ed., 1991).

62. For further discussion, see *infra* Part V.

63. On the aims of the law of occupation, see LONGOBARDO, *supra* note 3, at 82–87 (noting that the protection of the local population has increasingly become one of the goals of this body of law, as demonstrated by the adoption of the 1949 Geneva Conventions).

the occupying power substitutes its authority for that of the ousted sovereign.[64] Indeed, an alternate legal regime for maritime areas would risk endangering the rights of the ousted sovereign and the local population since it would create "factually uncontrolled areas."[65] Accordingly, the object and scope of the Hague Regulations suggest territory, as it appears in Article 42, includes maritime territory.

Contrary examples in State doctrine do exist. For instance, India denies that the sea is subject to occupation. According to the Indian Ministry of Defence,

> In contrast to the land, the sea is a medium for movement. *It cannot be occupied* and fortified. Navies cannot dig in at sea, or seize and hold ocean areas that have great intrinsic value. Indeed, although the objectives of *naval operations* involve control or influence over sea areas to varying degrees, they *do not involve occupation of sea areas on a permanent basis*.[66]

The Ministry of Defence of the Netherlands also appears to have a contrary opinion. According to Dutch maritime doctrine,

> The three forms of control of the sea [command of the sea, sea control and sea denial] can be regarded as points on a scale where control by one party shifts to control by the other . . . . In other domains too, obtaining and maintaining a degree of superiority is often a prerequisite for the friendly operation. This is the case in all environments where full control or *occupation is normally impossible: the sea*, the air, outer space, the information domain (including cyberspace) and the electromagnetic and acoustic spectra.[67]

On close reading, it seems doubtful that this statement is intended to pertain to all portions of the sea. Another statement in the same document indicates, "it is impossible to occupy positions *on the high seas*,"[68] suggesting that other areas of the sea can be occupied. Moreover, underlying both the

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64. Singer, *supra* note 1, at 259.

65. *Id.*

66. *See* INTEGRATED HEADQUARTERS, MINISTRY OF DEFENCE (NAVY), INDIAN MARITIME DOCTRINE 2009, at 54 (2009) (emphasis added). Faraone also supports this view. *See* Arturo Faraone, *Diritto Umanitario e Guerra Navale*, *in* QUALE DIRITTO NEI CONFLITTI ARMATI? 55, 56 (Irini Papanicolopulu & Tullio Scovazzi eds., 2006).

67. MINISTRY OF DEFENCE, FUNDAMENTALS OF MARITIME OPERATIONS: NETHERLANDS MARITIME MILITARY DOCTRINE 299 (2015) [hereinafter NETHERLANDS MARITIME MILITARY DOCTRINE] (emphasis added).

68. *Id.* at 83.

Dutch and Indian doctrinal documents is the belief that the sea is different from land territory strategically and that is must be considered only as a medium for movement,[69] a proposition the development of technology increasingly challenges.[70]

State practice suggests that certain portions of the sea may be occupied.[71] For example, Article 9 of the Instrument of Surrender between Italy and the Allied Forces provides that "all merchant ships, fishing or other craft of whatever flag, all aircraft and inland transport of whatever nationality in Italian or *Italian-occupied territory or waters* will, pending verification of their identity and status, be prevented from leaving."[72] Similarly, Albania, during the *Corfu Channel* case proceedings before the International Court of Justice, declared that the territorial sea and internal waters of Albania had been occupied by British vessels:

> Vingt-six bâtiments de la marine de guerre britannique ont violé les 12 et 13 novembre la souveraineté albanaise lui apparteriant aussi sur sa mer territoriale et les eaux intérieures dans le canal nord de Corfou en *occupant* lesdits jours, à l'aide de violence, la mer territoriale albanaise et en excluant les autorités et l'ordre public albanais.[73]

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69. *See* JULIAN CORBETT, SOME PRINCIPLES OF MARITIME STRATEGY 93 (Naval Institute Press 1988) (1911).

70. *See* Steven Haines, *Naval Warfare*, *in* STUART CASEY-MASLEN WITH STEVEN HAINES, HAGUE LAW INTERPRETED: THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT 274, 279 (2018).

71. For an accurate assessment, see KOUTROULIS, *supra* note 7, at 36–38.

72. Instrument of Surrender of Italy, U.S./U.K.-It., art. 9, Sept. 29, 1943, 61 Stat. 2742, T.I.A.S. 1604 (emphasis added).

73. Contre-Memoire Soumis par le Gouvernement de la République Populaire d'Albanie (Counter-Memorial Submitted by the People's Republic of Albania), Corfu Channel (U.K. v. Alb.), ¶ 145, (June 15, 1948), https://www.icj-cij.org/files/case-related/1/1492.pdf.

> Twenty-six vessels of the British navy violated on 12 and 13 November the Albanian sovereignty also belonging to it on its territorial sea and the internal waters in the north channel of Corfu occupying the said days, with the help of violence, the Albanian territorial sea and excluding Albanian authorities and public order.

(translation by author) Unfortunately, the Court did not deal with issues of the law of occupation in its decision.

More State practice on the occupation of maritime territory derives from the prolonged Israeli occupation of the Occupied Palestinian Territory.[74] Israel has taken the position that portions of the Gulf of Suez are subject to occupation.[75] In response, the United States asserted the "high seas are not subject to belligerent occupation" and that "the notion of occupation of territorial sea may be somewhat problematic," without ruling it out entirely.[76]

The agreements concluded between Israel and the Palestine Liberation Organization in the 1990s, commonly known as the Oslo Accords,[77] included provisions on the maritime territory adjacent to the Gaza Strip. For example, under Article V(1)(1) of the 1994 Agreement on the Gaza Strip and the Jericho Area, the territorial jurisdiction of the Palestinian Authority "shall include land, subsoil and territorial waters," whereas Israel is responsible "for defense against external threats from the sea" under Article VIII.[78] These provisions were reproduced in Article XVII(2)(a) and Article XII(2) of the 1995 Interim Agreement on the West Bank and the Gaza Strip.[79]

This agreement also divided the maritime territory off the Gaza coast into three areas, with a different partition of responsibilities between Israel

74. On this occupation, which has been explored by vast scholarship, see, for example, INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 9; ORNA BEN-NAFTALI, MICHAEL SFARD & HEDI VITERBO, THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY (2018); DINSTEIN, *supra* note 8, at 16–34.

75. Ministry of Foreign Affairs, Israel, Memorandum of Law on the Right to Develop New Oil Fields in Sinai and the Gulf of Suez (Aug. 1, 1977), *reprinted in* 17 INTERNATIONAL LEGAL MATERIALS 432 (1978).

76. U.S. Department of State, Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez (Oct. 1, 1976), *reprinted in* 16 INTERNATIONAL LEGAL MATERIALS 733 (1977).

77. On the legal value of these agreements, see generally Peter Malanczuk, *Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 485 (1996); RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES (1997); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN AGREEMENTS (2000).

78. Agreement on the Gaza Strip and the Jericho Area arts. V(1)(1), VIII, Isr.-P.L.O., May 4, 1994, 33 INTERNATIONAL LEGAL MATERIALS 622 (1994).

79. Interim Agreement on the West Bank and the Gaza Strip arts. XVII(2)(a), XII(2), Isr.-P.L.O., Sept. 28, 1995, 36 INTERNATIONAL LEGAL MATERIALS 551 (1997).

and the Palestinian Authority.[80] From the standpoint of the law of occupation, these provisions are relevant because they represent a transfer of responsibility from the occupying power to the authorities of the occupied territory.[81] These agreements not only did not terminate the occupation,[82] but the issues addressed therein are issues within the scope of the authority granted by the law of occupation to an occupying power.[83] It follows that Israel was able to transfer jurisdiction over the territorial waters of the Gaza Strip only because it retained it under the law of occupation.[84]

As further evidence of State practice, during the U.S.-led occupation of Iraq (2003–04), the occupying powers applied the law of occupation to the maritime territory of Iraq. In one case, they blocked the Panamanian flagged vessel *Navstar 1*, which was suspected of oil trafficking, from leaving Iraqi territorial waters, seized all relevant documentation from the vessel, detained the crew as security internees, and then referred the matter to the competent Iraqi authorities. These actions were accomplished utilizing the powers

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80. *See id.* annex I, art. 14; *see also* James Kraska, *Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 367, 375–76 (2010).

81. Wall Advisory Opinion, *supra* note 13, ¶ 77

> Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each Party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration.

82. *Id.*

83. Implicitly, Article 47 of Geneva Convention IV acknowledges this mechanism by affirming that agreements between the occupying power and the local population may not affect the protection offered by the law of occupation. *See* GC IV, *supra* note 6, art. 47. For more on this provision, see *infra* notes 184–86 and accompanying text.

84. Clearly, the perspective is different under the principle of self-determination of peoples. Indeed, from the Palestinian perspective the agreements are a step towards the attainment of self-determination, whereas from the Israeli perspective they are a transfer of competences under the law of occupation. The fact that the agreements can be seen from these two different perspectives should not be a surprise since the law of occupation emerged before the principle of self-determination of peoples and the two are not perfectly aligned. On the issue of the respect of the principle of self-determination of peoples in the accords, see Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 56 (1993). On the interplay between the law of occupation and the principle of self-determination of peoples, see Jorge Cardona Llorens, *Le Principe du Droit des Peuples à Disposer D'eux-mêmes et L'occupation Étrangère*, *in* DROIT DU POUVOIR, POUVOIR DU DROIT: MÉLANGES OFFERTS À JEAN SALMON 855 (Nicolas Angelet ed., 2007).

granted by the law of occupation.[85] Additionally, the Coalition Provisional Authority (CPA), which administered occupied Iraq in 2003 and 2004, adopted legislation regulating media activity on the basis of "the extensive specific authority granted to the CPA under the laws and usages of war for the control of all appliances, whether on land, sea, or in the air, adapted for the transmission of information."[86]

One author has noted that because States have not regulated occupation at sea through the law of naval warfare, this implies that they believed the law of occupation already governed it.[87] As detailed below, the law of naval warfare does not address the administration of hostile maritime territory,[88] but it is undeniable that at the time of the codification of the law of occupation there was a widespread consensus that maritime territory could be occupied. Article 88 of the 1913 The Laws of Naval War Governing the Relations between Belligerents (*Oxford Manual*), a private codification authored by the Institute of International Law, demonstrates this point, concluding that maritime territory may be occupied and "*is subject to the laws and usages of war on land*."[89] Although this document is not formally binding, most authors argue that it codified the customary international law that existed in 1913.[90] Moreover, the British Maritime Law Committee of the International Law

85. For more on this episode, see Michael J. Kelly, *Iraq and the Law of Occupation: New Tests for an Old Law*, 6 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 127, 149–50 (2003); *see also* ROB MCLAUGHLIN, UNITED NATIONS NAVAL PEACE OPERATIONS IN THE TERRITORIAL SEA 52–53 (2009).

86. *Coalition Provisional Authority Order No. 14: Prohibited Media Activity* pmbl. (June 10, 2003), *reprinted in* 2 STEFAN TALMON, THE OCCUPATION OF IRAQ: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY AND THE IRAQI GOVERNING COUNCIL 31 (2013).

87. Singer, *supra* note 1, at 259–60.

88. *See infra* Part VII.

89. The Laws of Naval War Governing the Relations between Belligerents, Aug. 9, 1913, art. 88, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 1123, 1135 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Oxford Manual] (emphasis added).

90. *See* Natalino Ronzitti, *Le Droit Humanitaire Applicable aux Conflits Armés en Mer*, 242 RECUEIL DES COURS 9, 28–29 (1993); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 61 (Louise Doswald-Beck ed., 1995); Kelly, *supra* note 85, at 131, 150; James Kraska, *Military Operations*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 866, 876 (Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott & Tim Stephens eds., 2015). *Contra* Pietro Verri, *The 1913 Oxford Manual*, *in* A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 329, 339–40 (Natalino Ronzitti ed., 1988).

Association in 1920 proposed that "territorial waters occupied by the belligerents" should be considered as within the geographical scope of application of the law of naval warfare, thus recognizing that territorial waters may be occupied.[91]

Finally, the geopolitical rationale that shaped the creation of the law of occupation demonstrates that the fact of occupation and the law of occupation apply to waters under the sovereignty of a State. Prior to the nineteenth century, it was commonly accepted that the military occupation of a territory was a legitimate means of annexing the territory to the occupying State. With the 1815 Congress of Vienna, European States began to adopt a different view, that military occupation did not sever the link between sovereignty and territory, so that territory occupied during a war should return to its sovereign at the conflict's conclusion unless a peace treaty provided otherwise.[92] From this perspective, the territory is the property of the sovereign, even though war has temporarily severed the parallelism between effective control and sovereignty.[93]

However, the law of the occupation was created to deal with the rights of European sovereigns only. Accordingly, it did not apply to areas of the world not organized on the model of the European nation State.[94] For these

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91. *See Report of the British Maritime Committee*, *in* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE TWENTY-NINTH CONFERENCE 165, 166 (1920).

92. For more on the origins of the law of occupation, see KOLB & VITÉ, *supra* note 8, at 9–58; Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW AND HISTORY REVIEW 621 (2008); Yutaka Arai-Takahashi, *Preoccupied with Occupation: Critical Examination of the Historical Development of the Law of Occupation*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 51 (2012).

93. *See, e.g.*, Final Act of the Congress of Vienna art. C(3), June 9, 1815, 64 Consol. T.S. 453, *reprinted* in HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 639 (3d ed. 1846) ("Le Prince Ludovisi Buoncompagni conservera pur lui et ses Successeurs légitimes, *toutes les propriétés* que sa Famille possédait dans la principauté de Piombino, dans l'ile d'Elbe ses dépendances, avant l'occupation de ces pays par les troupes Françaises en 1799.") (emphasis added) ("Prince Ludovisi Buoncompagni will retain for himself and his legitimate Successors, *all the properties* that his family possessed in the principality of Piombino, in the island of Elba, its dependencies, before the occupation of these countries by the French troops in 1799.") (translation by author).

94. The famous legal theorist Carl Schmitt argued that treating European territory differently than territory outside Europe formed the basis of the entire development of modern public international law. *See* CARL SCHMITT, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM (1950) (noting the publication of the English translation in 2006 by G.L. Ulmen, titled THE NOMOS OF THE EARTH). On the influence of Schmitt's scholarship on the law of occupation, see Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 721 (2005).

areas, occupation was a lawful way to acquire territory until the mid-twentieth century when self-determination of peoples was recognized as a fundamental principle of international law.[95] The legal fiction used by the European States to acquire colonial territories was to declare them *terra nullius*, nobody's land.[96] That expression did not mean these were lands without inhabitants, which would be absurd since entire civilizations dwelled in those territories, but as lands without a sovereign recognized as such by Eurocentric States. Although today this notion of *terra nullius* is no longer accepted,[97] at the time territory (and the local population dwelling therein) was relevant only as they constituted property of the sovereign. Territory was defined as the spatial geographic scope over which the sovereign exercised its full and largely unlimited powers, an element that could be ceded to other States at the discretion of the sovereign.[98] It is useful to recall how this theory constructed the relationship between European States and territory because it demonstrates that, originally, the law of occupation was created to deal with areas under State territorial sovereignty. Accordingly, since State sovereignty extends beyond its land territory to areas of the sea, there is no reason to restrict the definition of occupied territory under Article 42 of the Hague Regulations to land territory, rather it applies to maritime territory as well.

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95. *See* U.N. Charter art. 1. *See generally* Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INTERNATIONAL COMPARATIVE LAW QUARTERLY 241 (1994); ANTONIO CASSESE, THE SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1996); THEODORE CHRISTAKIS, LE DROIT À L'AUTODÉTERMINATION EN DEHORS DES SITUATIONS DE DÉCOLONISATION (1999); JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION (2000); Stefan Oeter, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 313 (Bruno Simma, Daniel-Rasmus Khan, Heorg Nolte & Andreas Paulus eds., 3d ed. 2012); Giuseppe Palmisano, *Il Principio di Autodeterminazione dei Popoli*, *in* ENCICLOPEDIA DEL DIRITTO: ANNALI V 82 (2012); IL PRINCIPIO DI AUTODETERMINAZIONE DEI POPOLI ALLA PROVA DEL NUOVO MILLENNIO (Marcella Distefano ed., 2014); JAMIE TRINIDAD, SELF-DETERMINATION IN DISPUTED COLONIAL TERRITORIES (2018).

96. Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 44–64 (Apr. 5). This practice is well described by the High Court of Australia in the *Mabo v. Queensland [No. 2]* decision. *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1, 32 (Austl.).

97. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶ 80–81 (Oct. 6) (stressing that *terra nullius* may refer only to areas devoid of inhabitants); *see also Mabo v. Queensland [No. 2]*, *supra* note 96, at 41–42.

98. *See* CALVO, *supra* note 35, at 253.

In conclusion, Article 42, correctly interpreted, coupled with relevant State practice and an understanding of the historical background of occupation and the theories underlying it, demonstrates that nothing precludes including portions of the sea within the definition of occupied territory.[99]

IV. REQUIREMENTS TO CONSIDER PORTIONS OF THE SEA OCCUPIED TERRITORY

Once established that portions of the sea are included within the definition of occupied territory, it is necessary to explore the conditions for determining maritime territory to be under occupation. In particular, this Part addresses whether it is possible to occupy maritime territory without occupying land territory, and whether the occupation of land territory necessarily implies the occupation of the adjacent maritime territory. In this regard, two opposite principles are at play: first, that maritime territory is ontologically an extension of land territory, and second, that small portions of territory may be occupied without altering the status of other portions of territory of the same State.

In answering the first question, it is noted preliminarily that legal scholarship has rarely explored the possibility of occupying maritime territory without occupying land territory. Rather, most academics focus on whether the use of naval (and aerial) means may be sufficient to exercise actual authority over a portion of adjacent *land* territory. For instance, the Institute of International Law stated that an island was under occupation if a State exercises actual authority through its navy over its entire coastline even in the absence of any military presence on the island.[100] Although some scholars support this conclusion,[101] most authorities reject the idea that "occupation could be enforced solely by either naval or air power" since "control of air space did not by itself meet the requirement of 'effective control' for the

99. *See, e.g.*, 4 ANGELO PIERO SERENI, DIRITTO INTERNAZIONALE 2000 (1965); Allan Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute*, 71 AMERICAN JOURNAL OF INTERNATIONAL LAW 725, 729 (1977); *see also* KOUTROULIS, *supra* note 7, at 38–39; Sassòli, *supra* note 7, at 1396; Singer, *supra* note 1, at 271–72; DINSTEIN, *supra* note 8, at 56; Eric David, Principes de Droit des Conflits Armés 699 (6th ed. 2019) (concluding that the control exercised by Israel over the maritime area off the coast of the Gaza Strip is occupation of territory under Article 42).

100. *Manuel des Lois de la Guerre Maritime*, 26 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 24, 330 (1913).

101. *See, e.g.*, KOUTROULIS, *supra* note 7, at 39.

purposes of [international humanitarian law]. Therefore, only effective control on land would characterize military occupation within the meaning of [international humanitarian law]."[102]

On the question of whether maritime territory may be occupied independently of the occupation of land territory, it is important to recall that the occupation of one portion of territory does not necessarily result in the occupation of the entire territory.[103] This is clearly demonstrated by Common Article 2 to the Geneva Conventions, according to which "[t]he Convention shall also apply to all cases of *partial* or total occupation of the territory."[104] Similarly, Article 42 of the Hague Regulations provides that "[t]he occupation extends only to the territory where [actual] authority has been established and can be exercised."[105] Examples of partial occupation include Northern Cyprus after the 1974 Turkish intervention,[106] the Syrian territory of the Golan Heights by Israel after the 1967 Six-Day War,[107] and the Turkish occupation of a portion of northern Syria since 2016.[108] Accordingly, if maritime territory is treated exactly as land territory, as long as a hostile force exercises actual authority, a specific portion of maritime territory can be occupied irrespective of any occupation of land territory.

Nonetheless, most authorities reject this seemingly logical conclusion and hold that the occupation of maritime territory may exist only in connection to the occupation of some land territory.[109] For instance, Article 88 of the *Oxford Manual* states, "occupation of maritime territory . . . exists only

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102. *See* ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY, *supra* note 14, at 17; *see also* Michael Bothe, *De Facto Control of Land or Sea Areas: Its Relevance under the Law of Armed Conflict, in Particular Air and Missile Warfare*, 45 ISRAEL YEARBOOK OF HUMAN RIGHTS 37, 39 (2015).

103. *See* 4 NEW ZEALAND DEFENCE FORCE, DM 69 (2 ed), MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT § 9.2.10 (2019); U.S. LAW OF WAR MANUAL, *supra* note 10, § 11.2.3; Sassòli, *supra* note 7, at 1398–99.

104. *See, e.g.*, GC IV, *supra* note 6, art. 2 (emphasis added).

105. Hague Regulations, *supra* note 6, art. 42.

106. On the occupation of Northern Cyprus, see *supra* note 5 and accompanying text.

107. On the legal status of the Golan Heights, see Ray Murphy & Declan Gannon, *Changing the Landscape: Israel's Gross Violations of International Law in the Occupied Syrian Golan*, 11 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 139 (2008).

108. On the occupation of Syrian territory by Turkey, see Shane Reeves & David Wallace, *Has Turkey Occupied Northern Syria?*, LAWFARE (Sept. 22, 2016), https://www.lawfareblog.com/has-turkey-occupied-northern-syria.

109. *See* 2 ALBÉRIC ROLIN, LE DROIT MODERNE DE LA GUERRE: LES PRINCIPES, LES CONVENTIONS, LES USAGES ET LES ABUS 281–82 (1921); Sassòli, *supra* note 7, at 1396; Singer, *supra* note 1, at 260–61; DINSTEIN, *supra* note 8, at 56.

when there is at the same time an occupation of continental territory, by either a naval or a military force."[110] The preparatory works of the *Manual* reveal that the members of the Institute of International Law extensively debated this point.[111] The view finally accepted in the wording of Article 88, which had been advocated particularly by Edouard Rolin-Jaequemyns,[112] was adopted with four votes in favor and three abstentions.[113]

The *Oxford Manual* rule that the occupation of maritime territory can only follow the occupation of land territory is based on the relationship between land and maritime territory under international law. Indeed, the fact that a State can exist only if it has a land territory limits the legal parallelism between maritime and land territory. Land territory appears to be an indispensable element to the exercise of governmental authority for the emergence of a State in the international arena. Indeed, although how States emerge in international law has been the center of intense debate,[114] land territory is always a necessary element. Maritime territory, however, is viewed, under public international law in general and under the international law of the sea in particular, as an extension and consequence of the existence of land territory,[115] the quintessential element for statehood. The principle that the "land dominates the sea,"[116] according to which "[i]t is the land which confers upon the coastal state a right to the waters off its coasts,"[117] reflects this reality.

110. Oxford Manual, *supra* note 89, art. 88.

111. *Manuel des Lois de la Guerre Maritime*, *supra* note 100, at 328–30.

112. *Id.* at 330 ("Pour qu'il y ait occupation maritime il faut sans doute qu'il y ait une occupation terrestre.") ("For there to be maritime occupation there must be a land occupation.") (translation by author).

113. *Id.* at 331–32.

114. Among the vast scholarship, see GAETANO ARANGIO-RUIZ, L'ETAT DANS LE SENS DU DROIT DES GENS ET LA NOTION DU DROIT INTERNATIONAL 3–63, 265–406 (1976); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2d ed. 2006); Antonello Tancredi, *Lo Stato nel Diritto Internazionale tra Effettività e Legalità/Legittimità*, 16 ARS INTERPRETANDI 131 (2011).

115. *See* Grisbardana Case (Nor. v. Swed.), 11 R.I.A.A. 155, 159 (Perm. Ct. Arb. 1909) (concluding "the maritime territory is essentially an appurtenance of a land territory").

116. The principle is mentioned in the *North Sea Continental Shelf* and *Delimitation of the Maritime Boundary in the Gulf of Maine Area* judgments of the International Court of Justice. *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 96 (Feb. 20); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶¶ 157, 226 (Oct. 12).

117. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 133 (Dec. 18).

Although current technology might sustain human communities living in maritime territory with no link to land territory, international law still considers land territory essential, as it is land that allows the development and exercise of full sovereignty.[118] Likewise, under the law of occupation, only land territory allows a hostile force to establish the temporary administration governing the occupied territory required by Article 43 of the Hague Regulations.[119] Since the law of occupation strikes a balance between the hostile character of the occupation and the need to temporarily govern the occupied territory,[120] it can only apply in the same circumstances that would allow a sovereign to exercise legitimate governmental functions, that is, in connection with land territory. It follows that maritime territory cannot be occupied unless the occupation also covers portions of land territory. There is no contrary State practice in which a State has occupied only maritime territory.

The second issue is whether the occupation of a portion of land territory also implies the occupation of maritime territory. Some authors consider that the status of the land territory determines the status of the maritime territory.[121] They view the "land dominates the sea" principle as creating an unbreakable link between the status of the land territory and that of the maritime territory. However, this principle only means that the status of maritime territory is a consequence of the status of land territory; it does not necessarily follow that occupation of land territory results in occupation of maritime territory.

Moreover, under international humanitarian law, it is clear that placing one portion of territory under occupation has no effect on the status of other portions of the State's territory. On this point, Hague Regulations Article 42 is very clear, stating, "[t]he occupation extends only to the territory where such authority has been established and can be exercised"[122]—a provision that is also relevant to maritime territory. Since the law of occupation imposes administrative responsibilities only on those portions of territory over which the occupying power exercises actual authority, the status of maritime territory is not affected by the occupation of land territory unless the occupying power exercises actual authority over the maritime territory as well.[123]

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118. *See* Island of Palmas (Neth. v. US), 2 R.I.A.A. 829, 833 (Perm. Ct. Arb. 1928).
119. Hague Regulations, *supra* note 6, art. 43.
120. For further discussion, see LONGOBARDO, *supra* note 3, at 176.
121. *See* Sassòli, *supra* note 7, at 1396; DINSTEIN, *supra* note 8, at 56.
122. Hague Regulations, *supra* note 6, art. 42.
123. Singer, *supra* note 1, at 266–67.

To consider maritime territory under occupation, the occupying power must exercise actual authority. In particular, the ousted sovereign must be unable to exercise its authority over the maritime territory, and the occupying power must have substituted its authority for that of the sovereign.[124] In assessing whether that has occurred, the guidelines utilized by the International Criminal Tribunal for the former Yugoslavia (ICTY) provide useful elements in determining whether a territory is occupied:

> [T]he occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation; the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; a temporary administration has been established over the territory; the occupying power has issued and enforced directions to the civilian population.[125]

Even though the ICTY applied these elements to the occupation of land territory, they can be adapted to maritime territory. Indeed, the degree of authority needed to maintain the occupation is flexible, and it may vary depending on the geographical conformation of the territory, the number of inhabitants, and their attitude towards the occupying power. In particular, the occupying power needs not exercise actual authority over every portion of occupied territory, but it is sufficient that the occupying power can readily exercise authority if it decides to do so.[126]

These ICTY guidelines are particularly relevant to maritime territory, which may require a different degree of control than land territory because the population of people at sea is normally less visible and more transitory

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124. See generally the discussion in BENVENISTI, *supra* note 5, at 43–51; LONGOBARDO, *supra* note 3, at 35–39; DINSTEIN, *supra* note 8, at 48–54.

125. Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Judgment, ¶ 217 (Int'l Crim. Trib. for the former Yugoslavia Mar. 31, 2003) (citations omitted); *see also* Prosecutor v. Prlić et al., IT-04-74-A, Appeals Chamber Judgment, ¶ 320 (Int'l Crim. Trib. for the former Yugoslavia Nov. 29, 2017).

126. *See* U.S. LAW OF WAR MANUAL, *supra* note 10, § 12.2.2.1; *see also* Andrea Gattini, *Occupazione Bellica*, *in* DIZIONARIO DI DIRITTO PUBBLICO 3889, 3891 (Sabino Cassese ed., 2006); LONGOBARDO, *supra* note 3, at 36; DINSTEIN, *supra* note 8, at 49.

than that of people dwelling on land.[127] Usually, military vessels tasked with preventing any performance of authority by the ousted sovereign and performing law enforcement responsibilities exercise actual authority over maritime territory. Accordingly, to consider maritime territory as under occupation, the occupying power must be able to expel enemy naval forces and intervene promptly in every portion of the occupied territory if needed.[128]

Given the preceding, portions of maritime territory adjacent to occupied land territory may not be under occupation, if the occupying power has not also exercised specific actual authority over that maritime territory. When deciding whether to extend its authority over maritime territory and its marine resources, the occupying power should be guided by the importance of the marine resources to the population of the occupied territory.[129]

However, occupying the maritime territory may be necessary to maintain the occupation of the land territory. In many instances, allowing the ousted sovereign to exercise its authority on the sea adjacent to the occupied land territory would threaten the occupying power's control of the land territory.[130] Indeed, at a practical level, at least for maritime territory adjacent to occupied land territory, it may be difficult to envisage a situation in which the occupying power exercises no authority over the maritime territory.[131]

In conclusion, although the definition of occupied territory found in Article 42 of the Hague Regulations encompasses maritime territory, an occupation of maritime territory may occur only in connection with occupation of land territory and, even then, only if the occupying power exercises actual authority over the maritime territory.

V. WHICH PORTIONS OF THE SEA CAN BE OCCUPIED TERRITORY?

After establishing that maritime territory can be occupied, the issue of which areas of the sea fall under occupation must be explored. The answer to this question is far from straightforward and requires an analysis of which portions of the sea can be defined as maritime territory.

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127. However, there are more "people at sea" today than in any other era of the human history. *See* IRINI PAPANICOLOPULU, INTERNATIONAL LAW AND THE PROTECTION OF PEOPLE AT SEA 15–24 (2017).

128. Singer, *supra* note 1, at 268–71.

129. BENVENISTI, *supra* note 5, at 55.

130. Singer, *supra* note 1, at 268.

131. KOUTROULIS, *supra* note 7, at 38–39.

The departing point is Article 88 of the *Oxford Manual*, the only codification, albeit non-binding, on the occupation of maritime territory. Under this provision, the occupation of maritime territory refers to "gulfs, bays, roadsteads, ports, and territorial waters."[132] Although these areas continue to exist in the current law of the sea, new marine spaces were created after World War II. The question is whether or not these new areas are also subject to occupation.

The very definition of territory refers to areas under the full sovereignty of a State.[133] Under Article 2(1) of UNCLOS, "[t]he sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to . . . the territorial sea."[134] The wording of this provision contains two interesting aspects: first, internal waters and archipelagic waters are akin to land territory; second, land territory and the territorial sea are spaces in which the territorial sovereignty of a State can be exercised. Both are encompassed in the wider notion of territory.[135] For that reason, scholars generally agree that internal waters,[136] the territorial sea,[137] and archipelagic waters[138] can be occupied under Article 42 of the Hague Regulations.[139] In the words of one commentator, "[i]n internal waters, in the territorial sea and in archipelagic waters the coastal state exercises

132. Oxford Manual, *supra* note 89, art. 88.

133. *See supra* Part III.

134. UNCLOS, *supra* note 60, art. 2(1).

135. *See* Richard A. Barnes, *Article 2*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 27, 32–33 (Alexander Proelss ed., 2017) [hereinafter LAW OF THE SEA COMMENTARY] (arguing that "the rights of the coastal state over the territorial sea does not differ in nature from rights exercised over land territory").

136. UNCLOS, *supra* note 60, art. 8(1) (describing internal waters as "those waters which lie landward of the baseline from which the territorial sea is measured").

137. *Id.* art. 3 (defining territorial sea as a belt of sea adjacent to land territory (and internal waters and archipelagic waters) and providing that "[e]very state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines").

138. Under UNCLOS Article 49(1), archipelagic waters are "waters enclosed by the archipelagic baselines." UNCLOS, *supra* 60, art. 49(1). Article 47 establishes how States may draw baselines. *Id.* art. 47.

139. *See, e.g.,* SERENI, *supra* note 99, at 2000; Gerson, *supra* note 99, at 729; KOUTROULIS, *supra* note 7, at 38–39; Sassòli, *supra* note 7, at 1396; Singer, *supra* note 1, at 271–72; DINSTEIN, *supra* note 8, at 56.

sovereignty which is derived from its territorial sovereignty and the proximity to its coast; these zones therefore form the maritime part of the coastal state's territory."[140]

More challenging is determining whether marine areas outside the territorial sovereignty of a State can be occupied. This debate focuses on the exclusive economic zone[141] and the continental shelf,[142] since the coastal State exercises more limited sovereign rights in these areas. When addressing Israeli activities in the Gulf of Suez, some authors claim that the continental shelf is subject to occupation.[143] Indeed, Article 76(1) of UNCLOS refers to the continental shelf as "the natural prolongation of its [the coastal State's] land territory."[144] According to Dinstein, this expression supports including the continental shelf on the list of maritime areas that can be occupied.[145]

Natural prolongation, however, refers to the physical dimension of the continental shelf, not to an extension of territorial sovereignty.[146] Under the law of the sea, it is an area outside State territorial sovereignty, in which the coastal State may exercise certain sovereign rights, mainly for the exploration and exploitation of natural resources, without exercising territorial sovereignty.[147] As the U.S. *Law of War Manual* states, "coastal states may exercise

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140. *See* Wolf, *supra* note 59, ¶ 2; *see also* ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW 6 (2006).

141. Under UNCLOS Article 55,

> [t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

UNCLOS, *supra* note 60, art. 55.

142. Pursuant to Article 76(1) of UNCLOS,

> [t]he continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Id. art. 76(1).

143. *See* Brice M. Clagett & O. Thomas Johnson, *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 AMERICAN JOURNAL OF INTERNATIONAL LAW 558, 559 n.12 (1978); *see also* BENVENISTI, *supra* note 5, at 55 ("It would make sense to regard the occupant as the responsible party.").

144. UNCLOS, *supra* note 60, art. 76(1).

145. DINSTEIN, *supra* note 8, at 56.

146. *See* Lindsay Parson, *Article 76*, *in* LAW OF THE SEA COMMENTARY, *supra* note 135, at 587, 592–93 (analyzing the relevant case law and State practice).

147. *See* Wolf, *supra* note 59, ¶ 2 (citations omitted)

limited 'sovereign rights' over specific functional areas in the exclusive economic zone and on the continental shelf, but these rights do not imply sovereignty over these areas."[148] It goes on to clarify, "in describing waters that are not subject to the sovereignty of a state (e.g., the exclusive economic zone and continental shelf, and high seas), the word 'territory' should not be used."[149] Similarly, the U.K. *Manual on the Law of Armed Conflict* concludes:

> [I]t is only internal waters and the territorial sea that together with the land territories constitute the territory of a belligerent. Other zones of maritime jurisdiction (eg [sic] continental shelf and exclusive economic zone) lying beyond the limits of the territorial sea do not form a part of the territory of the state.[150]

As such, the European Council has criticized the Turkish exploitation of natural resources in the continental shelf of Northern Cyprus, by "strongly condemn[ing] Turkey's continued illegal actions in the Eastern Mediterranean and the Aegean Sea . . . and urgently call[ing] on Turkey to cease these actions and respect the sovereign rights of Cyprus to explore and exploit its natural resources."[151] Accordingly, in this author's opinion, the exclusive economic zone and the continental shelf cannot be subjected to occupation.[152]

Similarly, the high seas may be not be placed under occupation. Although in the past some authors have supported the opposite view, arguing that occupation of the high seas can exist in the form of blockade;[153] this view is no

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> In internal waters, in the territorial sea and in archipelagic waters the coastal State exercises sovereignty which is derived from its territorial sovereignty and the proximity to its coast; these zones therefore form the maritime part of the coastal state's territory. In contrast thereto, other maritime zones do not form part of the coastal state's territory and the coastal state only exercises functional limited competences and is not granted sovereignty.

For more on this view, see YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 147–49 (2d ed. 2015).

148. U.S. LAW OF WAR MANUAL, *supra* note 10, § 13.2.1.

149. *Id.*

150. *See* U.K. LOAC MANUAL, *supra* note 39, ¶13.6(a).

151. European Council, European Council Conclusions on the Western Balkans and Actions by Turkey in the Eastern Mediterranean and the Aegean Sea, ¶¶ 12–13 (Mar. 22, 2018), https://www.consilium.europa.eu/en/press/press-releases/2018/03/22/european-council-conclusions-on-the-western-balkans-and-actions-by-turkey-in-the-eastern-mediterranean-and-the-aegean-sea-22-march-2018/.

152. *Cf.* Singer, *supra* note 1, at 272–73 (arguing that the contiguous zone and the exclusive economic zone may be occupied).

153. For instance, one author has studied blockades and the use of sea mines under the label of military occupation of the high sea. *See* Herbert Arthur Smith, *Le Dévelopment Moderne*

longer persuasive. Indeed, if blockade and occupation were equated in the law, there would be no reason to create blockade as a separate method of naval warfare.[154] Moreover, blockade is more comparable to siege than to occupation.[155] Today, most authorities are of the view that high seas areas cannot be occupied. For example, according to Rolin, such an occupation would be intrinsically contrary to the principle of freedom of seas.[156]

Further, under Article 89 of UNCLOS, "[n]o state may validly purport to subject any part of the high seas to its sovereignty."[157] This provision demonstrates that the high seas cannot be territory within the meaning of Article 42 of the Hague Regulations. As Gerson observed, the concept of high seas "by its very nature [is] not subject to belligerent occupation."[158] State practice supports this conclusion. For example, the United States finds that "it is clear that high seas are not subject to belligerent occupation,"[159] while the Netherlands concludes, "it is impossible to occupy positions on the high seas."[160] Likewise, in its report on the Israeli boarding of the *Mavi Marmara*, the Office of the Prosecutor of the International Criminal Court found that the passengers were not "'in occupied territory' since . . . the vessel [was] . . . on the high seas."[161]

In sum, only the maritime territory over which a State exercises territorial sovereignty—its internal waters, territorial sea, and archipelagic waters—are included in the notion of occupied territory under Article 42 of the Hague Regulations. If a belligerent State exercises actual authority over these areas and adjacent portions of land territory, then the law of occupation applies.

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des Lois de la Guerre Maritime, 63 RECUEIL DES COURS 601, 648–62 (1938). Lawrence takes a more cautious position. *See* T. J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 435–36 (6th ed. 1917) (concluding "occupation on land is *analogous* to blockade at sea") (emphasis added).

154. For more on blockade, see *infra* notes 196–98 and accompanying text.

155. *See* Kraska, *supra* note 80, at 373. On sieges under international humanitarian law, see, for example, EMANUELA-CHIARA GILLARD, CHATHAM HOUSE BRIEFING, SIEGES, THE LAW AND PROTECTING CIVILIANS (2019).

156. ROLIN, *supra* note 109, at 282.

157. UNCLOS, *supra* note 60, art. 89.

158. Gerson, *supra* note 99, at 728 n.15.

159. U.S. Department of State, *supra* note 76.

160. NETHERLANDS MARITIME MILITARY DOCTRINE, *supra* note 67, at 83.

161. *See* Office of the Prosecutor, *supra* note 3, ¶ 44; *see also* MARTIN FINK, MARITIME INTERCEPTION AND THE LAW OF NAVAL OPERATIONS 234–36 (2018) (noting that it would be erroneous to consider a vessel as occupied territory since vessels are not portions of territory of their State of registration).

VI. THE POTENTIAL AND LIMITS OF THE LAW OF OCCUPATION AT SEA

Having concluded that internal waters, the territorial sea, and archipelagic waters are subject to occupation, it is important to assess the usefulness of the law of occupation to govern occupied maritime territory as demonstrated through State practice.

Although occupation has been described as "a natural phenomenon in war,"[162] international law considers situations of occupation as exceptional circumstances in which it is necessary to allocate rights and responsibilities beyond the normal order governing sovereign States.[163] In doing so, the law of occupation takes into account the different and conflicting interests at stake. According to the U.S. *Law of War Manual*, the law of occupation involves "a complicated, *trilateral* set of legal relations between the occupying power, the temporarily ousted sovereign authority, and the inhabitants of occupied territory."[164] These different interests and legal regimes are reflected in the delicate balance between the hostile character of the occupation and the governmental-like authority given to the occupying State, which has a duty to administer the occupied territory to ensure public order and restore public life.[165]

The law of occupation is the only body of international law that requires an extensive exercise of governmental functions by one State in the territory of another State. In that territory, the occupying State may no longer use force under international humanitarian law, but must maintain public order

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162. DINSTEIN, *supra* note 8, at 1.

163. *See* Orna Ben-Naftali, *Belligerent Occupation: A Plea for the Establishment of an International Supervisory Mechanism*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 538, 540 (Antonio Cassese ed., 2012).

164. U.S. LAW OF WAR MANUAL, *supra* note 10, § 11.4 (citing JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 694 (1954)) (emphasis added); *see also* Charles Garraway, *Occupation Responsibilities and Constraints*, *in* THE LEGITIMATE USE OF MILITARY FORCE 263, 278 (Howard M. Hensel ed., 2008); Hans-Peter Gasser & Knut Dörmann, *Protection of the Civilian Population*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 231, 266 (Dieter Fleck ed., 3d ed. 2013). However, the law of occupation evolved so that that today it comprises obligations *erga omnes* and *erga omnes partes*, which are relevant for the international community as a whole and all the States parties to the Geneva Conventions. *See* Wall Advisory Opinion, *supra* note 13, ¶¶ 155, 157; LONGOBARDO, *supra* note 3, at 84–86.

165. *See* Hague Regulations, *supra* note 6, art. 43. For more on this, *see* LONGOBARDO, *supra* note 3, at 169–76.

through law enforcement means unless there is a resumption of hostilities.[166] Moreover, unless the occupying power has invoked lawful derogation clauses, international human rights law applies to the activities of the occupying power in the occupied territory.[167] But the law of occupation is not oblivious to the reality of the ongoing armed conflict in recognizing that there may be violent resistance to the occupation. If such violent resistance occurs, the occupying power can use military force in response if the violence is of sufficient intensity and duration to meet the threshold for a non-international armed conflict.[168] Accordingly, in cases of resumption of hostilities, the law of occupation allows the application of rules governing international armed conflict, including the rules on naval warfare.[169]

The law of occupation establishes a legal framework for the governance of maritime territory during an armed conflict—including for the exploitation of natural resources[170]—when a State exercises actual authority over

166. For more details, see LONGOBARDO, *supra* note 3, at 186–94; *see also* Kenneth Watkin, *Maintaining Law and Order during Occupation: Breaking the Normative Chains*, 41 ISRAEL LAW REVIEW 175 (2008); Kenneth Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 267 (2012) [hereinafter Watkin, *Use of Force*].

167. *See, e.g.,* Wall Advisory Opinion, *supra* note 13, ¶ 106; Armed Activities, *supra* note 13, ¶ 216; *see also* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISRAEL LAW REVIEW 17 (2004); YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW (2009); Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 317 (2012).

168. Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 881, 894 (2006); Marco Pertile, *L'Adozione di Misure contro il Terrorismo nei Territori Occupati: I Poteri e gli Obblighi Delle Potenze Occupanti*, *in* LA TUTELA DEI DIRITTI UMANI NELLA LOTTA E NELLA GUERRA AL TERRORISMO 295, 309 (Pietro Gargiulo & Maria Chiara Vitucci eds., 2009); Watkin, *Use of Force*, *supra* note 166, at 291; LONGOBARDO, *supra* note 3, at 235–38.

169. On naval warfare rules as a portion of Hague Law, see Haines, *supra* note 70.

170. *See generally* Antonio Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 9, at 419; Iain Scobbie, *Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty*, *in* HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE PALESTINIAN OCCUPIED TERRITORIES 221 (Stephen Bowen ed., 1997); Emanuele Cimiotta, *Conflitto Armato Nella Repubblica Democratica del Congo e Principio Della Sovranità Permanente Degli Stati Sulle Proprie Risorse Naturali*, *in* PROBLEMI E TENDENZE DEL DIRITTO INTERNAZIONALE DELL'ECONOMIA: *LIBER AMICORUM* IN ONORE DI PAOLO

portions of the territorial sea, internal waters, and archipelagic waters of another State. The occupying power does not acquire ownership of public goods and natural resources, rather, it has usufructuary rights;[171] this means that the occupying power may enjoy the fruits of public property to support the costs of the occupation and protect the interests and needs of the local population,[172] but it is prevented from completely depleting it or alienating the natural resources of the occupied territory.[173]

This rule could have been applied in determining Morocco's fishing rights in the waters of Western Sahara. Regrettably, the ECJ did not address the status of the waters as occupied territory,[174] having previously held that the 2006 EU-Morocco Fisheries Partnership Agreement[175] and its 2013 Protocol[176] *cannot be applied* to the territorial waters and exclusive economic zone of Western Sahara because to do so would conflict with the principle of self-determination of peoples.[177] The Court also failed to identify the legal regime

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PICONE 55 (Aldo Ligustro & Giorgio Sacerdoti eds., 2011); Marco Longobardo, *The Palestinian Right to Exploit the Dead Sea Coastline for Tourism*, 58 GERMAN YEARBOOK OF INTERNATIONAL LAW 317 (2015).

171. Hague Regulations, *supra* note 6, art. 55.

172. *See* Anicée van Engeland, *Protection of Public Property*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 7, 1535, 1543.

173. *See* ERNST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 71 (1942); Cassese, *supra* note 170, at 428; van Engeland, *supra* note 172, at 1541–42; Longobardo, *supra* note 170, at 335.

174. Western Sahara Campaign UK, *supra* note 4, ¶ 72. On the characterization of Western Sahara as occupied territory, see *Saharawi Arab Democratic Republic and Another v. Owner and Charterers of the MV 'NM Cherry Blossom' and Others* 2017 (5) SA 105 (ECP) at 11 para. 40 (S. Afr.); *see also* Christine Chinkin, *Laws of Occupation*, *in* MULTILATERALISM AND INTERNATIONAL LAW WITH WESTERN SAHARA AS A CASE STUDY 167 (Neville Botha, Michèle Olivier & Delarey van Tonder eds., 2010); BENVENISTI, *supra* note 5, at 171–72; Ben Saul, *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, 27 GLOBAL CHANGE, PEACE & SECURITY 301 (2015).

175. Council Regulation 764/2006 of May 22, 2006, on the Conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, 2006 O.J. (L 141/1), 4.

176. Protocol between the European Union and the Kingdom of Morocco Setting Out the Fishing Opportunities and Financial Contribution Provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, 2013 O.J. (L 328/2).

177. *See supra* note 4. These decisions have received considerable attention by legal scholars. *See, e.g.*, Eva Kassoti, *Between Völkerrechtsfreundlichkeit and Realpolitik: The EU and Trade Agreements Covering Occupied Territories*, 26 ITALIAN YEARBOOK OF INTERNATIONAL LAW 139 (2016); Enzo Cannizzaro, *In Defence of Front Polisario: The ECJ as a Global* Jus Cogens

applicable to Moroccan activities in the maritime territory of Western Sahara.[178] The Court should have considered the international customary law of occupation,[179] and, in this writer's opinion, concluded that Morocco is entitled to exploit the territory's natural resources so long as it complies with Article 55 of the Hague Regulations and other rules of the law of occupation requiring the occupying power to employ the natural resources for the welfare of the local population.[180]

Another maritime area in which the law of occupation could be applied is the territorial sea off the coast of the Gaza Strip since the international community considers that Gaza's land territory is under occupation.[181] As addressed above, in the 1990s Israel and the Palestine Liberation Organization concluded various agreements that focused, *inter alia*, on the maintenance of public order at sea, the regulation of fishing rights, and external defense of the Gazan coasts.[182] These agreements cannot derogate from international humanitarian law in general and the law of occupation in particular. Under Article 7 of the Fourth Geneva Convention, "[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."[183] Article 47 expressly addresses occupation providing,

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Maker, 55 COMMON MARKET LAW REVIEW 569 (2018); Pål Wrange, *Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara*, 52 ISRAEL LAW REVIEW 3 (2019); Balingene Kahombo, *The* Western Sahara *Cases before the Court of Justice of the European Union and International Law*, 18 CHINESE JOURNAL OF INTERNATIONAL LAW (forthcoming 2019).

178. On the different maritime areas established by Morocco as an occupying power and by the representatives of the Saharawi people, see the very informative article by Jeffrey Smith, *International Law and Western Sahara's Maritime Area*, 50 OCEAN DEVELOPMENT & INTERNATIONAL LAW 117 (2019).

179. On the applicability of customary international law within the EU legal order, see generally ALESSANDRA GIANELLI, DIRITTO DELL'UNIONE EUROPEA E DIRITTO INTERNAZIONALE CONSUETUDINARIO (2003); FEDERICO CASOLARI, L'INCORPORAZIONE DEL DIRITTO INTERNAZIONALE NELL'ORDINAMENTO DELL'UNIONE EUROPEA (2008); INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION (Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel eds., 2011).

180. Earlier, Enrico Milano put this position forward. *See* Enrico Milano, *The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing Too South?*, 22 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 423, 448–49 (2006) (noting that Milano's argument relies solely on the application of the Hague Regulations, rather than the entire law of occupation, coupled with the rules on non-self-governing territories).

181. *See supra* note 3 and accompanying text.

182. *See supra* notes 74–84 and accompanying text.

183. GC IV, *supra* note 6, art. 7.

> [p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.[184]

Accordingly, the conventional rules on the governance of the territorial sea off the Gaza Strip cannot derogate from the law of occupation, but, rather, must be interpreted in a manner compatible with both the Hague Regulations and the Fourth Geneva Convention.[185]

The application of the law of occupation to maritime territory is not a panacea, particularly because its geographic scope extends only to internal waters, the territorial sea, and archipelagic waters. Thus, even had the ECJ chosen to address occupation in its Western Sahara decisions, it would have only applied the law of occupation to the relatively small area of the territorial sea. Similarly, the law of occupation does not regulate Turkish activities in the area beyond the territorial sea of occupied Northern Cyprus. Thus, the 2018 Turkish decision to bar access to natural resources located in the continental shelf to the Italian vessel *Saipan 12000* cannot be assessed under the law of occupation.[186]

The inapplicability of the law of occupation does not leave exclusive economic zones and continental shelves without protection under international law. Rather, protection comes from other branches of public international law, such as the principle of self-determination and the law of the sea.

In conclusion, when there is the exercise of actual authority by a belligerent over portions of an enemy's maritime territory, the law of occupation can offer solutions to problems not addressed by the law of naval warfare. However, because it is limited in its application to the territorial sea, internal waters, and archipelagic waters, the law of occupation has no application to

184. *Id.* art. 47.

185. For further discussion, see Robert Kolb, *Etude sur l'Occupation et sur l'Article 47 de la IVeme 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*, 10 AFRICAN YEARBOOK OF INTERNATIONAL LAW 267 (2004).

186. For more on this incident, see Enrico Milano, *Tensioni Diplomatiche nel Mediterraneo Orientale: il Caso* Saipem 12000, 51 RIVISTA DI DIRITTO INTERNAZIONALE 553 (2018).

exclusive economic zones and continental shelves, areas in which many of the natural resources of the sea are found.

VII. THE INTERPLAY BETWEEN THE LAW OF OCCUPATION AND THE LAW OF NAVAL WARFARE

Although the law of occupation and the law of naval warfare generally regulate two distinctly different aspects of armed conflict, there may be times that they seemingly regulate the same conduct, thus raising questions as to the interplay between these two branches of international humanitarian law. This Part explores this interplay, taking into account how different rules of international humanitarian law usually interact.

First, it must be stressed that to consider the rules on naval warfare as applying only to the sea and the law of occupation only to land is not only erroneous—as demonstrated above, maritime territory may be occupied—but it fails to recognize the reality of armed conflict. In that reality, the boundaries between land and naval warfare are not always easy to assess because it is wrongfully assumed that hostilities are conducted exclusively either on land, on and under water, or in the air.

This belief has led to the development of different rules shaped specifically for these three realms, with States regulating the same conduct differently depending on whether it occurred on land, at sea, or in the air. The most typical example is the seizure of private property, which is allowed by the law of naval warfare but prohibited under the law of land warfare.[187] Indeed, a century ago, the treatment of private property was one of the main reasons cited for regulating naval and land warfare differently.[188] However, some commentators have denounced the artificial character of the distinction between naval and land warfare and noted the practical difficulties of assessing whether conduct falls into one or the other area in certain circumstances.[189] For instance, attack of an object on land from the sea may be seen as an act of either naval or land warfare (or both).

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187. On land, see Hague Regulations, *supra* note 6, arts. 46, 53; GC IV, *supra* note 6, art. 53. At sea, see SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, *supra* note 90, ¶¶ 135–52. See also the old, but still relevant article by Manley O. Hudson, *Seizures in Land and Naval Warfare Distinguished*, 16 AMERICAN JOURNAL OF INTERNATIONAL LAW 375 (1922).

188. ROLIN, *supra* note 109, at 17.

189. *See* SERENI, *supra* note 99, at 1997–2000.

Accordingly, there is a need for norms that regulate the scope of applications of the specific rules. In the example above of an object on land attacked from the sea, Article 49(3) of 1977 Additional Protocol I provides a specific rule.[190] This Article makes clear that its drafters did not unify the rules on land and naval warfare; thus, there are circumstances where two different sets of norms apply.[191] It is, therefore, important to understand how to reconcile normative conflicts when they arise.

The first step is to recognize that the law of occupation is open to the application of other rules of international humanitarian law, as well as other rules of public international law.[192] Although the law of occupation is principally contained in the Hague Regulations, the Fourth Geneva, and Additional Protocol I, other international humanitarian law treaties contain rules regarding the law of occupation, such those protecting cultural property.[193] Similarly, when an armed confrontation occurs in occupied territory of sufficient intensity to be classified as a non-international armed conflict, then the land warfare rules apply, even though they were not created to address situations of occupation.[194]

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190. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; *see generally* ELMAR RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE (1984).

191. AP I, *supra* note 190, art. 49(3)

> The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

See also Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 64, 69 (2000) ("No treaty rules specifically make the general principles of the law of war on land applicable to war at sea."). *But see* SERENI, *supra* note 99, at 1999–2000 arguing the contrary view).

192. For further discussion, see generally LONGOBARDO, *supra* note 3, at 47.

193. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 5, May 14, 1954, 249 U.N.T.S. 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 358; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 9, Mar. 26, 1999, 2253 U.N.T.S. 172.

194. *See* LONGOBARDO, *supra* note 3, at 258–60. The one notable exception is the case of a rule pertaining to the conduct of hostilities *embodied in the law of occupation*, which would prevail over a more generic rule on the conduct of hostilities not specifically addressing

By analogy, nothing precludes the application of the rules of naval warfare to a resumption of hostilities occurring in occupied maritime territory. If hostilities resume, the law on naval warfare would govern them. Again, the violence must be of sufficient intensity to meet the definition for a non-international armed conflict. If it does not reach that level, the occupying power is limited to the use of law enforcement measures to restore and ensure public order.

In applying this framework to the blockade of the Gaza Strip,[195] the law of occupation should not apply since the blockade was established beyond the territorial sea. However, the blockade does have an impact on occupied territory since its specific purpose is to prevent the transport of persons or goods to the Gaza Strip. The question presented here is whether Israel was entitled to enact the blockade, which is a method of warfare, under the law of occupation.

The legality of blockade as a method of warfare is outside the scope of the law of occupation and should be assessed under the law of blockade itself.[196] However, the law of occupation does, as discussed above, regulate *when* is it possible to use of methods of warfare; accordingly, the resort to a blockade to restore and ensure public order in occupied territory would be lawful only to address situations of violence comparable to a non-international armed conflict.[197] The alternate view, according to which a blockade

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occupations based on the principle of *lex specialis*. *See id.* at 260–61. However, no special rule on the conduct of hostilities at sea is embodied in the law of occupation.

195. For different views on this debate, see Kraska, *supra* note 80; Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 397 (2010); Russel Buchan, *The International Law of Naval Blockade and Israel's Interception of the* Mavi Marmara, 58 NETHERLANDS INTERNATIONAL LAW REVIEW 209 (2011); Douglas Guilfoyle, *The* Mavi Marmara *Incident and Blockade in Armed Conflict*, 81 BRITISH YEARBOOK OF INTERNATIONAL LAW 171 (2011).

196. On this topic, see SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, *supra* note 90, ¶¶ 93–104; Wolff Heintschel von Heinegg, *Blockade*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2015), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252; PHILLIP DREW, THE LAW OF MARITIME BLOCKADE: PAST, PRESENT, AND FUTURE (2018).

197. An U.N. panel accepted the Israeli assertion that the blockade was a lawful self-defense measure. *See* U.N. Secretary-General Panel of Inquiry, *Report on the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶ 72 (Sept. 2011). But for the argument that the analysis should not be influenced by *jus ad bellum* considerations since *jus ad bellum* "has no relevance" to the relationship between the occupying power and the occupied territory, see LONGOBARDO, *supra* note 3, at 126–33 (citing Wall Advisory Opinion, *supra* note

established in the high seas is lawful irrespective of its effects on the occupied territory, ignores the fact that the blockade is directed against the occupied territory. This result would lead to the unsupportable conclusion that an occupying power may lawfully resort to methods of warfare in the occupied territory beyond the limits set by the law of occupation as long as these methods are operated from outside the occupied territory.[198]

In cases of apparent overlap between the law of occupation and the law of naval warfare, a State must attempt to avoid the normative conflict through interpretation, taking into account the law of occupation when interpreting the law on naval warfare and vice versa.[199] The Vienna Convention on the Law of Treaties codifies this requirement in Article 31(3)(c), under which a treaty provision is to be interpreted in light of other "relevant rules of international law."[200] However, in cases of normative conflict between two sets of rules not resolved through interpretation, there is the need to identify a rule that does so.

The *Oxford Manual* resolves possible normative conflict by stating, "[r]ules peculiar to naval warfare are applicable only on the high seas and in the territorial waters of the belligerents, exclusive of those waters which, from the standpoint of navigation, ought not to be considered as maritime."[201] The original French text of the *Manual* employs the word "spéciales" instead of "peculiar," thus framing the relationship between the rules of naval warfare and the rules of land warfare as one of the prevalence of *lex specialis* over *lex generalis*.[202] Although this view enjoys some support among scholars,[203] it does not withstand scrutiny. If one conceives of international humanitarian law as divided into three areas—the law of land warfare, the

13, ¶ 139). In fact, the security of the occupying power is one of the considerations for resorting to means and methods of warfare under the law of occupation. *See id.* at 170–71.

198. The issue is so complex that Turkey has suggested that blockades of occupied territories are inherently unlawful, without providing a sound argument to support this view. *See* TURKISH NATIONAL COMMISSION OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010, at 78–81 (2011).

199. *See generally* Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 273, 275 (1975); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 240–44 (2003).

200. On this provision, see generally PANOS MERKOURIS, ARTICLE 31(3)(C) VCLT AND THE PRINCIPLE OF SYSTEMIC INTEGRATION (2013); GARDINER, *supra* note 31, at 289–346.

201. Oxford Manual, *supra* note 89, art. 1.

202. *See* Ronzitti, *supra* note 90, at 30. On the principle of *lex specialis*, see generally Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. Rep. 6, 44 (Apr. 12); Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. Rep. 18, ¶ 24 (Feb. 24).

203. *See* SERENI, *supra* note 99, at 2043; Ronzitti, *supra* note 90, at 30–31.

law of naval warfare, and the law of aerial warfare—there is no reason to consider one of them (land warfare) as general in relation to another one (naval warfare), rather, they should be considered as distinct areas not subject to the *lex specialis/lex generalis* analysis. Accordingly, it is necessary to find other mechanisms to resolve normative conflicts.

Article 53(2) of the Hague Regulations provides one such mechanism, stating:

> [a]ll appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, *exclusive of cases governed by naval law*, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[204]

Accordingly, the law of occupation on the seizure of means of maritime and naval communications and transport is applicable only when not governed by the "droit maritime."[205] Through this rule, the drafters of the Hague Regulations have avoided normative conflicts between the law of occupation and the law of naval warfare in this one area by establishing that the law of occupation pertaining to means of communication and transport controls only if there is no other applicable rule of naval warfare. The contrary view that this rule refers to domestic maritime law rather than to international law pertaining to naval warfare, albeit authoritatively supported,[206] is not persuasive. That interpretation subjects the international law regulation of the means of communication and transport in occupied territory to domestic law only at sea—a result without precedent in the law of war.

As evidence that Article 53(2) is a rule governing potential normative conflicts between the law of occupation and the rules of naval warfare, case law has recognized, based on this provision, the applicability of the rules of naval warfare to the seizure of vessels in internal waters of occupied territory.[207] The recognition that the law of naval warfare applies to the seizure

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204. Hague Regulations, *supra* note 6, art. 53(2) (emphasis added).

205. This is the authoritative French expression employed in Article 53(2). *See id.*

206. *See* 4 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 304–07 (1968).

207. *See* Cession of Vessels and Tugs for Navigation on the Danube (Czech., Greece, Rom., Serb-Croat-Slovene Kingdom v. Austria, Bulg., Ger., Hung.), 1 R.I.A.A. 97, 105–08 (Perm Ct. Arb. 1921); *see also* GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 221 (1957).

of vessels in internal waters instead of the law of occupation based on Article 53(2) is more persuasive than the abovementioned suggestion that this result is the consequence of the principle of *lex specialis*. Although the case law addressed seizures occurring in rivers, Article 53(2) applies regardless of whether the seizure occurs in other internal waters, the territorial sea, or archipelagic waters.

It is suggested here that the Article 53(2) rule should be interpreted as applying to the entire relationship between the law of occupation and the law of naval warfare, and not only to instances involving the seizure of means of communications and transportation. Under this interpretation, if there were an apparent normative conflict between the law of occupation and the law of naval warfare concerning activities in occupied maritime territory, the law of naval warfare would govern.

Finally, it should be noted that the different focuses of the law of occupation—principally concerned with the governance of occupied territory and the protection of the interests of the ousted sovereign—and of the rules of naval warfare—principally concerned with the means and methods of warfare, as well as prize law and maritime neutrality—reduces the possibility of normative conflicts. But, if a normative conflict does occur, we would first turn to the interpretative methodology of Article 31(3)(c) of the VCLT. Only if the conflict still exists would the principle embodied in Article 53(2) of the Hague Regulations favoring the rules on naval warfare be invoked.

VIII. CONCLUSION

This article has demonstrated that the law of occupation extends to maritime territory when a State both exercises actual authority over the maritime territory of another State and occupies a portion of the land territory of that State. This conclusion is the result of the evolution of the concept of territory under international law, which today encompasses the territorial sea, internal waters, and archipelagic waters. The decision of a State to exercise actual authority over portions of the maritime territory of another State without the latter's consent triggers the application of the law of occupation. Occupation burdens the occupying State with a number of obligations, in particular, the duty to maintain public order and protection of natural resources. Currently, this legal framework applies to the occupation of maritime territories off the coast of Western Sahara and the Gaza Strip, and it was relevant to other situations of occupation such as that of Iraq in 2003 and 2004.

Applying the law of occupation to maritime territory fills a governance gap by providing rules for activities not covered by the law of naval warfare or any other source of international humanitarian law. However, the law of occupation does not extend to conduct occurring outside the sovereign maritime territory of an occupied State, that is, on the continental shelf, in the exclusive economic zone, or on the high seas.

The law of occupation recognizes that at times other international humanitarian law rules may apply in occupied maritime territory, in particular, the law of naval warfare if there is a resumption of hostilities. In those instances, the rules of treaty interpretation should be used to resolve apparent conflicts between the law of occupation and the law of naval warfare. If this does not resolve the conflict, the law of naval warfare should prevail because of the principle embodied in Article 52(3) of the Hague Regulations.

The law of occupation is a powerful tool to govern conduct at sea in those areas subject to its application, doing so in a manner that supports the security needs of belligerent States and the welfare of the local population. Accordingly, national and international courts and tribunals should be more willing to apply the law of occupation to maritime territory, as the ECJ should have done in its Western Sahara decisions.