

ILLEGAL OCCUPATION AND ITS CONSEQUENCES

Yaël Ronen*

This Article explores the grounds and consequences of illegal occupation. It proposes that an occupation may be considered illegal if it involves the violation of a peremptory norm of international law that operates erga omnes, and is related to territorial status. Accordingly, illegal occupations are primarily those achieved through violation of the prohibition on the use of force and of the right to self-determination, or maintained in violation of the right to self-determination. This examination forms the basis for a systematic analysis of specific occupations that have been declared illegal by U.N. organs. The second part of the Article addresses the consequences of an occupation's illegality, in view of the political and legal objectives of determining such illegality. It considers the international responsibility for an illegal occupation; the obligation of non-recognition and the law applicable to an illegal occupation; and the right to self-defense. The Article concludes by commenting on the role of "illegal occupation" as a category under international law.

I. Introduction

Occupation has traditionally been regarded as a factual matter. Under Article 42 of the 1907 Hague Regulations on Land Warfare,¹ and its precursor, Article 42 of the 1899 Hague Regulations on Land Warfare,² occupation requires only that territory be "actually placed under the authority of a hostile army." In recent years the concept

* Assistant Professor, Ono Academic College. yael.ronen@ono.ac.il or yael.ronen@cantab.net. I am grateful to participants of the conference, Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Palestinian-Israeli Context, particularly Prof. Martti Koskenniemi and Prof. Eyal Benvenisti, as well as to the Israel Law Review editors and the anonymous referees, for their comments.

¹ See also The 1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 205 Consol. T.S. 277 and its annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter Hague Convention IV and Hague Regulations respectively].

² Regulations Respecting the Laws and Customs of War on Land annexed to the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 187 Consol. T.S. 429.

of occupation has grown to cover various types of situations where there is “effective control of a power ... over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.”³ This definition should perhaps be modified so that the term “occupation” denotes the absence of not only sovereign title, but also of any other internationally-recognized territorial title, such as a lease, trusteeship or, in the past, mandate. At any rate, even the modern definition suggested above⁴ contains only factual requirements.

The exclusion of occupation from a test of legality has at times been put to question, and the term “illegal occupation” has occasionally appeared in international discourse. When used by partisan states,⁵ it might be dismissed as an attempt to render the notion of occupation a pejorative connotation, as if it does not already suffer from that vice.⁶ However, the usage in Security Council and General Assembly resolutions of the term illegal occupation indicates that the international community acting collectively acknowledges this concept, even if in a very limited manner. The

³ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4 (2nd. ed. 2004).

⁴ As well as other definitions, *see, e.g.*, a situation where “the armed forces of a country are in control of foreign territory.” Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT’L L. 249, 250 (1985).

⁵ *See, e.g.*, with regard to the French administration of Mayotte, *see* 1989 U.N.Y.B. 154, U.N. Sales No. E.97.I.11; Israel’s Occupation of Southern Lebanon, *see* 1978 U.N.Y.B. 298, U.N. Sales No. E.80.I.1; Israel regarding Jordan’s occupation of East Jerusalem 1948-1967, *id.* at 347; Indonesia’s annexation of East Timor, *see* Permanent Mission of Portugal to the United Nations, *Note Verbale Address to the Secretary-General: Question of East Timor*, U.N. Doc. A/52/152 (May 20, 1997); Turkey’s Presence in Northern Cyprus, *see* Letter dated May 28, 2004 from the Permanent Representative of Cyprus to the United Nations Addressed to the Secretary-General, U.N. Doc. A/518/815-S/2004/438 (May 28, 2004) (*signed by* Andreas D. Mavroyiannis); the Soviet annexation of Estonia, Latvia, and Lithuania *see* Case of Slivenko v. Latvia, *see* App. no. 48321/99, 2003-X Eur. Ct. H.R. ¶. 76, HC Debs., vol. 980, WA, col. 223 (Mar. 5, 1980); Argentina’s military campaign in the Falkland/Malvinas Islands, *see* Letter Dated Apr. 29, 1982 from the Permanent Representative of the United Kingdom of Great Britain And Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/15010 (Apr. 29, 1982); the Soviet occupation of Afghanistan, 12-1984 BULLETIN OF THE EUROPEAN COMMUNITIES 111 (1984); the Chinese Occupation of Tibet, U.S. S. Res. 271, 102 Cong. (1993); the Syrian occupation of Lebanon, *see* U.S. H. Con. Res. 363 108th Cong. (2004); U.S. and U.K. occupation of Iraq, *see* opinion of the UK General-Attorney, John Kampfner, *Blair was Told it Would be Illegal to Occupy Iraq*, NEW STATESMAN, May 26, 2003, available at <http://www.newstatesman.com/200305260010>; Bahrain control of Hawar Islands, *see* Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001 I.C.J. 40, at 60, ¶ 58 and at 74, ¶107; U.S. control over Guantánamo Bay, *see* Core document Forming Part of the Reports of States Parties: Cuba, ¶¶ 22, U.N. Doc. HRI/CORE/1/Add.84 (Oct. 13, 1997).

⁶ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) (separate Opinion of Judge Kooijmans) [hereinafter *Armed Activities*].

term has also been mentioned, but rarely explored, by scholars.⁷ Even less attention has been paid to the consequences of illegal occupation.⁸

The purpose of this Article is to shed light on international practice concerning the notion of illegal occupation, with emphasis on the consequences of such an occupation. Its point of departure is that the juridical category “illegal occupation” exists; yet occupation is not inherently illegal, and consequently, not all occupations fall within this category. That occupation is in itself legitimate under international law has been confirmed in as late as 2003 by S.C. Resolution 1483⁹ in which the Security Council recognized the “specific authorities, responsibilities, and obligations under applicable international law” of the coalition partners in Iraq “as occupying powers under unified command[.]”¹⁰ Moreover, references to the term “illegal occupation” are sufficiently discriminate to refute the possibility that this usage is entirely arbitrary. Part II of the Article examines the parameters that should govern the legality (or lack thereof) of occupation, and reviews specific norms that have been suggested in this context.

⁷ Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44, 66 (1990); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 409 (6th ed. 2003); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 101 (2000); *But see* a more detailed analysis in ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 55, 99 (1995); Stefan Talmon, *The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, IUS COGENS AND OBLIGATIONS ERGA OMNES* 99, 116 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); BENVENISTI, *supra* note 3, at 187. Orna Ben-Naftali, Aeyal M. Gross, & Keren Michaeli, *Illegal Occupation: Framing the Occupied Territories*, 23 BERKELEY J. INT’L L. 551 (2005); ENRICO MILANO, *UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW* (2006).

⁸ A discussion of some aspects in the context of the effect of violation of *jus ad bellum* on *jus in bello* is offered by Alexander Orakhelashvili, *Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, 12 J. CONFLICT & SECURITY L. 157 (2007).

⁹ S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

¹⁰ Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 I.D.F. L. REV. 19, 36-37 (2003). *See also* Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, ¶ 62, U.N. Doc. A/HRC/4/17 (Jan 29, 2007) (prepared by John Dugard). There are various documents that suggest that an occupation is by definition an illegal situation. Documents that refer to colonial domination, occupation, and racism, (*see, e.g.* the Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 16(1), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc A/9631 (Dec. 12, 1974); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), Dec. 12, 1977, 6 U.S.T. 3114, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]), particularly in the context of the legitimacy of the struggle for self-determination, suggest that just as colonial domination and racism are *ipso facto* illegal, so is occupation. For a review of some opinions to this effect and their critique *see* Ben-Naftali, Gross & Michaeli, *supra* note 7, at 557-59.

Against this background, Part III examines U.N. practices in which occupations have been declared illegal. Part IV analyses some of the potential consequences of illegality under existing international law.

II. *Grounds for Illegality of Occupation*

In the absence of agreement whether an occupation is subject to a test of legality, there is obviously no agreed definition to the term “illegal occupation.” Existing literature on illegal occupation for the most part assumes the applicability of the term with respect to a specific norm¹¹ or instance of occupation.¹² This part of the Article offers a typology of norms that should govern the legality of occupation. It then places within this typological analysis the particular norms that have been put forward as grounds for illegality.

A. *Parameters*

Occupation designates the territorial status of a territory, and as such has consequences *erga omnes*. It may constitute the violation of a consent-based obligation (presumably by the occupant) toward certain individual states (for instance an obligation not to occupy the territory in question),¹³ without raising any legal issue *vis-à-vis* other states. However, labeling such an occupation illegal is problematic, as it makes the status of territory, which ought to be uniform towards all states, subject to opposability. Such incoherency can be avoided by admitting only violations that operate uniformly toward all states, as grounds for illegal occupation. Accordingly, a norm that governs the legality or illegality of an occupation should be one that has *erga omnes* consequences.

¹¹ CASSESE, *supra* note 7, at 99; BENVENISTI, *supra* note 3, at 68.

¹² Ben-Naftali, Gross, & Michaeli, *supra* note 7; MILANO, *supra* note 7.

¹³ This is comparable to the notion that the existence of a state constitutes the violation of an obligation *inter partes*, *see, e.g.*, the establishment of the Federal Republic of Germany in violation of the quadripartite agreements on the status of Germany, *see* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 454-55 (2nd ed. 2006).

In addition, if the illegality of an occupation results from the violation of an ordinary norm of international law, the violation may be waived by some states while not by others. Again, the occupation would become legal with respect to some states but not with respect to others. To ensure that the legality of an occupation remains a matter of status rather than subject to opposability, the norm that governs the legality or illegality of an occupation should also be a peremptory one. Its violation cannot be waived, and thus operates uniformly toward all states and renders it appropriate for determining territorial status.

Inevitably, even when a territorial situation is illegal because it is in violation of a peremptory norm of *erga omnes* character (such as the prohibition on the use of force or the violation of the obligation to respect the right of peoples to self-determination, both discussed below), the decision whether to uphold legality or not is in the hands of states, unless the Security Council takes action to enforce a uniform policy. States sometimes recognize an illegal territorial situation as valid. Such were the cases, for example, of the Swedish stance toward the Soviet annexation of the Baltic States in 1940,¹⁴ and the Australian recognition of the Indonesian annexation of East Timor.¹⁵ Nonetheless, if the term “illegal occupation” is reserved to occupations created or maintained in violation of a peremptory norm, legally, such a waiver is invalid.¹⁶

A third parameter might be that the illegality goes to the heart of the status of occupation. This distinguishes an occupation which is *accompanied by* a violation of international law from an occupation which *rests on* a violation of international law. Without this distinction, any violation of international law puts in doubt the status of the occupation as a whole, and the status of the occupation may change at any moment according to the particular measures that are taken by the occupant at that moment. To avoid such a problem, the illegality should be limited to violations that directly bear on the continued existence of the occupation.

¹⁴ William J.H. Hough, III, Note, *The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*, 6 N.Y. L. SCH. J. INT'L & COMP. L. 301 (1985).

¹⁵ *Australian Practice in International Law*, 8 AUST. Y.B. INT'L L. 253, 279 (1978-1980); East Timor (Portugal v. Australia), Counter-memorial of the Government of Australia, ¶¶ 175-76, (June 1, 1992), available at <http://www.icj-cij.org/docket/files/84/6837.pdf> (last visited Jan. 29, 2008); Rejoinder of the Government of Australia, ¶¶ 44-54, East Timor (Portugal v. Australia) (July 1, 1993), available at <http://www.icj-cij.org/docket/files/84/6841.pdf> (last visited Jan. 29, 2008).

¹⁶ A separate question is whether a violation of a peremptory norm can be waived by the entire international community.

The three parameters: a peremptory norm, of *erga omnes* character, and getting to the root of occupation—are interrelated. Obligations that govern territorial status,¹⁷ as well as peremptory norms,¹⁸ are characterized by their *erga omnes* effect. The choice of norms that fulfill these requirements is therefore not unlimited.

B. *The Norms*

This section reviews specific norms that have been suggested as governing the legality of occupation, in light of the parameters suggested above. The purpose of the current section is not to analyze each norm exhaustively, but to set the background for examination of international practice with respect to occupations declared illegal by U.N. organs.

The most commonly invoked norm for testing the illegality of an occupation is the prohibition on the use of force. This is generally accepted as a peremptory norm¹⁹ that operates *erga omnes*. It goes to the root of occupation, i.e., without the use of force there is no occupation (legal or otherwise). The illegality of the use of force may lie in the very resort to force, when it occurs in circumstances that do not substantiate a claim of self-defense. Even when the resort to force is justified by the right to self-defense, the use of force may be illegal if it is disproportionate to the threat against which it is exercised.²⁰

Concluding the illegality of the occupation from the illegality of the use of force which led to it creates a nexus between *jus ad bellum* and *jus in bello*. This nexus has generally been avoided. This may raise doubt whether *jus ad bellum* is an appropriate

¹⁷ Stefan Kadelbach, *Ius Cogens, Obligations Erga Omnes and other Rules—the Identification of Fundamental Norms* in Tomuschat & Thouvenin, *supra* note 7, at 25.

¹⁸ Michael Byers, *Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules*, 66 *NORDIC J.INT'L L.* 211, 236-37 (1997). The relationship between the peremptory and *erga omnes* characteristics of a norm is discussed in Kadelbach, *supra* note 17, at 25.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, 100-01, ¶ 190 (June 27) [hereinafter *Nicaragua*]. International Law Commission, *Report of the International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts*, 283 (Commentary to Article 40, ¶ (4)), U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter *ILC Draft Articles*].

²⁰ See, e.g., *Armed Activities*, *supra* note 6, at ¶ 147. Or, according to a different approach, if it is disproportionate to the attack instigating it. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 225 (4th ed. 2002).

ground for determining the legality of an occupation. On the other hand, it is arguable that if violation of *jus ad bellum* has no concrete implications within *jus in bello*, it risks becoming a dead letter.²¹

Another norm often invoked as a basis for testing the illegality of an occupation is the obligation to respect peoples' right to self-determination.²² The right to self-determination is generally accepted as a peremptory norm,²³ it operates *erga omnes*,²⁴ and is likely to go to the core of the territorial status. The violation of the right may be implicated in the very creation of an occupation, as the corollary of the prohibition on the use of force: its breach is an illegal use of force looked at from the perspective of the victimized people, rather than from that of the victimized state or territory.²⁵

The right to self-determination may also be invoked with respect to the maintenance of the occupation, regardless of the legality of the original resort to force. Such a violation can take a variety of forms along a continuum of gravity. At one end of the continuum are individual acts that adversely affect the right to self-determination, but are of relatively low severity and are reversible. At the other end is conduct by the occupant which amounts to a complete rejection of the basic tenets of the law of occupation. Such a rejection may be explicit, when an occupant purports to annex the occupied territory under its domestic law.²⁶ Annexation may also be covert, when the occupant formally acknowledges its status as occupant, but takes measures that effectively amount to annexation, and at the same time frustrates the resolution of the territorial conflict and instead prolongs the occupation.

The latter situation, namely prolongation of an occupation and its maintenance in violation of the fundamental principles of occupation, is suggested by Ben-Naftali,

²¹ Orakhelashvili, *supra* note 8, at 195-96.

²² CASSESE, *supra* note 7, at 55 & 90-99.

²³ East Timor Case (Portugal v. Indonesia) 1995 I.C.J. 90, 102, ¶ 29; ILC Draft Articles, *supra* note 19, at 113 (commentary to art. 40 ¶ 5).

²⁴ *Id.*

²⁵ CASSESE *supra* note 7, at 55 & 99. The author appears to argue that even an occupation falling within the scope of Article 51 is unlawful. The basis for this argument remains unclear.

²⁶ BENVENISTI, *supra* note 3, at 68. This situation may be more appropriately addressed as an "illegal annexation." However, with respect to both Iraq's annexation of Kuwait and Israel's annexation of Jerusalem (and possibly the Golan Heights, see Leon Sheleff, *Application of Israeli Law to the Golan Heights is not Annexation*, 20 BROOK. J. INT'L L. 333 (1994) and Asher Maoz, *Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 355 (1994) the terminology used was "illegal occupation."

Gross and Michaeli, as a separate and distinct ground for illegality.²⁷ The U.N. Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 has to some extent endorsed this line of reasoning in his August 2007 report, and proposed that an authoritative determination be requested from the I.C.J. on “the legal consequences of a prolonged occupation that has acquired some characteristics of apartheid and colonialism and has violated many of the basic obligations imposed on an occupying Power.” He then intimated that such an occupation may have ceased to be a lawful regime, particularly in respect of measures aimed at the occupant’s own interests.²⁸ The Special Rapporteur joined together a variety of measures relating to the maintenance of an occupation, which, at least cumulatively, may give rise to its illegality. The notion that a prolonged occupation is illegal is consonant with the parameters suggested above. It is however questionable whether it constitutes a separate ground for illegality: First, the objective of the law of occupation, embodied in the basic tenets elaborated by Ben-Naftali, Gross and Michaeli—namely the vesting of sovereignty in the population; the occupant’s obligation of trust toward the population; and the temporary nature of occupation—is to safeguard the sovereignty of the ousted or prospective sovereign, or, in modern-day parlance, the right to self-determination of the local population.²⁹ Thus, the violation of the law of occupation is ultimately a violation of the right to self-determination. Accordingly, this third ground can in fact be regarded as a specific situation on the continuum of violations of self-determination, admittedly at the very end of it.

A different analysis subsumes this ground into the prohibition on the use of force. Both Cassese and Benvenisti support the notion that a protracted occupation is illegal, particularly when combined with a refusal to negotiate withdrawal from the territory. Neither writer regards this as an independent ground of illegality. Cassese argues that a protracted occupation no longer satisfies the requirement of self-defense,³⁰ while Benvenisti labels it an aggressive act.³¹ Both writers concede that a protracted occupation is in violation of the right to self-determination, but link this violation to the illegality of the use of force. Finally, it is difficult to see why a violation of the fundamental principles of occupation is qualitatively distinct from the massive

²⁷ Ben-Naftali, Gross, & Michaeli, *supra* note 7, at 554, 570-79, 592-99.

²⁸ Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, *Report*, ¶ 8, U.N. Doc. A/62/275 (Aug 17, 2007) (prepared by John Dugard).

²⁹ BENVENISTI, *supra* note 3, introduction to the paperback edition.

³⁰ CASSESE, *supra* note 7, at 99.

³¹ BENVENISTI, *supra* note 3, at 187, 216.

plurality of violations of individual international humanitarian norms embodied, *inter alia*, in the law of occupation, given that the violation of the fundamental principles of the law of occupation³² is reflected in the cumulative effect of the violations of individual norms.

At the same time, the third ground proposed, namely violation of the fundamental principles of occupation, may carry particular weight because not all violations of the obligation to respect the right to self-determination necessarily render an occupation illegal. The justification for regarding an occupation as illegal on grounds of violation of self-determination grows as the reversibility of the acts diminishes, their adverse effect on self-determination grows, and consequently they become ingrained in the occupation.

Another ground for illegality of an occupation has been put forward, for example by Falk and Weston, namely the violation of international humanitarian law during the existence of the occupation.³³ The ICJ has more than once stated that some international humanitarian law norms are of an *erga omnes* character.³⁴ It has not indicated which norms possess such a character. Common Article 1 of the Geneva Conventions³⁵ stipulates the obligation to respect and ensure respect for certain rights “under all circumstances.” Article 75(2) of Additional Protocol I also guarantees certain rights unconditionally. These formulations support classification of those rights, if they are recognized also under customary law, as peremptory norms.³⁶ Nonetheless, it is submitted that the violation of international humanitarian law should not be considered an independent ground for illegality of an occupation, but at most a subset of the violation of the right to self-determination. Examples include the requisitioning of

³² See, e.g., Ben-Naftali, Gross, & Michaeli, *supra* note 7, at 579-90.

³³ Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT’L L. J. 129, 155 (1991). The authors also suggest that the measures in question also impinge on the right to self-determination. The U.N. Secretary-General used the terminology “illegal occupation” to indicate the violations by Israel of international humanitarian law in the maintenance of the occupation. Frederic Eckhard, Letter to the Editor, *A Delicate Word in the Mideast*, N.Y. TIMES, Mar. 23, 2002, at A16.

³⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 199, ¶¶ 155, 157 (July 9) [hereinafter *Wall Advisory Opinion*]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*]; ILC Draft Articles, *supra* note 19, at 113 (commentary to art. 40, ¶ 5); but see President (then Judge) Higgins in her separate opinion in *Wall Advisory Opinion* at 529, ¶ 39.

³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

³⁶ Kadelbach, *supra* note 17, at 30-31.

real property for non-military purposes, population transfers to and from the territory, and extension of the occupant's law to the territory.³⁷ Other violations, such as arbitrary arrests, violation of family rights, or failure to compensate for requisition or to pay usufruct, are less likely to affect the right to self-determination.³⁸ The capacity of these violations to render an occupation illegal is arguable because they do not necessarily go to the core of occupation. If we adopt the parameter under which the illegality is innate to the occupation, violations that may be rectified while occupation persists should not be regarded as affecting the legality of the occupation as a whole. For example, they may be reversible, in which case the entire occupation, if previously held to be illegal, would revert to legality. In other words, violations of international humanitarian law do not, *per se*, satisfy the third parameter proposed for a norm governing the legality of occupation. When they do, they may constitute elements in the violation of the right to self-determination. Indeed, the literature suggesting that illegality is based on violations of international humanitarian law actually assumes that the violations amount to prolongation of the occupation and veiled annexation,³⁹ and thereby to a violation of the right to self-determination.

C. Conclusion

This part proposes parameters for the illegality of an occupation. In essence, it defines an illegal occupation as one that rests on the violation of a peremptory norm that operates *erga omnes* and is innate to the existence of the occupation. Together these criteria create the "*ius ad occupationem*." The principal situations that fulfill these criteria are the violation of *jus ad bellum* and the violation of the right to self-determination, both as a corollary of the former and as an independent ground related to the maintenance of the occupation.

This list of norms is not exhaustive. There are other potential grounds for the illegality of an occupation, such as the violation of *jus in bello* in the course of

³⁷ Hague Regulations, *supra* note 1, violation of art. 52; Fourth Geneva Convention, *supra* note 35, art. 49; and Hague Regulation, *supra* note 1, art. 43 and Fourth Geneva Convention, *supra* note 35, art. 64, respectively.

³⁸ Fourth Geneva Convention, *supra* note 35, violation of arts. 42 & 27; Hague Regulations, *supra* note 1, arts. 52, 55.

³⁹ Falk & Weston, *supra* note 33, at 155; U.N. Doc. A/62/275, *supra* note 28, at ¶ 8.

establishing the occupation,⁴⁰ which raises questions exceeding the current discussion.⁴¹ There is no international practice regarding an occupation achieved directly and exclusively through violation of *jus in bello*. Another ground that may be considered in this context is the violation of sovereignty. Under certain circumstances (indeed more often than not), this violation is also a violation of the prohibition on the use of force, and at least partly covered by the violation of the right to self-determination. Whether the two coincide fully or not depends on the interpretation we adopt of the right to self-determination, a matter outside the scope of this Article.

Following this analytical review, it is now possible to examine the grounds relied on in various instances where occupations have been declared illegal by U.N. organs.

III. U.N. Practice Regarding Illegal Occupations

In order to establish the current state of international law, an examination of international practice is essential. This part of the Article analyses those instances the international community has collectively determined the illegality of an occupation, and identifies the norms that were invoked or relied on in such a determination. It reviews both general declarations and the treatment of specific instances of occupation.

Since another aim of the Article is to highlight the consequences of illegality as they arise from international practice, the discussion is limited to cases the illegality of the occupation was (or still is) universally accepted, thereby isolating the consequences of illegality from other potential factors. For this reason, the Article focuses on illegality determined by U.N. organs. Needless to say, this does not always reflect true universality, particularly when the determination of illegality is made other than unanimously. Nonetheless, the U.N. is currently the best mechanism for universal action, and particularly when the Security Council is the acting organ, its action largely

⁴⁰ For example, territory may be occupied through the use of weapons which are prohibited under customary international law, or through violation of the principles of distinction and proportionality.

⁴¹ Such as whether territory is by definition a necessary military objective and whether the act of occupation is subject to the same tests of proportionality as other attacks, namely that the expected incidental injury to civilians and civilian objects is measured against the concrete and direct military advantage anticipated gained by the control of the territory. Additional Protocol I, *supra* note 10, art. 51(5)(b).

eliminates the issue of opposability of the occupation's illegality. When the illegality is determination by the I.C.J., it is actionable only between the parties, but it reflects general international law.

The analysis offered here of the consequences of illegal occupation is, in fact, relatively non-case-specific; as such it is germane to various other cases of illegal occupation, including ones not studied here in detail, such as the annexation of the Baltic States by the Soviet Union, Indonesia's annexation of East Timor or the status of Western Sahara.⁴²

A. *Declarations*

Three general U.N. documents address the status of occupation. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations provides⁴³ “[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter.” This declaration reflects the customary prohibition on occupying territory by illegal use of force. The same prohibition can be found in two other U.N. declarations, much less prominent. The 1969 Declaration on Social Progress and Development⁴⁴ explicitly uses the term “illegal occupation.” It calls for “[c]ompensation for damages, be they social or economic in nature—including restitution and reparations—caused as a result of aggression and of illegal occupation of territory by the aggressor.” The 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations stipulates:⁴⁵ “Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from

⁴² The occupation of Iraq, although arguably illegal, is regulated, *inter alia*, by Security Council resolutions. Compliance by states with such resolutions takes precedence over conflicting international law obligations, U.N. Charter, art. 103.

⁴³ G.A. Res. 2625 (XXV) ¶ 10, U.N. GAOR, 25th Sess. Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter 1970 Declaration].

⁴⁴ G.A. Res. 2542 (XXIV), art. 26, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11 1969) [hereinafter 1969 Declaration].

⁴⁵ G.A. Res. 42/22, ¶ 10, U.N. GAOR, 42nd Sess., Supp. No. 49, U.N. Doc. A/RES/42/22 (Nov. 18, 1987) [hereinafter 1987 Declaration].

the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.”

In terms of the designation of an occupation as illegal, the 1969 Declaration and the 1987 Declaration add nothing to the 1970 Declaration, which is highly authoritative as the codification of customary international law.⁴⁶ All three documents link the illegality of an occupation to the violation of the prohibition on the use of force. None of them indicate the circumstances under which the use of force (and consequently the occupation) is illegal. This preliminary determination should be made by the Security Council, in light of Articles 2(4) and 51 of the U.N. Charter. In practice, even when the Security Council is seized of a specific dispute, the decision on the legality of the use of force is normally left at the discretion of individual states.⁴⁷ The two declarations are nonetheless of interest because they address the consequences of the illegality of an occupation, discussed in Part IV.

B. *Specific Conflicts Considered in the United Nations*

Occupations have been declared illegal by United Nations organs in a number of cases. In few of them was the basis for illegality clearly specified, or its consequences elaborated.

1. *Namibia and Guinea-Bissau*

In 1966, the U.N. General Assembly terminated South Africa's mandate over Namibia, on the ground that South Africa had violated the terms of that mandate.⁴⁸ This termination was reaffirmed by Security Council Resolutions 264 (1970)⁴⁹ and 276 (1970).⁵⁰ In the 1971 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding

⁴⁶ *Nicaragua*, *supra* note 19, at 98-101, ¶¶ 187-90; *Wall Advisory Opinion*, *supra* note 34, at 171, ¶ 87.

⁴⁷ GRAY, *supra* note 7, at 85.

⁴⁸ G.A. Res. 2145 (XXI), U.N. Doc. A/6316 (Oct. 27, 1966).

⁴⁹ S.C. Res. 264, U.N. Doc. S/RES/264 (Mar. 20, 1969).

⁵⁰ S.C. Res. 276, U.N. Doc. S/RES/276 (Jan. 30, 1970).

Security Council Resolution 276 (1970) (the *Namibia Advisory Opinion*), the I.C.J. confirmed the validity of the termination of the mandate.⁵¹ Consequently it determined that South Africa's presence in Namibia was illegal, and that its status there was that of an occupant. The I.C.J. did not use the term "illegal occupation." It only stated that "[b]y maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities..."⁵² From that moment, the Security Council and General Assembly, which had until then referred to Namibia as occupied territory in which South Africa was maintaining an illegal presence,⁵³ began to refer to Namibia as "illegally occupied," and to the situation as one of "illegal occupation". This terminology appeared consistently and was used routinely by both individual states and U.N. organs⁵⁴ until the conflict was resolved in 1988.

In 1973 the Portuguese colony of Guinea-Bissau declared itself an independent state while still fighting the Portuguese colonial government.⁵⁵ Shortly afterwards, the U.N. General Assembly adopted Resolution 3061 (XXVIII), entitled "Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic," which states

The General Assembly,

Recognizing the inalienable right of all peoples to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples...

⁵¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 at 54, ¶ 118, details at 50, ¶ 105 (June 21) [hereinafter *Namibia*].

⁵² *Id.* at 54, ¶ 118.

⁵³ See, e.g., S.C. Res. 264, *supra* note 49, ¶¶ 2; G.A. Res. 2403 (XXIII), ¶¶ 3, U.N. GAOR, 23rd Sess. Supp. No. 18, U.N. Doc A/7218 (Dec 16, 1968).

⁵⁴ See, e.g., S.C. Res. 301, U.N. Doc. S/RES/301 (Oct. 20, 1971); S.C. Res. 366, U.N. Doc. S/RES/366 (Dec. 17, 1974); S.C. Res. 385, U.N. Doc. S/RES/385 (Jan. 30, 1976); G.A. Res. 2871 (XXVI) U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (Dec. 20, 1971); G.A. Res. 41/39A, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/39A (Nov. 20, 1986); S.C. Res. 601, U.N. Doc. S/RES/601 (Oct. 30, 1987); and G.A. Res. 43/26A, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/RES/43/26A (Nov. 17, 1988).

⁵⁵ Norrie MacQueen, *Belated Decolonization and Politics against the Backdrop of the Cold War, Portugal, Britain, and Guinea-Bissau's Proclamation of Independence, 1973–1974*, 8 J. COLD WAR STUD. 29 (2006).

Noting with satisfaction that the State of Guinea-Bissau assumes the sacred duty to expel the forces of aggression of Portuguese colonialism from that part of the territory of Guinea-Bissau which they still occupy...

2. *Strongly condemns* the policies of the Government of Portugal in perpetuating its illegal occupation of certain sectors of the Republic of Guinea-Bissau...⁵⁶

General Assembly and Security Council resolutions⁵⁷ concerning Portugal's other colonial holding in Africa do not refer to occupation at all.

The cases of Namibia and Guinea-Bissau demonstrate the complex relationship among the right to self-determination, the prohibition on the use of force, the existence of occupation and the legality of occupation.

In Namibia and Guinea-Bissau, occupation did not result from the entry of foreign forces into the territory in question. In both cases, the foreign forces (of South Africa and Portugal, respectively) had initially⁵⁸ exercised effective control over the territory under an internationally-recognized title (colonial holding by Portugal and a mandate by the League of Nations to South Africa).⁵⁹ The two territories became occupied once the controlling states lost the titles they had held. This loss was the outcome of the controlling states' violations of the population's right to self-determination. The right of the Guineans to self-determination led to recognition of Guinea-Bissau's independence;⁶⁰ the violation of the right led to the disentanglement of Portugal. As a result Guinea-Bissau became a "foreign" territory to which Portugal had no longer any right.⁶¹ Namibia's foreign nature with respect to South Africa was never disputed,⁶²

⁵⁶ G.A. Res. 3061 (XXVIII), U.N. GAOR, 28th Sess. Supp. No. 30, U.N. Doc. A/9030 (Nov. 2, 1973).

⁵⁷ See, e.g., G.A. Res. 3113(XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, (Dec. 12, 1973), S.C. Res. 322, U.N. Doc. S/RES/322 (Nov. 22, 1972).

⁵⁸ For the purposes of this Article. South Africa's first status in the territory was of occupant following the ousting of the German forces during the First World War. This period of occupation is of no concern to this Article.

⁵⁹ See the definition of occupation suggested in the introduction.

⁶⁰ Other colonies did not become "occupied" precisely because they were not recognized as independent and therefore foreign. See CRAWFORD, *supra* note 13, at 137.

⁶¹ For a comparison in this context of Guinea-Bissau with other Portuguese colonies see CRAWFORD, *id.*

⁶² Except possibly by South Africa, whose attitude toward Namibia was unclear and inconsistent. At times South Africa appeared to claim that Namibia had been incorporated into it.

but South Africa had initially held an internationally-recognized mandate over it. The violation by South Africa of the right of Namibians right to self-determination led the U.N. to terminate the mandate and thereby to deprive South Africa of the right to control the territory. In both cases, the controlling states failed to withdraw their forces even when their title to the territory was terminated. At this moment the non-compliance with *jus ad bellum* became pertinent.⁶³ The prohibition on the use of force covers not only entry into a territory, but also failure to leave it.⁶⁴ Accordingly, the continued but unauthorized presence of foreign forces in the territories constituted an illegal use of force unless justified by self-defense (which neither South Africa nor Portugal claimed as grounds for maintaining their control over the territories in question). It also constituted occupation.

The direct basis for the designation of the occupation as illegal was therefore the violation of *jus ad bellum*. This is particularly clear with regard to Portugal's occupation of Guinea-Bissau. General Assembly Resolution 3061 (XXVIII) repeatedly refers to the aggression by Portugal,⁶⁵ including in the paragraphs expressly mentioning the illegal occupation. Yet it is impossible to isolate the violation of the right to self-determination from the violation of *jus ad bellum*. In both cases, the right to self-determination was the grounds, directly or indirectly, for depriving the controlling states of the right under international law to control the territory. It thus brought into action the prohibition on the use of force. As noted, the ICJ did not use the term "illegal occupation." The phrase was coined with respect to Namibia by the Security Council and General Assembly. As political organs, they were perhaps less restrained in their use of terminology than the Court.

2. Arab and Palestinian Territories

In 1975, the General Assembly adopted Resolution 3414(XXX) on the situation in the Middle East, in which it stated:⁶⁶ "[g]uided by ... those principles of international law

⁶³ Separate opinion of Vice-President Ammoun in *Namibia*, *supra* note 51, at 89, ¶ 12.

⁶⁴ The *Namibia* case is a case of "continued presence." Dinstein defines as "constructive armed attack" a situation where the forces of one state stationed by permission on another state's territory refuse to withdraw upon expiry of the time allotted for their presence, *see* DINSTEIN, *supra* note 20, at 196. *See* also Definition of Aggression, G.A. Res. 3314 (XXIX), ¶¶ 3(e) of annex, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974).

⁶⁵ G.A. Res. 3061, *supra* note 56, prmb. ¶¶ 2, 3, 4, operative ¶¶ 2, 3, 4.

⁶⁶ G.A. Res. 3414 (XXX), prmb. ¶ 2, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 5, 1975).

which prohibit the occupation ... of territory by the use of force and which consider any military occupation, however temporary, or any forcible annexation of such territory, or part thereof, as an act of aggression[.]”

From 1977 until 1980, General Assembly resolutions on the situation in the Middle East contained paragraphs referring to the illegal Israeli occupation of Arab and Palestinian territories. The standard paragraphs provided:⁶⁷ “[t]he General Assembly, ... *Deeply concerned* that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights[.]”

In addition, numerous General Assembly resolutions⁶⁸ condemn “Israel’s continued occupation of Arab territories, in violation of the Charter of the United Nations, the principles of international law and repeated resolutions of the United Nations[.]” General Assembly Resolution 3414(XXX) and subsequent ones that echo it⁶⁹ are ambiguous. On the one hand they refer to “those principles of international law which prohibit the occupation...of territory by the use of force” and thus imply that

⁶⁷ G.A. Res. 32/20, prmb. ¶ 4 and operative ¶ 1, U.N. GAOR, 32nd Sess., Supp. No. 45, U.N. Doc. A/RES/32/20 (Nov. 25, 1977). Virtually identical paragraphs appear in, G.A. Res. 33/29, prmb. ¶ 4 and operative ¶ 1, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/RES/33/29 (Dec. 7, 1978) and in G.A. Res. 34/70, prmb. ¶ 5 and operative ¶ 1, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/70 (Dec. 6, 1979). *See also* Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, G.A. Res. 35/122E, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/RES/35/122E (Dec. 11, 1980).

⁶⁸ G.A. Res. 3414, *supra* note 66, operative ¶ 2; G.A. Res. 32/20, *supra* note 67, ¶ 1; *see also* G.A. Res. 33/29, *supra* note 67, and 34/70, *supra* note 67, common operative ¶ 1; *see also* G.A. Res. 36/226A, operative ¶ 1, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/RES/36/226A (Dec. 17, 1981); *see also* G.A. Res. 35/122E, *id.*, prmb. ¶ 2; G.A. Res. 40/168A, operative ¶ 5, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/168A (Dec. 16, 1985); G.A. Res. 43/54A, operative ¶ 5, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/RES/43/54A (Dec. 6, 1988); G.A. Res. 44/40A operative ¶ 5, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/40A (Dec. 4, 1989); G.A. Res. 45/83A, operative ¶ 5, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/83A (Dec. 13, 1990).

⁶⁹ *See, e.g.* G.A. Res. 38/180A prmb. ¶ 5, U.N. GAOR, 38th Sess., Supp. No. 47, U.N. Doc. A/RES/38/180A (Dec. 19, 1983); G.A. Res. 40/168B, prmb. ¶ 5, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/168B (Dec. 16, 1985); G.A. Res. 43/54B prmb. ¶ 5, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/RES/43/54B (Dec. 6, 1988); G.A. Res. 44/40B, prmb. ¶ 5, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/40B (Dec. 4, 1989); G.A. Res. 47/63A, preambular ¶ 5, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/RES/47/63A (Dec. 11, 1992).

the legality of an occupation depends on compliance with *jus ad bellum*. While this is hardly a novel idea, its applicability to the case of Israel is noteworthy because the United Nations has never formally denounced Israel's resort to force in 1967 as illegal. On the other hand, according to the Resolution, the said principles "consider any military occupation...as an act of aggression."⁷⁰ This suggests a more controversial stance, namely that any occupation is inherently illegal. Since at issue is the work of a political body, too much legal significance should not be attached to the resolutions. Instead, despite the absence of an explicit condemnation to this effect, the resolutions should probably be read as a reflection of the position of Arab and other states, namely that Israel had acted aggressively in 1967. States also invoke the violation of the right to self-determination, as a corollary of the violation of *jus ad bellum*⁷¹ as a ground for the illegality of the Israeli occupation.

Even if the creation of the occupation was lawful, a violation of self-determination may arise from the manner of the occupant's conduct in the maintenance of the occupation. The first resolution on the illegality of the occupation by Israel was adopted eight years after the occupation, by which time claims were made that Israel's maintenance of the occupation (regardless of how it was achieved) was prejudging the future status of the territories and as such was in violation of the obligation to respect the right to self-determination of the Palestinians.⁷² The 1977-1980 resolutions concerning the Israeli occupation refer both to the right to self-determination⁷³ and to the illegality of the occupation. Interestingly, they do not clearly link the two. According to these resolutions, the deprivation of the right to self-determination concerns the Palestinians and dates to 1948,⁷⁴ while the illegal occupation concerns all Arab territories (i.e., including the Syrian Golan Heights and Egyptian Sinai) and dates to 1967. These different formulations indicate that the drafters of the resolution distinguished the illegality of the occupation from the right to self-determination.⁷⁵

⁷⁰ G.A. Res. 3414, *supra* note 66, prml. ¶ 2. Yet even the controversial definition of aggression adopted the preceding year in G.A. Res. 3314, *supra* note 64, qualified as aggression "[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack[...]" (art. 3(a)), thereby limiting occupation to a violation of *jus ad bellum*.

⁷¹ GRAY, *supra* note 7, at 102.

⁷² See, e.g., G.A. Res. 3236 (XXIX), prml. ¶ 6, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3236 (Nov. 22, 1974).

⁷³ "[T]heir inalienable national right."

⁷⁴ The resolutions passed in the late 1970s refer to the deprivation "three decades" earlier, *supra* note 67.

⁷⁵ This distinction between violation of sovereignty and violation of the right to self-determination may be cited in support of the analysis offered by Ben-Naftali, Gross, & Michael, who regard a

One might construe a broader understanding of self-determination as encompassing violations of sovereignty, in which case the right to self-determination of the Arab States was also violated, and not only the right of the Palestinian people. However, the resolutions do not support such a reading, but imply some variance between illegality of occupation and the right to self-determination. The Arab states might not have wanted to have the protection of their acknowledged sovereignty relegated to the vague sphere of self-determination, while the Palestinian cause had no alternative ground. The distinction between self-determination and sovereignty (where both are applicable) may have become less crucial in view of the development of the right to self-determination in the thirty-odd years that have passed since the resolutions were adopted.

Despite these inconsistencies, a link between the illegality of the occupation and the claimed violations of both *jus ad bellum*⁷⁶ and self-determination in the maintenance of the occupation can be inferred from the resolutions and the surrounding debates.

prolonged occupation which frustrates the resumption of sovereignty as an independent ground for illegality. However, it is suggested here that the obligation to respect the right to self-determination may encompass more, in the context of illegal occupation, than the violations of the law of occupation through the prolongation of occupation.

⁷⁶ G.A. Res. 32/20, *supra* note 67, prml. ¶ 3 takes into account the resolutions of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, held at Colombo on Aug. 16-19, 1976, concerning the situation in the Middle East and the question of Palestine (Fifth Conference of Heads of State or Government of Non-Aligned Countries, Colombo, Aug. 16-19, 1976, Resolution on the Middle East, NAC/Conf.5/S/Res.8 and Res.9 contained in U.N. Econ. & Soc. Council, Report of the Economic and Social Council, U.N. Doc. A/31/197, at 116, 119 (Sept. 8, 1976)), in which there is reference to Israeli aggression. However, the usage of the term “aggression” in these resolutions is not clearly in the context of *jus ad bellum*, and can be linked to claims of violation of international humanitarian law, international human rights and denial of self-determination. G.A. Res. 33/29, *supra* note 67, takes into account the decisions of the Conference of Ministers for Foreign Affairs of Non-Aligned Countries held at Belgrade on 25-30 July 1978 concerning the situation in the Middle East and the Question of Palestine. These resolutions refer to the illegality of Israel’s exploitation of Palestinian resources (Conference of Ministers for Foreign Affairs of Non-Aligned Countries, Beograd, 1978, Resolution on the Middle East, NAC/Conf.5/FM/PC/L.1, ¶ 12 (July 30, 1978), *reprinted in* Conference of Ministers For Foreign Affairs of Non-Aligned Countries, Belgrade, July 25-30, 1978, Documents, U.N. Doc. A/33/206, at 131 (Sept. 6, 1978). However, in the Final Declaration of the Conference (to which Res. 33/29 does not refer), the Foreign Ministers confirm the need for concern “in view of Israel’s expansionist policy and attempts at procrastination which aim at continuing its illegal occupation of Palestinian and Arab territories...” This single reference to the illegality of the occupation grammatically assumes illegality prior to the claimed violations of the right to self-determination, but substantively may link the two. Both resolutions, however, contain various statements that are hard to reconcile with prevalent international law (e.g., that occupation is in violation of international law). Their legal significance should therefore not be overestimated.

Those are replete⁷⁷ with references to aggression,⁷⁸ “creeping annexation,” violation of the right to self-determination,⁷⁹ and violations of international humanitarian law.

In 2004, the I.C.J. gave an advisory opinion on the following question:⁸⁰

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The Court stated that the construction of the wall being built by Israel, the occupant and its associated regime, are contrary to international law and in violation of applicable international humanitarian law and human rights instruments;⁸¹ by altering the demographic composition of the West Bank, the construction of the wall “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right[.]”⁸² It stated that Israel was obligated to terminate its breaches of international law; thus it must cease forthwith the construction of the wall, dismantle the existing structure, and repeal or render ineffective all legislative and regulatory acts relating thereto. The ICJ also stated that Israel was under an obligation to make reparation for all damage caused by the construction of the wall. It determined that all states were under an obligation not to recognize the illegal situation resulting from the construction of the wall, not to render aid or assistance in

⁷⁷ See generally 1977 U.N.Y.B., 266-341, U.N. Sales No. E.79.I.1, 1978 U.N.Y.B., *supra* note 5, at 288-370.

⁷⁸ See, e.g., Benin, 1977 U.N.Y.B., *id.* at 269; Syria, at 290; USSR, at 297. Albania referred to Israel as the “invader,” at 311; it is not clear from these statements whether the aggression refers to the event leading to occupation or to the conduct of occupation. Sri Lanka referred expressly to “territories occupied by force,” 1978 U.N.Y.B., *id.*, at 337.

⁷⁹ See, e.g., Syria, 1977 U.N.Y.B., *id.* at 286; Yugoslavia, at 300; Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, at 306; Jordan, at 314; and others, at 316. U.S., at 317.

⁸⁰ *Wall Advisory Opinion supra* note 34, at 193-94, ¶ 137; G.A. Res. Es-10/13, U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003).

⁸¹ *Wall Advisory Opinion supra* note 34, at 193-194, ¶ 137.

⁸² *Id.* at 184, ¶ 122.

maintaining the situation created by such construction, and ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁸³

The advisory opinion, however, does not declare the Israeli occupation illegal. The Court went only so far as to find “that the construction of the wall and its associated régime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.”⁸⁴ The advisory opinion thus supports the proposition that individual acts, even when they adversely affect the right to self-determination, do not render an occupation illegal. As for the implication of intentional prolongation of the occupation and its *de facto* annexation, by qualifying the situation as one that “*could* well become permanent”⁸⁵ the Court stopped short of determining that a veiled annexation was already taking place. The Court might have been influenced by the narrow scope of the request for opinion which identified one particular measure taken by Israel.⁸⁶ This leaves open the question as to the illegality of occupation in the event that a finding is made on a veiled annexation having taken place.⁸⁷ As for the violations of international humanitarian law, they too did not suffice for the Court to declare the occupation illegal. Again this is consonant with the parameters suggested above.

In a separate opinion, Judge Elaraby opined that the Israeli occupation is illegal, implying that any occupation is by definition illegal.⁸⁸ In addition he cited Falk and Weston who had claimed that the Israeli occupation was illegal. However, as noted above,⁸⁹ Falk and Weston tied this claim to the violation of international humanitarian law and self-determination through prolongation of the occupation.⁹⁰

⁸³ *Id.* at 202, ¶ 163.

⁸⁴ *Id.* at 184, ¶ 121.

⁸⁵ *Id.* emphasis added.

⁸⁶ The proposal by the U.N. Special Rapporteur that the International Court of Justice be asked for an Advisory Opinion on the legal consequences resulting from this prolonged occupation attempts to fill this gap. U.N. Doc. A/HRC/4/17, *supra* note 10 ¶ 62; *see also* U.N. Doc. A/62/275 *supra* note 28, ¶ 8.

⁸⁷ Ben-Naftali, Gross, & Michaeli, *supra* note 7, reach a different result because they assess the facts differently (more widely than the Court), especially with regard to the role of Israeli settlement in the West Bank.

⁸⁸ *Wall* Advisory Opinion (Separate Opinion of Judge Elaraby), *supra* note 34, at 256.

⁸⁹ *See* text at *supra* note 39.

⁹⁰ *Wall* Advisory Opinion (Separate opinion of Judge Elaraby), *supra* note 34, at 255-56; Ben-Nafatli, Gross, & Michaeli interpret Judge Elaraby’s reliance on Falk and Weston, *supra* note 33, as indicating that he regards the occupation’s illegality as based on the violation of *jus in bellum*, *supra* note 7, at 557, n.25.

3. *Kampuchea*

In 1978 Vietnam invaded and occupied Kampuchea,⁹¹ and installed a puppet government that remained in place until 1989. In 1981 the U.N.⁹² convened an international conference on Kampuchea. In the concluding document of the Conference, entitled “Declaration on Kampuchea”:⁹³

3. The Conference expresses its concern that the situation in Kampuchea has resulted from the violation of the principles of respect for the sovereignty, independence and territorial integrity of states, non-interference in the internal affairs and the inadmissibility of the threat or use of force in international relations.
7. The Conference regrets that the foreign armed intervention continues and that the foreign forces have not been withdrawn from Kampuchea, thus making it impossible for the Kampuchean people to express their will in free elections.

The Conference attributed the situation to the violation of the principle of inadmissibility of threat or use of force (implicitly referring to Vietnam’s action) and emphasized that Kampuchea had the right to be “free from any external threat or armed aggression.”⁹⁴ The General Assembly endorsed the declaration⁹⁵ and noted that the Conference had deplored the fact “that foreign armed intervention continues.”⁹⁶ Subsequent resolutions rely on this Declaration.

The Declaration does not refer to occupation, let alone its illegality. Accordingly, the link between the violation of *jus ad bellum* and the illegality of the occupation remains implied. The terminology “illegal occupation” appears only in the work of the Commission of Human Rights and ECOSOC. The Commission of Human Rights

⁹¹ The Kingdom of Cambodia, as it is called today, was called “Democratic Kampuchea” from 1975 until 1979, and “People’s Republic of Kampuchea” from 1979 until 1989.

⁹² Acting through an Ad Hoc Committee of the International Conference on Kampuchea.

⁹³ International Conference on Kampuchea Declaration, at 7-10, U.N. Doc. A/CONF.109/5 (July 17, 1981), *reprinted* in 20 I.L.M. 1503 (1981).

⁹⁴ *Id.* ¶¶ 3 & 9.

⁹⁵ G.A. Res. 36/5, U.N. GAOR, 36th, Sess., Supp. No. 51, U.N. Doc. A/RES/36/5 (Oct. 21, 1981).

⁹⁶ *Id.* prmb. ¶¶ 5 & 6.

adopted annual resolutions on Kampuchea, in which it referred to the conference and General Assembly action, and then⁹⁷

Deploring the continuance of foreign armed intervention in and occupation of Kampuchea, which deprive the Kampuchean of their right to the exercise of self-determination....

2. Reaffirms that the continuing illegal occupation of Kampuchea by foreign forces deprives the people of Kampuchea of the exercise of their right to self-determination and constitutes the primary violation of human rights in Kampuchea at present;...

The Commission and ECOSOC are mandated with issues of human rights and self-determination and not with the regulation of the use of force. Indeed, the situation in Kampuchea was considered under the title of “The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation.”⁹⁸ These factors support an interpretation of the illegality of the occupation as related to self-determination, and in particular to the right of Kampucheans to elect their own government freely.⁹⁹ While the ability to do so was denied by Vietnam through use of force, free election of a government falls squarely within the scope of the right to self-determination.

4. *Kuwait*

Following the Iraqi invasion and purported annexation of Kuwait in August 1990, the U.N. Security Council passed a number of resolutions referring to Iraq’s action as “invasion” and “occupation.”¹⁰⁰ Resolution 674(1990)¹⁰¹ focuses on the well-being

⁹⁷ U.N. Commission on Human Rights, Situation in Kampuchea, at 66, prml. ¶ 7, operative ¶ 2 CHR Res. 1989/20 U.N. ESCOR, 1989, Supp. No. 2, U.N. Doc. E/1989/20 (Mar. 6, 1989). *See also* CHR Res. 1983/5 (Feb. 15, 1983); CHR Res. 1985/12 (Feb. 27, 1985), reaffirmed in ECOSOC Res. 1985/155 (May 30, 1985).

⁹⁸ CHR Res. 1989/20, *supra* note 97, operative ¶ 10.

⁹⁹ *See, e.g.*, CHR 1983/5, *supra* note 97, prml. ¶ 7 and operative ¶ 5(c).

¹⁰⁰ *See, e.g.*, S.C. Res. 661, prml. ¶ 3, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 674, preamblar ¶ 11, U.N. Doc. S/RES/674 (Oct. 29, 1990).

¹⁰¹ S.C. Res. 674, *supra* note 100.

of Kuwaiti and third state nationals. It “[r]eminds Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq[.]” The Resolution expressly links the illegal occupation to “invasion.” References to the “invasion” and to Iraq’s aggressive action in numerous other resolutions and in surrounding debates¹⁰² make it abundantly clear that the illegality of the occupation stemmed from the violation of *jus ad bellum*.

5. *The Democratic Republic of Congo*

The Security Council was seized of the topic of armed conflict in the Democratic Republic of Congo (DRC) since the late 1990s,¹⁰³ but the occupation of territory was first addressed by the ICJ in the 2005 *Armed Activities* judgment. As in the cases of Namibia and Guinea-Bissau, the issue arose due to the failure to withdraw forces from foreign territory. Until 1998, Ugandan forces had been present on Congolese territory by invitation from Congo. Once this invitation was rescinded, Uganda did not remove its forces. The Court rejected Uganda’s claim that its use of force was justified by self-defense. It thus found that Uganda had illegally used force against the DRC. It further determined that Uganda had been, as a matter of fact, in occupation of the Congolese region of Ituri, following Ugandan advance into Congolese territory beyond the area where its forces had previously been stationed. In this respect, the occupation of Ituri is a simple case of aggressive use of force.¹⁰⁴ After a further finding that the occupation was fraught with violations of international humanitarian law, the Court examined the consequences of all these breaches. It noted that:

given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and

¹⁰² See, e.g., S.C. Res. 660, operative ¶ 1, U.N. Doc. S/RES/660 (Aug. 3, 1990); S.C. Res. 661, *supra* note 100, prml. ¶¶ 2, 3; S.C. Res. 677, prml. ¶ 2, U.N. Doc. S/RES/677 (Nov. 28, 1990); S.C. Provisional Verbatim Record, 2951st mtg., U.N. Doc. S/PV.2951 (Oct. 29, 1990); S.C. Provisional Verbatim Record, 2981st mtg., U.N. Doc. S/PV.2981 (Apr. 3, 1991).

¹⁰³ See, e.g., S.C. Res. 1234, U.N. Doc. S/RES/1234 (Apr. 9, 1999) and S.C. Res. 1304, U.N. Doc. S/RES/1304 (June 16, 2000).

¹⁰⁴ *Armed Activities*, *supra* note 6, ¶ 178.

of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory.¹⁰⁵

The *dispositif* provides that the Court “[f]inds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri[...] violated the principle of non-use of force in international relations and the principle of non-intervention[.]”¹⁰⁶

The Court listed the “occupation of Ituri” as an “international wrongful act,” without expressly stating the ground for its illegality.¹⁰⁷ From the enumeration of “occupation” in the list of wrongful acts it remains unclear whether the Court regarded the illegality of the occupation as a consequence of the violation of *jus ad bellum* or whether it considered any occupation to be *ipso facto* illegal. The *dispositif* is ambiguous and sheds little light on the matter. On the one hand, in stating that Uganda, “by occupying Ituri ... violated the principle of non-use of force,” the *dispositif* suggests that any occupation is *ipso facto* illegal and consequently a violation of the prohibition on the use of force. If resolutions on the Israeli occupation that make a similar suggestion can be set aside as political statements, the *dispositif* of an ICJ judgment cannot be dismissed so easily. Whether this is an appropriate interpretation of the law or not, it is unlikely that the Court meant to adopt it so off-handedly. President Higgins,¹⁰⁸ for example, had previously rejected the notion of occupation being *ipso facto* illegal.¹⁰⁹

A more likely interpretation of the judgment is that that just like “engaging in military activities” is implicitly qualified by “without justification,”¹¹⁰ the phrase “by occupying Ituri” is also implicitly qualified by a phrase such as “without justification” or “aggressively.” The occupation by Uganda is then illegal because it was created through a violation of *jus ad bellum*.

Judge Kooijmans expressed concern with the apparent implication of the *dispositif*. He criticized the designation of the occupation as an independent violation of the

¹⁰⁵ *Id.* ¶ 259.

¹⁰⁶ *Id.* ¶ 345 (emphasis added).

¹⁰⁷ The submissions of the DRC also referred to the violation of the right to self-determination. *Armed Activities*, *supra* note 6, ¶ 24. The Court did not address this norm.

¹⁰⁸ Judge Higgins, at the time the judgment was handed down.

¹⁰⁹ Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT’L L. 1, 8 (1970).

¹¹⁰ As in *Armed Activities*, *supra* note 6, ¶ 149.

prohibition on the use of force. In his view, “the occupation of Ituri should not have been characterized in a direct sense as a violation of the principle of the non-use of force.”¹¹¹ He also regretted that in the first paragraph of the *dispositif* the Court may have contributed to the reluctance on the part of belligerent parties to declare the law of occupation applicable, by strengthening the impression that “occupation” has become almost synonymous with aggression and oppression.¹¹² It is not clear whether Judge Kooijmans regarded the majority’s error as one of drafting or of law; from the fact that he did not dissent on this point but only appended a separate opinion, the former may be inferred. This strengthens the interpretation of the majority opinion proposed above, namely tying the illegality of the occupation to the illegal use of force.

As in the *Wall* Advisory Opinion, in *Armed Activities* the Court determined that international humanitarian law had been violated;¹¹³ yet it appears that it is not this violation that led to the declaration of the Ugandan occupation’s illegality. This practice is consonant with the parameters suggested above. The violations were not innate to the occupation. In theory, at least, they could have been rectified. Accordingly, conduct in violation of *jus in bello* did not constitute an independent ground for declaring the occupation illegal.

C. Conclusion

In 1984 Adam Roberts wrote that the term “illegal occupation” is “almost invariably used to refer to an occupation which is perceived as being the outcome of aggressive and unlawful military expansion[.]”¹¹⁴ This statement is equally true a quarter of a century later.

At the same time, the violation of the right to self-determination also features prominently in the debate. This violation is partly the corollary of the violation of *jus ad bellum*. It may also have an independent role, where at issue is the maintenance of the

¹¹¹ *Id.* (separate opinion of Judge Kooijmans), ¶ 56.

¹¹² *Id.* ¶¶ 62 & 64 read together.

¹¹³ *Id.* ¶ 259; *Wall* Advisory Opinion, *supra* note 34, at 184-87, ¶¶ 123-26.

¹¹⁴ Roberts, *supra* note 4, at 293. It has been suggested in the past to distinguish between an aggressor-occupant and a lawful occupant, see Alan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 3 (1973); and more recently Orakhelashvili, *supra* note 8; but see criticism by BENVENISTI, *supra* note 3, at 69.

Occupation. In the case of Kampuchea there is express reference to the infringement upon the right of Kampucheans to conduct free elections. In this respect, the right to self-determination clearly goes beyond the legality of the original resort to force.

IV. *The Consequences of Illegal Occupation*

A. *General*

For the category “illegal occupation” to be meaningful, it must have consequences that advance the removal of the illegality.¹¹⁵ Practice provides little help in identifying the consequences of an illegal occupation. There are various reasons for this: First, there is limited international practice regarding the consequences of illegality beyond calling for the termination of the occupation. Moreover, when the determination of the illegality of an occupation or of its consequences is made by the U.N. General Assembly, it carries limited legal weight. Finally, except for the Israeli occupation of the West Bank and Gaza Strip, in none of the cases where an occupation has been labeled illegal, either by the United Nations or unilaterally by individual states, have the occupants acknowledged their status as such. Instead they either claimed some status other than that of an occupant, for example sovereignty,¹¹⁶ or denied that they were exercising any control over the territory.¹¹⁷ The international censure focused on the specific status that the occupant purported to attach to the situation,¹¹⁸ rather than the consequences of occupation.

A step toward an examination of the consequences of illegality of an acknowledged occupation was taken by the Special Rapporteur on the situation of human rights in

¹¹⁵ Cf. *Namibia*, *supra* note 51, at 54, ¶ 117; *Wall Advisory Opinion*, *supra* note 34, at 197, ¶¶ 147-48.

¹¹⁶ Portugal claimed sovereignty over its African holdings; South Africa's position as to its status in Namibia was vague and changeable. At times it claimed to continue holding the mandate (e.g., *Binga v. Administrator-General, South West Africa, and Others* 1988(3) SA 155); at times it claimed that the mandate was no longer in effect; and at times it assumed sovereignty over the territory; Iraq purported to annex Kuwait; Israel purported to annex East Jerusalem and the Golan Heights.

¹¹⁷ See, e.g., *Vietnam and Uganda, Armed Activities*, *supra* note 6, ¶ 170.

¹¹⁸ See, e.g., the claim to sovereignty in the case of Guinea-Bissau, annexation in the case of Kuwait, and change of government in the case of Kampuchea.

the Palestinian territories occupied since 1967 in his August 2007 reports. Following his recommendation to seek an advisory opinion of the ICJ on the legal status of the Israeli occupation, he suggested that if the Court finds that such an occupation has ceased to be a lawful regime, particularly in respect of measures aimed at the occupant's own interests, it should further advise on the legal consequences of that finding.¹¹⁹ The following discussion examines such potential consequences.

B. *International Responsibility for the Wrongful Act*

It is well established in general international law that a state which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act.¹²⁰ First, it must cease the violation. In view of the parameters suggested in this Article, namely that the violation goes to the very existence of the occupation, the cessation of violation necessarily means termination of the occupation.¹²¹ Termination of an occupation is inevitable even when it is lawful, but unlike an "ordinary" occupation, an illegal occupation must, under the general laws of state responsibility, be terminated immediately and without prior negotiations. In addition, international law may require other reparation, such as compensation for injuries caused by the illegal occupation. This is reflected, for example, in the 1969 Declaration, which calls for compensation by the aggressor for damages caused as a result of illegal occupation. In *Armed Activities* the Court found Uganda responsible for the occupation of Ituri as an independent injury. By the time the judgment was given, Uganda had already withdrawn from the DRC, so cessation was no longer necessary. Nonetheless the Court required Uganda to make reparation for the occupation, separately from other wrongful acts.¹²² At the time of writing there is not yet any concrete expression to this obligation.

¹¹⁹ U.N. Doc. A/HRC/4/17, *supra* note 10, ¶ 62, and again in U.N. Doc. A/62/275 *supra* note 28, ¶ 8.

¹²⁰ ILC Draft Articles, *supra* note 19, Draft Article 31. See *Factory at Chorzów (Claims for Indemnity) (Jurisdiction) (Germany v. Poland) 1927 P.C.I.J. (ser. A) No. 9*, at 21 (July 26); *Armed Activities*, *supra* note 6, ¶ 259.

¹²¹ See, e.g., S.C. Res. 301, *supra* note 54, operative ¶ 6 (Namibia); G.A. Res. 3061 (XXVIII), *supra* note 56, operative ¶ 3 (Guinea-Bissau); G.A. Res. 32/20 and 33/29, *supra* note 67, common preambular ¶ 5; G.A. Res. 45/83A, *supra* note 68, operative ¶ 5 (territories occupied by Israel); G.A. Res. 34/22, ¶ 7, U.N. GAOR, 34th Sess., Supp. 46, U.N. Doc. A/RES/34/22 (Nov. 14, 1979) (Kampuchea); S.C. Res. 660, *supra* note 102, operative ¶ 2; S.C. Res. 661 *supra* note 100, prmb. ¶ 3 (Kuwait).

¹²² *Armed Activities*, *supra* note 6, ¶¶ 259 & 345(5).

A demand for reparation for the illegal occupation was also made to Iraq, following its occupation of Kuwait. Security Council Resolution 674 (1990), provided that Iraq “is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.”¹²³ Resolution 687 (1991), which established the United Nations Compensation Commission (UNCC), reaffirmed that Iraq would be “liable under international law for any direct loss, damage[...] or injury [...] as a result of its unlawful invasion and occupation of Kuwait.”¹²⁴ The UNCC established its own criteria for eligibility for compensation. Among the acts entitling claimants to compensation was “actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation.”¹²⁵

Liability was thus attached to Iraq even where the conduct in question was not, *per se*, a violation of international law, but only became so because it followed an illegal use of force. A general explanation for the mechanism was given by the U.S.: “Baghdad must hear from us clearly: unprovoked aggression entails crippling costs, and Iraq must not be allowed to profit from its unacceptable disregard for the sovereignty and territorial integrity of another State.”¹²⁶

The Iraq case is exceptional in the extension of responsibility from the violation of *jus ad bellum* to all its consequences, including the consequences of acts that may have been lawful under *jus in bello*. This is in divergence from Article 3 of Hague Convention IV. In the debate preceding the adoption of Resolutions 674 (1990) and 687 (1991), numerous speakers referred to the losses incurred by Kuwaiti civilians and third nationals through violations of international humanitarian law.¹²⁷ None of the speakers addressed the possibility of liability for acts that had not been illegal *per se*. In the circumstances, since Iraq acted as sovereign, practically all its acts

¹²³ S.C. Res. 674, *supra* note 100, operative ¶ 8.

¹²⁴ S.C. Res. 687, operative ¶ 16, U.N. Doc. S/RES/687 (Apr. 3, 1991).

¹²⁵ U.N. Compensation Commission, Criteria for Expedited Processing of Urgent Claims, ¶ 18(c), U.N. Doc. S/AC.26/1991/1 (Aug. 2, 1991).

¹²⁶ U.N. Doc. S/PV.2951, *supra* note 102, at 91.

¹²⁷ *Id.* Ethiopia, at 46; Finland, at 86; Canada, at 87; U.K., at 92-93; S/PV.2981, *supra* note 102, U.S. at 87, France at 93, China, at 96, U.K. at 114.

could be construed as violations of the law of occupation which forms part of *jus in bello*. Nonetheless the disregard in resolution 687(1991) and the UNCC criteria for the distinction between *jus ad bellum* and *jus in bello* is striking.

Denying the occupant's exemption when the illegality is based on *jus ad bellum* means that the distinction between *jus ad bellum* and *jus in bello* is eliminated. It is a question of policy whether this is desirable. In some contexts the answer may be positive,¹²⁸ if the distinction is eliminated for the purpose of international responsibility, the illegal occupant has no incentive to abide by *jus in bello*. The immediate victim is the population subject to the control of this occupant. Doing away with the distinction between *jus ad bellum* and *jus in bello*, which is intended to ensure that the population not be held hostage to the legal dimensions of the conflict as a whole, does not seem a satisfactory arrangement.

Granted, this was not a problem with Iraq. First, Iraq did not claim exemption from liability or any benefit under *jus in bello* because it did not regard itself subject to this body of law. Second, by the time the UNCC criteria were established, Iraq had already been ousted from Kuwait. On either count, maintaining the exemption from liability for acts in accordance with *jus in bello* would not have induced Iraq to act one way or another. Indeed, it is doubtful whether any state contemplating invasion and occupation would reconsider its strategy only because of potential liability for acts such as those falling within UNCC criterion (c). However, as a matter of doctrine, the leap from *jus ad bellum* to *jus in bello* did not receive attention.

The matter also arose, albeit in a minor fashion, with regard to Uganda and the DRC. In his declaration, Judge ad hoc Verhoeven went so far as to state that the extension of responsibility for all acts linked to the original illegal use of force is *lex lata*, since "it is difficult, however, to see how a state which uses armed force outside the scope of legitimate defense could avoid its obligation to make reparation for the injury it has caused."¹²⁹ On the one hand, unlike Iraq, Uganda did not claim sovereignty and there was no dispute that international humanitarian law applied to the situation.¹³⁰ The denial of exemption could have therefore been pertinent to the occupant's policy. On

¹²⁸ Orakhelashvili, *supra* note 8, at 195-96.

¹²⁹ *Armed Activities* (Declaration of Judge ad hoc Verhoeven), *supra* note 6, ¶ 5 (translated Y.R.).

¹³⁰ Uganda did not acknowledge its status as occupant. However, the applicability of international humanitarian law is not limited to situations of occupation. Also, once the Court determined that Uganda had been in occupation of Ituri, it could proceed to examine Uganda's actions in that context, even if Uganda itself had not done so before.

the other hand, the judgment was given after Uganda had already withdrawn from the DRC, thus the statement had no immediate practical impact on Uganda's conduct.

To complete the picture it should be noted that a mechanism for extracting damages from an occupant was also established in the wake of the *Wall* Advisory Opinion. In the advisory opinion, the ICJ held that Israel has the obligation to make reparations for the damage caused to Palestinians by the construction of the wall. Where restitution of property was not possible, the Court stated, Israel "has an obligation to compensate, in accordance with the applicable rules of international law, all natural and legal persons having suffered any form of material damage as a result of the wall's construction."¹³¹ In 2006 the General Assembly established the United Nations Register of Damages Caused by the Construction of the Wall in the Occupied Palestinian Territory.¹³² In May 2007, the U.N. Secretary-General appointed three members of the administering board of this register.¹³³ The basis of this mechanism is different from that of the UNCC. First, it does not rest on a perceived illegality of the occupation as a whole. Second, while reparation from Iraq was demanded for acts of the occupant even though the conformity of those acts with *jus in bello* was not questioned, the 2006 Register only concerns damages as a result of the construction of the wall as a violation of *jus in bello* and of the right to self-determination.

Another element which may affect the deterring force of international responsibility for an illegal occupation is the actual financial impact of this responsibility. In other words, if the international responsibility for acts carried out in compliance with the law of occupation, but under an illegal occupation, does not significantly add to the financial burden already calculated by the occupant, the deterring effect of this responsibility is reduced. If an occupant's conduct was in fact compliant with the law of occupation in individual instances, in many cases this means that some remuneration has already been paid to injured individuals.¹³⁴ With respect to such conduct, attributing international responsibility will add little in the way of financial burden, as the injury has largely been recompensed. There will be liability, of course,

¹³¹ *Wall* Advisory Opinion, *supra* note 34, ¶ 153.

¹³² Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, G.A. Res. ES-10/17, U.N. Doc. A/RES/ES-10/17 (Dec. 15, 2006).

¹³³ *Ban Ki-Moon Appoints Experts to Board of U.N. Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory*, U.N. NEWS CENTRE, May 10, 2007, available at <http://www.un.org/News>.

¹³⁴ See, e.g., Hague Regulations, *supra* note 1, arts. 52, 53, & 54.

for acts which the law of occupation permits the occupant to carry out without recompensing the population.¹³⁵ Only if the financial impact of these acts is significant, will international responsibility deter an occupant from pursuing the occupation.

To conclude, the attachment of responsibility for the illegal occupation in a manner which creates liability for acts carried out in compliance with the law of occupation may serve as a deterrent for illegal occupants. However, the effectiveness of this measure is debatable. Its most important characteristic is that it largely blurs the distinction between *jus ad bellum* and *jus in bello*. If the responsibility of the occupant accrues regardless of the legality of the actions, a realistic approach cannot but admit that an occupant is as likely to expand its illegal acts (because it is liable in any case), as it is to withdraw from territory occupied illegally.

One way of bringing home responsibility, without jeopardizing the welfare of the population, is through international criminal law. The risk of criminal responsibility may restrain individuals responsible for carrying out the policy of the occupation. On the one hand, this will encourage them to abide by international humanitarian law and thereby ensure that that occupation is maintained in accordance with *jus in bello*. On the other hand, they will not be held responsible for the violation of *jus ad bellum* which rendered the occupation illegal; or do they risk being held responsible for the illegality of the occupation on the ground that it violated the right to self-determination.¹³⁶

C. *The Obligation of Non-Recognition*

Once the fact of occupation has been established, it gives rise to certain rights and obligations. The question may arise whether these should be modified when the occupation has been declared illegal. In other words, is an “illegal occupation” normatively different from an ordinary occupation?

Article 41 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts¹³⁷ codifies the general principle *ex injuria ius non oritur*. It requires that no state shall recognize as lawful a situation created by a serious breach of international

¹³⁵ See, e.g., *id.* art. 49.

¹³⁶ Once a definition of the crime of “aggression” is adopted, this matter might need reconsideration.

¹³⁷ ILC Draft Articles, *supra* note 19.

law within the meaning of Draft Article 40, nor render aid or assistance in maintaining that situation. Draft Article 40 defines a serious breach as the gross or systematic failure by the responsible state to fulfill an obligation arising under a peremptory norm of general international law. The objective of the refusal to recognize as lawful a situation created through a violation of a peremptory norm, usually referred to as the “obligation of non-recognition,” is to induce the responsible state to revert to legality. An alternative policy would constitute legitimization of the acts of the wrong-doing state. Since at issue are violations of peremptory norms that operate *erga omnes*, the violation cannot be waived or its consequences acquiesced in. A state which does recognize as lawful a situation created through violation of a peremptory norm is itself in violation of the obligation of non-recognition.¹³⁸

Illegal use of force and the violation of the obligation to respect the right of peoples to self-determination are both serious breaches under Draft Article 40. In theory, at least, Draft Article 41 requires states not to recognize the consequences of such breaches as lawful.¹³⁹ A preliminary question is whether non-recognition is indeed an appropriate response to illegal occupation. Some doubt is based on the rationale for the obligation itself. Occupation does not reflect any legal claim of the occupant but a factual situation. The law of occupation balances the absence of title to territory against the *effectiveness* of the territorial control, and not against any *claimed rights* of the controlling state. The illegality of the means in which the occupation is achieved or maintained does not enter into this equation, because the occupation is no less effective when it is illegal. Since the law of occupation does not reflect recognition of any legal claim of the occupant, its application cannot legitimize any claim. To the extent that non-recognition aims to deny legitimacy to a claim,¹⁴⁰ there is therefore no reason to apply it to an occupant’s status as such.

Technically, however, non-recognition may be exercised with respect to an occupation. This leads to the subsequent question, namely the content and implications of non-recognition under these circumstances. Separate discussion is necessary with

¹³⁸ Cf. *East Timor Case* (dissenting opinion of Judge Weeramantry), *supra* note 23, at 171-74.

¹³⁹ There is controversy whether the obligation applies to violations of all types of peremptory norms. Talmon, *supra* note 7 at 103. This controversy is partly conflated with the question considered below as to the meaning of the obligation where the violation results in a purely factual situation. In any case, the obligation undoubtedly applies to violations of the prohibition on the use of force.

¹⁴⁰ Cf. CASSESE, *supra* note 7, at 96.

respect to each of the main norms that serve as grounds for designating an occupation illegal.

Non-recognition of the consequences of illegal use of force means the denial of the status claimed as a result of that use of force. In most cases, aggressor states claimed sovereignty over the area gained through their use of force. Politically this situation is the gravest, but legally it is the clearest. It is already covered by a *lex specialis*, namely the customary prohibition on the acquisition of territory through use of force.¹⁴¹ In fact, the inadmissibility of territorial acquisition governs both legal and illegal use of force. Indeed, it is not strictly an application of the obligation of non-recognition of the consequences of illegal acts. The question remains as to the consequences of illegality when the controlling state acknowledges its status and claims not sovereignty but the rights and powers of an occupant. The Israeli occupation of the West Bank (excluding East Jerusalem, where Israel claims sovereignty) remains to date the only potential case for examining the implications of an illegal occupation that is *not* accompanied by a claim of sovereignty.

The 1987 Declaration provides that “[n]either acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law *will be recognized as legal acquisition or occupation.*”¹⁴²

Although *prima facie* adding nothing to existing law on the prohibition on the use of force, this formulation actually elaborates on the law in two ways. First, it introduces the concept of legal occupation and by implication acknowledges the concept of “illegal occupation.” In a legal system where occupation is still fundamentally a factual situation, this is an innovation. Second, it indicates that the consequence

¹⁴¹ See, e.g., Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Treaty), art. II, Oct. 10, 1933, 49 Stat. 3363, U.S.T.S. 906; 1970 Declaration, Principle 10, ¶ 10.

¹⁴² (Emphasis added Y.R.). This drafting echoes the Helsinki Final Act, Section IV, ¶ 4 which provides that the participating states “... will likewise refrain from making each other’s territory the object of military occupation or other direct or indirect measures of force in contravention of international law No such occupation ... will be recognized as legal.” Conference on Security and Co-Operation in Europe: Final Act: Declaration of Principles Guiding Relations between Participating States, Aug. 1, 1975, *reprinted in* 70 AM. J. INT’L L. 417 (1976). The Final Act was not intended to be a legally-binding document. See Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AM. J. INT’L L. 242, 246-49 (1976); however, through the years the Helsinki Final Act has accumulated significant weight as a “soft law.”

of an illegal occupation is the prohibition on recognizing the legal validity of the occupation.

Although an obligation of non-recognition with respect to an illegal occupation is simply the implementation of the rule underlying ILC Draft Article 41, the 1987 Declaration is the only general U.N. document that mandates non-recognition with respect to occupation. The Declaration puts an illegal occupation on par with an illegal claim of sovereignty, to which non-recognition—as a policy and later as an obligation under general international law—has been applied numerous times.¹⁴³

The Declaration did not generate much interest in the United Nations, nor among scholars,¹⁴⁴ and the emerging category of “illegal occupation” raised no controversy.¹⁴⁵ The quoted paragraph was the object of some concern during the Sixth Committee debate on the draft declaration, but that concern revolved only around the consequences of acquisition of territory through illegal use of force and not around the consequences of occupation under the same circumstances. Strangely enough, some delegations used the stipulation on acquisition of territory as an example of the legally non-binding character of the Declaration, while none mentioned the much more innovative notion of non-recognition of an occupation’s validity as an example *lex ferenda*.¹⁴⁶

A different analysis is called for if the illegality of the occupation stems from the manner in which the occupation is maintained, particularly when it is in violation of the right to self-determination. In this case, the occupation precedes the violation, rather than results from it. Thus, non-recognition of the consequences of violation does not reflect on the status of the occupation as such. In other words, the obligation of non-recognition operates differently with respect to the different grounds for illegality, and does not affect the status of the territory or of the occupant when the violation concerns the maintenance of the occupation.

¹⁴³ See, e.g., with regard to Manchukuo, Rhodesia, Namibia, the South African Bantustans, the TRNC. JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* (1987).

¹⁴⁴ Koskenniemi notes that it is one of many documents that clearly do not go beyond the U.N. Charter. Martti Koskenniemi, *Police in the Temple Order, Justice and the UN: a Dialectical View*, 6 EUR. J. INT’L L. 325, 340-41 (1995).

¹⁴⁵ This does not mean that it was taken to reflect existing law.

¹⁴⁶ Delegates to the Security Council debate clarified that the Declaration added nothing and had no law-creating force. Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, UK2-3 ¶ 5; Israel, ¶¶ 3 & 7; France, ¶¶ 4 & 12; Germany, ¶¶ 4-5 & 13; possibly arguing that it *is* law, in U.N. GAOR, 42nd Sess., 6th Committee, U.N. Doc. A/C.6/42/SR.50 (Nov. 17, 1987).

The practical consequences of non-recognition must be considered. Those were spelt out in the *Namibia* Advisory Opinion. Non-recognition means that rights and powers that are inherent to the status claimed should be denied to the illegal actor. Although far from clearly defined, this is not a situation of total legal vacuum; an illegal regime¹⁴⁷ is normally regarded as incapable of or prohibited from¹⁴⁸ introducing any legal changes to the territory, and whatever changes it purports to make are not recognized internationally; at the same time, the regime is bound by at least some human rights and international humanitarian law.¹⁴⁹ In addition, its acts may be given effect where non-recognition would be detrimental to the population.¹⁵⁰

The detailed and authoritative guidance as to the obligation and consequences of non-recognition provided in *Namibia* concerned not an illegal occupant but an illegal claim to mandate status, which, had it been lawful, would have generated quasi-sovereign rights. Indeed, the consequences of non-recognition as elaborated in *Namibia* did not reject South Africa's status as a belligerent occupant but rather confirmed it. This was later supported by Security Council and General Assembly resolutions.¹⁵¹ Thus, there is a problem in a strict application of the doctrine that grew from *Namibia* in situations of occupation, because the target of non-recognition would have to be precisely that mandated by the Advisory Opinion. Applying the *Namibia* principles by analogy in a situation where a claim of occupation is denied recognition may require pouring new content into the obligation. Primarily, this casts doubt on the applicability of the law of occupation. The regime should nonetheless be governed by basic obligations arising from its de facto control. It is unclear, however, what these "basic obligations" entail, if they are less than the law of occupation.

It is often proposed to interpret *Namibia* as denying the illegal actor the rights arising from its claimed status while maintaining the obligations arising from it. This ensures that the occupant does not benefit from its illegal action, but also does not evade the responsibilities attached to it. Yet separating the powers from the responsibilities may not be conducive to the welfare of the population. The occupant is granted powers

¹⁴⁷ Often referred to as a "de facto regime," see, e.g., PEGG SCOTT, INTERNATIONAL SOCIETY AND THE DE FACTO STATE (1998); MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF 'SOMALILAND' (2004).

¹⁴⁸ Stefan Talmon, *The Constitutive Versus the Declaratory Theory of Recognition: Tertium non Datur?*, 75 BRIT. Y. B. INT'L L. 101 (2005).

¹⁴⁹ *Namibia*, supra note 51, at 56, ¶ 122.

¹⁵⁰ *Id.* at 56, ¶ 125.

¹⁵¹ See, e.g., G.A. Res. 2871 (XXVI), supra note 54.

not only to further its own objectives, but also to discharge its obligations towards the population. If it is deprived of the powers, its ability to discharge its obligations may be curtailed. Therefore a distinction may be necessary between powers that should be denied to the occupant and those that should remain intact.¹⁵²

A question of principle remains: non-recognition creates a clear nexus between the illegality of occupation and the law applied to it. To the extent that the former is based on the violation of *jus ad bellum*, a link emerges between *jus ad bellum* and *jus in bello*. Yet as Judge Kooijmans noted, “no distinction is made in the *jus in bello* between an occupation resulting from a lawful use of force and one which is the result of aggression.”¹⁵³ Judge *ad hoc* Verhoeven also emphasized that particularly in the case of violation of *jus ad bellum*, the obligations under international humanitarian law and human rights apply to the occupant, since the aggressor must take responsibility for the disorder and chaos that result from its military intervention caused.¹⁵⁴ Applying the obligation of non-recognition in this case is therefore problematic. Instead the distinction between *jus ad bellum* and *jus in bello* should take precedence over the obligation of non-recognition, as it is *lex specialis*.

In conclusion, there are various reasons not to put into operation the obligation of non-recognition with respect to illegal occupation. First, it is questionable whether the doctrine is at all applicable to a claim of occupation. Second, even if it is, its operation differs depending on the ground for illegality. Arguably, the consequences of illegality should be the same regardless of the ground for illegality, particularly when in practice the two are often difficult to differentiate. Applying the obligation would result in vagueness as to the obligations of the occupant and in placing unreasonable obstacles to performing them. A final difficulty lies in the elimination of the distinction between *jus ad bellum* and *jus in bello*. While there is nothing holy about this distinction, it is currently the basis for protecting the population of an occupied territory regardless of the legality of the original resort to force. The existence of illegal occupations reveals that this protection is lacking. This is not, however, a reason to reduce the protection to nothing.

¹⁵² Cf. Orakhelashvili, *supra* note 8, at 184.

¹⁵³ *Armed Activities* (separate opinion of Judge Kooijmans), *supra* note 6, ¶ 58 but also see ¶ 60. This clear statement appears to be in conflict with the one previously quoted.

¹⁵⁴ *Id.* (declaration of Judge *ad hoc* Verhoeven), *supra* note 6, ¶ 4. This statement can be reconciled with his statement on the illegality of all consequences of the violation of the prohibition on the use of force because he applies to the occupant only the obligations under international humanitarian law, and not the rights.

Even if applying non-recognition to an illegal occupation is inadvisable, this does not mean that the law is powerless to constrain the occupant. The answer may lie within the law of occupation itself. This body of law limits the powers of an occupant, granting it powers only as necessary to respond to its military necessity and to discharge its obligations towards the population. This principle is enunciated in Article 43 of the Hague Regulations and in Article 64 of Geneva Convention IV, and detailed in specific provisions of customary and conventional law.¹⁵⁵

It is arguable that an illegal occupant (as opposed to a legal occupant) cannot rely on military necessity. Orakhelashvili argues that the absence of necessity in *jus ad bellum* is linked to the denial of necessity within *jus in bello*. Thus, if in resorting to force in the first place the occupant has either not had any necessity or has overstepped the limits of necessity¹⁵⁶ and thus violated *jus ad bellum*, it also cannot benefit from any perceived necessity in maintaining the occupation. This argument conflates necessity as an element of *jus ad bellum* with necessity as an element of *jus in bello*. If we accept such conflation, namely that the absence of necessity to use force in the first place precludes a necessity to preserve the military advantage gained during the conflict, then the entire concept of occupation, not only specific aspects of it, becomes subject to *jus ad bellum*.

If the occupation is maintained in violation of self-determination, the illegality is precisely because the occupant has already exceeded the limits of necessity and proportionality in its actions.¹⁵⁷ Accordingly, military necessity cannot justify further action.

The emerging picture is that the necessity of each of the occupant's acts must be assessed on its individual merits. Under certain circumstances, the illegality of the occupation will also be expressed in the impermissibility of a specific measure. Otherwise, the needs of the occupant should be regarded as valid even if it is an illegal one. While this appears to reduce the effectiveness of non-recognition, it should be recalled that the law of occupation already reflects a balance between the absence of rights and the existence of military power. Once this balance has been made, and is reflected in exiting norms, there is no need to perform a further balancing process with respect to those powers that the occupant has been permitted.

¹⁵⁵ See, e.g., the obligations listed in Fourth Geneva Convention, *supra* note 35, arts. 27, 38, 39, 40, 50, 55, 56, & 59.

¹⁵⁶ *Armed Activities*, *supra* note 6, ¶ 147.

¹⁵⁷ Falk & Weston, *supra* note 33, at 148.

It is now time to turn to U.N. practice with respect to specific occupations. Since the Second World War,¹⁵⁸ a policy of non-recognition has not been adopted toward any occupation as such.¹⁵⁹ In a singular resolution concerning the Israeli occupation, G.A. Resolution 2949 (XVIII) of 1972,¹⁶⁰ the General Assembly invited states “to avoid actions, including actions in the field of aid, that could constitute recognition of that occupation[.]”¹⁶¹ The express inclusion of aid as subject to the policy of non-recognition is particularly interesting given that non-recognition should not be exercised at the detriment of the population.¹⁶² At any rate, this call was not generally heeded.¹⁶³

Since ordinarily occupants have denied their status and did not apply the law of occupation, the applicability of that law received little attention. Even in those cases where U.N. declared a situation was one of occupation,¹⁶⁴ the weight of the declaration was rhetoric rather than practical. Security Council resolutions concerning the illegal occupation of Namibia and Kuwait as well as General Assembly resolutions on the illegal occupation by Israel repeatedly reaffirmed the applicability of Geneva Convention IV.¹⁶⁵ Even General Assembly Resolution 2949 (XVIII) which called for non-recognition of the occupation did so in direct response to the violations of Geneva Convention IV.¹⁶⁶ In other words, even the call for non-recognition assumed that at least part of the law of occupation continues to govern the powers of an implied illegal occupant. In all these cases the reaffirmation of the applicability of Geneva Convention IV was an element in emphasizing that it was *merely* an occupant; it is difficult to interpret this reaffirmation as a statement of the consequences of the illegality of the occupation. The same may be said with respect to *Armed Activities*, despite its very different circumstances. Judge Kooijmans took for granted that *ex*

¹⁵⁸ The Nuremberg tribunal expressly affirmed right to collect tax and requisition. Roberts, *supra* note 4, at 293-94.

¹⁵⁹ This is hardly surprising given that there were no acknowledgements of occupation with the mentioned exception of Israel.

¹⁶⁰ Which does not even declare the illegality of the occupation.

¹⁶¹ G.A. Res. 2949 (XXVII), operative ¶ 8, U.N. GAOR, 27th Sess., Supp. No. 30, U.N. Doc. A/8730, (Dec. 8, 1972).

¹⁶² *Namibia*, *supra* note 51, at 56, ¶ 125.

¹⁶³ Some states do not recognize Israel. No state recognizes the annexation by Israel of East Jerusalem and the Golan Heights. But no state recognizes Israel yet refuses to recognize its occupation over the West Bank.

¹⁶⁴ See, e.g., *Namibia*, *supra* note 51.

¹⁶⁵ See, e.g., G.A. Res. 2678 (XXV), operative ¶ 11, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Dec. 9, 1970); S.C. Res. 674, *supra* note 99, prml. ¶¶ 3 and particularly 5; G.A. Res. 35/122E, *supra* note 67, operative ¶¶ 1-3, G.A. Res. 45/83A, *supra* note 68, prml. ¶¶ 11.

¹⁶⁶ G.A. Res. 2949 (XXVII), *supra* note 161, operative ¶¶ 7-8.

injuria ius non oritur: “It goes without saying that the outcome of an unlawful act is tainted with illegality.”¹⁶⁷ Yet the Court examined in detail the compliance with international humanitarian law, including the Hague Regulations of 1907 and Geneva Convention IV. It seems to have had no doubt as to the applicability of international humanitarian law or of any of its parts, despite the implied illegality of the occupation. Again, however, the applicability of the law of occupation did not serve as delineation of the status of an illegal occupant but to emphasize that Uganda had indeed been an occupant.

Another avenue of responding to illegal occupations through non-recognition was through the refusal of accreditation by the U.N. General Assembly. Attempts to reject credentials have been made with respect to Israel, Kampuchea, and South Africa.¹⁶⁸ With respect to South Africa and Israel, the attempts to reject their credentials were aimed at preventing their participation in the work of the U.N. The steps taken to refuse accreditation (which succeeded with respect to South Africa) reflected deep dissatisfaction with the policy or even existence of the states. But they were neither limited nor legally linked to the status of the two states as illegal occupants.¹⁶⁹

In contrast, Kampuchea’s credentials dispute from 1979 to 1989 was directly related to its occupation by Vietnam. During this period, the Credentials Committee was presented with conflicting letters of accreditation annually, one from the effective government established by the Vietnamese Government, and the other from the exiled government. The Credentials Committee, and subsequently the General Assembly, chose to accept the latter credentials.¹⁷⁰ This reflected their unease with accepting the credentials of a government imposed and sustained by the occupant. In essence, they refused to recognize the consequences of the Vietnamese occupation.¹⁷¹ Formally, however, the debate was framed in terms of the legitimate representation of independent

¹⁶⁷ *Armed Activities* (separate opinion of Judge Kooijmans), *supra* note 6, ¶ 60.

¹⁶⁸ On the birth of this practice Dan Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 INT’L COMP. L. Q. 351 (1976).

¹⁶⁹ With respect to South Africa, emphasis was put on the policy of apartheid within South Africa. With respect to Israel, the attempt was first made in 1982, following the First Lebanon War. Malvina Halberstam, Note, *Excluding Israel from the General Assembly by a Rejection of its Credentials*, 78 AM J. INT’L L. 179 (1984).

¹⁷⁰ The dispute was only resolved in 1991 with the signing of the Paris Treaty, terminating the civil war in Cambodia.

¹⁷¹ For a detailed chronology and discussion of these events see Orna Ben-Naftali & Antigoni Axenidou, “Accredito” *Ergo Sum: Reflections on the Question of Representation in the Wake of the Cambodian Representation Problem in the Fifty-Second Session of the General Assembly*, 27 DENV. J. INT’L L. & POL’Y 151, especially 178-84 (1998-99).

Kampuchea and not on whether Kampuchea was independent or occupied, or on who is entitled to represent an occupied territory. Indeed, a proper application of the obligation of non-recognition should have addressed Vietnam. If the government it instituted was able to establish its independence and claim to represent Kampuchea, a state that has done no wrong, it was inappropriate to continue the sanction of non-recognition against Kampuchea.¹⁷²

D. *The Right to Self-Defense*

The illegality of the occupation raises the question whether the occupant can invoke the right of self-defense with respect to the territory under illegal occupation. In the *Wall* case, the ICJ noted the right to self-defense under U.N. Charter Article 51 cannot be invoked when the threat to the state emanates from within territory under occupation.¹⁷³ Christine Gray argues that as a matter of principle, the right to self-defense cannot be invoked by an illegal occupant. This argument is supported by statements rejecting the claims of South Africa, Portugal, and Israel¹⁷⁴ regarding self-defense with respect to the territories under their occupation, on the ground that the three occupants' use of force was directed against the legitimate struggles of peoples holding the right to self-determination.¹⁷⁵ This is an accurate description of states' positions, supported by certain readings of international instruments which prohibit the use of force which deprives peoples of the right to self-determination.¹⁷⁶ But it is submitted that this is an incomplete application of international law. At issue is the relationship between the right to self-determination and the prohibition on the use of force. Normally the question in this context is whether force may be used to vindicate the right to self-determination. Here the question is different; it is whether use of force that is lawful under *jus ad bellum*, namely self-defense, becomes unlawful when it conflicts with the right to self-determination. Gray presents the argument that it does. This proposition assumes that the right to self-determination trumps the laws on the use of force and therefore the occupant of a territory inhabited by a people

¹⁷² Colin Warbrick, *Kampuchea: Representation and Recognition*, 30 INT'L COMP. L. Q. 234, 245 (1981).

¹⁷³ *Wall* Advisory Opinion, *supra* note 34, at 194, ¶ 139.

¹⁷⁴ Which she characterizes as an illegal occupant because of its illegal use of force, GRAY, *supra* note 7, at 102.

¹⁷⁵ *Id.*

¹⁷⁶ 1970 Declaration principle 1 ¶ 7, Definition of Aggression, *supra* note 64, prmb. ¶ 6.

enjoying the right to self-determination (which exists prior to and independently of the use of force) is necessarily in violation of the prohibition on the use of force. In this case, the occupant cannot rely on the right to self-defense. But if this proposition is adopted, the concept of occupation, which almost by definition places limitations on the right to self-determination, would become largely irrelevant.¹⁷⁷ Instead, it is submitted that the relationship is more complex. The right to self-determination is not absolute. Just as it yields to the right of states to sovereignty,¹⁷⁸ it also yields to the right to self-defense. An occupation justified by self-defense may constitute an interference with the right to self-determination,¹⁷⁹ but is not necessarily in violation of it. As Cassese notes, the violation of the right to self-determination is implicated only if the use of force leading to occupation was illegal.¹⁸⁰ This analysis highlights the difference between the Israeli occupation and the South African and Portuguese ones. In the case of Namibia and Guinea-Bissau, there was no internationally-acceptable justification for the use of force which led to occupation. Accordingly the occupation was illegal because it not only interfered with, but actually violated the right to self-determination.¹⁸¹ With respect to Israel, there is at least a credible claim that the occupation was a result of lawful action in self-defense. As such, it was not a violation of the right to self-determination, although it interfered with this right.

The question of self-defense can also be examined from within the law of self-defense itself, where necessity is a requisite for a lawful claim of self-defense. If territory is held in breach of a peremptory norm of international law, its maintenance by the occupant cannot be regarded as necessary, not least by force. Accordingly, the laws of self-defense do not admit a claim of self-defense when the occupation

¹⁷⁷ Cf. BENVENISTI, *supra* note 3, at 187.

¹⁷⁸ In that self-determination is not regarded as grounds for disrupting territorial integrity except under exceptional circumstances. Malcolm Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478 (1997). Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 127.

¹⁷⁹ At least when it concerns a self-determination unit CRAWFORD, *supra* note 13, at 115.

¹⁸⁰ CASSESE, *supra* note 7, at 55.

¹⁸¹ GRAY, *supra* note 7, at 101. For statements *see, e.g.*, Security Council, Provisional Verbatim Record, 2607th mtg., France, at 10, ¶ 127:

We cannot accept the pretexts put forward by the South African Government, according to which this attack is to be viewed as preventive action against the forces of SWAPO. They do not threaten the territory of South Africa, and nothing authorizes Pretoria to conduct military operations in Angola in the name of the inhabitants of Namibia[.]

Similarly U.S., at 11 ¶130: “[W]e are not sympathetic to South African assertion of any right to conduct military expeditions into Angola under the theory of defending its illegal presence in Namibia.” And *see also* the statement by Trinidad and Tobago, at 5, ¶ 47, U.N. Doc. S/PV.2607 (Sept. 20, 1985).

is illegal in the sense proposed in this Article. Similarly, Dinstein argues that an armed attack on forces of a state would be grounds for an action in self-defense if the forces are legally stationed outside their home territory.¹⁸² Conversely, a claim of self-defense would be inadmissible if the forces are stationed at the same place illegally, as they are when the territory is under illegal occupation. This is true at least if the illegality stems from violation of *jus ad bellum*, which is the scenario contemplated by Dinstein. Moreover, if the occupation resulted from violation of *jus in bellum*, it is the military response to that violation that would constitute the true act of self-defense. The occupant obviously does not have a right of self-defense against self-defense.¹⁸³ A different set of questions on the acceptability of self-defense applies if the illegality of occupation stems from the violation of self-determination, e.g., by measures of veiled annexation. An occupant maintaining an occupation in violation of the law of occupation and the right to self-determination may be regarded as an aggressor,¹⁸⁴ but this does not necessarily mean that it had carried out an armed attack which triggers the right to self-defense.¹⁸⁵ Then the legality of military opposition by an indigenous force is governed by the answer to the dilemma noted above, regarding the relationship between the right to self-determination and the prohibition on the use of force. One claim is that the prohibition on the use of force takes precedence, in which case there is no right to use force even in pursuance of the right to self-determination.¹⁸⁶ Alternatively, the right to self-determination takes precedence over the prohibition on the use of force. In this case, the resistance to the occupant would be lawful. Then the occupant has no right to self-defense.¹⁸⁷

To conclude, the ability of the occupant to rely on the right to self-defense with respect to the territory under illegal occupation depends partly on the grounds for illegality. If it is the violation of *jus in bellum*, there is no right to self-defense, as

¹⁸² DINSTEIN, *supra* note 20, at 197.

¹⁸³ *Id.* at 178.

¹⁸⁴ See BENVENISTI, *supra* note 3, at 216.

¹⁸⁵ Leaving aside the question whether non-state entities have such a right. Cf. Falk & Weston, *supra* note 33.

¹⁸⁶ The debate was almost revived following the U.S. and U.K.'s occupation of Iraq in 2003. However S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) confirmed that the occupation of Iraq does not entitle the local population to struggle against it. Whether this is a basic principle of the contemporary law on occupation as argued by Benvenisti, *supra* note 10, at 37, or simply an instruction by the Security Council, depends largely on one's interpretation of the role of the Security Council in shaping international law.

¹⁸⁷ *Namibia* (separate opinion of Vice-President Ammoun), *supra* note 51, at 90, ¶ 12. But note that Article 51 does not expressly require the attack to be unlawful for the triggering of the right to self-defense.

in any “ordinary” case of aggression. If the illegality stems from the violation of the right to self-determination in the maintenance of the occupation, this becomes a question of the preferred doctrine as to the relationship between self-determination and self-defense.

V. Conclusion

Part II of this Article proposes that an occupation may be considered illegal if it involves the violation of a peremptory norm of international law that operates *erga omnes* and is related to territorial status. Accordingly, illegal occupations are primarily those achieved through violation of the prohibition on the use of force, or maintained in violation of the right to self-determination. Part III of the Article examines U.N. practices in which specific occupations have been declared illegal. It demonstrates that the norms reviewed in Part II have in fact served as the basis for designating illegal occupations, with a clear emphasis on the violation of the prohibition on the use of force in the creation of the occupation. Part IV addresses certain possible consequences of an occupation’s illegality. It examines the implications of attaching international responsibility for the occupation as an internationally wrongful act; applying the principle of non-recognition to an illegal occupation; and the applicability of the right to self-defense to such an occupation.

There is no doubt that illegality of an occupation may have concrete legal outcomes. In some instances, these are direct consequences of the illegality *per se*, such as international state responsibility and the obligation of non-recognition; in other instances, the illegality plays into the operation of different bodies of law, such as the law of self-defense or the law of occupation itself. The manifest characteristic of the direct consequences of illegality, at least when the latter is grounded in the violation of *jus ad bellum*, is the loss of distinction between *jus ad bellum* and *jus in bello*. Indeed, the primacy of this distinction now faces challenges, both doctrinally and in practice. Rather than ask whether the distinction is fading into oblivion, the correct question may well be whether we should precipitate this inevitable process. The main difficulty arising from this course of development, namely subsuming the status of the occupant to the legality of the occupation, is that it may result in greater injury than benefit to the population under occupation, by making the applicable law less clear and more susceptible to manipulation.

Altering the application of the law of occupation does not seem an appropriate response. On the one hand, detraction from the rights or status of the occupant would not necessarily induce it to rectify the illegality by withdrawing from the territory; on the other hand, such detraction is prone to cause uncertainty as to the rights of the population. A clear set of rules should apply with respect to the population in the territory, namely the full law of occupation. The latter clearly makes concessions towards the illegally-acting state. But it does not go so far as to privilege it and reward its illegal action. The illegality of the occupation will find expression in the application of specific bodies of law.

Another matter that needs consideration is situations when the occupant does not acknowledge its status. A formalistic approach, of applying a body of law (the law of occupation) to a situation which in practice is governed by an entirely different body of law (the domestic law of the occupant) may result in greater harm than benefit to the population. A more realistic approach would allow some flexibility in the application of the law of occupation. In practice, questions often arise only after the occupant has been ousted. By then a returning or new sovereign is in place, which can adopt a variety of policies. Other states may take the cue from that sovereign in order to minimize the variance between the formalistic and the realistic approaches.

To conclude, introducing the category of illegal occupation into international law opens up various avenues for action, but not without reservations. The guiding principle must be that the welfare of the population under illegal occupation must be safeguarded and not sacrificed for the sake of high policy. Accordingly, while the category of illegal occupation has positive and desirable aspects, they should be pursued with caution.