

A CHANGE IN PERSPECTIVE: LOOKING AT
OCCUPATION THROUGH THE LENS OF
THE LAW OF TREATIES

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I. INTRODUCTION	103	R
II. THE EFFECT OF ARMED CONFLICT ON TREATIES...	106	R
III. WHAT IS OCCUPATION?	108	R
A. <i>The Obligations of an Occupying Power under International Humanitarian Law</i>	110	R
IV. TREATY OBLIGATIONS AND OCCUPATION	117	R
A. <i>Defining "Territory"</i>	119	R
B. <i>Defining "Jurisdiction"</i>	124	R
C. <i>The Limits of an "Effect" of Extraterritorial Application</i>	127	R
V. CONCLUSION	128	R

I. INTRODUCTION

During its fifty-ninth session, in 2007, the International Law Commission (ILC) debated whether situations of occupation should be included within the scope of the draft articles on the “Effect of Armed Conflict on Treaties” then being prepared. The Working Group on the topic discussed whether the definition of armed conflict in draft article 2 should be presumed to include occupation.¹ The Working Group did not decide how the inclusion of occupation would be handled in future drafts; its final recommendation was simply that “occupation in the course of an armed conflict should not be excluded from the definition of ‘armed conflict.’”² The ILC’s

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1. Int’l Law Comm’n, *Report of the International Law Commission, on the Work of Its Fifty-Ninth Session*, ¶ 324(b)(ii), U.N. Doc. A/62/10 (2007) [hereinafter *ILC 59th Report*].

2. *Id.*

failure to address this issue directly could leave a significant gap in the law of treaties and the law of occupation.

While the Working Group's pronouncement is oblique, occupation may in fact have different effects on the treaty obligations of occupying and occupied states than armed conflict has on those obligations.³ The ILC draft articles represent an important opportunity to clarify the obligations of occupying powers. If "occupation" is read to be interchangeable with "armed conflict" in the draft articles, the two scenarios may come to be understood as legally equivalent, which could undermine the fundamental principles of the law of occupation. An occupying power takes on certain duties which do not arise in situations of armed conflict that do not involve occupation, such as the duty to restore public order while respecting the laws in force in the occupied territory.⁴ If the termination and suspension of treaty obligations are considered to operate equally in times of armed conflict and occupation, the additional positive duties of an occupying power may be negated. In order to avoid this outcome, the Commission should include a separate article in the draft articles on the particular effects that occupation may have on treaties.

The tendency to equate armed conflict and occupation stems in part from the fact that the existing legal principles applicable to the two situations derive from the same source. The law of occupation developed as part of international humanitarian law and the law of war.⁵ The Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict apply to both armed conflict and occupation.⁶ However, this similarity of prove-

3. See also *Int'l Law Comm'n, Report of the International Law Commission on the Work of Its Fifty-Ninth Session: Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Sixty-Second Session*, ¶ 125, U.N. Doc. A/CN.4/588 (Jan. 24, 2008) [hereinafter *Sixth Committee Discussions*] ("While support was likewise expressed for the inclusion of situations of occupation, it was pointed out that 'armed conflict' and 'occupation' were not synonymous and merited separate treatment.").

4. See *infra* Part III.

5. See *id.*

6. See, e.g., 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 [hereafter Fourth Geneva Convention]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 ("1. Apart from the provisions which shall take effect in time of peace, the pre-

nance does not make the situations of armed conflict and occupation legally indistinguishable. Seen through the window of another field of law whose rationale differs from that of international humanitarian law—the law of treaties—the necessity of treating armed conflict and occupation differently becomes clear.⁷

Neither the law of occupation nor the law of treaties explicitly sets out the effect of occupation on treaty obligations. The ILC itself debated whether the topic “Effect of Armed Conflict on Treaties” properly belongs to the law of war or the law of treaties.⁸ In introducing his report to the ILC at the fifty-ninth session, the Special Rapporteur on the topic recalled that the overall goals of his reports were: “(a) to clarify the legal position; (b) to promote the security of legal relations between States, through the assertion in draft article 3 that the outbreak of an armed conflict does not as such involve the termination or suspension of a treaty; and (c) to possibly stimulate the appearance of evidence concerning State practice.”⁹ The stated aims of the ILC in discussing armed conflict and treaties were therefore not aligned to those of the law of occupation, whose rationale is primarily humanitarian. This differ-

sent Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them. 2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”).

7. Traditional approaches to determining the effect of armed conflict on treaties have focused on either the subjective intention of the parties, an objective test of the compatibility of the treaty with national policy during the armed conflict, or have differentiated effects by the type of treaty involved. This Essay is concerned with possible effects of occupation, which may or may not come to pass depending on intention or typology, and should not be taken to suggest that the effects discussed would occur automatically in the case of all types of treaties, as will be discussed further in Part II below.

8. In his first report, the Special Rapporteur discusses the attitude of the ILC of 1963 that the topic was not properly a part of the law of treaties and concludes: “Text-writers of the modern era assume that the more attractive categorization is the law of treaties, and the Special Rapporteur considers that this approach rests upon sound principles.” Int’l Law Comm’n, *First Report on the Effects of Armed Conflict on Treaties*, ¶ 10, U.N. Doc. A/CN.4/552 (Apr. 21, 2005) (prepared by Ian Brownlie) [hereinafter *First Report*].

9. *ILC 59th Report*, *supra* note 1, ¶ 274.

ence in foundational motivation, combined with an examination of certain possible duties of the occupier under the law of occupation that do not exist in situations of armed conflict, such as the duty of the occupying power to temporarily administer the obligations of the occupied state, affirm the argument that a separate draft article that addresses the consequences of occupation is appropriate and necessary.

The Essay proceeds in four parts. Part II will outline the current draft articles on the Effect of Armed Conflict on Treaties, discuss the concept of an “effect” on a treaty obligation, and suggest that termination and suspension are not the only possible effects on treaty obligations. Part III will examine the concept of occupation as developed under international humanitarian law and the specific duties it places on the occupying power. In particular, it will discuss the obligation of the occupying power to respect the laws in force in the occupied territory and the presumption inherent in this obligation against the termination or suspension of any of the treaty obligations of the occupied state. Part III also suggests that the principles underlying the law of occupation could give rise to a possible duty of the occupying power to administer temporarily the obligations of the occupied state. Part IV will consider the law of treaties as it relates to occupation, particularly the concepts of jurisdiction and territory. It will consider in what circumstances treaty obligations of the occupying power would apply extraterritorially and whether extraterritorial effect can be considered an “effect” of occupation on treaty obligations, or whether those obligations remain essentially unchanged.

II. THE EFFECT OF ARMED CONFLICT ON TREATIES

The effect of armed conflict on treaties remains an unsettled area of international law. The opinion of the Special Rapporteur was that there was no “generally accepted opinion”¹⁰ on the basis for deciding which legal regime governs the situation, though various conceptual backgrounds to the topic have been proposed including those based on the compatibility of the treaty with the purposes of war and on the intention of the parties concluding a treaty. This lack of clarity motivated the ILC to codify and develop the law, and to include the topic in

10. *First Report*, *supra* note 8, ¶ 4.

the ILC's long-term program of work in 2000.¹¹ A primary goal of the draft articles is to indicate if or when armed conflict brings about the automatic termination or suspension of treaty obligations. If state practice of automatic termination or suspension is found to exist, this would distinguish armed conflict from other non-automatic doctrines of the law of treaties which require any changes to be affirmatively agreed to or invoked by the parties to the treaty. The Memorandum of the Secretariat, for example, notes that the doctrine of *rebus sic stantibus* (fundamental change of circumstances) may be distinct from a theory of the effect of armed conflict on treaties, as *rebus sic stantibus* cannot be declared unilaterally and is not automatic.¹² The possibility of automatic termination or suspension would also be relevant during an occupation. However, the effects of termination and suspension may not operate in the same way during armed conflict and occupation. Given the debate over the continued relevancy of the law of occupation,¹³ any inclusion of occupation within the scope of the draft articles, without further commentary distinguishing it from armed conflict, could be understood as rejecting these differences.

Two other relevant considerations are whether, when armed conflict involves occupation, the occupying power must temporarily administer the obligations of the occupied state, and whether the obligations of the occupying power can be applied extraterritorially to the occupied state. However, it is not clear that these considerations necessarily "affect" the treaty. A duty of temporary administration may not constitute an "effect" on a treaty, since the treaty continues in force, and the only element affected is the party who is to carry out the obligations. Similarly, extraterritorial application of a treaty could be understood as merely extending the scope of application of the treaty rather than as being an "effect" on the treaty

11. Int'l Law Comm'n, *The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine*, ¶ 164, U.N. Doc. A/CN.4/550 (Feb. 1, 2005) ("With input from States as to current governmental views, codification could greatly advance international understanding on the topic, and update a doctrine that has been largely written for another age.")

12. *Id.* ¶ 126 (also noting "the question of whether the effect of armed conflict is invocable or automatic is one that has generated surprisingly little discussion among commentators.")

13. See generally *infra* note 42.

itself. However, as both the duty to administer and extraterritorial application could alter the way in which obligations of the occupied and occupier states, respectively, are carried out, they will be examined as potential effects on treaty obligations for the purposes of this Essay.¹⁴ Whether such effects might occur automatically upon occupation, or would have to be invoked by the parties, will be discussed further in Parts III and IV.

III. WHAT IS OCCUPATION?

The law of occupation developed as part of the law of war and was codified in the Hague Regulations of 1907¹⁵ and further in the Geneva Conventions of 1949 and their first additional protocol.¹⁶ A territory is occupied when a hostile army controls it.¹⁷ Occupation can be conceived of as a temporary,

14. The possible existence of effects other than termination and suspension was also referred to during discussion of the topic at the UN General Assembly's Sixth Committee in 2007. *Sixth Committee Discussions, supra* note 3, ¶ 122 ("The comment was made on the fact that the work on the topic was limited to the possibility of suspension and termination of treaties, when, on this view, armed conflict could give rise to other more varied questions with respect to the law of treaties, including the application of the *clausula rebus sic stantibus* rule or the question of the consequences of non-performance.").

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15. Convention Respecting the Laws and Customs of War on Land § III, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV]. Although it is sometimes referred to as "belligerent occupation," occupation involving the use of military force within the context of an armed conflict is just one of several situations to which the law of occupation will apply. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3 (2004); *see generally* Adam Roberts, *What is a Military Occupation?* 55 BRIT. Y.B. INT'L L. 249 (1984).

16. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."). *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3 (applying "in the situations referred to in Article 2"). *See also* Fourth Geneva Convention *supra* note 6 (additional occupation requirements).

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17. The definition contained in article 42 of Hague IV is a factual one, stating that a "territory is considered occupied when it is actually placed under the authority of the hostile army." Hague IV, *supra* note 15, at art. 42. The legality or nature of the occupation is not taken into account in the application of international humanitarian law. *United States v. List* 15 ANN.

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intermediate phase before peace or sovereignty is restored or a new administration is created.¹⁸ Whereas occupation of territory may be regulated by international humanitarian law, annexation, that is, the incorporation of territory of one state into another, is prohibited under customary international law.¹⁹ Therefore, although the occupant exercises control over the territory, sovereignty is not actually transferred to it, and it acquires no sovereign rights over the territory in international law.

Instead, the law of occupation regulates how the occupied territory and its population are to be administered.²⁰ The 1907 Hague Convention Regulations deal primarily with the duties of the occupant towards the sovereignty of the occupied territory and its deposed government,²¹ while the Geneva Conventions contain rules regulating the treatment of individuals in occupied territory.²² In that the law of occupation lays out how the occupant is to administer the territory on behalf of

DIG. & REP. PUB. INT'L L. CASES 632, 637 (1948) ("International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupies territory. . .Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.").

18. See BENVENISTI, *supra* note 15, at xi ("Occupation is a temporary measure for reestablishing order and civil life after the end of active hostilities, benefiting also, if not primarily, the civilian population."); Nehal Bhuta, *The Antimonies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 726 (2005) ("In contrast to *debellatio*, *occupatio bellica* is an intermediate status between invasion and conquest, during which the continuity of the juridical and material constitution is maintained.").

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19. This rule of customary law is evidenced in article 2 of the U.N Charter, U.N. Charter art. 2, para. 4., and in General Assembly Resolution 2625, which states that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal." Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970).

20. The administration of the territory and its occupants in question is military administration and cannot be compared to the regular administration of a territory in peacetime. See 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, DISPUTES, WAR AND NEUTRALITY 437 (Hersch Lauterpacht ed., 1951).

21. Articles 48 to 51 regulate the collection of taxes, article 52 requisitions in kind, and article 55 public property. Hague IV, *supra* note 15.

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22. A substantial part of the Fourth Geneva Convention regulates the status and treatment of protected persons. Fourth Geneva Convention, *supra* note 6, at arts. 27-141.

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the defeated government, it can in some ways be compared to trusteeship, either like the concept in municipal law or like the trusteeship system established by the United Nations (UN) in the wake of World War II.²³ Under this system, the General Assembly approved trusteeship agreements designed to promote the gradual progression towards independence of trust territories.²⁴ However, the idea of trusteeship is only a conceptual aid in understanding the nature of occupation; the law of occupation does not recognise the legal status of the occupying power as trustee or the legality of the occupation.²⁵

A. *The Obligations of an Occupying Power under International Humanitarian Law*

The basic principle underlying the law of occupation is expressed in article 43 of the 1907 Hague Convention as follows:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in its power to restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country.*²⁶

Article 43 requires the occupying power to balance measures necessary for the maintenance of order with respect for the sovereignty of the occupied territory. Although the occupying power has some license to depart from existing law in

23. See Roberts, *supra* note 15, at 294-95 (trusteeship in its general sense is implicit in occupation, and “[t]he idea that all occupants are in some vague and general sense trustees is nothing new.”) (citing Arnold Wilson, *The Laws of War in Occupied Territory*, 18 *Transaction of the Grotus Soc’y* 38 (1933) (“Enemy territories in the occupation of the armed forces of another country constitute. . . a sacred trust”), and GERHARD VON GLAHN, *LAW AMONG NATIONS* 673 (4th ed. 1981) (occupants exercise “a temporary right of administration on a sort of trusteeship basis.”)).

24. U.N Charter arts. 75-85.

25. See the discussion of Allan Gerson, *Trustee-Occupant: The Legal Status of Israel’s Presence in the West Bank*, 14 *HARV. INT’L L.J.* 1, 1-49 (1973), in CONOR MCCARTHY, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10.1 *J. CONFLICT & SECURITY L.* 43, 46 (2005), and Roberts, *supra* note 15, at 294-295, who both contest the validity of a separate status of trustee occupation as advanced by Gerson.

26. Hague IV, *supra* note 15, at art. 43 (emphasis added).

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light of the words “unless absolutely prevented,”²⁷ it is clear that, as far as possible, the legal *status quo ante* is to be respected, because under the law of war occupation is by definition temporary.²⁸

The obligation to respect existing law is reiterated in the Fourth Geneva Convention, which concretizes the article 43 Hague Convention Regulations rule detailing the extent to which the occupying power may create or change laws of the occupied territory.²⁹ Article 64 of the Fourth Geneva Convention provides that penal laws may only be repealed or suspended by the occupant where they constitute a threat to security or an obstacle to the application of the Convention. It also details the situations in which the occupying power is entitled to introduce legislative measures.³⁰ The main purpose of thus increasing the occupants’ power to make legislative change under the Geneva Conventions was to permit the introduction of measures to fulfill the obligations of the occupant towards the local population under the Convention, which include ensuring the availability of food, maintaining hospitals, and other basic duties that the occupied government would perform.³¹ The law of occupation lays down specific rules allowing for the administration of certain fields, which may be the subject of multilateral treaties, such as the

27. See BENVENISTI, *supra* note 15, at 9 (“[F]rom the latter duty emerges the implicit recognition of the right of the occupant not to respect some of the local laws.”). R

28. See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L., 580, 582 (2006) (“The assumption that, the occupant’s role being temporary, any alteration of the existing order in occupied territory should be minimal lies at the heart of the provisions on military occupation in the laws of war.”).

29. See Fourth Geneva Convention, *supra* note 6, at art. 64 (“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”). R

30. See BENVENISTI, *supra* note 15, at 100-05 (explaining the *travaux préparatoires* of the Geneva Conventions and why the second paragraph of Article 64 is not restricted to penal matters only). R

31. *Id.* at 104.

administration of natural resources or labor laws.³² In other specific fields, customary law has developed rules governing how the occupant must administer the territory. For example, it is generally agreed that an occupant may regulate the local currency.³³ The obligations under private contracts negotiated by the occupied state are also regulated. Article 46 of the Hague Regulations obliges the occupant to respect private property. Article 53 of the Fourth Geneva Convention prohibits the destruction of real or personal property belonging to either individuals or the occupied state, unless rendered absolutely necessary by military operations. The occupying power is prevented from appropriating any property rights acquired by non-belligerent entities.³⁴

While always technically temporary, occupation is not always brief. The logic of preserving the laws of an occupied state becomes less clear when occupation is prolonged, as it prevents the occupant from reacting to social and economic change as it would do in its own country.³⁵ Given that the protection of the local population is one of the key purposes un-

32. See Hague IV, *supra* note 15, at art. 55 (“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the laws of usufruct.”); Fourth Geneva Convention, *supra* note 6, at art. 51 (detailed provisions on working conditions).

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33. ERNEST FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 70-83 (1942).

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34. See Pieter H.F. Bekker, *The Legal Status of Foreign Economic Interests in Occupied Iraq*, *THE AMERICAN SOCIETY OF INTERNATIONAL LAW*, July, 2003, <http://www.asil.org/insigh114.cfm>.

35. This problem is highlighted by Benvenisti, who comments that the underlying assumption of this law is that “in a prolonged occupation the maintenance of the *status quo ante* could prove insupportable to the local population.” BENVENISTI, *supra* note 15, at 147. *But see* Allan Gerson, *Trustee-Occupant: The Legal Status of Israel’s Presence in the West Bank*, 14 *HARV. INT’L L.J.* 1, 39-40 (1973) (“Preservation of the status quo ante by belligerent-occupants is not predicated on humanitarian concern for the inhabitants, since the best interests of the populace might well require introduction of new legislation and changes in existing institutions should the occupation prove protracted in duration. Instead, preservation of the status quo is sought out of apprehension that any changes by the occupant may become *faits accomplis* prejudicing the possible return of the territory in a peace treaty.”).

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derlying international humanitarian law,³⁶ modification of the laws of an occupied state for their benefit may in fact be permissible under that legal regime.³⁷

However, occupation has in certain circumstances been conducted with a specific goal of transforming the laws of the occupied territory; whether the law of occupation should be adapted to provide the legal framework for these situations is an open question.³⁸ This phenomenon has been referred to as “transformative occupation,”³⁹ and the U.S occupation of Iraq following the defeat of Iraqi armed forces in 2003 is arguably an example of such occupation.⁴⁰ Several orders of the Coalition Provisional Authority (CPA) were aimed at the regulation of areas which could not be considered strictly necessary under the laws of occupation, such as the complete revision of Iraqi investment law and the reorganization of the tax sys-

36. The rules of international humanitarian law seek to balance the demands of military necessity with the fundamental principles of humanity. See HANS-PETER GASSER, *INTERNATIONAL HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1998) <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JM93#7> (“The objective of international humanitarian law is to limit the suffering caused by warfare and to alleviate its effects. Its rules are the result of a delicate balance between the exigencies of warfare (‘military necessity’) on the one hand and the laws of humanity on the other.”).

37. Marten Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 86 INT’L REV. RED CROSS 745, 751 (2004) (“It appears to be currently widely accepted in legal doctrine that the welfare of the local population may justify deviation from the legislation in force.”) (citing GERARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 28 (1957)); Allan Gerson, *War, Conquered Territory, and Military Occupation in the Contemporary International Legal System*, 18 HARV. INT’L L.J. 525, 538 (1977).

38. Bhuta, *supra* note 18, at 740 (noting about the experience of the U.S occupation of Iraq that “[t]he profound difficulties encountered by the United States in realizing its vision of ‘transformative occupation’ has put into question whether legal recognition of such a notion is either desirable or useful.”). R

39. See Roberts, *supra* note 28 at 580; Bhuta, *supra* note 18, at 740 (characterizing the United States’ occupation of Iraq as transformative occupation). R

40. Whether this was a “transformative occupation” is debatable; it was, in any case, an occupation. UN Security Council Resolution 1483 recognized the responsibilities and obligations of the United States of America and the United Kingdom of Great Britain and Northern Ireland as occupying powers under unified command. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

tem.⁴¹ Some scholars have argued that the law of occupation is relevant to such scenarios, though opinion is divided.⁴² The debate turns on whether the law of occupation should adapt to encompass goals of wide-reaching reform of benefit to the occupied population or whether the law should remain as it is, to discourage such actions. David Glazier argues that past experience of occupation demonstrates that the restrictions placed on the occupying power are in fact essential “to both minimizing the military costs of the occupation and to creating favorable long-term resolution of the conflict.”⁴³ Adam Roberts suggests that deviations from the accepted principles of occupation law could be remedied by Security Council authorization, though the power of the Security Council to modify the law of occupation is debatable.⁴⁴ At the very least, it is clear that the concept of transformative occupation exists in tension with the framework of occupation law as it stands and that respect for existing laws in the occupied territory remains a fundamental principle of the law of occupation.

Neither the Regulations nor the Geneva Conventions make explicit reference to international obligations and how

41. See COAL. PROVISIONAL AUTH., ORDER 39: FOREIGN INVESTMENT (2003), available at http://www.cpa-iraq.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf; COAL. PROVISIONAL AUTH., ORDER 37: TAX STRATEGY FOR 2003 (2003), available at http://www.cpa-iraq.org/regulations/20030919_CPAORD_37_Tax_Strategy_for_2003.pdf (revising Order No. 39); COAL. PROVISIONAL AUTH., ORDER 46: AMENDMENT TO COALITION PROVISIONAL AUTHORITY ORDER NUMBER 39 (2003), available at http://www.cpa-iraq.org/regulations/20031221_CPAORD46-39Amend.pdf (revising Order No. 39); Zwanenburg, *supra* note 37, at 757-59 (discussing the legitimacy of such orders). R

42. Compare Roberts, *supra* note 28, at 620 (“Experience suggests that even overtly transformative occupants would be wise to recognize the strength and continuing validity of the law on occupations in general, and the conservationist principle in particular.”) and Zwanenburg, *supra* note 37, at 768 (supporting the continuing relevance of the law of occupation and rejecting suggestions that the existing law of occupation needs to be revised) with David Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 844 (2003) and Davis Goodman, *The need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985) (making the suggestions that Zwanenburg rejects). R

43. David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 193 (2005). R

44. See Roberts, *supra* note 28, at 622 (noting that the power of the Security Council to derogate from the law of occupation is “hard to deny”). R

they are affected by occupation or armed conflict.⁴⁵ The principles of the law of occupation demand that the automatic termination of the obligations of the occupied state cannot be an effect of occupation.⁴⁶ The termination of the obligations of the occupied state would be a denial of its residual sovereignty inherent in the concept of occupation. Draft article 3 on the Effect of Armed Conflict on Treaties states the principle that the outbreak of armed conflict does not necessarily terminate or suspend the operation of treaties.⁴⁷ Given the temporary and inherently more stable nature of occupation, the presumption against termination is arguably stronger than in the case of armed conflict, which involves constant societal unrest and might result in a permanent change in government. This distinction ought not to be overlooked by the ILC in their draft articles, as the effect on treaty obligations would be significant.⁴⁸

Whether occupation would suspend treaty obligations is less clear. A multilateral treaty that has been ratified by the occupied state is certainly a “law in force in the country.” Therefore, in restoring and ensuring public order and civil life, an occupying power would be obligated to respect the international obligations of the occupied territory “unless absolutely prevented”⁴⁹ or unless its own security needs or its obligations under the Geneva Conventions towards the local population prevent it from doing so.⁵⁰ The law of occupation

45. Since the Geneva Conventions are concerned with the protection of civilians, and most multilateral treaties do not create rights for individuals, it is perhaps not surprising that no reference is made to international obligations in those conventions.

46. See BENVENISTI, *supra* note 15, at 183 (though Benvenisti suggests that since sovereignty inheres in the local population and not in the ousted government, respect for the laws created by a non-representative government need not be absolute). R

47. See *First Report*, *supra* note 8, at ¶ 24 (“The outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties as: (a) Between the parties to the armed conflict; (b) Between one or more parties to the armed conflict and a third State.”). R

48. I suggest that the commentary to draft article 4.2(b), which refers to the nature and extent of the armed conflict in question, could include a specific reference to the nature of occupation.

49. See BENVENISTI, *supra* note 15, at 13 (explaining the meaninglessness of the phrase “unless absolutely prevented”). R

50. See Hague IV, *supra* note 15, at art. 43; Fourth Geneva Convention *supra* note 6, at art. 64. R

could thus be considered to contain a presumption against the suspension of any of the treaty obligations of the occupied state that contributed towards the restoration and promotion of public order and civil life. Conversely, the replacement of the government of the occupied state by the occupying power makes it practically impossible for the occupied state to fulfill its treaty obligations itself,⁵¹ so the law of occupation could also be said to contain a presumption that the treaty obligations of the occupied state are suspended. The ILC draft articles could incorporate the former presumption by adding to the list of treaties in draft article 7, whose object and purpose necessarily imply that they continue in operation during armed conflict, those treaties which contribute to public order and civil life in occupied territories.⁵²

The draft articles might also make explicit reference to what is now merely a potential effect of occupation: the creation of a duty on the occupying power to temporarily administer the obligations of the occupied state on its behalf. Such a duty would logically stem from the obligation articulated in Article 43 of the Hague Regulations to respect existing laws in force⁵³ in matters within the realm of the occupant's administration.⁵⁴ This scenario would see the occupying power administering the obligations of the occupied state in place of the deposed government. In cases where the occupied state is a party to a particular convention, this solution would avoid the conflict between respect for the sovereignty of the occupied territory and respect for the welfare of the local population inherent in the extraterritorial application of the obliga-

51. Though the deposed government is not prevented from legislating for the occupied territory from outside the area. See BENVENISTI, *supra* note 15, at 18.

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52. Given the range of treaties that could legitimately fall within this category, this might not appear to be a particularly useful addition to the list of treaties. However, specific acknowledgement of the duties of an occupying power towards the population in occupied territory is useful in itself.

53. Hague IV, *supra* note 15, at art. 43. But see *supra* note 27 and accompanying text (potential limitations in the extent to which an occupant must respect local laws).

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54. See the discussion of occupant administration of transboundary water resources in Eyal Benvenisti, *Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT'L L. 860 (2003), which argues that the occupant may negotiate within the framework of watercourse conventions on behalf of the occupied territory.

tions of the occupying power. This would mean, for example, that an occupant would prepare separate reports to any treaty monitoring bodies for the occupied territory. Although this solution is preferable in that it allows both sovereignty and the welfare of the local population to be taken into account, it does not allow for the application of obligations when the occupant is party to a convention which may be of benefit to the inhabitants of occupied territory (for example, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), but the occupied state is not a party to that convention. Furthermore, the recognition of a duty of *temporary* administration should be seen not as giving the occupant the *right* to take over treaty obligations, but rather as imposing a *duty* to temporarily administer them.

IV. TREATY OBLIGATIONS AND OCCUPATION

The Vienna Convention on the Law of Treaties⁵⁵ does not specifically mention occupation. Article 73 of the Vienna Convention merely provides, “The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.”⁵⁶ Given that occupation may occur without any outbreak of hostilities between states,⁵⁷ and that there were no proposals made to include “occupation” within this article at the Vienna Conference,⁵⁸ it is unlikely that the Convention was intended to apply to occupation. This may be

55. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

56. *Id.* at art. 73.

57. It was precisely for this reason that the Geneva Conventions of 1949 expanded the definition of occupation from that of the Hague Regulations of 1907, which was conditional on the existence of a state of war, to encompass occupation occurring in the absence of a state of war, such as the occupation of Denmark and Czechoslovakia that occurred before World War II. Article 2 of the Fourth Geneva Convention reads: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” Fourth Geneva Convention *supra* note 6, at art. 2.

58. Conference on the Law of Treaties, March 26-May 24, 1968, *Documents of the Conference*, ¶¶ 635-38, U.N. Doc. A/CONF.39/14 (May 1, 1969) [hereinafter Treaties Conference].

partially explained by a reluctance to appear to legitimize any unlawful use of force, or to accept as normal the existence of armed conflict prohibited by the UN Charter. This reluctance was evident at the ILC when the draft articles on the law of treaties were prepared in 1963;⁵⁹ it was only at the first session of the Treaties Conference of 1968 that the reference to “outbreak of hostilities between States” was added.⁶⁰ In contrast, by the time of the drafting of the Vienna Convention on Succession of States in respect of Treaties in 1974, the ILC was willing expressly to acknowledge the existence of situations of military occupation.⁶¹

However, the law of treaties does lay down certain rules which will be of use in determining the effect of occupation on treaty obligations. Article 29 of the Vienna Convention states that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”⁶² The effect of occupation on treaty obligations therefore turns in large part on the definition of territory.

59. The text of the original draft article finally adopted as article 69 by the ILC at its 893rd meeting reads as follows: “The provisions of the present article are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.” *Summary Record of the 893rd Meeting*, [1966] 1 Y.B. Int’l L. Comm’n 327, ¶118, U.N. Doc. A/CN.4/SER.A/1966. The original draft article was introduced by the Special Rapporteur as article Y at the 890th meeting and adopted unanimously. *Summary Record of the 890th Meeting*, [1966] 1 Y.B. Int’l L. Comm’n 307, ¶¶1-17, U.N. Doc. A/CN.4/SER.A/1966.

60. The reference to armed conflict was added as a result of amendments by Hungary, Poland, and Switzerland at the conference. Treaties Conference, *supra* note 58, ¶¶ 635-38.

61. Article 40 of the Vienna Convention on Succession of States provides, “The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from the military occupation of a territory.” Vienna Convention on Succession of States in Respect of Treaties art. 40, Aug. 23, 1978, 1946 U.N.T.S. 3. The effects of an outbreak of hostilities between states are dealt with in Article 39. *Id.*, at art. 39. The commentary to the ILC draft articles on Succession of States in respect of Treaties explains, “The military occupation of a territory does not constitute a succession of States. *While it may have an impact on the operation of the law of treaties, it has no impact on the operation of the law of succession of States (emphasis added).*” *Draft Articles on Succession of States in Respect of Treaties with Commentary*, [1974] 2 Y.B. Int’l L. Comm’n 174, 268, U.N. Doc. A/CN.4/SER.A/1974/Add.1.

62. Vienna Convention, *supra* note 55, at art. 29.

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A. *Defining "Territory"*

Though not defined in the Vienna Convention, territory is normally taken to mean, in the context of treaties, "all the land, internal waters and territorial sea, and the airspace above them, over which a party has sovereignty."⁶³ The rules of international humanitarian law regarding occupation, as outlined above, make it clear that occupation does not involve any transfer of sovereignty, though it may involve a transfer of control. A transfer of sovereignty would amount to the acquisition of territory by the threat or use of force, which is prohibited under customary international law.⁶⁴ Mere temporary control over the land by the occupying power does not allow for that land to be considered part of the "territory" of the occupying power, within the meaning of the Vienna Convention.⁶⁵

One could argue that the effective administration and management of an area can be equated with de facto acquisition of that land as territory. This argument is distinct from any interpretation of territory based on the special nature of human rights obligations. It is a basic tenet of occupation that the occupying power substitutes its own authority for that of the occupied state.⁶⁶ The occupying power exercises control over occupied territory as it does over its own sovereign territory. Some scholars argue, therefore, that occupied territory can be considered de facto, if not de jure, part of the "territory" of the occupying power, and the human rights obliga-

63. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 162 (2000).

64. See OPPENHEIM, *supra* note 20, at 43.

65. This does not preclude the possibility that occupied land could be considered as falling within the territory of the occupying power, within the context of certain conventions which may explicitly ascribe to "territory" a broader meaning than the Vienna Convention standard. See, e.g., Convention on International Civil Aviation art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (recognizing complete and exclusive sovereignty over each contracting state's airspace).

66. The idea of the occupying power replacing the local government is a basic tenet of occupation. It was referred to by the International Court of Justice (ICJ) in *Armed Activities on the Territory of the Congo*: "In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government." *Case Concerning Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1 ¶ 173 (Dec. 19) [hereinafter *Armed Activities Decision*].

tions of the occupying power will apply in occupied territory for this reason.⁶⁷

The ICJ Advisory Opinion on the Consequences of the Construction of a Wall held that Israel's obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Political rights (ICESCR) and the Convention on the Rights of the Child (CRC) extended to their policies in occupied Palestinian territory.⁶⁸ In relation to the ICCPR, the Court relied on findings of the Human Rights Committee, referring to the "long-standing presence of Israel in [the occupied] territories [and] Israel's ambiguous attitude towards their future status,"⁶⁹ and held 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 a de facto annexation."⁷⁰ In discussing the different legal arguments for the extraterritorial application of human rights treaties and the ICJ Advisory Opinion, Michael Dennis states that "arguably the best reading of the Court's opinion is that it was based only on the view that the West Bank and Gaza were part of the "territory" of Israel for purposes of the application of the Covenant."⁷¹ If one accepts this view, then the case for extraterritorial application of treaty obligations is much stronger in situations of occupation, where the occupying power is in control of a territory, than in times of armed conflict in general, where the opposing state may still exercise some governmental functions. Such a view

67. In explaining case law in which human rights obligations were held to extend to areas under the effective control of the state, Noam Lubell writes: "The essence of the extension of obligations to occupied territory is based on the analogy to national territory, in that occupied territory is in effect under the authority and control of the occupying State." Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV RED CROSS 737, 740 (2005).

68. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter Wall Opinion].

69. *Id.* ¶ 110 (second bracket added).

70. *Id.* ¶ 121.

71. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123 (2005).

would also mean that the reference to “territory” in all treaty obligations of the occupying power, regardless of their nature, would include the occupied territory.

However, to consider that treaty obligations apply because the occupied territory has *de facto* become analogous to the national territory of the occupying power does not appear to have any basis in the law-of-treaties concept of territory.⁷² This consideration also ignores one of the fundamental principles of the law of occupation: that illegal occupation cannot result in the acquisition of territory. Moreover, the ICJ opinion states that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”⁷³ For this reason, this Essay argues that the Court does not mean to accept the view that occupied territory becomes part of the *de facto* territory of the occupying power. Rather, the Court’s decision can be read as an acknowledgement of the specific interpretation of jurisdiction in the context of human rights treaties, discussed further below.⁷⁴

Even if occupied territory cannot be considered “territory” of the occupying power within the meaning of Article 29 of the Vienna Convention, the treaty obligations of the occupying power may apply in occupied territory if such an intention of the parties can be established, or is specifically provided for in the treaty itself.⁷⁵ Apart from these two situations, Article 29 of the Vienna Convention can actually be taken to contain a general presumption against the extraterritorial effect of treaties. When the draft articles of Vienna Convention were under discussion at the ILC, a specific reference to extraterritorial effect was intentionally avoided. The initial proposal by the Special Rapporteur in his third report contained the following formulation:

72. As Enrico Milano points out, “[t]he law of military occupation represents a limitation to a full impact of the principle of effectiveness in international law . . . [I]ts *raison d’être* lies exactly in the possibility of distinguishing between a military *de facto* authority—temporally limited—and the exercise of territorial sovereignty by the occupying power.” ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND EFFICIENCY 96 (2006).

73. Wall Opinion, *supra* note 68, ¶ 111.

74. See *infra* Part IV.B.

75. Vienna Convention, *supra* note 55, at art. 29.

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A treaty applies with respect to all the territory or territories for which the parties are *internationally responsible* unless a contrary intention (a) is expressed in the treaty; (b) appears from the circumstances of its conclusion or the statements of the parties; (c) is contained in a reservation effective under the provisions of articles 18 to 20 of these articles.⁷⁶

However, discussion of the then-draft article 57 at the ILC in 1966 specifically changed the scope of application so as not to include the application of a treaty beyond national frontiers: In his sixth report the Special Rapporteur suggested an additional paragraph that would read, "A treaty may also apply in areas outside territories of any of the parties in relation to matters within their competence with respect to those areas if it appears from the treaty that such application is intended."⁷⁷

This amendment was rejected; it was considered unnecessary in light of the assumption that any treaty designed to have extraterritorial application would explicitly say so.⁷⁸ Therefore, there can be said to be a presumption against extraterritorial application.

Given this presumption, a treaty, according to Article 29 of the Vienna Convention, must either contain specific provisions on the effect of occupation⁷⁹ or such effect must be "otherwise established"⁸⁰ to overcome that presumption. Human

76. Special Rapporteur, *Third Report on the Law of Treaties*, 21, delivered to the International Law Commission, U.N. Doc. A/CN.4/167 (Mar. 3, 1964).

77. Special Rapporteur, *Sixth Report of the Law of Treaties*, 24, delivered to the International Law Commission, U.N. Doc. A/CN.4/186/Add. 1 (Mar. 25, 1966). This amendment was discussed at the 850th meeting. *Summary Records of the 850th Meeting*, [1966] 1 Y.B. Int'l L. Comm'n 39, ¶¶ 85-101, U.N. Doc. A/CN.4/SER.A/1966.

78. *Summary Record of the 851st Meeting*, [1966] 1 Y.B. Int'l L. Comm'n 48, ¶¶ 48-73, U.N. Doc. A/CN.4/SER.A/1966. The article was then sent to the Drafting Committee without the amendment. *Id.* The article was adopted as Article 25 at 893rd meeting.

79. See, e.g., Fourth Geneva Convention *supra* note 6; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

80. Vienna Convention, *supra* note 55, at art. 29 ("Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.").

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rights treaties are of particular interest in the latter regard.⁸¹ It has been held by various jurisdictions that the human rights obligations of an occupying power will extend to include occupied territory.⁸² However, this principle is not universally accepted.⁸³ Although there is some overlap between international humanitarian law obligations and those contained in human rights instruments, to state that certain multilateral conventions (which have not attained the status of customary law) apply extraterritorially is to go a step beyond the application of international humanitarian law. There may be room for such an argument, however. Arguments for an exceptional human rights regime are based on the nature and purpose of such conventions,⁸⁴ and the fact that they create obligations of a state party towards individuals and not towards other states.⁸⁵

81. However, note the argument that the Vienna Convention is not adapted to human rights treaties and application of the Vienna Convention to human rights treaties would therefore not provide a good case study. Martin Scheinin, *Human Rights Treaties and the Vienna Convention on the Law of Treaties – Conflicts or Harmony* (2006), www.abo.fi/institut/imr/research/martin/ILA%20Scheinin.doc.

82. See Armed Activities Decision, *supra* note 66, § 179; Wall Opinion, *supra* note 68, at § 102-113; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1 (Grand Chamber) [hereinafter Cyprus Opinion] at §77; Human Rights Committee, International Covenant on Civil and Political Rights *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (“[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”). See also F. COOMANS & M.T. KAMMINGA, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES I (2004).

83. See Dennis, *supra* note 71, at 123.

84. In the interpretation of such treaties, the fundamental principles the treaty is designed to protect are always borne in mind and are actively incorporated into particular provisions. The ILC Report on Fragmentation states “the principle of ‘dynamic’ or teleological interpretation is much more deeply embedded in human rights law than in general international law.” Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, ¶ 130, U.N. Doc. A/CN.4/L.682 (Apr. 1, 2006) (*finalized by* Martti Koskenniemi).

85. See, e.g., Hum. Rts. Comm., *General Comment No. 24*, ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (“Such treaties and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee’s competence under article 41.”).

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Human rights conventions differ from other multilateral treaties in that many human rights conventions set out the obligations of the state towards people under their jurisdiction, rather than explicitly mentioning territory as a limit to the scope of application.⁸⁶ In the context of the Vienna Convention, it can be argued that these characteristics indicate an intention of the parties that human rights conventions would apply to occupied territory.

B. Defining “Jurisdiction”

Within the field of human rights treaties, the concept of extraterritorial application has developed primarily through judicial interpretation of the meaning of “jurisdiction.”⁸⁷ Although there are some differences between the regional human rights systems—for example, European Court of Human Rights jurisprudence stresses control over territory⁸⁸

86. See generally International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, U.N. Doc. A/6316 (Dec. 16, 1966) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.”) (emphasis added); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (“The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.”) (emphasis added); American Convention on Human Rights art. 1, Nov. 11, 1969, 1144 U.N.T.S. 123 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure *to all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms.”) (emphasis added).

87. See *supra* note 82 (listing instances in which human rights treaties have been found to have extra-territorial application). For relevant references to “jurisdiction,” see International Covenant on Civil and Political Rights, *supra* note 86; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 86; American Convention on Human Rights, *supra* note 86.

88. Cyprus Opinion, *supra* note 82, § 77 (“Having effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of other acts of the local administration which survives by virtue of Turkish military and other support.”). See also *Bankovic v. Belg.*, 2001-XII Eur. Ct. H.R. 333 (Grand Chamber) (focusing on whether the impugned act was performed or had effects outside of the territory of the respondent state); *Issa v. Turk.*, App. No. 31821/96 Eur. Ct. H.R. (2004) (finding jurisdiction to include control over individuals); *Öcalan v. Turk.*, 2005-IV Eur. Ct. H.R. 131 (indicating that human rights obligations can be attached

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and the Inter-American system makes control over the person the essential factor⁸⁹—the fundamental principle is that human rights obligations will apply when a state exerts control over situations outside its own territory.⁹⁰ The decision of the ICJ in the *Armed Activities* case, citing the Wall Opinion, suggests that there are degrees of control a state may exercise outside of its own territory. “The Court further concluded that international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,’ particularly in occupied territories.”⁹¹ The phrase “particularly in occupied territories” can be taken to indicate that a state may exercise sufficient control over a territory for that territory to be considered within its jurisdiction for the purposes of international human rights instruments without being considered an occupying power; the word “particularly” suggests that occupation is just one situation out of several in which human rights obligations are applicable outside a state’s territory. By logical extension, extraterritorial application is an effect which both armed conflict and occupation could have on particular types of treaties, as both are situations in which jurisdiction is exercised outside of a state’s territory.

The use in human rights treaties of the word “jurisdiction,” rather than “territory,” could be considered evidence of a different intention for application within the meaning of article 29 of the Vienna Convention. It could also be considered

to extraterritorial actions of state agents in which they have authority and control over an individual).

89. See, e.g., *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 3 rev. ¶ 37 (1999) (“In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”); *Alejandro v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 23 (1999).

90. See Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 HUM. RTS. L. REV. 411, 435 (2008) (“[T]he notion of jurisdiction in human rights treaties relates essentially to a question of fact, of actual authority and control that a state has over a given territory or person. ‘Jurisdiction’, in this context, simply means actual *power*, whether exercised lawfully or not – nothing more, and nothing less.”).

91. *Armed Activities Decision*, *supra* note 66, ¶ 216.

that courts such as the European Court of Human Rights and the ICJ, have “otherwise established” the intention of the parties that human rights treaties apply extraterritorially within the meaning of Article 29 (even when the states themselves dispute such application).⁹² In either case, it is clear that extraterritorial application is an exceptional effect and dependent on the type of treaty concerned and the nature of the obligations it contains. This is further confirmed by the recent ICJ order in the *Georgia v. Russian Federation* case.⁹³ In assessing whether the provisions of Articles 2 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) applied outside of a state’s territory, the Court stated, “whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”⁹⁴ The relevant articles of CERD do not contain any reference to territory or jurisdiction, nor was the intention of states parties as to the scope of application easily ascertainable from the *travaux préparatoires* of the Convention. Nevertheless, highlighting that CERD was a particular kind of instrument, that is, presumably, a human rights instrument, the Court found obligations under CERD to be applicable when a state acted outside its own territory.⁹⁵ This indicates that even in the absence of particular language on jurisdiction, the specific nature of human rights instruments overrides the Vienna Convention presumption against extraterritorial effect of treaties. It can therefore be argued that other obligations, sharing the particular characteristics of those found in human rights conventions, would also apply in occupied territory, despite the provisions of the Vienna Convention.

92. Vienna Convention, *supra* note 55, at art. 29

93. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), 2008 I.C.J. 140 (October 15).

94. *Id.* at 31.

95. *Id.* The wording “acts beyond its territory” suggests a lower standard for extraterritorial application than in the previous jurisprudence of the Court and can be contrasted with the *Wall Opinion* wording of “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.” See *Wall Opinion*, *supra* note 68, at §102-113.

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C. *The Limits of an “Effect” of Extraterritorial Application*

Combining the occupation-law presumption of continuity of existing laws with the law of treaties presumption against extraterritorial effect, extraterritorial effect should be considered to occur in the exceptional case. As discussed above, the ICJ has found human rights obligations to apply both during times of armed conflict and occupation.⁹⁶ If one accepts the argument in which effective control renders occupied territory de facto territory of the occupied power, then extraterritorial effect is more likely to occur during occupation than armed conflict, as the occupying state will exert a higher degree of control over the territory than it might during an armed conflict. However, a more satisfying explanation for the extraterritorial effect of human rights treaties is the nature and purpose of such treaties.

Any possible effect of extraterritorial application would only concern the obligations of the occupying power. For example, if the occupying power had a greenhouse gas emission reduction obligation under the Kyoto Protocol (and such a convention was found to be of a nature and purpose so as to require extraterritorial application in situations of occupation), it could be required to take into account emissions emanating from territory it had occupied. An important factor in deciding whether extraterritorial effect applies is which parties have signed the treaty in question. If both occupying and occupied states are parties to the convention in question, then this factor does not arise. If the occupied state has signed a treaty but the occupying power has not, the treaty will then form part of local laws in place, which must be respected by the occupier unless the occupying power is “absolutely prevented” from doing so.⁹⁷ If the occupying power has signed a treaty that the occupied state has not, extraterritorial application could be considered a violation of the sovereignty of the occupied state even if it would benefit the local population. Theodor Meron, while allowing that the needs of the local population must be taken into account, notes that such needs must be balanced with respect for the sovereignty of the territory.⁹⁸

96. See Dennis, *supra* note 71, at 122.

97. See *supra* notes 20, 63 and accompanying text.

98. Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542, 550 (1978) (“[O]n the other hand, these posi-

Given that the welfare of the local population is one of the pillars of the law of occupation,⁹⁹ the benefit to the local population of any extraterritorial effect must also be considered. To insist on the sovereignty of the occupied government, and not to recognize the fact of the authority of the occupying power, may cause unnecessary hardship to the local population. Meron raises the example of the Chicago Convention on International Civil Aviation, under which the International Civil Aviation Organization (ICAO) Assembly held that Jordan must give prior permission for any flight agreements concluded in regard to the Jerusalem airport, noted as lying in occupied Arab territories.¹⁰⁰ In failing to recognize the de facto administrative authority of the occupant, the respect of sovereignty is put before the needs of the local population, potentially to their detriment.¹⁰¹

For these reasons, a duty of temporary administration is a more satisfactory effect of occupation on treaty obligations than extraterritorial effect as it allows both sovereignty and the welfare of the local population to be taken into account. Extraterritorial effect would remain relevant when the occupant is party to a convention that may be of benefit to the inhabitants of occupied territory, but the occupied state is not a party to that convention.

V. CONCLUSION

The foregoing analysis demonstrates that occupation has unique legal implications for treaty obligations of the states involved in occupation. First, it may have effects that armed conflict does not: namely, it may create a duty of temporary administration of the obligations of another state. Second, even if extraterritorial effect and the duty to temporarily administer the obligations of another state do not constitute effects on

tive considerations should be weighed against the consideration that the ratification or nonratification of such conventions prior to the commencement of the occupation was a sovereign prerogative of the previous government.”).

99. See GASSER, *supra* note 36.

100. Meron, *supra* note 98, at 556.

101. *Id.* at 557 (“[T]he dichotomy between the real world control of civil aviation by the de facto authority and the ICAO-supported illusory control by the dispossessed government is dangerous for the safety of civil aviation.”).

the treaty itself, it is clear that the effects of termination and suspension may operate differently as a result of occupation, as compared to armed conflict. For example, the law of occupation demands that termination of the obligations of the occupied territory can never be an effect of occupation. When considering whether or not situations of occupation should be included within the scope of the draft articles under preparation for the topic "Effect of Armed Conflict on Treaties," the ILC would be advised to take into account the distinct nature of occupation. Given the debate over the continued relevancy of the law of occupation,¹⁰² any inclusion of occupation within the scope of the draft articles, without further commentary, could be understood as rejecting the existence of extraterritorial effect or the duty to temporarily administer the obligations of the occupied state. The ILC ought to consider a separate draft article to take into account situations of occupation thus clarifying the law of occupation and reinforcing the principle of respect for the needs of the local population. Alternatively, the ILC could consider referring to the distinct nature of occupation in the commentary of pertinent articles. For example, the commentary to draft article 4.2(b), which refers to the nature and extent of the armed conflict in question, could include a specific reference to the nature of occupation.

The ILC draft articles are clearly not the right instrument for a widespread revision and updating of the law of occupation. However, given the recommendation of the ILC working group that occupation be included within the definition of armed conflict,¹⁰³ the substantive content of the draft articles should logically take the distinct nature of occupation into account. The law of occupation creates unique obligations for the occupying power; a consideration of the consequences of occupation within the law of treaties by the ILC would reinforce the importance of this body of rules, designed to minimize the effects of occupation on local populations.

102. See, e.g., Glazier, *supra* note 43.

103. See *Sixth Committee Discussions*, *supra* note 3.

