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The Practice of Shared Responsibility in relation to Occupation

Enrico Milano[*]

1. Introduction

The present chapter surveys the existing practice of shared responsibility in international law in the context of occupations. The choice has been made to consider the concept of 'occupation' in a broader meaning than that normally associated with the legal regime of 'military occupation' or 'belligerent occupation', as defined in accordance with Article 42 of the Hague Regulations[1] and confirmed in the 1949 Fourth Geneva Convention[2] to include any situation in which powers of governmental authority are exercised on the basis of a contested jurisdictional title or without the consent of the legitimate government. Therefore the present analysis extends to relevant practice concerning situations of *de facto* governmental authority, and of contested extension of territorial jurisdiction beyond national borders through military means, which does not display all the features of a belligerent occupation.

For the purpose of the present analysis, the concept of shared responsibility refers to that identified by Nollkaemper and Jacobs, namely *ex post facto* responsibility of multiple actors for their contribution to a single harmful outcome.[3] The notion of 'harmful outcome' encompasses both material and non-material injury, involving a violation of an international obligation owed to a subject of international law or to the international community as a whole. Moreover, a finding of responsibility of individual entities with regard to the whole harmful effect often will be impossible on the basis of the ordinary standards of causation.

The chapter first identifies a number of relevant scenarios in which questions of shared

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[1] Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 1 Bevans 631 (Hague Regulations).

[2] Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (Fourth Geneva Convention).

[3] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, at 366-368.

responsibility have arisen or may potentially arise with regard to occupation, such as the cases of Iraq, the seceding entities in Georgia or Western Sahara (section 2). It then discusses applicable primary norms in the context of occupation, with special regard to the practice concerning the application of international humanitarian law and international human rights law (section 3). Relevant practice concerning secondary rules, as laid down in the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[4] and the Articles on the Responsibility of International Organizations (ARIO)[5] are also discussed, especially with respect to the implementation of responsibility and with respect to third parties' obligations (section 4). The procedures and processes of implementation of shared responsibility in the context of occupation are considered in the following section (section 5). Finally, some conclusions concerning the chapter's findings are drawn in the last section (section 6).

A message of caution must be expressed at the very outset: the existing practice of shared responsibility in the context of occupations is limited; as a result of that, the analysis that follows is to a certain extent speculative.

2. Factual scenarios concerning occupation

The most typical, legally defined, and systematically regulated form of occupation is that of 'military' or 'belligerent' occupation as defined in Article 42 of the Hague Regulations, which is commonly considered as reflective of customary international law.[6] According to that provision, a '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' While the above Article refers in the singular to the authority of the 'hostile army', an occupying authority may be jointly established by two or more states which are occupying a foreign state without the latter's consent. Hence, a question of shared responsibility may arise out of a joint policy of indiscriminate expropriation of

[4] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).
[5] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).
[6] See in particular the case *Prosecutor* v. *Naletilić and Martinović*, Judgment, ICTY Case No. IT-98-34, T. Ch., 31 March 2003, para. 215: 'in the absence of a definition of "occupation" in the Geneva Conventions, the Chamber refers to the Hague Regulations and the definition provided therein, bearing in mind the customary nature of the Regulations'.

private property, justified on the basis of military necessity; or out of a joint policy of creeping annexation of occupied territory.

The establishment of the Coalition Provisional Authority (CPA) in Iraq (2003-2004),[7] or the Allied Military Governments of Germany (1945-1949), Italy (1943-1945) and Japan (1945-1951) during and after World War II (WWII), were indeed joint efforts to manage occupied areas through a common organ.[8] As Dinstein has observed:

> [A] number of Occupying Powers may act together as a coalition governing a single occupied territory. If they maintain unified command, as happened in Iraq in 2003-4, the Occupying Powers will bear the brunt of joint responsibility for what is happening within the area subject to their combined effective control.[9]

To take the most recent example of a jointly managed regime of occupation, Iraq, a number of sweeping measures concerning the civil administration of the country were taken by the CPA, especially with regard to the political future and to the economic governance of the country; some of these measures, such as the 'de-baathification' of the Iraqi society, appear to have gone beyond the powers which are entrusted to occupying powers under the law of belligerent occupation.[10] The latter measures may involve the shared responsibility of the United States (US) and the United Kingdom (UK), in that both countries established and controlled the CPA and participated in its activities. On the other hand, the lack of real mechanisms of accountability created by the CPA itself has resulted in the lack of practice concerning the invocation of shared responsibility of the occupying states.

As far as security is concerned, the division of Iraq in different sectors under the responsibility of different occupying powers does not detract from the impression that the

[7] With a letter addressed to the President of the UN Security Council and dated 8 May 2003, the two lead countries of the Coalition, the US and the UK, announced the establishment of the Coalition Provisional Authority: 'the United States and the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of the Coalition Forces have created the Coalition Provisional Authority ... to exercise powers of government temporarily and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction'. UN Doc. S/2003/538 (8 May 2003).

[8] S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in P. Shiner and A. Williams (eds.), *The Iraq War And International Law* (Oxford: Hart Publishing, 2008), 185.

[9] Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), 48.

[10] The CPA Order No. 1 on the 'De-Baathification of Iraq Society' (16 May 2003) outset the Baath Party and the previous establishment linked to the Hussein's regime. See Talmon, 'A Plurality of Responsible Actors', n. 8, in particular at 187; see also M.N. Shaw, 'Territorial Administration by Non-territorial Sovereigns', in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (Oxford: Hart Publishing, 2008), 369, in particular at 390.

occupation of Iraq between 2003 and 2004 constitutes a typical occupation scenario where issues of shared responsibility may easily arise, despite the overall authority of the US Commander. The control of Iraqi territories was carved out in four areas of operations (North, North-West, Central-South, South-East). The Northern areas were under the control of the US Army. The Central-South area was under the control of the multinational division headed by Poland, which included Polish, Spanish and Ukrainian forces. The South-East area was under the control of the multinational division headed by the British army, which included British, Italian and Dutch forces.[11] Within each area, every troop-contribution nation had its own area of responsibility. For instance, the Italian contingent was assigned to the South-East area, under British control. Specifically, the Italian area of responsibility corresponded to the province of Dhi Qar.[12] The case *Jaloud* v. *the Netherlands*, recently decided by the European Court of Human Rights (ECtHR), involved a number of claims against the Netherlands for its role in the shooting and alleged lack of investigation in the death of an Iraqi national in 2004, in the context of the Dutch activities in the South-East area of occupation. The ECtHR found the Netherlands responsible for a violation of Article 2 of the ECHR due to its failure to properly investigate the death of Mr Jaloud.[13] As a result of the 'mixity' of occupying actors present on the ground in sectors under the authority of multinational divisions, one may for example envisage a scenario of shared responsibility of the commanding state and of the state operating, on the ground of failing to prevent widespread acts of looting, which became common in the first weeks after the occupation was established. While in the above-mentioned *Jaloud* case the UK was not sued before the ECtHR, it is worthwhile noting that it intervened in the proceedings on matters of principle concerning the meaning and scope of the concept of jurisdiction for the purpose of Article 1 of the European Convention on Human Rights (ECHR or Convention), and argued that neither the Netherlands, nor the UK had jurisdiction over the victim.[14]

[11] The maps describing the division in areas of responsibilities during the Iraqi occupation can be found on the following websites: www.history.army.mil/html/books/058/58-2/CMH_Pub_58-2.jpg; www.globalsecurity.org/military/ops/iraqi_freedom-ops-maps_04-2004.htm.

[12] The participation of Italian forces in the multinational occupation of Iraq was established in the framework of the operation 'Antica Babilonia'. See www.difesa.it/OPERAZIONIMILITARI/OP_INT_CONCLUSE/IRAQ_ANTICABABILONIA/Pagine/Schedadisintesi.aspx (only in Italian).

[13] *Jaloud* v. *the Netherlands*, App. No. 47708/08 (ECtHR, 20 November 2014).

[14] Ibid., Hearing (19 February 2014), available at www.echr.coe.int/Pages/home.aspx?p=hearings&w=4770808_19022014&language=lang. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).

The test set out in Article 42 of the Hague Regulations is an objective, factual test, which does not rest on the will of the occupying power to subject its conduct to the law of occupation. Yet contemporary practice concerning cases of belligerent occupation is generally limited, exactly because occupants are not inclined to be considered as effecting a 'military occupation' and to accept the legal obligations and restraints deriving therefrom under international law. The only current case where a state is accepting the status of 'belligerent occupant' under international law is the case of Israel with regard to the West Bank. More often, states intend to extend their jurisdiction on the basis of claims of sovereignty or on the basis of international instruments authorising a temporary or long-term deployment. In that regard, the notion of 'transformative occupation' has been developed by a number of writers with regard to cases such as the long-term Israeli administration of the Palestinian territory or Morocco's administration of Western Sahara, in order to affirm a 'looser' form of occupation, which meets the needs of the local population in the medium- and long-term and affords a less 'conservative' interpretation of the law of military occupation.[15] However, the notion has been persuasively criticised as conflating multilateral efforts to enforce community interests through the United Nations (UN), such as stability and the protection of human rights, with less benevolent forms of unilateral intervention, such as the US and British-led intervention in Iraq.[16]

Cases of shared responsibility in the context of occupation are not frequent; the little relevant practice has more to do with the shared 'cumulative' responsibility of non-occupying states and/or international organisations, than the joint 'cooperative' responsibility of the occupying states.[17] That may have to do with the fact that mechanisms and procedures of accountability for violations of international humanitarian law tend to be underdeveloped, based on voluntary, non-judicial mechanisms, and are normally focused on the individual responsibility

[15] A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in M.N. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Fault Lines, Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff Publishers, 2007), 439; see also E. Benvenisti, *The International Law of Occupation*, 2nd edn (Oxford University Press, 2012), 17.
[16] G.H. Fox, 'Transformative Occupation and the Unilateralist Impulse' (2012) 94 IRRC 237.
[17] According to Nollkaemper and Jacobs, 'shared responsibility that arises out of joint or concerted action. We refer to such instances of shared responsibility as *cooperative responsibility*. This covers such examples as coalition warfare, joint border patrols, or one state aiding another in committing a wrongful act. Occurrences of shared responsibility also can arise when there is no concerted action. For these cases, we adopt the phrase *cumulative responsibility*. In such cases, we recognize the need for the injured party or parties to be able to make claims against several entities, despite the fact that these entities acted independently from each other.' Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 3, at 368-369.

of each occupying state.[18] With regard to the shared responsibility of non-occupying states, factual scenarios may involve different norms applicable to third actors, or different standards of diligence required under the same primary norm. The former scenario applies when the occupation involves a gross violation of a peremptory norm, such might occur in cases where the right to self-determination of a people is systematically denied (Western Sahara, East Timor) or when the occupation results from an act of aggression (Kuwait, Crimea); third states and international organisations are under the obligation not to recognise those situations as lawful and not to render assistance to the occupant.[19] The latter scenario may relate to primary *erga omnes* and *erga omnes partes* obligations under international humanitarian law and international human rights law which provide for a 'common but differentiated' responsibility in upholding norms which are aimed at protecting fundamental values of the international community or of the contracting states (e.g. third states responsibilities with regard to Israel's occupation of the West Bank; Moldova's and Russia's responsibilities under the ECHR with regard to Transnistria).

The present chapter also looks at the practice of shared responsibility in the context of so-called *de facto* regimes, situations which do not always fit into the notion of military occupation, and where an effective governmental authority is exercised without a proper sovereign title under international law: one may recall the separatist regions of Abkhazia and South Ossetia in Georgia, the region of Transnistria in Moldova or the region of Nagorno-Karabakh in Azerbaijan. Issues of shared responsibility in these situations tend to be complicated by the fact that the exercising governmental authority is normally not associated to a recognised state maintaining significant relations at the international level, and by the fact that the so-called 'kin-states' may intervene in different forms and with different instruments (military occupation, logistical support, economic aid, etc.). With regard to South Ossetia, for instance, the Fact-Finding Commission established by the European Union (EU) has identified a number of instances in which the failure of Russian troops to prevent acts of violence and of looting conducted by South Ossetian militias in territories occupied by Russian troops has led to violations of human rights and of international humanitarian law, in

[18] Benvenisti, *The International Law of Occupation*, n. 15, at 318-47.

[19] Article 41(2) of the ARSIWA, n. 4, states as follow: 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'; Article 42(2) of the ARIO, n. 5, further specifies that: 'No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.'

the context of the 2008 conflict between Georgia and Russia.[20] The latter incidents regarding South Ossetia are indeed instances of shared responsibility, in which the conduct of a non-state entity and of a state have led to a harmful outcome.[21]

3. Primary rules applicable in the context of occupation

Primary rules are to be found mainly in the law of occupation, yet other important principles of international law come into play, such as the principle of self-determination of peoples and the right to permanent sovereignty over natural resources. Human rights law is also relevant, as it may apply to the exercise of public powers in the occupied territory as confirmed by the International Court of Justice (ICJ or Court) in the 2004 Advisory Opinion on the *Legality of the Wall*.[22] These primary rules may also become relevant in cases in which a plurality of actors is involved in the occupation, potentially raising issues of shared responsibility. The content and nature of primary obligations – for instance, whether they are obligations of conduct or obligations of result, to resort to Ago's differentiation[23] – will also affect the possibility of holding jointly or separately responsible different actors for a harmful outcome connected to the occupation.

Turning to the content of primary obligations, both the Hague Regulations and the Fourth Geneva Convention are reflective of customary international law and they impose specific obligations on the occupying states, for instance with regard to the use of public and private properties and to respect existing legislation. As far as public estates are concerned, Article 55 of the Hague Regulations recognises the right of the occupying states to usufruct, whereas Article 46 prevents the confiscation of private property. Moreover, under Article 52 of the Hague Regulations, occupants have a limited authority to requisition goods and services to accommodate the needs of the army of occupation, but the occupant is obligated to pay compensation. One should also mention the fundamental provision found in Article 43 of the

[20] Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009), vol. II, at 431, available at www.refworld.org.
[21] A similar scenario may be envisaged with regard to Russia's recent intervention in Crimea, even the level of integration and control of the new Crimean authorities in the Russian state machinery is such as to justify a conclusion that the former were *de facto* organs of Russia during the short period between their take over of Crimean institutions and Russia's annexation. See A. Tancredi, 'The Russian annexation of the Crimea: questions relating to the use of force' (2014) 1 QIL - Zoom Out I 5.
[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (*Legality of the Wall*).
[23] ILC *Yearbook* 1977/II, 31.

Hague Regulations, whereby occupants shall respect the laws in force in the occupied territory, unless they are absolutely prevented from doing so. Article 64 of the Fourth Geneva Convention specifies the content of Article 43 of the Hague Regulations, in particular with regard to the application of penal legislation in the occupied territories. In part, according to some authors, it has introduced innovative elements affording more law-making activities by the occupants.[24] Furthermore, Article 49(6) of the Fourth Geneva Convention lays down a prohibition for occupying states to 'deport or transfer parts of its own civilian population into the territory it occupies'. In sum, the gist of the law of occupation is to regulate a temporary exercise of jurisdiction by the occupying state(s), while preserving the status of the territory and the rights of the people residing therein.

In cases of occupation effected by a plurality of states, the above-mentioned obligations may apply to all the states involved in the occupation, especially in those situations, such as Iraq between 2003 and 2004, in which the occupying powers establish a joint administrative structure. In the latter scenario, obligations dealing with questions of general policy related to the occupation are more likely to give rise to issues of shared responsibility, such as those related to the transfer of civilian population or those related to respecting existing legislation; whereas, others related to the day-to-day conduct of administrative activities, such as an unlawful arrest and detention of an individual, are more likely to give rise to individual state responsibility. For instance, the CPA, in its submission to the UN High Commissioner for Human Rights, stated that 'US and UK military forces retain legal responsibility for prisoners of war and detainees in US and UK custody respectively. The US and the UK will therefore respond separately on the issue of treatment of detainees within their custody'.[25]

On the other hand, obligations of due diligence are more likely to jointly accrue upon the occupying powers. These include in general the duty to ensure public order and safety, and more specifically, the duty to prevent acts by private persons of looting, plundering and

[24] Benvenisti, *The International Law of Occupation*, n. 15.

[25] Coalition Provisional Authority submission to the UN High Commissioner for Human Rights (28 May 2004), cit. in Talmon, 'A Plurality of Responsible Actors', n. 8, at 197. See, however, Article 12 of the Third Geneva Convention (Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135) which provides for a situation of potentially shared responsibility of states, with regard to transfer of prisoners of war from one state to the other. Note, in particular the last part of the provision: 'When prisoners of war are transferred … responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.'

exploitation of natural resources, and looting of cultural and religious sites.[26]

International humanitarian law also provides for obligations incumbent upon third, non-occupying states. Article 1 of the Fourth Geneva Convention, in particular, sets out the obligation to respect and 'ensure respect for the Convention in all circumstances', which applies to states also when they are not party to the conflict or they are not occupying territory. According to the ICJ, such conclusion is warranted by the *erga omnes* nature of international humanitarian law obligations.[27] Considerable uncertainties remain over the exact content and scope of the latter obligation, and according to the International Committee of the Red Cross (ICRC), state practice on Common Article 1 is 'not rich enough to determine the upper limits of how a State may "ensure respect" for the Fourth Geneva Convention'.[28] According to Sassòli, Common Article 1 could be seen as 'establishing a standard of due diligence with regard to private players if the latter find themselves under the jurisdiction of a State, or even with regard to breaches of international humanitarian law by States and non-State actors abroad which could be influenced by a State'.[29] The above comment suggests that primary obligations of conduct under international humanitarian law, especially those setting a due diligence standard, could be ideally construed to give rise to instances of shared responsibility involving a state or a non-state actor acting 'on the ground' and another state, which may be held responsible for failing to make all possible efforts to prevent a certain conduct by the former actor. Moreover, with regard to the prohibition set out in Article 49(6) of the Fourth Geneva Convention, to induce demographic changes in the occupied territory, one could argue that a third state would be in breach of Common Article 1, if it was to promote or facilitate the transfer of its own nationals from its territory to the occupied territory. Third party's failure to comply with its international legal obligation will contribute, to different degrees, to the harmful outcome.

[26] The ICJ, in the *Congo* v. *Uganda* case affirmed that 'whenever members of the UPDF [Uganda People's Defence Force] were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the jus in bello, which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage', *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, ICJ Reports 2005, 168, para. 245 (*Armed Activities* or *Congo* v. *Uganda*); See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), Provisional Measures, ICJ Reports 2008, 353.

[27] *Legality of the Wall*, n. 22.

[28] M. Sassòli, A.A. Bouvier, and A. Quintin, *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law*, 2nd edn (Geneva: International Committee of the Red Cross, 2006), 231.

[29] M. Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401, at 412.

The principle of self-determination is nowadays considered to be a fundamental principle of international law; according to some authors this has even acquired the status of *jus cogens.*[30] The ICJ has characterised the obligation to respect the right of self-determination of peoples as having an *erga omnes* character, in two cases involving an occupation which was arguably (*East Timor*),[31] or was found to be (*Legality of the Wall*), in breach of the right of self-determination of a people. According to the identically worded Articles 1(3) of the International Covenant on Civil and Political Rights (ICCPR)[32] and of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[33] '[t]he States Parties to the present Covenant[s], including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect the right, in conformity with the provisions of the Charter'. In its General Comment No. 12, the Human Rights Committee has added that '[t]he obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.'[34] Similarly to what has been observed with regard to international humanitarian law, respect for the right of self-determination clearly imposes specific obligations upon states occupying the territory inhabited by the people, but it also extends positive obligations upon third states. Yet the scope and meaning of the latter obligations is left, to a considerable extent, undefined and it tends to conflate with the secondary obligations of cooperation to bring to an end to the unlawful situation under the law of state responsibility.[35] Indeed, it is hard to figure out what kind of positive action could be required as a matter of international law, beyond the general obligation to cooperate through international organisations and international *fora* to promote the realisation of the right of self-determination. The generic nature of the due diligence obligation will make it difficult to find a) a violation of the due diligence standard; and b) a contribution to the harmful outcome, namely to the impairment of the right to self-determination of a people.

[30] E.g. I. Brownlie, *Principles of Public International Law*, 7th edn (Oxford University Press, 2008), 579-582.
[31] *East Timor (Portugal* v. *Australia)*, Judgment, ICJ Reports 1995, 90.
[32] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).
[33] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3 (ICESCR).
[34] Human Rights Committee, General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples (13 March 1984), para. 6, available at www.refworld.org.
[35] See section 4.

As an important corollary to the principle of self-determination, one should also mention the principle of permanent sovereignty over natural resources. In the *Congo* v. *Uganda* case,[36] the ICJ has characterised the principle as being part of customary international law, despite the fact that it has held that the principle is not applicable 'to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State'.[37] Despite the controversial nature of the Court's statement, it would be too far-reaching to infer from the conclusion that the principle in point and international humanitarian law are mutually exclusive. What can be stated is that the principle is applicable to all situations in which a people has yet to determine its final status and, in certain situations, it may qualify states' obligations under international humanitarian law, in the sense that the principle of usufruct may be rendered more stringent by the application of the regime of exploitation of natural resources associated to non-self-governing territories (NSGTs). In the 2002 legal opinion rendered by the UN Legal Office to the Security Council concerning the exploitation of natural resources in Western Sahara, the Legal Office has maintained that the administrator of a NSGT is not prevented from undertaking any exploration or exploitation activity with regard to natural resources present in the NSGT, but that such use of natural resources should be in accordance with the interests and wishes of the local population.[38] The principle may well apply to situations in which administrative authority is exercised by two or more states through joint, common organs, entailing the shared responsibility of those states in case of violation of the principle.

With respect to the principle of permanent sovereignty over natural resources, questions of shared responsibility are more likely to arise regarding the legal position of third parties. Arguably, the relevant obligation is incumbent upon third parties as well, to the extent that they may directly undertake or facilitate the exploitation of natural resources, in cooperation with the authorities of the occupying state. The latest string of EU-Morocco fisheries partnership agreements have proved controversial, exactly because of the EU's involvement in the exploitation of fishing resources in the waters off the coast of Western Sahara. The Legal Services of the EU Council and of the Parliament had initially contended that obligations under international law concerning the exploitation of natural resources in Western Sahara would accrue on Morocco, and that, with regard to the conclusion and

[36] *Armed Activities*, n. 26.
[37] Ibid., para. 244.
[38] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc. S/2002/161 (12 February 2002).

implementation of the 2006 EC-Morocco Fisheries Partnership Agreement (FPA),[39] it would be Morocco's duty to make sure that the exploitation would be conducted for the benefit of the local population.[40] Yet they apparently limited the European Community's legal responsibilities in suggesting that, should 'the Moroccan authorities disregard manifestly their obligations under international law vis-à-vis the people of Western Sahara, the Community *could eventually enter into bilateral consultations with a view to suspending the agreement*'.[41] Despite the opinion, Sweden voted in the Council against the approval of the agreement, as according to its view 'all concerned [were] not ensured to benefit from the implementation of this agreement in accordance with the will of the people of Western Sahara, as provided by international law'.[42]

In a later opinion rendered in 2009, the Legal Service of the Parliament has stiffened its position by concluding that '[i]n the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resource, *principles which the Community is bound to respect, the Community should refrain from allowing vessels to fish in the waters off Western Sahara by requesting fishing licences only for fishing zones that are situated in the waters off Morocco*'.[43] The 2011 Protocol extending the agreement was approved by the Council, despite the negative vote cast by Sweden, Denmark and the Netherlands; but it was rejected by the European Parliament in December 2011, due to increasing doubts as to its compatibility with international law. On 19 December 2011, the Council informed Morocco of its termination with immediate effect of the provisional application of the 2006 FPA, which had been effected a few months earlier in accordance with Article 25 of the Vienna Convention on the Law of Treaties.[44] The European Parliament called on the European Commission to negotiate a new agreement with Morocco and to ensure that the agreement

[39] Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco, (2006) OJ L 141/4 (FPA).
[40] Legal Opinion of the Legal Service of the Council, 6664/06 (22 February 2006) (only available paras. 1-5).
[41] Legal Opinion of the Legal Service of the European Parliament, SJ-0085/06 (20 February 2006), at para. 44 (emphasis added).
[42] The full text of the Swedish declaration is reported in E. Milano, 'The 2006 Fisheries Partnership Agreement between the European Community and Morocco: Fishing too south?' 2006 22 AEDI 413, footnote 61.
[43] Legal Opinion of the Legal Service of the European Parliament, SJ-0269/09 (14 July 2009), available at www.fishelsewhere.eu/a140x1077, at para. 37 (emphasis added).
[44] M. Dawidowicz, 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC–Morocco Fisheries Agreement', in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013), 250. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

'fully respects international law and benefits all the local population groups affected'.[45] A new Protocol incorporating some of the requests made by the Parliament, and extending the application of the FPA, was eventually approved by the Council in July 2013, and later endorsed by the Parliament.[46] That notwithstanding, considerable opposition to the conclusion of the Protocol, on the basis of the latter incompatibility with international law, was expressed in the Council by five member states.[47] Such practice is evidence of the fact that a third party, by taking part in the exploitation of natural resources, may be held jointly responsible for the harmful outcome that such exploitation involves.

Finally, following the ICJ's determination concerning Israel's occupation of the West Bank in *Legality of the Wall*, it is now clear that international human rights obligations are applicable in situations of occupation. According to the Court, the ICCPR, the ICESCR and the Convention on the Rights of the Child bind Israel's authorities in the context of the military administration of the West Bank.[48] The view of the Court has been confirmed by the EU Fact-Finding Mission on the conflict in Georgia, which has held international human rights obligations applicable to the conduct of Russian troops in the context of the occupation of parts of Georgia as a result of the 2008 conflict.[49]

The extraterritorial application of international human rights conventions in situations of territorial occupations has been affirmed by the ECtHR in the 2011 *Al-Skeini*[50] and *Al-Jedda*[51] judgments, where it has found the UK to be in breach of a number of provisions of the ECHR, namely Article 2(1) (right to life) and Article 5(1) (lawful arrest and detention), as a result of a number of unlawful acts committed by British troops during the period of occupation of Southern Iraq.

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[45] European Parliament resolution of 14 December 2011 on the future Protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, P7_TA(2011)0573 (14 December 2011).

[46] European Parliament legislative resolution of 10 December 2013 on the draft Council decision on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (14165/2013 – C7-0415/2013 – 2013/0315(NLE)) (10 December 2013).

[47] Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two parties (17194/13, ADD 1 LIMITE PECHE 590) (10 December 2013).

[48] *Legality of the Wall*, n. 22, paras. 11-113. Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3.

[49] Fact-Finding Mission on the Conflict in Georgia, vol. II, n. 20, in particular at 312-317.

[50] *Al-Skeini and others* v. *the United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011), para. 149.

[51] *Al-Jedda* v. *the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011), paras. 80-84.

Moreover, the ECtHR in *Ilaşcu*[52] has held that where a contracting state is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation (such as when a separatist regime is set up, whether or not this is accompanied by military occupation by another state), the state does not thereby cease to have jurisdiction within the meaning of Article 1 of the ECHR over that part of its territory although it is temporarily subject to a local authority sustained by rebel forces or by another state. Nevertheless, such a factual situation reduces the scope of that jurisdiction. The state in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign states and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention. In other words, the ECtHR has elaborated a generic concept of differentiated responsibility for the safeguard of fundamental human rights in territories in which the exercise of lawful sovereign authority has been temporarily suspended; and found a violation by Moldova of its human rights obligations under the ECHR.

In this respect, the more recent *Catan* and *Chiragov* judgments are also instructive.[53] In the former judgment, Russia has been held responsible for violations of Article 2, Protocol 1 of the ECHR (right to education), committed by the *de facto* administration of Transnistria, due to its strong political and economic ties with the separatist regime, despite the absence of Russian military or civilian personnel on the ground and involved in the contested actions. In *Chiragov*, Armenia has been held responsible for violations of Article 1, Protocol I of the Convention (right to property), Article 8 (right to respect for private and family life), and Article 13 (right to an effective remedy) due to the impossibility for the applicants of regaining access to their homes and properties in an area under the control of the separatists of Nagorno-Karabakh; that without evidence of the establishment of a territorial occupation by Armenia on the territory of Azerbaijan, but simply on account of the strong military and economic ties between Armenia and the separatist movement.

4. Secondary rules (with special regard to the law of international responsibility)

The general international law of state responsibility and of responsibility of international

[52] *Ilaşcu and others* v. *Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004), paras. 310-319.
[53] *Catan and others* v. *Moldova and Russian Federation*, App. Nos. 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012), paras. 103-121. *Chiragov and others* v. *Armenia*, App. No. 13216/05 (ECtHR, 16 June 2015), paras. 167-187.

organisations is codified in the ILC ARIO and ARSIWA, respectively. The ARIO and ARSIWA are relevant to situations of occupation with regard to questions of attribution of conduct to multiple actors; concurring responsibility; third states obligations deriving from a serious breach of a peremptory norm; and implementation of the regime of state responsibility. International organisations may come into play both in terms of intervention on the ground, and in terms of authorisation and/or recommendation of the deployment of a security force, which was originally characterised as an occupying force. In both scenarios, it is possible to envisage different levels of multiple responsibility, which are discussed in the present section.

Before turning to general international law, one must mention the role of special regimes in defining issues of shared responsibility. Special regimes may envisage rules setting the framework, and details of, joint responsibilities of different actors in the context of occupations. For instance, the 1993 Oslo Accords established a system of interim governance in the West Bank and Gaza, involving both the occupying power, Israel, and the local Palestinian Authority, and provided for the creation of a Joint Civil Affairs Coordination and Cooperation Committee (CAC); Joint Regional Civil Affairs Subcommittees, one for the Gaza Strip and the other for the West Bank; District Civil Liaison Offices (Article I(6)(2)); and a Legal Committee jointly managed by Israel and the Palestinian Authority (PA, referred to also as 'Council' in the Accords). With regard to the maintenance of order and security, the Oslo Accords provided for the creation of a Joint Coordination and Cooperation Committee for Mutual Security Purposes (JSC); a Joint Regional Security Committee (RSC); and Joint District Coordination Offices (DCOs). The division of labour in matters of security in the 'mixed zones' (Area B) is set out in Article XII(2)(a), which provides that 'Israel will transfer to the Council and the Council will assume responsibility for public order for Palestinians. Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism.' Moreover, Article XIII(6) provides that '[t]he Palestinian Police and the Israeli military forces will conduct joint security activities on the main roads as set out in Annex I'.[54]

[54] The practice of implementation of the Oslo Accords in the West Bank has been seriously impaired by the break-out of the Second *Intifada* in 2000, and has been practically terminated with regard to Gaza as result of Israel's withdrawal, and of Hamas taking control of the area. For the little practice reported of security cooperation see G.R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press, 2000), 211-217. Declaration of Principles on Interim Self-Government Arrangements, Washington, DC, 13 September 1993, (1993) 32 ILM 1525 (Oslo Accords).

As another example, the Helsinki Agreement, concluded by Russia and the United States on 18 June 1999, provided for the participation of Russian troops in the Kosovo Force (KFOR) operation in Kosovo.[55] It established in detail the division of labour between the Russian contingent and the US, French and German contingents, respectively, in the latter's sectors and between Russian troops and North Atlantic Treaty Organization (NATO) troops at Pristina airfield. Russia's participation in KFOR has been terminated in 2003.

In general, these arrangements are not constitutive of international legal obligations potentially entailing scenarios of shared responsibility towards, for instance, the local population or the territorial sovereign. However, they may be of great relevance when determining issues of attribution in the context of occupations involving a plurality of actors. They may indeed form presumptions for the purpose of identifying the responsible actors or for apportioning responsibility for a harmful conduct. One could think of the shared responsibility arising out of a violation of international human rights law committed by Palestinian officers and Israeli soldiers during a joint patrol; or arising out of omissions attributable to Russian troops in the sector of another state, in case the latter state failed to exercise due diligence by properly instructing the Russian contingent. On the other hand, it is important to note that these rules are not 'self-standing' in defining issues of international responsibility, but they may facilitate the application of the general rules of international responsibility to the case at hand.

Turning to general international law, issues of attribution of the wrongful conduct may be particularly intricate where different occupying powers jointly act through a common administrative structure. The CPA's administration of Iraq from May 2003 to June 2004 is a case in point. The CPA was not endowed with a separate international legal personality, and it may be best characterised as a joint, common organ of the US and of the UK, which established the authority after the invasion of Iraq was completed. This would result in acts committed by the CPA as being attributable to both the US and the UK, which would share responsibility for the CPA's violations of international law.[56] The same may be said with regard to the joint allied authorities that were established by the Allied Powers in Germany,

[55] The text of the Helsinki Agreement and the related Annexes are available on the NATO website at www.nato.int/kosovo/docu/a990618a.htm.

[56] See Talmon, 'A Plurality of Responsible Actors', n. 8. See also C. Chinkin, 'The Continuing Occupation?: Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds.) *The Iraq War And International Law* (Oxford: Hart Publishing, 2008), 161.

Italy and Japan, during and after WWII.[57] With regard to Iraq, the situation is further complicated by the fact that other coalition partners, such as for example Australia, Italy and the Netherlands, participated in the occupation of Iraq during the relevant period of activity of the CPA, and seconded their personnel to the CPA: it is submitted that the latter countries put at the disposal of the CPA their military personnel for the purpose of performing functions within the mandate, with the consent and under the authority of the CPA, hence responsibility would still rest with the US and the UK. The latter solution finds confirmation in Article 6 of the ARSIWA.

On the other hand, one must highlight Article 16 of the ARSIWA, which provides for the concurring responsibility of states aiding and assisting in the commission of the wrongful act. This may well be the case in instances of occupation, in which the occupying state acts contrary to its international legal obligations with the (active) support of other states. Yet Article 16 is narrow and specific in terms of conditions. The 'aiding' state must do this with knowledge of the circumstances of the internationally wrongful act; and the contested conduct would have been internationally wrongful had it been committed by that state.

Articles 40 and 41 ARSIWA are also of great relevance with regard to the present analysis, as occupations often involve serious violations of peremptory norms. This is particularly the case where the occupation is the result of an act of aggression (e.g. Iraq's invasion of Kuwait in 1990 or Russia's recent military intervention in Crimea), or when it results in a gross denial of self-determination (as the ICJ has established in *Legality of the Wall* with regard to Israel's occupation of the West Bank). In the latter cases, third states and international organisations are under the obligations not to recognise the legality of the situation, not to render aid or assistance in maintaining the situation, and to cooperate to bring the situation to an end through lawful means. While the scope of the latter obligation is yet uncertain, and the obligation appears more to be progressive development of international law, the former 'negative' obligations have already found application in several cases and have been the subject of elaboration by the ICJ, especially in the 1971 *Namibia* opinion.[58]

[57] Talmon, ibid., at 199-201.

[58] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 (*Namibia* opinion). See also the recently adopted Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, (2013) OJ C 205/9: '[the guidelines'] aim is to ensure the respect of EU positions and commitments in conformity with international law on the non-recognition by the EU of Israel's sovereignty over

Non-recognition and the duty not to render aid or assistance may imply the prohibition to conclude agreements with regard to the occupied territory, including agreements the territorial scope of which includes the occupied territory. Limited recognition of day-to-day dealings and acts is still lawful, as it is assumed that this will benefit the local population (*Namibia* opinion).[59] On the other hand, it is arguable that states are not under the positive obligation to prevent own nationals or own corporations to trade commercially with the occupied territory, unless specific obligations to that effect are imposed by the United Nations, or if those activities directly contribute to violations of international humanitarian law. In this respect, one may recall the embargo imposed by the Security Council in the case of the Iraqi occupation of Kuwait,[60] and Decree No. 1 of the UN Council for Namibia,[61] which went as far as imposing the obligation not to trade in Namibian natural resources directly to private actors.[62] In this latter regard, one must note that, except for such rare circumstances, international law does not generally impose obligations upon private actors not to maintain commercial relations with the illegal occupant. Finally, states should be aware that under certain circumstances conduct of state-owned corporations may be attributed to them, especially when the conditions set out in Articles 5 and 8 of the ARSIWA are fulfilled. In *UN Council for Namibia* v. *Urenco, UNC and the Netherlands*, the UN Council for Namibia summoned the state of the Netherlands to appear in court, due to its control over the two companies Urenco and UNC, which had allegedly enriched uranium originating from Namibia.[63]

One must also mention the question of the concurring responsibility of international organisations in the context of occupations. The involvement of international organisations in situations of occupation may alter the legal qualification of the international presence (arguably SC Resolution 1244 with regard to KFOR's occupation of Kosovo),[64] or may render the occupation in principle to comply with fundamental principles of international law, such as the principle of self-determination of peoples (SC Resolution 1483 with regard to the

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the territories occupied by Israel since June 1967', para. 1.
[59] *Namibia* opinion, ibid., at 55.
[60] UN Doc. S/RES/661 (6 August 1990).
[61] United Nations Council for Namibia, Decree No. 1 for the Protection of the Natural Resources of Namibia (27 December 1974).
[62] N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997).
[63] N. Schrijver, 'The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands' (1988) 1 LJIL 25.
[64] UN Doc. S/RES/1244 (10 June 1999).

Coalition's occupation of Iraq).[65] That an international organisation may be responsible for internationally wrongful acts committed in the context of occupations is evidenced by the case law of the ECtHR, including the cases *Behrami*,[66] *Al-Skeini*[67] and *Al-Jedda*.[68] On the other hand, in all these cases, emphasis has been put on the criterion of effective control over the conduct to establish whether the contested act should be attributed to the state *or* to the international organisation. For instance, in the former case, the ECtHR came to the conclusion that the relevant conduct should be attributed to the United Nations, to the exclusion of the responsibility of the defendant states on the basis of a controversial notion of normative authority and control exercised by the UN Security Council;[69] whereas in the latter case, responsibility lay with the troop contribution nation on the basis of the latter's control over the contested unlawful detention.[70] Similarly to Article 6 of the ARSIWA, Article 7 of the ARIO confirms in its text and in its Commentary that for those cases in which an organ of a state or of an international organisation is put at the disposal of another international organisation, it has been envisaged to mainly support findings of responsibility of individual entities, rather than shared responsibility.[71]

The dimension of joint or subsidiary responsibility in the apportionment of responsibility in the context of occupations remains unexplored in international case law, despite the codification of the responsibility of international organisations effected by the ILC in 2011. Part II, Chapter IV of the 2011 ARIO deals with the responsibility of an international organisation in connection with the conduct of a state or another international organisation, namely in cases of aid and assistance, coercion, direction, and circumvention through binding decisions or authorisations; whereas Part V deals with responsibility of a state in connection with the conduct of an international organisation. In this latter respect, the present author has argued that the conclusion by the EC/EU of fisheries partnership agreements with Morocco extending to the waters off the coast of Western Sahara in their application, identifies a

[65] UN Doc. S/RES/1483 (22 May 2003).
[66] *Agim Behrami and Bekir Behrami* v. *France*, App. No. 71412/01 (ECtHR, 2 May 2007) (*Behrami*).
[67] *Al-Skeini*, n. 50.
[68] *Al-Jedda*, n. 51.
[69] *Behrami*, n. 66, paras. 140-141.
[70] *Al-Jedda*, n. 51, para. 84.
[71] Article 7 of the ARIO, n. 5, provides that '[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'. See F. Messineo, 'Attribution of Conduct', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 60.

'primary' responsibility of the international organisation for the violation of secondary rules of non-recognition binding upon international organisations as well, while not excluding separate responsibility of member states voting in favour within the Council and accruing rights for their fishing fleet from the relevant agreement.[72]

Under Article 47 of the ARSIWA, in cases of several responsibility for the same internationally wrongful act, the injured state is entitled to invoke responsibility with regard to each responsible state, to the extent that it does not seek compensation for more than the damage it has suffered, and without prejudice to the right of recourse against any of the other responsible states. This provision is most pertinent to instances of occupation effected by several states, especially with regard to joint actions taken by the occupying powers.[73] Provision for the invocation of several responsibility of states and international organisations may be also found in Article 48 of the ARIO. The latter provision specifies that subsidiary responsibility may be invoked insofar as the invocation of primary responsibility has not led to full reparation.

In cases of shared responsibility for distinct wrongful acts, reparation will depend on the identity – or diversity – of the obligation(s) breached. Most due diligence obligations accruing upon third parties will lend themselves to declaratory reliefs (rather than compensation), due to the difficulty in establishing a causal nexus between the wrongful conduct and the injury suffered. In those cases in which a competent tribunal will be able to apportion responsibility also in terms of compensation, equitable principles will play an important role in setting the exact amount due. The *Ilaşcu* judgment is most instructive in this respect, as the amount of compensation due by each respondent state (2/3 Russia, 1/3 Moldova) shows the ECtHR's appreciation of the different gravity of the conduct attributed to Moldova and Russia, respectively.

Finally, one should mention that responsibility under international law may accrue on individuals on the basis of Article 8(b)(viii) of the Statute of the International Criminal

[72] Milano, 'The 2006 Fisheries Partnership Agreement', n. 42, at 443-444.

[73] According to the opinion expressed by the Swiss Federal Political Department in relation to the injured caused by the joint administration of the Tangier zone, set up by Spain, France and Britain in 1923, 'chacune des puissances en question est cependant pas responsable entièrement pour les actes de l'organe commun qu'est le Comité de controle. Le représentant qu'elle y délègue n'est en effet qu'un organe partiel. Il nous semble donc juste d'admettre que chaque des puissances membres du Conseil de controle est responsible pour une partie seulement du dommage', in Talmon, 'A Plurality of Responsible Actors', n. 8, at 210.

Court,[74] which identifies a specific hypothesis of war crimes related to cases of occupation, and namely '[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory'. One must underline that such a hypothesis does not extend to juridical persons, such as corporations, but only to individuals.[75] International criminal law makes room for different forms of joint criminal liability, under legal concepts such as joint criminal enterprise and accessory liability, which could potentially extend to crimes related to instances of occupation.

5. Processes

While enforcement mechanisms to ensure compliance of the occupant's conduct with international law were already in place in the second half of the twentieth century, including through resort to domestic and international courts and tribunals, a preliminary research shows that the practice of invocation of responsibility in the context of occupation with regard to multiple actors is mainly limited to the individual petition system before the ECtHR. Yet such practice also shows that it is exactly in modern occupations or occupation-like scenarios that issues of shared responsibility may potentially arise, precisely because of the involvement of a plurality of actors, and that in principle existing procedural regimes are not biased against litigation strategies aiming at 'targeting' the conduct of several respondent states.

In *Saddam Hussein* v. *Albania and others*,[76] the former Iraqi President brought a claim before the ECtHR against 21 states involved in the occupation of Iraq, who were allegedly responsible for violations of the ECHR in the context of his arrest, detention and trial. The Court declared the claim inadmissible, due to the fact that the claimant did not produce any evidence substantiating the allegation that he remained during the relevant period under the jurisdiction of the respondent states. In particular, the ECtHR highlighted that no evidence had been produced in order to identify the different roles and involvement of each of the respondent states.[77] Whereas the litigating strategy chosen by the applicant was probably far

[74] Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3 (last amended 2010).
[75] J. Crawford, 'Opinion – Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', para. 69, available at www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf.
[76] *Saddam Hussein* v. *Albania and others*, App. No. 23276/04 (ECtHR, 14 March 2006).
[77] 'The Court considers these jurisdiction arguments to be based on submissions which are not substantiated.

from ideal, the case also points to the considerable difficulties inherent in the task of gathering evidence and developing a case for shared responsibility of those actors before a domestic or international tribunal; especially where formal and informal arrangements among different actors involved in the occupation remain confidential.

In *Saramati*,[78] the claimant lodged a complaint against France, Germany and Norway before the ECtHR for a violation of Articles 5 (personal liberty and security) and 13 (right to an effective remedy), committed by the forces of the latter countries during the early stage of the KFOR operation in Kosovo. The Court declared the lack of competence *ratione personae* as it held that the contested acts were attributable to the United Nations. The decision was heavily criticised in the literature. It constitutes an interesting case of practice to the extent that the law of occupation could be considered fully applicable to the initial phase of KFOR's intervention.[79]

The cases *Ilaşcu* and *Catan* are also examples of claims of a violation of the ECHR brought against multiple parties. In the former case, the Court identified differentiated levels of responsibility of Russia, which had been actively supporting the *de facto* administration of Transnistria; and Moldova, which maintained ties with the separatist region.[80] The differentiation of the responsibility of the two parties is not reflected in the procedure for the filing of claims, as the applicants presented their claims in applications brought against both parties.

Jurisdictional hurdles before other international tribunals, including the ICJ, may be difficult to overcome, as the *East Timor* case has clearly shown. Neither Indonesia nor Australia could be held accountable for the joint exploitation of natural resources in the East Timor Gap, due to Indonesia's lack of consent to ICJ jurisdiction. Nollkaemper has referred to this

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While the applicant referred to certain UN documents, press releases and academic publications, these referred, without more, to coalition partners acting together. The applicant did not address each respondent State's role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US and non-US forces except to refer to the overall Commander of coalition forces who was at all relevant times a US General. Finally, and importantly, he did not indicate which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover. Despite the formal handover of authority to the Iraqi authorities in June 2004 and elections in January 2005, the applicant simply maintained, without more, that those forces remained *de facto* in power in Iraq', ibid., at 3-4.

[78] *Ruzhdi Saramati* v. *France, Germany and Norway*, App. No. 78166/01 (ECtHR, 2 May 2007).

[79] Benvenisti, *The International Law of Occupation*, n. 15; J. Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-conflict Kosovo' (2001) 12 EJIL 469.

[80] See section 4.

jurisdictional hurdle as the 'indispensable parties principle'.[81]

However, the principle has been interpreted restrictively by the ICJ, and it has not prevented the assertion of jurisdiction in the case concerning *Certain Phosphate Lands in Nauru*,[82] a case involving the alleged joint responsibility of three states, namely Australia, the UK and New Zealand, which composed the Authority which had administered the island from 1947 to 1967, two of which, the UK and New Zealand, were not parties to the proceedings before the Court. While the latter case does not fit into the description of 'occupation', it shows that the ICJ may constitute a suitable venue in cases in which occupying states create a common organ to decide and coordinate their occupation policies.

Whereas processes allowing claims of joint liability involving states and individuals or private corporations are unknown in international law, the little relevant practice may be found in proceedings instituted before domestic courts, where controlling procedural rules are domestic. Some judicial practice concerning the review of the occupant's measures stems from the courts of occupied territories, but this did not involve issues of shared responsibility.

To provide a significant example of proceedings instituted before a domestic court, in *UN Council for Namibia* v. *Urenco, UC and the Netherlands*, the UN Council for Namibia brought a claim before the District Court in the Hague, with regard to uranium enriching activities by two Dutch companies, against both the companies and the state of the Netherlands, on the basis that the defendants '[were] acting unlawfully vis-à-vis the people of Namibia, viz. infringing and contributing towards the infringement of the right to self-determination of the people of Namibia, the rights of that people with respect to the ownership and exploitation of the natural resources of Namibia … and [were] acting contrary to the due diligence they are bound to observe vis-à-vis the people of Namibia and its natural resources'.[83] The proceedings were later discontinued.

Relevant practice may also be found before Israeli courts, where both the governmental agencies and private actors have been sued before domestic courts, in order to contest measures adopted in the context of Israel's occupation, especially involving the exploitation of natural resources in the West Bank (e.g. *Yesh Din – Volunteers for Human Rights* v. *IDF*

[81] P.A. Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', SHARES Research Paper 01 (2011), ACIL 2011-01, at 13, available at www.sharesproject.nl. See also M. Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4(2) JIDS 295.
[82] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Preliminary Objections, ICJ Reports 1992, 240.
[83] Cit. in Schrijver, *Sovereignty over Natural Resources*, n. 62, 150.

Commander;[84] *Na'ale* v. *the Supreme Planning Committee*);[85] yet in all these cases the petitions were dismissed on substantive grounds.[86]

Non-judicial, administrative procedures may be set up in the context of peace-support operations. As far as KFOR in Kosovo is concerned, the 'Standard Operating Procedure 3023 for Claims in Kosovo' (SOP) was promulgated by the KFOR Commander (COMKFOR) on 22 March 2003.[87] The SOP is binding only for troops integrated within NATO's chain of command. The procedure envisaged in Annex A specifies that the Claims Office is the competent body entrusted with the enquiry and the final determinations related to any claims brought against KFOR. When the Claim Officer has gathered all relevant information, he or she examines the complaint and determines whether the latter fulfils all the conditions and requirements set out in section 7 of UNMIK Regulation No. 2000/47 concerning the jurisdiction *ratione personae.*[88] The claimant 'must prove on the balance of probabilities (51 per cent) each element of a claim, namely did HQ KFOR owed [sic] a duty of care; was there a breach of this duty; did damage occur; and "but for" the acts or omissions of HQ KFOR the damage occurred. If the act or omission was caused by "operational necessity", HQ KFOR is relieved of liability'.[89] If a complaint is brought against a specific contributing state, section 6 provides that each '[t]roop Contributing Nation [TCN] is responsible for adjudicating claims that arise from their own activities, in accordance with their own claims rules, regulations and procedures'. This results in different standards of accountability according to the procedures and legal guarantees provided for by each contributing state. Moreover, the decision-making process is all within KFOR, hence no standard of impartiality is ensured. The appeal procedure envisaged in section 7 is a very limited guarantee as it creates only 'a *non-binding* voluntary appeal system in which HQ KFOR Claims Office and those TCNs who wish, will participate in'.[90] No evidence was found of claims brought under the above-mentioned mechanisms that implied shared responsibility among multiple actors. Moreover, the mechanism seems to envisage an alternative between 'collective' responsibility of KFOR and

[84] *Yesh Din – Volunteers for Human Rights* v. *IDF Commander in the West Bank and others*, High Court of Justice, Judgment, No. HCJ 2164/09, ILDC 1820 (IL 2011).
[85] *Na'ale* v. *the Supreme Planning Committee of the Judea and Samaria Area and others*, Original Petition to the High Court of Justice, No. HCJ 9717/03, 10359/03, ILDC 70 (IL 2004).
[86] See D. Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94 IRRC 207.
[87] See OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Property Rights in Kosovo 2002-2003, 45 (SOP), available at www.osce.org/kosovo/13059?download=true.
[88] The full text of the Regulation is available at www.unmikonline.org/regulations/2000/reg47-00.htm.
[89] SOP, Annex A, n. 87, section 5.
[90] Ibid., section 7 (emphasis added).

individual responsibility of TCNs, hence leaving little room for instances of proper shared responsibility.

6. Findings and conclusions

Practice concerning shared responsibility in the context of occupations is limited. However, the applicable normative framework is increasingly developing, both in terms of primary rules controlling the conduct of occupying states/international organisations and of third states/international organisations, and in terms of secondary rules regulating the responsibility of states and of international organisations for breaches of those primary rules. Moreover, factual scenarios where multiple actors are involved in the context of occupations are on the increase (a prominent example is the occupation of Iraq between 2003 and 2004); other cases involving states and non-state actors are becoming more and more frequent.

The gap between normative development, refinement and relevant practice, is probably due to a number of structural deficiencies characterising international law in general and, with specific regard to occupation, to the following four factors: first, due to the fact that 'reviewable' occupation measures are often taken individually by each occupant, they can lend themselves to single attribution, even in those situations in which the occupation of a territory is jointly established and managed through a common organ; second, the limited availability of processes and procedures for local actors affected by measures taken by the occupying states/international organisations and/or non-occupying states/international organisations; third, when these processes or procedures are available, both jurisdictional hurdles and 'structural bias' in the law of international responsibility in favour of findings of individual responsibility may come in the way of a successful invocation of shared responsibility; fourth and finally, when international obligations are incumbent upon non-occupying third states and their conduct may entail a violation of those obligations, there may be little 'real' interest on the part of other international subjects in invoking their responsibility.

The most interesting (and promising for the purpose of the present research) element emerging from the above practice is the concept of differentiated responsibility: the law of self-determination, international humanitarian law and international human rights law provide

increasing room for different levels and thresholds of legal responsibility related to occupations, so that the traditional designation ‘third state’ or ‘third party’ may become less pertinent. To a certain extent, that is hardly surprising given that many of the international law obligations (and rights) coming into play in the context of occupations are of an *erga omnes* character. The practice concerning Israel, Western Sahara, the Georgian seceding entities, Nagorno-Karabakh and Transnistria, which has been examined in the present chapter, points to this common feature. One can anticipate that the priority in the years to come will be the identification of the specific scope and content of primary rules, predominantly of a due diligence nature, which may give rise to situations of shared responsibility in the context of occupations; and of the different forms of reparation that the injured party and the parties acting for the protection of a collective interest may seek to obtain.