**Occupying Powers, Obligations of Prevention and Private Actors in Occupied Territory: A Theoretical Inquiry under the Law of Occupation**

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Abstract

This article explores the duties of occupying powers in relation to the activities of private actors in occupied territory. It is argued that under international law, occupying powers are bound by obligations of prevention pertaining to private actors’ activities that might be in conflict with rules of international law, and in particular, international humanitarian law. The main obligation is based upon Article 43 of the 1907 Hague Regulations. All the relevant obligations of prevention are obligations of conduct governed by the concept of due diligence. The article goes on to address the measures that the occupying powers must undertake to comply with these obligations of preventions, taking into account the limitations on the actions of occupying powers in lights of the law of occupation.

**1 Introduction**

This article explores which obligations bind occupying powers in relation to private actors’ activities in an occupied territory that are in conflict with international law. Although the law of occupation is a widely explored topic in international law scholarship,[[2]](#footnote-2) the legal obligations of occupying powers vis-à-vis private actors’ activities that are in conflict with international law have received relatively scant attention.[[3]](#footnote-3) This is unfortunate since private actors are routinely involved in the daily life of occupied territories and their activities may potentially breach many rules of international law adopted to protect the interests of the ousted sovereign, the local population, or third states. The idea that the law of occupation should be concerned only with the relations between the occupying power (through its organs) and the occupied state and / or the local population of the occupied territory lacks nuance and would create legal black holes. Indeed, state practice and international case law explored herein demonstrate that there is a significant consensus about the fact that the occupying power is responsible for preventing private actors from undertaking conduct in conflict with international law.

Examples of private actors’ involvement in occupied territories could be endless. Just to present some very typical cases, one could mention the phenomenon of the so-called outposts, which are settlements created by the population of the occupying power in the occupied territory without any direct support from the occupying power. As a such, they are outside the scope of Article 49(6) of the GCIV, which states that the occupying power ‘shall not deport or transfer parts of its own civilian population into the territory it occupies.’[[4]](#footnote-4) Another example could be that of extractive companies that pillage the natural resources of an occupied territory for profit.[[5]](#footnote-5)

This article begins by offering a cursory overview on the main tenets of the law of occupation, discussing how private actors may frustrate the protection offered by this body of law (Section 2). Then, the article addresses which entities can be considered to be private actors, in light of the rules on attribution embodied in the law on state responsibility (Section 3). At this point, the attention shifts on the obligation of prevention that can be identified under the different legal strata applicable to occupied territory, with specific attention to Article 43 of the 1907 Hague Regulations (Section 4). Subsequently, the study explores the nature of these obligations of prevention in order to assess what the occupying power is required to do in order to comply with them (Section 5), taking into account the limitations that the law of occupation imposes upon the occupying power in the fields of the legislation and other administrative measures that can be adopted in occupied territory (Section 6). Finally, the article offers some conclusive remarks on how effective these obligations of prevention are, takings into account the specific circumstances of occupied territories (Section 7).

In this study, the emphasis is mainly on the occupying power and its responsibility under the law of state responsibility. Accordingly, only cursory attention is provided to the individual criminal responsibility of state organs for lack of prevention. Likewise, since the emphasis is on the occupying powers, this article falls short of providing an account of the responsibility of private actors for violations of international law in occupied territory, either in the form of individual criminal responsibility of the private actor or of other forms of liability for business operating in occupied territory.[[6]](#footnote-6) The analysis is conducted from the perspective of public international law, with specific reference to international humanitarian law. Although several examples of obligations of prevention are discussed, the article does not aim at providing an exhaustive list of obligations of prevention binding the occupying power in relation to private actors’ activities.

Finally, a brief note on terminology. For the purposes of this article, ‘private actors’ refer to individuals or collective entities (e.g., corporations) whose actions are not attributable to the occupying power under the law on state responsibility and under international humanitarian law, as explored in Section 3.[[7]](#footnote-7) The activities of private actors that could potentially violate international law and, thus, are the object of the occupying powers’ obligations of prevention are here termed as ‘illegal activities’ or ‘activities in conflict with international law’ for reasons of brevity.

**2 A Brief Overview on the Main Tenets of the Law of Occupation**

Since occupations occur during armed conflicts, international humanitarian law is the main body governing the duties and faculties of occupying powers in occupied territory. The ensemble of international humanitarian law rules governing situations of occupation are often termed ‘law of occupation’. The law of occupation is mainly embodied in the Regulations annexed to the IV Hague Convention of 1907 (hereinafter: HR),[[8]](#footnote-8) in the Fourth Geneva Convention adopted in 1949 (hereinafter: GC IV),[[9]](#footnote-9) and in the First Protocol Additional to the 1949 Geneva Conventions concluded in 1977 (hereinafter: AP I).[[10]](#footnote-10) There is overall consensus that the rules provided by HR and the GC IV correspond to customary international law,[[11]](#footnote-11) while whether all the rules codified in the AP I have attained customary status is a matter of certain debate even today due to the steadfast opposition of few states.[[12]](#footnote-12)

The term ‘occupation’ identifies both a factual situation and the legal consequences that international law recognises for that situation.[[13]](#footnote-13) The HR provides a definition of occupied territory in its Article 42, according to which ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’ This definition corresponds to customary international law.[[14]](#footnote-14) To summarise a wider debate on when a territory can be considered under occupation pursuant to this provision, it is possible to affirm that an occupation is established when there is an exercise of actual authority over a portion of territory, and said authority is gained during an armed conflict and without the consent of the sovereign of that territory.[[15]](#footnote-15) Once these factual elements materialise, an occupation is established and the law of occupation applies, irrespectively of whether the Occupying Power declares the territory to be occupied.[[16]](#footnote-16)

Once an occupation is established, the first concern of the law of occupation is preserving a legal distinction between the power exercised temporarily by the occupying power and the entitlement to the exercise of governmental functions over that territory upon the ousted sovereign. Article 43 HR provides the main legal framework governing this distinction.[[17]](#footnote-17) According to Article 43 HR, ‘[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.’[[18]](#footnote-18) Article 43 of the HR emphasizes that the authority is translated because of the change in the factual situation over the occupied territory, rather than as per a lawful transfer of legal title, providing that the occupying power must implement its obligations while preserving as far as possible the legal framework applicable in the occupied territory before the occupation. This idea – which is at the basis of many provisions of the law of occupation – is often termed as conservationist principle, and plays an important role in relation to the activities of private actors. Article 47 of the GC IV strengthens this idea by providing that that protected persons in the occupied territory enjoy the rights embodied in the convention notwithstanding any change introduced in the territory and any annexation.[[19]](#footnote-19) Finally, Article 4 of the AP I unequivocally affirms that the occupation of a territory does not affect its legal status.[[20]](#footnote-20)

Accordingly, in situations of occupation, sovereignty remains vested in the ousted government or in the population of the occupied territory if no state existed at the time of occupation, whereas the occupying power is temporarily tasked with the administration of the territory. The core of the law of occupation is that the occupying power is nevertheless prevented from acquiring sovereignty over the occupied territory; rather, the law of occupation, along with the other rules of international law such as the principle of self-determination of peoples and the ban on the use of armed force, eradicated conquest as a lawful means to acquire territory.[[21]](#footnote-21) Accordingly, situations of occupation are always inherently temporary in the sense that occupations should end with the withdrawal of the occupying power and the reinstatement of the ousted sovereign.[[22]](#footnote-22) The recent practice of occupations lasting several decades – so-called prolonged occupations such as in the Occupied Palestinian Territory and in Western Sahara – severely undermines this fundamental character of the law of occupation.[[23]](#footnote-23)

All in all, it is possible to see the entire law of occupations as a delicate balance, a challenging bargain between different and conflicting interests. On the one hand, the occupying power is allowed to administer temporarily a portion of territory upon which it has no legal title; however, in exchange, the occupying power must bear responsibility for protecting the rights of the ousted sovereign, the rights of the local population, and, to a certain extent, the rights of third states in the occupied territory.[[24]](#footnote-24) In other words, the price for administering a territory during an armed conflict is accepting extensive responsibilities. This is not an easy task: occupations are hostile environments in which the local population is not bound by any duty of obedience to the occupying power,[[25]](#footnote-25) but rather, armed resistance against it is widespread and largely supported – even if indirectly – by international law.[[26]](#footnote-26) This fragile ecosystem of conflicting interests must be born in mind in discussing the responsibility of the occupying power for private actors’ illegal activities in occupied territory.

**3 Who Is a Private Actor?**

This section identifies who is a private actor for the purposes of this study. Private actors are those individuals or entities whose conduct is not attributable to the occupying power. Since the law of occupation is directed towards the occupying power, that is, the state that exercises hostile actual authority over the occupied territory, private actors’ activities in occupied territory complicate the legal framework and present some distinctive legal challenges.

Although the law of occupation binds states, it is a truism in international law that states do not exist in the material world, but rather, they undertake their actions thanks to human beings. Accordingly, the law of occupation binds individuals who act on behalf of the occupying power, that is, the organs of the occupying power or individuals who are considered as such under the law of state responsibility. The law of state responsibility embodies several rules that determine which individuals act on behalf of a state. These rules are explored here in wide brushstrokes only with the aim of understanding who a private actor is. They developed through customary international law and apply to international humanitarian law and the law of occupation as well.[[27]](#footnote-27) As a point of reference for them, it is possible to refer to the work of the International Law Commission, which in 2001 has adopted some Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[[28]](#footnote-28) Although these are not formally binding, the ARSIWA are generally recognised as correspondent to customary international law.[[29]](#footnote-29) The ARSIWA tackles the relationship between a human being and a state from the perspective of the legal notion of ‘attribution’,[[30]](#footnote-30) even though different tests have been suggested.[[31]](#footnote-31) For the purposes of this study, it is enough to consider that a private actor is an individual or an entity whose conduct is not attributable to the occupying power under international law.

For the ARSIWA, the conduct of some individuals is immediately attributed to the state, whereas the conduct of other individuals can be attributed to the state only subsequently if certain circumstances materialise. Attribution ab initio pertains to conduct of those individuals who are organs of the state under its domestic law;[[32]](#footnote-32) to conduct of those individuals who are placed at the complete dependence of the state;[[33]](#footnote-33) or to conduct which is directed or controlled by the state, if the state has exercised effective control over the conduct;[[34]](#footnote-34) to conduct of those individuals who exercise elements of governmental authority;[[35]](#footnote-35) to conduct carried out in the absence or default of the official authorities;[[36]](#footnote-36) and to conduct of those individuals who are placed at the disposal of a state by another state.[[37]](#footnote-37) Cases of subsequent attribution include conduct of an individual which is subsequently acknowledged and adopted by a state as its own,[[38]](#footnote-38) and the conduct of an individual belonging to an insurgent group if that group replaces the government of the state or becomes the government of a new state.[[39]](#footnote-39)

International humanitarian law only marginally alters these rules on attribution.[[40]](#footnote-40) The main difference is that while the general regime provides that the state is responsible for the conduct of organs or individuals empowered to exercise elements of governmental authority only if that conduct occurs in the exercise of official capacity,[[41]](#footnote-41) under international humanitarian law even conduct that occurs outside official capacity is attributable thanks to the more stringent test embodied in the HR and AP I.[[42]](#footnote-42) Outside this particular issue, the rules on attribution are the same. It is well-known that the jurisprudential attempt to consider that conduct of an armed group is attributable to a state if this exercises *overall* (rather than effective) control over it[[43]](#footnote-43) has been openly rejected by the ICJ.[[44]](#footnote-44) Today, the overall control test is relevant for the classification of an armed conflict, but it is not accepted as a rule on attribution.[[45]](#footnote-45)

Having identified which conduct is attributable to the occupying power, it is possible to move on to ascertain who is a private actor. A private actor is an individual or entity whose conduct is not attributable to the occupying power. This negative definition encompasses a multitude of different actors such as nationals of third states, foreign and multinational corporations, nationals of the occupying power, and the local population of the occupied territory in relation to other individuals belonging to the local population. The rules of the law of occupation that are binding upon the occupying power are inapplicable, directly, to them. Accordingly, they present a potential danger for the occupied state, the local population, and third states, since the restraints created by the law of occupation are inapplicable to them, at least at a first approximation.

The following sections will explore how and to what extent the occupying power has duties to prevent private actors from undertaking actions in conflict with international law. These duties are obligations of prevention upon the occupying power rather than direct obligations upon the private actors. They are the consequence of the burden that international humanitarian law places on occupying powers in exchange for the permission to administer alien territory temporarily: the occupying power must assume temporarily some of the duties of sovereign governments, including obligations of prevention.

**4 The Sources of Obligations for Private Actors’ Illegal Activities in Occupied Territory**

**4.1 Preliminary Remarks**

The previous section has analysed the conditions under which the law on state responsibility attributes some conduct of private actors to the legal sphere of the occupying power, leaving all the other actions by private actors outside that legal sphere. However, this does not mean that the occupying power has no responsibility for conduct of private actors that cannot be attributed under the law on state responsibility. Rather, it is necessary to shift the attention from secondary rules on the attribution of wrongful acts to states to the field of the relevant primary rules.[[46]](#footnote-46) It is possible to identify in the law of occupation some obligations that require the occupying power to prevent private actors from undertaking certain conduct; the violation of these obligations of prevention is an autonomous source of state responsibility for the occupying power.

The wrongful act at hand would consist in a conduct contrary to the primary obligation of prevention that is attributable to the occupying power under the usual rules on attribution. However, the search for relevant obligations of prevention in the law of occupation should be kept separate from the search for new grounds of attribution in relation to the conduct of a private actor. If an occupying power has the duty to prevent private actors from behaving in a way that conflicts with rule X, if the prevention fails, the occupying power would not be responsible for the violation of rule X, but rather, for the violation of the different rule that imposes the obligation of prevention. [[47]](#footnote-47)

The next subsections will explore potential sources of this obligation of prevention upon the occupying power. After having identified these primary rules, the analysis will focus on the conditions under which these obligations are breached.

**4.2. International Humanitarian Law and Private Actors**

***4.2.1 The Role of Article 43 of the HR***

International humanitarian law imposes some obligations of prevention upon the occupying power in relation to illegal activities of private actors. In particular, international courts and tribunals have interpreted Article 43 of the HR as the cornerstone of this obligation of prevention.

Before discussing this obligation of prevention, it is useful to provide a brief anatomy of Article 43 of the HR. As recalled above, under Article 43 of the HR, the occupying power must ‘take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country’.[[48]](#footnote-48) The duty to restore and ensure public order and civil life encompasses a number of different activities that characterize the life of the local population of the occupied territory. Public order encompasses ‘responsibility for preserving order, punishing crime, and protecting lives and property within the occupied territory’,[[49]](#footnote-49) as well as the protection of the occupying power’s own forces.[[50]](#footnote-50) The civil life is interpreted as encompassing the ‘whole social, commercial and economic life of the community’[[51]](#footnote-51), considering ‘a variety of aspects of civil life, such as the economy, society, education, welfare, health, [and] transport’.[[52]](#footnote-52) The duty to restore public order and civil life refers to the possibility that the invasion that leads to the occupation has disrupted public order and civil life to an extent that the occupying power has to re-establish the pre-occupation levels of both.[[53]](#footnote-53) The duty to ensure has a more progressive scope and envisages certain positive actions of the occupying power to improve the levels of both public order and civil life in the occupied territory.[[54]](#footnote-54) However, the occupying power is limited in this by the fact that it is not the legitimate sovereign, but rather, it is bound by the duty to respect, unless absolutely prevented, the laws in force in the territory.

This author believes that a duty to prevent violations of international humanitarian law by private actors can be constructed through implications, based on Article 43 of the HR. Several arguments support this view. First, it would be illogical that the occupying power is prohibited from taking certain actions but, simultaneously, it can tolerate private actors committing the same actions themselves. Indeed, the law of occupation puts limits on the action of the occupying power in order to protect the interests of the ousted sovereign and the local population. From this perspective, it is irrelevant whether the threats to these interests come from the occupying power itself (i.e., its organs) or from private actors; the law of occupation must try to limit the negative impact of the occupation on these legally protected interests. In the words of a leading commentator, “[t]he occupant cannot sit idly by if marauders pester the occupied territory, killing local inhabitants, even though no soldiers of the army of occupation get injured.”[[55]](#footnote-55) As it is upon the organs of the occupying power to fight against private actors that breach the local legislation of the occupied territory, equally, the occupying power is tasked with the maintenance of public order and civil life in relation to violations of international humanitarian law. No territory can be considered orderly governed if the law primarily devised to regulate it is not respected.

In relation to international humanitarian law, Article 43 of the HR works as overarching rule that can be combined with all the rules of the law occupation. The effect is that Article 43 of the HR burdens the occupying power with an obligation of prevention for every conduct in conflict with international humanitarian law that is not attributable to the occupying power but that occurs in the occupied territory. However, the scope of the obligation of prevention under Article 43 of the HR is broader. It has already been recalled that under Article 43 of the HR the occupying power must restore and ensure public order and civil life in relation to the legal framework that existed prior to the occupation. Indeed, the GCIV maintains that the criminal law system of the occupying power and the criminal courts operating in the occupied territory should be kept in function by the occupying power.[[56]](#footnote-56) This means that this obligation of prevention extends to prevention of crimes under the domestic legal system of the occupied territory as well.

***4.2.2 International Case Law on the Obligation of Prevention under Article 43 of the HR***

Several international decisions support the idea that Article 43 of the HR is the cornerstone to prevention of conduct of private actors in conflict with international humanitarian law. To this end, the decisions rendered by the Eritrea-Ethiopia Claims Commission in 2004 and by the International Court of Justice in 2005 and 2022 deserve particular attention.

In 2004, the Eritrea-Ethiopia Claims Commission had to assess the responsibility of Ethiopia for damage that occurred during its nine-month occupation of Tserona Town.[[57]](#footnote-57) The Commission argued that it was not necessary to prove that the alleged looting was attributable to Ethiopia since, in any case, the occupying power had responsibility for preventing private actors from violating international humanitarian law. In the words of the Commission,

Whether or not Ethiopian military personnel were directly involved in the looting and stripping of buildings in the town, Ethiopia, as the Occupying Power, *was responsible for the maintenance of public order, for respecting private property, and for preventing pillage*. Consequently, Ethiopia is liable for permitting the unlawful looting and stripping of buildings in the town during the period of its occupation.[[58]](#footnote-58)

Despite the fact that this passage does not mention Article 43 of the HR, this is the legal basis of the Commission’s reasoning, as revealed by a footnote referring to Article 43 and other provisions of the HR.[[59]](#footnote-59) The conclusion is sound and in line with what argued so far in this article. However, the Commission mixes attribution with lack of prevention when it says that it is irrelevant to investigate whether the acts where committed by the occupying forces. In this respect, the Commission considers that lack of prevention is as serious as direct commission of a violation of international humanitarian law, a conclusion that will be shared by the ICJ some years later.[[60]](#footnote-60) Nevertheless, this argument would have needed more articulation: it looks unfair to fully equate the lack of prevention with the direct commission, totally ignoring the fact that the relevant primary rules are different (in one case, the obligation of prevention under Article 43 of the HR; in the other, the rules of the international humanitarian law in conflict with the specific private actors’ conduct at hand).

It is interesting that the Commission sees this duty of vigilance under Article 43 of the HR as the consequence of the status of occupation rather than as a rule applicable to any phase of an international armed conflict. According to the Commission, “Ethiopia is not liable for damages [that] . . . occurred either before or after its occupation of the town.”[[61]](#footnote-61) One could wonder if the Commission could have reached a different conclusion taking into account different rules of international humanitarian law which do not apply exclusively in situations of occupation. For instance, many observers consider that the duty to ensure respect for international humanitarian law embodied in common Article 1 to the Four Geneva Convention and in the AP I has a preventive dimension.[[62]](#footnote-62) Whereas this provision may be moot in relation to the duties of the occupying power in an occupied territory – because it is displaced by the more specific rule embodied in Article 43 of the HR[[63]](#footnote-63) – it could play a role outside situations of occupations in relation to the conduct of private actors. In any case, the Commission did not explore this issue further and, due to the scope of the present study, it is better if we leave it aside too.

A year later, the ICJ authoritatively confirmed the Eritrea-Ethiopia Claims Commission’s view about an obligation of prevention binding the Occupying Power in relation to the conduct of private actors was authoritatively confirmed a year later by the ICJ. In the 2005 *DRC v. Uganda* case,[[64]](#footnote-64) the ICJ discussed the responsibility of Uganda, the occupying power of the region of Ituri, in relation to the spoliation of natural resources by private actors, in particular corporations, which were permitted by Uganda to plunder natural resources in the occupied territory, mentioning that Uganda had a duty of vigilance upon private actors.[[65]](#footnote-65) This duty of vigilance is constructed as an obligation of prevention by the ICJ, according to which Article 43 HR imposes upon the occupying power an obligation to prevent private actors from violating international law:

Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[[66]](#footnote-66)

Correctly, the Court makes a distinction between the responsibility of Uganda as an occupying power for violations of international law that are attributable to it, and violations of the obligation of prevention.[[67]](#footnote-67) In a fashion similar to that of the Eritrea-Ethiopia Claims Commission, the ICJ clarifies that the duty of vigilance does not extend to armed groups operating outside the occupied territory and whose conduct is not attributable to Uganda under the law of state responsibility.[[68]](#footnote-68) Again, it is disappointing that the ICJ does not consider whether a potential source of obligations in this case could have derived from Common Article 1 of the Four Geneva Conventions in relation to activities that occurred outside the occupied territory. The lack of mention to Common Article 1 for activities in occupied territory strengthens the idea that the obligation of prevention under Article 43 of the HR prevails as *lex specialis*.[[69]](#footnote-69)

In 2022, the ICJ had the opportunity to come back to this issue since DRC and Uganda were unable to find an agreement on the reparations due to DRC in light of the 2005 decision. As a consequence, the ICJ was asked to render a decision on reparations that ultimately condemned Uganda to pay USD 325.000.000 as compensation for the violation of international law by Uganda.[[70]](#footnote-70) The relevance of this decision for the present study is more limited than that adopted in 2005 since it focuses on the consequences of a wrongful act (reparations) rather than on the existence of a wrongful act (which was determined in the 2005 decision). However, the 2022 decision presents some interesting features. The methodology behind the calculation of the compensation owed towards the DRC has raised significant debate in international scholarship that cannot be explored on this occasion.[[71]](#footnote-71) Clearly, the entire sum was not awarded for violations that occurred solely in occupied Ituri, nor does the entire sum pertain to reparations for the violation of the obligation of prevention under Article 43 of the HR. However, for the purposes of this study, it should be emphasized not only that the Court has reaffirmed that Article 43 of the HR is a source of the obligation of prevention,[[72]](#footnote-72) but also that the Court has considered that there is no difference between the reparations owed for the direct commission of a violation by the occupying power and those owed for lack of prevention. For instance, in relation to the exploitation of gold in occupied territory, the Court stated that Uganda

is responsible for “all acts” of exploitation in Ituri. […] [T]his implies that Uganda is liable to make reparation for all acts of looting, plundering or exploitation of natural resources in Ituri, even if the persons who engaged in such acts were members of armed groups or other third parties.’[[73]](#footnote-73)

Similar statements are commonplace in relation to reparations for the exploitation of other components of natural resources, such as wildlife.[[74]](#footnote-74)

Moreover, in this decision the 2022 Court took the opportunity to clarify which are the private actors’ activities that must be prevented. The Court stated that Uganda is not responsible for the activities of civilians who continued the extraction of natural resources that had commenced before the beginning of the occupation:

In the circumstances assumed by the expert, it can be concluded that *an operator’s continued retention of its own profits* does not amount to an act of “looting, plundering and exploitation” in respect of which the Court found that Uganda had failed to comply with its obligations as an occupying Power under Article 43 of the [HR] and thus, would not call for any reparation by Uganda.[[75]](#footnote-75)

This is an important statement because it links the obligation of prevention and the notions of public order and civil life under Article 43 of the HR to the conservationist principle so that activities by private actors that commenced before the occupation are outside the scope of the obligation of prevention. However, although this conclusion is correct, it is based on a faulty analysis of the conservationist principle: the conservationist principle is not based on temporal considerations but on legal considerations based on the entitlement to adopt new legislation. This means that private actors can start business even after an occupation is established, the only relevant consideration being that this must be done in compliance with the law of occupation, pursuant to the local legislation that existed prior to the occupation rather than pursuant to new legislation by the occupying power, and to enhance the welfare of the local population rather than that of the occupying power.

The brief overview on international case law presented so far demonstrates unequivocally that Article 43 of the HR makes the occupying power responsible for preventing private actors from undertaking conduct in conflict with international humanitarian law. The next subsection will explore how obligations of prevention pertain to private actors’ conduct in conflict with other rules of international law.

**4.2.2 Obligations to Prevent Private Actors’ Conduct in Conflict with Other Rules of International Law**

So far, the article has analyzed Article 43 of the HR as a source of an obligation of prevention for private actors’ conduct in conflict with international humanitarian law. However, there is a significant trend suggesting that the occupying power must prevent private actors from acting in contrast with other rules of international law as well. This section offers a brief overview of these rules.

The starting point is, again, the 2005 *DRC v Uganda* case. The ICJ considered that Article 43 of the HR imposes an obligation of prevention in relation to private actors’ conduct in conflict with both international humanitarian law and international human rights law. The reference to human rights law makes sense prima facie if one considers that public order encompasses freedom from crime and that most criminal activities – if not all of them – are violations of human rights law;[[76]](#footnote-76) moreover, civil life is constructed with reference to the enjoyment of certain human rights such as the right to education and the right to health.[[77]](#footnote-77)

However, the reference to Article 43 of the HR as a source of this obligation of prevention is puzzling. It is necessary to make a distinction between two different scenarios. International human rights law can be part of the legal framework applicable in the occupied territory before the occupation due to the ratification of the relevant conventions by the ousted sovereign; in this case, international human rights law is a component of the public order and civil life that existed before the occupation and it is part of the legal framework that the occupying power must respect under Article 43 of the HR.[[78]](#footnote-78) Accordingly, the reasoning of the ICJ on the obligation of prevention for human rights violations under Article 43 does not raise any concern. However, international human rights law can bind the occupying power directly in light of the occupying power’s own participation in the relevant conventions. It is today established without significant opposition that an occupying power is bound by international human rights law when it acts in occupied territory (except where the occupying power had lawfully derogated to derogable rights embodied in some international human rights law conventions).[[79]](#footnote-79) In this latter scenario, the occupying power is bound by obligations of prevention in relation to international human rights law – e.g., the duty to prevent violation of the right to life by criminalizing, prosecuting, and punishing murder – but these obligations of prevention are not mediated by Article 43 of the HR. Rather, they bind directly the occupying power for its own ratification of the relevant legal framework. Accordingly, these are purely international human rights law obligations of prevention, rather than the consequence of the need to restore and ensure public order and civil life while respecting the legal framework of the occupying power under Article 43 of the HR. This specification may seem to be artificial and based on a useless and tedious legal discussion whose point is moot, but is nevertheless relevant in practice. As mentioned, the occupying power can derogate to its own international human rights law convention under international human rights law,[[80]](#footnote-80) but it cannot derogate the international human rights law convention that are part of the legal framework of the occupied territory protected by Article 43 of the HR; conversely, Article 43 of the HR does not embody absolute obligations of result, but rather, the occupying power is bound by the duty to restore and ensure public order and civil life only “as far as possible”,[[81]](#footnote-81) whereas such clause may not be relevant for some international human rights law treaties. All in all, the conclusion of the ICJ that Article 43 of the HR is a source of an obligation of preventions for conduct in conflict with international human rights law looks like an approximation that needs some clarification.

Additionally, state practice and case law highlight that occupying powers have been considered responsible for the prevention of conduct of private actors that conflicts with other rules of international law. A couple of examples will suffice to explain this. For instance, in relation to the duty of the host state to protect UN facilities and diplomatic premises,[[82]](#footnote-82) China claimed that the responsibility for protecting them from terrorist attacks in occupied Iraq in 2003 rested with the Coalitional Provisional Authority (CPA),[[83]](#footnote-83) that is, the administration created by the occupying powers of the region, the US and the UK.[[84]](#footnote-84) Similar statements have been voiced by Belgium and Russia.[[85]](#footnote-85) As demonstrated by a thorough study, claims that the occupying power is responsible for the protection of foreign diplomatic missions are at least as old as the Italian occupation of Addis Ababa in 1936, when the UK and the US claimed that Italy had the duty to protect its diplomatic premises there.[[86]](#footnote-86) In 1990, in the framework of the occupation of Kuwait by Iraq, the UNSC commanded that Iraq respected the immunities of diplomatic and consular personnel under the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations,[[87]](#footnote-87) demanding that “*Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait* and in Iraq and take no action to hinder the diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests”.[[88]](#footnote-88) This practice is too fragmented to conclude whether this duty of protection is a consequence of the fact that the occupying powers were autonomously bound by the relevant law on diplomatic and consular relations or whether these obligations where part of the local legislation that the occupied powers had to respect under Article 43 of the HR.[[89]](#footnote-89) Nevertheless, it is clear that occupying powers in this field have obligations of prevention that are similar to those of states in peacetime.

Moreover, there is evidence that the occupying power is responsible for preventing private actors from using the occupied territory to harm other states.[[90]](#footnote-90) For instance, during the occupation of Iraq by the US and the UK in 2003, the foreign ministers of Saudi Arabia, Jordan, Iran, Egypt, Turkey, Kuwait, and Syria voiced their concerns regarding potential threats posed by terrorist armed groups located in Iraq against neighboring countries.[[91]](#footnote-91) In the statement, “the ministers call on the responsible Iraqi authorities to cooperate with these states to ward off threats to the security of the neighbouring states and prevent any infiltrations of their borders.”[[92]](#footnote-92) Now, the reference to “Iraqi authorities” should not mislead the reader: at the time, Iraq was under US and UK occupation, as the neighboring states acknowledge in the same statement, and, accordingly, this invitation should be considered as directed to the occupying powers.

Additionally, the International Law Commission, in its work on the protection of the environment in armed conflict, has adopted an interesting draft Article in 2022 about the “prevention of transboundary harm”.[[93]](#footnote-93) According to Draft Article 21, “[a]n Occupying Power shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory.”[[94]](#footnote-94) This is clearly an obligation of prevention, but what is its legal basis? Contrary to the other obligations of prevention analyzed so far, this obligation pertains to both lawful and unlawful activities in occupied territory, rather than to activities in conflict with international law. In peacetime, this is a well-known obligation which in the past was constructed as pertaining to the sovereign territory of a state only,[[95]](#footnote-95) while more recently has been applied to activities occurring outside the sovereign territory of a state, too.[[96]](#footnote-96) International case law has referred to this obligation both in relation to illegal activities of private actors[[97]](#footnote-97) and to activities per se not in conflict with international law.[[98]](#footnote-98) According to the US, in occupied territory, this obligation is based on Article 43 of the HR: “the Occupying Power has the duty to respect, unless absolutely prevented, the laws in force in the country, which would include an obligation to respect the occupied State’s obligation in this regard.”[[99]](#footnote-99) The Special Rapporteur on the protection of the environment in relation to armed conflicts disagrees, in the sense that, in her view, the obligation at hand is autonomous from that embodied in Article 43: “While the Special Rapporteur agrees that the obligation under article 53 [*sic*] of the Hague Regulations to respect the “laws in force” is to be interpreted to include the international obligations of the occupied State, the draft principle at hand deals with an obligation that is binding on the Occupying Power as such.”[[100]](#footnote-100) Both views are valid. The common idea is that, irrespective of any sovereign title, as the ICJ recalled in relation to the occupation of Namibia by South Africa, “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”[[101]](#footnote-101) In the case of occupied territory, this author believes that it is correct to refer to Article 43 of the HR as the source of this obligation of prevention since Article 43 is the cornerstone of the occupying power’s entitlement to administer temporarily the occupied territory. Indeed, the existence of these obligations of prevention oscillates from territorial sovereign to other forms of authority exercised over a portion of territory.[[102]](#footnote-102)

In conclusion, for the purposes of this study, it is important to emphasize that there is a growing consensus of states regarding the subsistence of an obligation of prevention under Article 43 of the HR that binds the occupying power in relation to actions of private actors. It is possible to appreciate an expansion of the scope of prevention in relation to the conduct that has to be prevented: traditionally, Article 43 of the HR has been interpreted as pertaining to conduct in conflict with international humanitarian law and the local legislation of the occupied territory. Gradually, it has been interpreted as encompassing conduct in conflict with international human rights law and other rules of international law such as those pertaining to the protection of UN and diplomatic facilities. More recently, it has been interpreted as regarding also conduct that is not per se in conflict with any international law obligation but which, nonetheless, is potentially harmful for other states. The next section will explore the nature of these obligations and the means available to an occupying power to implement them.

**5. Nature of the Obligation of Prevention for Private Actors’ Activities in Occupied Territory under Article 43 of the HR**

This section explores the nature of the obligation of prevention incumbent upon the occupying powers for the activities of private actors in occupied territory. It is argued that this is an obligation of conduct governed by due diligence. As a result, the implementation of this obligation should be measured in light of the efforts that the occupying power undertook to prevent private actors’ conduct that would conflict with international law rather than in light of whether this conduct in fact occurred.

The nature of the obligation of prevention is strictly linked to the distinction between obligations of conduct (or means) and obligations of result in international law.[[103]](#footnote-103) The starting point of this distinction can be traced in the attempts of Roberto Ago, then Special Rapporteur on state responsibility of the International Law Commission, to include a legal distinction between obligations of conduct and obligations of result in the law of state responsibility.[[104]](#footnote-104) Ago considered that “[t]here is a breach by a state of an international obligation requiring it to adopt a particular course of conduct when the conduct of that state is not in conformity with that required of it by that obligation,” and that “[t]here is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation.”[[105]](#footnote-105) Ago also formulated some proposals regarding obligations of prevention, envisaging them as obligations of negative result, which allowed states to perform any conduct as long as the event that had to be prevented did not occur.[[106]](#footnote-106)

Ago’s proposal was ultimately rejected on the premise that the law on state responsibility does not concern the nature of international law obligations (primary rules) but it focuses only on the consequences of those violations (secondary rules).[[107]](#footnote-107) However, Ago’s terminology became mainstream in international case law, even if with a paradoxical feature: contemporary international law defines obligations of result and obligations of conduct in a way that radically departs from Ago’s proposal.[[108]](#footnote-108) Following an intuition by Paul Reuter,[[109]](#footnote-109) contemporary international case law considers that obligations of result demand states to specifically perform a certain action that is the aim of that specific obligation (e.g., the obligation to notify the UN Security Council reactions in self-defense under Article 51 of the UN Charter); on the other hand, to comply with obligations of conduct, states must “deploy adequate means, to do the utmost, to obtain [a certain] result”[[110]](#footnote-110) but they do not incur international responsibility if, notwithstanding their diligent conduct, that result is not obtained.[[111]](#footnote-111) As noted by a prominent scholar on this topic, while “the obligation of result is an obligation to ‘succeed,’ [. . .] the obligation of diligent conduct is an obligation to ‘make every effort.’”[[112]](#footnote-112)

Obligations of conduct are governed by the notion of due diligence, an elusive notion that has sparked a significant academic debate.[[113]](#footnote-113) For the purposes of this article, suffices it to say that due diligence refers to the diligence that is due under a certain obligation of conduct in order to assess whether the state has violated it or not. There is no overarching notion of the diligence that is applicable to every obligation of conduct, but rather, the diligence that it is due depends on the specific primary rule at hand. Usually, textual references such as the “as far as possible” clause in Article 43 of the HR[[114]](#footnote-114) or “feasible measures”[[115]](#footnote-115) guide the interpretation of the level of diligence that it is due in relation to a specific rule.[[116]](#footnote-116)

International case law considers obligations of prevention to be obligations of conduct. For instance, in relation to the obligation to prevent genocide under Article I of the 1948 Genocide Convention, the ICJ stated that “a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible”.[[117]](#footnote-117) Subsequently, the ICJ affirmed that a specific obligation to prevent river pollution “is an obligation of conduct”.[[118]](#footnote-118) Most scholars agree that obligations of prevention are obligations of conduct.[[119]](#footnote-119) The only point of disagreement is on whether obligations of prevention are breached when the state fails to undertake the relevant diligence – as in relation to all the other obligations of conduct –[[120]](#footnote-120) or whether they are breached when the event that has to be prevented in fact occurs – as held by the ICJ and the ARSIWA.[[121]](#footnote-121)

The fact that obligations of prevention are obligations of conduct is relevant also for the obligation under Article 43 of the HR. First, it should be noted that there is a well-established consensus among scholars that this is an obligation of conduct governed by due diligence.[[122]](#footnote-122) Recently, in relation to the 2022 Russian occupation of certain portions of Ukraine, the experts dispatched by the OSCE under the Moscow Mechanism concluded that: “[e]nsuring public order and civil life is an obligation of means for the occupying power. Accordingly, harm to public order and civilian life constitutes a violation of IHL if Russia did not make every effort of which it was objectively capable.”[[123]](#footnote-123) Similarly, the Supreme Court of Israel noted that, under Article 43 of the HR, “the duties were defined as being conditional on what is possible (d’autant qu’il est possible). The degree of possibility of fulfillment of the duties is measured according to a complex of circumstances”.[[124]](#footnote-124)

The assessment of due diligence under Article 43 of the HR must be conducted *in concreto*,[[125]](#footnote-125) on the basis of several factors such as the degree of control of the occupying power over the occupied territory and over the private actors therein, the importance of the interest to be protected in the specific situation, the degree of predictability of the violation, and the degree of risk involved.[[126]](#footnote-126) However, the diligence that is due in case of occupied territory is particularly high since the very application of Article 43 is premised on the fact that the occupying power exercises actual authority over that portion of territory.[[127]](#footnote-127) On a general level, it is possible to envisage that the stricter the control over a source of risk is, the higher the diligence required by an obligation of conduct.[[128]](#footnote-128)

The fact that the obligation of prevention under Article 43 of the HR is an obligation of conduct means that the occupying power evades responsibility if it demonstrates that it has exercised the diligence that is due and, nevertheless, private actors have undertaken activities in conflict with international law. Yet, it is the occupying power’s duty to prove that such a diligence was exercised, by disclosing what has been done to prevent private actors’ illegal activities. In other words, obligations of conduct reverse the burden of proof.[[129]](#footnote-129) This was clearly stated by Judge Tomka in its individual opinion in the 2005 *DRC v Uganda* decision, even though not in relation to the obligation of prevention under Article 43 of the HR, but regarding the duty not to allow private actors to use one state’s territory to harm another state. According to Judge Tomka,

The occurrence of harm does not necessarily prove that the duty of vigilance was breached. But its occurrence creates the presumption that the obligation of vigilance has not been complied with. In such a case it would be for the State which has the duty of vigilance (i.e., the DRC in the present case) to demonstrate that it exerted all good efforts to prevent its territory from being misused for launching attacks against its neighbour in order to rebut such a presumption.[[130]](#footnote-130)

This conclusion is supported by the findings of the ICJ in the 2022 *DRC v Uganda* decision, this time in relation to the reparation owed for the breach of the obligation of prevention under Article 43 of the HR. In this decision, the Court affirmed that it “is not convinced by the standard suggested by Uganda, according to which the DRC has to prove the specific time, place, and damage relating to each incident of exploitation”.[[131]](#footnote-131) The Court went on explaining how it relied on the experts’ assessment that is provided on the basis of some inferences.[[132]](#footnote-132) Although this statement is limited to the quantification of the damage rather than on the existence of a violation of the obligation of prevention, which was addressed by the 2005 *DRC v Uganda* judgment and could not be examined again in 2022, this approach is in line with the case law of international courts[[133]](#footnote-133) and the – somewhat controversial – practice of fact-finding missions[[134]](#footnote-134) that employed inferences in relation to obligations of conduct when the states under the obligations failed to demonstrate that they had acted diligently.

Accordingly, under Article 43 of the HR, the occupying power has the duty to act diligently in order to prevent private actors from undertaking actions in conflict with international law. Compliance with this obligation is based on whether the occupying power acted diligently rather than on whether the prevention succeeded. However, the burden to disclose the measures that it has adopted in order to demonstrate that it acted diligently under Article 43 of the HR is upon the occupying power.

**6. The Latitude of the Measures that Occupying Powers Can Adopt to Implement Their Obligation of Prevention**

This section briefly explores the measures that an occupying power can lawfully adopt in occupied territory to implement its obligation of prevention under Article 43 of the HR. These measures can be legislative, administrative, or of a military nature.

The latitude of the measures that can be adopted should take into account the boundaries set by the law of occupation to the legislative and administrative activities of the occupying power. Under Article 43 of the HR, the duty to restore and ensure public order and civil life must be undertaken “while respecting, unless absolutely prevented, the laws in force in the country”.[[135]](#footnote-135) This clause applies to all the obligations pursuant to Article 43, including the obligation of prevention. Before analyzing when the occupying power is absolutely prevented, it is necessary to emphasize that the entire architecture of Article 43 is based on the need not to alter the law in force in the occupied territory. As mentioned afore, this idea is called the conservationist principle and is applicable also to other areas of the administration of the occupied territory, such as in relation to the maintenance in function of judges and public officials.[[136]](#footnote-136)

There is a presumption that the occupying power must restore and ensure public order and civil life, through legislative, administrative, and judicial measures, as far as possible in continuity with the means deployed by the ousted sovereign before the occupation.[[137]](#footnote-137) Naturally, this principle applies also to the obligation of prevention so that the occupying power must maintain in function the legislative, administrative, and judicial machineries that were in place in the occupied territory prior to the occupation and that addressed private actors’ conduct in conflict with international law. The occupying power can impose its legislative, administrative, and judicial measures only if the local means of restoration and maintenance of public order and civil life are inadequate or unavailable because of the occupation. Sometimes, this can be done through the very army of occupation, which, for instance, can be tasked with the prevention of conduct harmful to foreign diplomatic missions and UN facilities.[[138]](#footnote-138) Other times, additional legislative measures are needed.

The law of occupation limits the legislative innovations that an occupying power can introduce by demanding in Article 43 of the HR the respect, “unless absolutely prevented”, for “the laws in force in the country”.[[139]](#footnote-139) Immediately after its adoption, the interpretation of this clause sparked an intense debate that can be summarized in two phases: the first commentators interpreted it very strictly, considering that only serious security reasons would have allowed the occupying power to alter the law in force.[[140]](#footnote-140) However, after WWII, the need to deal with the Nazi and Fascist regimes in occupied Germany and Italy suggested a less stringent interpretation of the “absolutely prevented” clause to accommodate the legislative reforms undertaken by the allies.[[141]](#footnote-141)

To limit the risk of leaving the self-appreciation of this clause to the occupying power, Article 64(2) of the GCIV offers an authoritative interpretation of the “unless absolutely prevented” clause[[142]](#footnote-142) by allowing for certain alterations to the legislative framework in the occupied territory in order to “enable the Occupying Power to fulfil its obligations under the [GCIV], 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.”[[143]](#footnote-143) These three grounds are relevant for the obligation of prevention under Article 43 of the HR for several reasons. First, as recalled above, the obligation of prevention is in itself functional to the restoration and maintenance of public order and civil life in the occupied territory. Second, preventing private actors from undertaking actions in conflict with the GC IV is a way to ensure the rights protected by the GC IV. This is particularly clear if one recalls the fact that the emphasis of the GC IV is on the rights of the local population – which cannot be renounced[[144]](#footnote-144) – rather than on the relationship between the occupying power and the ousted sovereign. Accordingly, legislative changes that are necessary to prevent private actors’ from infringing the GC IV are permitted.

In the field of legislative measures to prevent private actors from violating international law, a specific role is played by criminal law provisions. Although in international law there is a difference between obligations of prevention – those that leave states free to decide which measures are appropriate to ensure prevention – and obligation of domestic criminalization – those that do not leave any choice to the state on whether or not to adopt new criminal legislation –,[[145]](#footnote-145) it is undeniable that criminal law has a strong preventive effect in the form of deterrence.[[146]](#footnote-146) However, it is important to stress that sometimes the occupying power has no choice but to adopt new criminal legislation if there are no corresponding criminal norms in the occupied territory: for instance, this is the case of the duty to criminalize war crimes under Articles 146 and 146 of the GC IV.[[147]](#footnote-147) In this case, not only is the local legislation of the occupied territory not a hindrance, but there is no discretion left to the occupying power to determine which measures achieve prevention diligently: simply, these obligations of domestic criminalization are obligations of result.[[148]](#footnote-148) When dealing with true obligations of prevention, on the contrary, the occupying power may decide not to use the instrument of criminal law to prevent private actors from adopting conduct in conflict with international law, but rather, to employ other measures (e.g., administrative ones). However, criminalizing private actors’ conduct in conflict with international law is clear evidence – albeit not necessarily sufficient evidence – of the attempt of the occupying power to undertake prevention diligently.

Finally, these obligations of prevention may be implemented by legislation adopted by the occupying power specifically in relation to the activities of its own nationals in occupied territory. Two scenarios can be confronted. One the one hand, the occupying power should adopt legislation to direct the occupying army and the administration of the occupied territory to implement the duty of prevention under Article 43 of the HR. On the other, the occupying power should adopt legislation directed to its nationals who could qualify as private actors, ordering them to abstain from undertaking conduct if conflict with international law. The latter scenario is particularly relevant in relation to those nationals of the occupying power who are lawfully or unlawfully present in the occupied territory. As an example of the former, one might cite a corporation based in the territory of the occupying power who was conducting business in the occupied territory prior to the occupation; in this scenario, the occupying power must ensure that the corporation does not take advantage of the situation of occupation to overcome the boundaries of the original concession. As an example of the second scenario one could mention settlers who are nationals of the occupying power and who have been illegally transferred in the occupied territory in violation of Article 49(6) of the GC IV; in this case, the occupying power must prevent its own nationals from further expanding the settlements in occupied territory even in the absence of a specific involvement of the government in the new illegal project. In all these cases, it must be recalled that when the occupying power legislates in relation to its own citizens, the conservationist principle is less challenging: as long as the legislation is necessary to implement international humanitarian law and protect the local population, the occupying power could adopt it pursuant to Article 64(2) of the GC IV. Moreover, any legislation to implement international humanitarian law and directed only to citizens of the occupying power in the territory of the occupying power (e.g., prohibiting them from establishing settlements) is not subject to the conservationist principl.

**7 Conclusions**

This article has presented an overview of the main challenges pertaining to the obligation to prevent private actors’ actions in conflict with international law in occupied territory. Article 43 of HR offers a solid basis for this obligation of prevention, both because of its reference to the duty to restore and ensure public order and civil life, and because of its obligation to respect the law in force in the occupied territory. Obligations of prevention are imposed upon the occupying power because international law always demands prevention of private actors’ conduct from those states that exercise governmental functions over a certain territory. The fact that the occupying power does not enjoy sovereignty over the occupied territory but is tasked with temporary administration does not free the occupying power from these obligations. This conclusion is supported by an increasingly coherent set of judicial precedents, and responds to the growing involvement of private actors in occupied territories, especially in those cases in which the occupation lasts for many decades. Accordingly, it is necessary to pay attention to the burden that occupying powers bear in relation to private actors, and it is necessary to understand the conditions under which the occupying powers can incur in international responsibility for lack of prevention. Only in this way is it possible to strengthen the rule of law and the protection of individual rights in times of occupation.

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2. *See generally* Francesco Capotorti, L’occupazione nel diritto di guerra (1949); Alessandro Migliazza, L’occupazione bellica (1949); Hersh Lauterpacht, Oppenheim’s International Law: A Treatise, II: Disputes, War and Neutrality 432–56 (7th ed., 1952); Giorgio Balladore Pallieri, Diritto bellico 300–41 (2nd ed., 1954); Julius Stone, Legal Controls of International Conflict 651–732 (1954); Gerhard von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (1957); Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 731–832 (1961); Georg Schwarzenberger, International Law as Applied by International Courts and Tribunals II 163–358 (1968); International Law and the Administration of Occupied Territories (Emma Playfair ed., 1992); Robert Kolb & Sylvain Vité, Le droit de l’occupation militaire: perspectives historiques et enjeux juridiques actuels (2009); Alessandra Annoni, L’occupazione ‘ostile’ nel diritto internazionale contemporaneo (2012); Eyal Benvenisti, The International Law of Occupation (2nd ed., 2012); Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory (Tristan Ferraro ed., 2012); Philip Spoerri, *The Law of Occupation*, *in* The Oxford Handbook of International Law in Armed Conflict (Andrew Clapham & Paola Gaeta eds., 2014); Michael Bothe, *The Administration of* *Occupied Territory*, *in* The 1949 Geneva Conventions: A Commentary (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); Hanne Cuyckens, Revisiting the Law of Occupation (2017); Aeyal Gross, The Writing on the Wall: Rethinking the International Law of Occupation (2017); Yoram Dinstein, The International Law of Belligerent Occupation (2nd ed., 2019); Eliav Lieblich and Eyal Benvenisti, Occupation in International Law (2022). [↑](#footnote-ref-2)
3. This author has addressed some of these issues in an earlier article. *See* Marco Longobardo, *State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources*, 63 Neth. Int.l L. R. 251 (2016) (analysing specifically the exploitation of natural resources). See, also, Marco Pertile, La relazione tra risorse naturali e conflitti armati del diritto internazionale 183-184 (2013). [↑](#footnote-ref-3)
4. GC IV, Article 49(6). [↑](#footnote-ref-4)
5. In relation to activities in areas of DRC occupied by Uganda, see Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo, S/2001/357, Apr. 12, 2001, Annex I. [↑](#footnote-ref-5)
6. On business in occupied territory, see generally Tom Moerenhout, “The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements”, *EJIL:Talk!*, 4th April 2017, <https://www.ejiltalk.org/the-consequence-of-the-un-settlements-resolution-for-the-eu-stop-trade-with-settlements/>; Valentina Azarova, “Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel’s Settlements”, 3 *Business and Human Rights Journal* (2018) 187–209; Pål Wrange, “Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara”, 52 *Israel Law Review* (2019) 3-29; The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives (Antoine Duval and Eva Kassoti eds., 2020); Yael Ronen, “The Responsibility of Businesses Operating in the Settlements in Occupied Territory” in Joseph E. David, Yaël Ronen, Yuval Shany, J. H. H. Weiler (eds), *Strengthening Human Rights Protections in Geneva, Israel, the West Bank and Beyond* (CUP 2021) 130-156. [↑](#footnote-ref-6)
7. See infra\_\_\_\_\_\_\_\_\_ [↑](#footnote-ref-7)
8. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (HR). [↑](#footnote-ref-8)
9. Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC IV). [↑](#footnote-ref-9)
10. First Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I). [↑](#footnote-ref-10)
11. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 1994 I.C.J. Rep. 136, ¶ 89. See, generally, Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 AJIL 348. [↑](#footnote-ref-11)
12. On this debate, *see generally* Antonio Cassese, *The Genova Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA Pacific Basin L. J. 55 (1984); Dieter Fleck, *The Protocols Additional to the Geneva Conventions and Customary International Law*, 29 Mil. L. & L. War Rev. 497 (1990); Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honor of Frits Kalshoven (Astrid J. M. Delissen & Gerald Jacob Tanja eds.,1991); Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 Int’l L. Stud. 337 (2002). [↑](#footnote-ref-12)
13. *See generally* Marco Longobardo, The Use of Armed Force in Occupied Territory 28 (2018). [↑](#footnote-ref-13)
14. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 1994 I.C.J. Rep. 136, ¶ 78; Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 172. [↑](#footnote-ref-14)
15. See Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 173. *see generally* Vaios Koutroulis, Le Début et la Fin de l’Application du Droit de l’Occupation (2010); Marco Sassòli, *The Concept and the Beginning of the Occupation*, *in* The 1949 Geneva Conventions: A Commentary (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); Natia Kalandarishvili-Mueller, Occupation and Control in International Humanitarian Law (2020). [↑](#footnote-ref-15)
16. Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* International Law and the Administration of Occupied Territories 241, 250 (Emma Playfair ed., 1992). [↑](#footnote-ref-16)
17. See generally Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 Eur. J. Int’l L. 661; Yoram Dinstein, ‘Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding’, Program on Humanitarian Policy and Conflict Research Harvard University, 1 Occasional Paper Series (Fall 2004) 2, available at [www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf](http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf); Benvenisti, *supra* note \_\_\_\_, 69. [↑](#footnote-ref-17)
18. The non-authoritative English text refers to ‘safety’ rather than to ‘civil life’. This is a blatant error of translation since the word “safety” does not mean the same as “vie publique”, which is the notion embodied in the original and authoritative French text. *See* Edmund H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 Yale L. J. 393 (1945). [↑](#footnote-ref-18)
19. Article 47 of the GC IV: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.” [↑](#footnote-ref-19)
20. Article 4 of the AP I: “The application of the Conventions and of this Protocol, as well as the con- clusion of the agreements provided for therein, shall not affect the legal sta- tus of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.” [↑](#footnote-ref-20)
21. See *Affaire de la Dette Publique Ottomane (Bulgaria, Irak, Palestine, Transjordan, Greece, Italy and Turkey* [1925] RIAA 529, p. 555. *See generally* Sharon Korman, The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice (1996). Accordingly, the ECJ refused to qualify as “made in Israel” products manufactured by companies located in the Occupied Palestinian Territory (ECJ, Case C‑386/08, 25 February 2010). [↑](#footnote-ref-21)
22. On the difference between the expressions ‘temporary’ and ‘lasting only a short time’, see Vaios Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?*, 94 Int’l Rev. Red Cross 165, 167 (2012). [↑](#footnote-ref-22)
23. On prolonged occupation, *see generally* Richard A. Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. Refugee Stud. 40 (1989); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 Am. J. Int’l L. 44 (1990); Iain Scobbie, *International Law and the Prolonged Occupation of Palestine*, May 22, 2015, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611130>; Jaume Ferrer Lloret, ‘Morocco, Occupying Power of Western Sahara: Some Notes about Spain’s Foreign Legal Policy, the Role of the Spanish Doctrine and the Rule of Law in International Relations’ (2022) 26 *Spanish Yearbook of International Law* 196. [↑](#footnote-ref-23)
24. See generally Longobardo, The Use, *supra* note \_\_\_\_\_, 82-87. [↑](#footnote-ref-24)
25. See Holland, Council for the Restoration of Legal Rights, D’Escury v. Levensverzekerings- Maatschappij Utrecht Ltd (30 April 1940) 15 ILR 572; UK Military Manual, section 11.15.1. See also; Hersh Lauterpacht, *Oppenheim’s International Law. A Treatise, vol. II: Disputes, War and Neutrality* (7th edn, Longmans 1952) 438-439; Lassa Oppenheim, ‘The Legal Relations between an Occupying Power and the Inhabitants’ (1907) 37 *Law Quarterly Review* 363, 368; Richard R. Baxter, ‘The Duty of Obedience to the Belligerent Occupant’ (1950) 27 *British Year Book of International Law* 235; Greenwood, supra note, 252; Longobardo, The Use, supra note, 137-141. [↑](#footnote-ref-25)
26. See generally W. J. Ford, ‘Resistance Movements in Occupied Territory’ (1956) 3 NILR 355; W. Thomas Mallison & R. A. Jabri, ‘Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity’ (1974) 42 George Washington Law Review 185, 190–219; Ben Clarke, ‘The Judicial Status of Civilian Resistance to Foreign Occupation under the Law of Nations and Contemporary International Law’ (2005) 7 University of Notre Dame Australia Law Review 1; Frédéric Mégret, ‘Grandeur et déclin de l’idée de résistance à l’occupation: réflexions à propos de la légitimité des “insurgés”’ (2008) 41 RBDI 382; Adam Roberts, ‘Resistance to Military Occupation: An Enduring Problem in International Law’ (2017) 111 AJIL Unbound 45; Longobardo, The Use, supra note, 134-164. [↑](#footnote-ref-26)
27. For an overview, *see* Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, 88 Recueil des Cours 263 (1955); Fritz Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 Int’l Comp. L. Q. 827; Pierre D’Argent, Les réparations de guerre en droit international public (2002); Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 Int’l Rev. Red Cross 401 (2002); Andrea Gattini, Le riparazioni di guerra nel diritto internazionale (2003); Marco Longobardo, *Rapporti fra strumenti di codificazione: il Progetto di articoli sulla responsabilità degli Stati e le convenzioni di diritto umanitario*, 101 Rivista di diritto internazionale 1136 (2018); Emanuele Sommario, *State Responsibility for Violations of International Humanitarian Law in the Work of the Eritrea-Ethiopia Claims Commission: A Reappraisal Ten Years On*, *in* The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective: From the 2000 Algiers Agreements to the 2018 Peace Agreement 477 (Andreas de Guttry, Harry Post & Gabriella Venturini eds., 2nd ed., 2021). [↑](#footnote-ref-27)
28. Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001) (Draft Articles with Commentaries). [↑](#footnote-ref-28)
29. *See* David Caron, “The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority”, 96 *American Journal of International Law* (2002) 857; Fernando Lusa Bordin, Still Going Strong: Twenty Years of the Articles on State Responsibility’s ‘Paradoxical’ Relationship between Form and Authority, EJIL:Talk!, August 3, 2021, <https://www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibilitys-paradoxical-relationship-between-form-and-authority/>; Maurizio Arcari, The future of the Articles on State Responsibility: A matter of form or of substance?, 93 Zoom-In Questions of International Law 3 (2022). [↑](#footnote-ref-29)
30. On attribution, see generally see Dioniso Anzilotti, Teoria generale della responsibilità dello Stato nel diritto internazionale 153–87 (1902); Roberto Ago, ‘Le délit international’ (1939) 68 RCADI 415, 450–98; Ian Brownlie, System of the Law of Nations. State Responsibility, 132–66 Part I (Clarendon Press 1983); Luigi Condorelli, *L’imputation à l’état d’un fait internationalment illicite: solutions classiques et nouvelles tendances*, 189 Recueil des Cours 9 (1984); Haritini Dipla, La responsabilité de l’Etat pour violation des droits de l’homme: problèmes d’imputation (1994); Paolo Palchetti, L’organo di fatto dello Stato nell’illecito internazionale (2007); James Crawford, State Responsibility: The General Part 113–214 (2013); Gaetano Arangio-Ruiz, State Responsibility Revisited: The Factual Nature of the Attribution of Conduct to the State (2017); Carlo de Stefano, Attribution in International Law and Arbitration (2020). [↑](#footnote-ref-30)
31. Arangio Ruiz, supra note. [↑](#footnote-ref-31)
32. Article 4 of the ARSIWA. [↑](#footnote-ref-32)
33. Nicaragua v. USA, para 110; Bosnian Genocide case, para. 392 [↑](#footnote-ref-33)
34. Article 8 of the ARSIWA. See, also, Nicaragua v. USA, paras. 109–10; Bosnian Genocide case, para. 391. See also Marko Milanovic, *The European Court’s Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly – Part II*, EJIL:Talk!, Jan 26, 2023, <https://www.ejiltalk.org/the-european-courts-admissibility-decision-in-ukraine-and-the-netherlands-v-russia-the-good-the-bad-and-the-ugly-part-ii/> (considering this kind of dependence as included in the cases governed by Article 4 of the ARSIWA). [↑](#footnote-ref-34)
35. Article 5 of the ARSIWA. [↑](#footnote-ref-35)
36. Article 9 of the ARSIWA. [↑](#footnote-ref-36)
37. Article 6 of the ARSIWA. [↑](#footnote-ref-37)
38. Article 11 of the ARSIWA. See, also, United States Diplomatic and Consular Staff in Tehran, p. 35, para. 74; MAKUCHYAN AND MINASYAN v. AZERBAIJAN AND HUNGARY (Application no. 17247/13), 26 May 2020, para 112. [↑](#footnote-ref-38)
39. Article 10 of the ARSIWA. [↑](#footnote-ref-39)
40. See generally Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 International Law Studies 295, 317-331 (2020) (who, however, does not analyse Article 91 of the AP I in relation to Article 7 of the ARSIWA). [↑](#footnote-ref-40)
41. Article 7 of the ARSIWA. [↑](#footnote-ref-41)
42. See Article 3 of the 1907 Fourth Hague Convention and Article 91 of the AP I; Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 214. See also Freeman, *supra* note, at 332-342; Condorelli, *supra* note, at 145-149; Sassòli, *supra* note, at 405–406; Longobardo, Rapporti, *supra* note, at 1145-1150 [↑](#footnote-ref-42)
43. ICTY, Prosecutor v. Tadić, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 145. [↑](#footnote-ref-43)
44. Bosnian Genocide case, para. 404. [↑](#footnote-ref-44)
45. See Prosecutor v. Aleksovski, IT-95-14/1-A, Appeals Chamber, 24 March 2000, paras. 131–4; Prosecutor v. Delalic´ et al., IT-96-21-A, Appeals Chamber, 20 February 2001, para. 26; Prosecutor v. Kordic´ and Čerkez, IT-94-1-A, 17 December 2004, paras. 306–8; Prosecutor v. Mladic´, IT-09- 92-T, 22 November 2017, para. 3014; Prosecutor v. Lubanga, Decision on Confirmation of Charges, para. 221; Prosecutor v. Lubanga, Judgment pursuant to Art. 74, para. 541; Prosecutor v. Katanga, Trial Chamber, Judgment pursuant to Art. 74, para. 1178; Prosecutor v. Bemba Gombo, para. 130. [↑](#footnote-ref-45)
46. ‘Primary rules’ is the expression usually employed to refer to international law obligations, whereas ‘secondary rules’ is used to refer to the rules on state responsibility applicable to violations of primary rules. *See generally* Eric David, *Primary and Secondary Rules*, *in* The Law of International Responsibility 27 (James Crawford, Alain Pellet & Simon Olleson eds., 2010); Giorgio Gaja, *Primary and Secondary Rules in the International Law on State Responsibility*, 97 Rivista di diritto internazionale 981 (2014). [↑](#footnote-ref-46)
47. See International Law Commission in the Draft Articles with Commentaries, 39, para. 4: ‘[T]here is often a close link between the basis of attribution and the particular obligation to have been breached, even though the two elements are analytically distinct.’ [↑](#footnote-ref-47)
48. Article 43 of the HR. [↑](#footnote-ref-48)
49. US Military Tribunal at Nuremberg, *In re List and Others* (Hostages Trial) (1948) 15 AD 632, p. 652. [↑](#footnote-ref-49)
50. See Affaire Chevreau (France v. Royaume-Uni), 9 June 1931, 2 RIAA 1113, 1123; Greece, Court of First Instance of Corfu, V v. O (1 January 1947), 14 ILR 264, 265; US, District Court D Utah, Central Division, Aboitiz & Co. v. Price, 610. [↑](#footnote-ref-50)
51. Grahame v. Director of Prosecutions, 14 I.L.R. 228, 232 (Control Comm’n Ct. Crim. App. 1947) (Ger., British Zone). [↑](#footnote-ref-51)
52. Supreme Court of Israel, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in Judea and Samaria Region et al,* HCJ 393/82, 37(4) PD (1983) 785. [↑](#footnote-ref-52)
53. Longobardo, The Use, supra note, at 173. [↑](#footnote-ref-53)
54. *See* Marco Longobardo, *The Palestinian Right to Exploit the Dead Sea Coastline for Tourism*, 58 German Y.B. Int’l L. 317 (2015). [↑](#footnote-ref-54)
55. Yoram Dinstein, ‘The International Law of Belligerent Occupation and Human Rights’ (1978) 8 IYBR 104, 111. [↑](#footnote-ref-55)
56. See Articles 54 and 64 of the GC IV. [↑](#footnote-ref-56)
57. *Eritrea-Ethiopia Claims Commission, Partial Award: Central Front* (Apr. 28, 2004). [↑](#footnote-ref-57)
58. *ibid*, ¶ 67 (emphasis added). [↑](#footnote-ref-58)
59. *Ibid.* [↑](#footnote-ref-59)
60. See infra \_\_\_\_\_. [↑](#footnote-ref-60)
61. *Eritrea-Ethiopia Claims Commission, Partial Award: Central Front* (Apr. 28, 2004), ¶ 67. [↑](#footnote-ref-61)
62. See generally Luigi Condorelli & Laurence Boisson De Chazournes, *Quelques remarques à propos de l’obligation des États de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances»*, *in* Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet 17, (Christoph Swinarski ed., 1984); Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Jean Pictet ed., 1958) 15; Giuseppe Barile, *Obligationes erga omnes e individui nel diritto internazionale umanitario*, 68 Rivista di diritto internazionale 5 (1985); Paolo Benvenuti, *Ensuring Observance of* *International Humanitarian Law: Function, Extent and Limits of the Obligation of Third States to Ensure Respect for* *International Humanitarian Law*, 1 Y.B. Int’l Institute Humanitarian L. 27 (1989-90); Kurt Dörmann & José Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 Int’l R. Red Cross 707 (2014); Robin Geiβ, *The Obligation to Respect and to Ensure Respect for the Conventions*, *in* The 1949 Geneva Conventions: A Commentary 111 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); Jean-Marie Henckaerts, *Article 1: Respect and Ensure Respect*, in Updated Commentary on the First Geneva Convention (ICRC, 2016) 35; Andrea Breslin, *A Reflection on the Legal Obligation for Third States to Ensure Respect for IHL*, 22 J. Conflict & Security L. 5 (2017). *See also* the brief reflections by this author in Marco Longobardo, *L’art. 1 comune*, *in* I “nuovi” commentari alle Convenzioni di Ginevra del 1949: Riflessioni dell'anniversario dei settant’anni delle Convenzioni 20 (Croce Rossa Italiana ed., 2022). [↑](#footnote-ref-62)
63. See my reflections in Longobardo, *State Responsibility*, *supra* note, at 261-262. [↑](#footnote-ref-63)
64. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168. [↑](#footnote-ref-64)
65. See, e.g., Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 248. On this aspect of this decision, see María José Cervell Hortal, *La explotación ilegal de los recursos naturales de un estado a la luz de la sentencia del Tribunal Internacional de Justicia sobre las actividades armadas en el territorio de Congo*, 22 Anuario Español de Derecho Internacional 559 (2005); Robert Dufresne, *Reflections and extrapolation on the ICJ’s approach to illegal resource exploitation in the Armed Activities Case*, 40 NY Univ. J. Int. Law Politics 171 (2008); Emanuele Cimiotta, *Conflitto armato nella Repubblica Democratica del Congo e principio della sovranità permanente degli Stati sulle proprie risorse naturali*, *in* Problemi e tendenze del diritto internazionale dell’economia: Liber amicorum in onore di Paolo Picone 55 (Aldo Ligustro & Giorgio Sacerdoti eds., 2011); [↑](#footnote-ref-65)
66. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 178. [↑](#footnote-ref-66)
67. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 179: “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”.See also paras 180 and 248. [↑](#footnote-ref-67)
68. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. Rep. 168, ¶ 247: “As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC’s natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda (see paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance.” [↑](#footnote-ref-68)
69. Longobardo, *State Responsibility*, *supra* note, at 261-262. [↑](#footnote-ref-69)
70. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda) (Reparations), 2022, ¶ [↑](#footnote-ref-70)
71. See generally Ori Pomson, The ICJ’s Armed Activities Reparations Judgment: A Brave New World?, Articles of War, Feb. 16, 2022, <https://lieber.westpoint.edu/icj-armed-activities-reparations-judgment/>; Alice Ollino, Causality in the law of State responsibility: Considerations on the Congo v Uganda case, 95 Zoom-In Questions of International Law 5 (2022); Bernardo Mageste Castelar Campos, War reparations as a financial burden on the responsible State: The Congo v Uganda case, 95 Zoom-In Questions of International Law 43 (2022). [↑](#footnote-ref-71)
72. 2022 DRC v Uganda, paras. 79 and 275. [↑](#footnote-ref-72)
73. 2022 DRC v Uganda, para. 296. [↑](#footnote-ref-73)
74. 2022 DRC v Uganda, para. 359. [↑](#footnote-ref-74)
75. 2022 DRC v Uganda, para. 278 (emphasis added). [↑](#footnote-ref-75)
76. On this complex topic see e.g. Francesco Bestagno, Diritti umani e impunità: obblighi positivi degli stati in materia penale (2003); Laurens Lavrysen and Natasa Mavronicola (eds), Coercive Human Rights Positive Duties to Mobilise the Criminal Law under the ECHR (2020); Steven Malby, Criminal Theory and International Human Rights Law (2020); Mattia Pinto, Historical Trends of Human Rights Gone Criminal, 42 Human Rights Quarterly 729-761 (2020). [↑](#footnote-ref-76)
77. See supra \_\_\_\_. [↑](#footnote-ref-77)
78. *See* Naomi Burke, *A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties*, 41 N.Y.U. J. Int’l L. & Pol. 103 (2008). [↑](#footnote-ref-78)
79. *See e.g.* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (July 9) [hereinafter Wall Opinion]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19). On the contextual application of international human rights law and international humanitarian law in occupied territory, *see generally* Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 Isr. L. Rev. 24 (1992); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. 17 (2004); Sylvain Vité, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and* *Property*, 90 Int’l Rev. Red Cross 629 (2008); Yutaka Arai-Takahashi, The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law 401–607 (2009); Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 Int’l Rev. Red Cross 317 (2012); Víctor Luis Gutiérrez Castillo, *La aplicación extraterritorial del Derecho internacional de los derechos humanos en casos de ocupación beligerante*, 36 Revista Electrónica de Estudios Internacionales 1 (2018); Gilles Giacca & Ellen Nohle, *Positive Obligations of the Occupying Power: Economic, Social and Cultural Rights in the Occupied Palestinian Territories*, 19 Hum. Rts L. Rev. 491 (2019). [↑](#footnote-ref-79)
80. See e.g. See, e.g., Art. 4 ICCPR; Art. 15 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (text in 213 UNTS 222). [↑](#footnote-ref-80)
81. For more on this, see below \_\_\_\_\_\_\_\_. [↑](#footnote-ref-81)
82. This duty has been described by United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, paras. 56-75 [↑](#footnote-ref-82)
83. See the statement by China in the aftermath of an attack against UN facilities in Iraq, S/PV.4812, 9–10. [↑](#footnote-ref-83)
84. For an analysis of the legal foundations and of the activities of the CPA, see generally Andrea Carcano, The Transformation of Occupied Territory in International Law (2015). For relevant documents pertaining to the CPA’s administration, see in 2 Stefan Talmon, The Occupation of Iraq: The Official Documents of the Coalition Provisional Authority and the Iraqi Governing Council (2013). [↑](#footnote-ref-84)
85. See the statements quoted by Stefan Talmon, ‘Diplomacy under Occupation: The Status of Diplomatic Missions in Occupied Iraq’ (2006) 6 Anuario Mexicano de Derecho Internacional 461, 502, notes 190 and 192. [↑](#footnote-ref-85)
86. See Talmon, Dièplomacy, supra note, 503. [↑](#footnote-ref-86)
87. UNSC Res 667 (1990), September 16, 1990, para. 3. [↑](#footnote-ref-87)
88. UNSC Res 667 (1990), September 16, 1990, para. 4 (emphasis added). [↑](#footnote-ref-88)
89. Compare Talmon, Diplomacy, supra note, 504-505; Carlo Curti Gialdino, Diritto diplomatico-consolare internazionale ed europeo 460-463 (6th ed., 2022). See also Jean Salmon, Manuel de droit diplomatique 432-433 (1994) (who, however, makes a distinction between lawful and unlawful occupations that has no bearing on the application of the law of occupation). [↑](#footnote-ref-89)
90. Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 Israel Y.B. Human Rights 233, 241 (1989). [↑](#footnote-ref-90)
91. Joint Statement of Iraq’s Neighboring States, 2 November 2003, in Talmon (ed.), The Occupation, 1453. [↑](#footnote-ref-91)
92. Ibid, para. 7. [↑](#footnote-ref-92)
93. International Law Commission, Seventy-third session, Protection of the environment in relation to armed conflicts, Texts and titles of the draft preamble and the draft principles adopted by the Drafting Committee on second reading, Draft principles on protection of the environment in relation to armed conflicts, 20 May 2022, A/CN.4/L.968. [↑](#footnote-ref-93)
94. Ibid. [↑](#footnote-ref-94)
95. See e.g. Arbitration on the *Island of Palmas (Netherlands/USA)* [1928] 2 RIAA 829, p. 839 (‘Territorial sovereignty […] has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory’); *Corfu Channel Case (UK* v *Albania)* (Merits) [1949] ICJ Rep 4, p. 22 (mentioning ‘every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States); 2005 DRC v Uganda, para 300 (linking this duty to the UNGA Friendly Declaration). [↑](#footnote-ref-95)
96. *Nuclear Weapons* Opinion, para. 29 (affirming that ‘the general obligation of States to ensure that activities *within their jurisdiction and control* respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment’ (emphasis added)); *Pulp Mills on the River Uruguay (Argentina* v *Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 101 (stating that ‘[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, *or in any area under its jurisdiction*, causing significant damage to the environment of another State’ (emphasis added)) [↑](#footnote-ref-96)
97. *Corfu Channel Case (UK* v *Albania)* (Merits) [1949] ICJ Rep 4, p. 22 [↑](#footnote-ref-97)
98. *Nuclear Weapons* Opinion, para. 29; *Pulp Mills on the River Uruguay (Argentina* v *Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 101. See also International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001, Article 1. [↑](#footnote-ref-98)
99. Comments of the United States on the International Law Commission’s draft principles on the protection of the environment in relation to armed conflicts, October 6, 2021, 24. [↑](#footnote-ref-99)
100. International Law Commission Seventy-third session, Third report on protection of the environment in relation to armed conflicts, by Marja Lehto, Special Rapporteur, A/CN.4/750, 16 March 2022, para 251 (with a typo in referring to article 53 rather than to Article 43). [↑](#footnote-ref-100)
101. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para. 118. See, also, Condorelli L (1989) The Imputability to States of Acts of International Terrorism. Israel YHR 19:233, 240-241. [↑](#footnote-ref-101)
102. See, generally, Federica Violi, ‘The Function of the Triad ‘Territory’, ‘Jurisdiction’ and ‘Control’ in Due Diligence Obligations’ in Anne Peters, Heike Krieger, Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 75. [↑](#footnote-ref-102)
103. On the contemporary understanding of this distinction in international law, *see generally* Jean Combacau, *Obligations de résultat et obligations de comportement: quelques questions et pas de réponse*, *in* Mélanges offerts a Paul Reuter 182 (1981); Benedetto Conforti, *Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme*, *in* Studi in memoria di Mario Giuliano 373 (1989); Antonio Marchesi, Obblighi di condotta e obblighi di risultato: contributo allo studio degli obblighi internazionali (2003); Constantin P. Economidés, *Content of the Obligation: Obligations of Means and Obligations of Result*, *in* The Law of International Responsibility 371 (James Crawford, Alain Pellet & Simon Olleson eds., 2010); Rüdiger Wolfrum, *Obligation of Result versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations*, *in* Looking to the Future: Essays on International Law in Honor of W Michael Reisman 363 (Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane & Siegfried Wiessner eds., 2010); Marco Longobardo, L’obbligo di prevenzione del genocidio e la distinzione fra obblighi di condotta e obblighi di risultato, 13 *Diritti umani e diritto internazionale* 237-256 (2019); Pierre d’Argent, *Les obligations internationales*, 417 Recueil des Cours 17, 150-195 (2021). [↑](#footnote-ref-103)
104. See Draft Articles 20 and 21 and the accompanying commentary in Roberto Ago (Special Rapporteur on State Responsibility), Sixth Rep. on State Responsibility, at 8–43, U.N. Doc. A/CN.4/302 (July 15, 1977). [↑](#footnote-ref-104)
105. Ibid. [↑](#footnote-ref-105)
106. Roberto Ago (Special Rapporteur on State Responsibility), Seventh Rep. on State Responsibility, at 32–37, U.N. Doc. A/CN.4/307 (July 4, 1978). [↑](#footnote-ref-106)
107. Report on the work of its fifty-first session (3 May to 23 July 1999), UN Doc. A/CN.4/49, Feb. 10 1999, paras. 7-8. [↑](#footnote-ref-107)
108. On the significant differences between Ago’s view and the concept of obligations of means or conduct and obligations of result in contemporary international law, *see generally* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 Eur. J. Int’l L.371 (1999); Andrea Gattini, *Breach of International Obligations*, *in* Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art 25,35-36 (André Nollkaemper & Ilias Plakokefalos eds., 2014). [↑](#footnote-ref-108)
109. Paul Reuter, Droit international public 56-59 (1956); *Id.*, *Principes de droit international public*, 103 Recueil des Cours 9, 472, 598-599 (1961-II). [↑](#footnote-ref-109)
110. ITLOS, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 2011 I.T.L.O.S. Rep., ¶ 110. [↑](#footnote-ref-110)
111. *See* Bosnia v. Serbia, *supra* note 15, ¶ 430. *See, also,* U.S.-U.K. Arbitration concerning Heathrow Airport User Charges (Nov. 30, 1992 – May 2, 1994), 24 R.I.A.A. 1, ¶ 2.2.4; DRC v. Uganda, *supra* note 7, Declaration of Judge Tomka, ¶ 4. [↑](#footnote-ref-111)
112. Riccardo Pisillo Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 German Y.B Int’l L. 9, 48 (1992). [↑](#footnote-ref-112)
113. *See generally* Riccardo Pisillo Mazzeschi, Due diligence e responsabilità internazionale degli Stati (1989); José Fernando Lozano Contreras, La noción de debida diligencia en derecho internacional público (2007); Joanna Kulesza, Due Diligence in International Law (2016); Le standard de due diligence et la responsabilité internationale (Sarah Cassella ed., 2018); Marco Longobardo, *The Relevance of the Concept of Due Diligence for International Humanitarian Law*, 37 Wisconsin Int’l L. J. 44 (2019); Samantha Besson, *La due diligence en droit international*, *in* 409 Recueil des Cours 154 (2020); Due Diligence in the International Legal Order (Heike Krieger, Anne Peters & Leonhard Kreuzer eds., 2020); Maria Monnheimer, Due Diligence Obligations in International Human Rights Law (2021); Alice Ollino, Due Diligence Obligations in International Law (2022). [↑](#footnote-ref-113)
114. Article 43 of the HR. [↑](#footnote-ref-114)
115. Article 57(2)(a)(i) of the AP I. [↑](#footnote-ref-115)
116. Longobardo, The Relevance, supra note, at 55. [↑](#footnote-ref-116)
117. Bosnia v Serbia, para 430. [↑](#footnote-ref-117)
118. Pulp Mills, para. 187. [↑](#footnote-ref-118)
119. See e.g. Condorelli, supra note, 241; Ollino, supra note, 112; D’Argent, supra note, 195-102. [↑](#footnote-ref-119)
120. Marco Longobardo, Is the Duty to Prevent Genocide an Obligation of Result or an Obligation of Conduct according to the ICJ?”, EJIL:Talk!, May 16, 2019, [www.ejiltalk.org/symposium-on-the-genocide-conventionis-the-duty-to-prevent-genocide-an-obligation-of-result-or-an-obligation-of-conduct-according-to-the-icj/](http://www.ejiltalk.org/symposium-on-the-genocide-conventionis-the-duty-to-prevent-genocide-an-obligation-of-result-or-an-obligation-of-conduct-according-to-the-icj/); Longobardo, L’obbligo, supra note; Jutta Brunée, Procedure and Substance in International Environmental Law, 405 Recueil des Cours 83, 152-158 (2020). [↑](#footnote-ref-120)
121. Article 14(3) of ARSIWA; Bosnia v Serbia, para. 431; see D’Argent, supra note, 195-102. [↑](#footnote-ref-121)
122. See, e.g., Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 Eur. J. Int’l L. 661,664-665 (2005); Benvenisti (2012), p. 76; Longobardo, *supra* note 157, at 171-173; Dinstein, supra note, at 101-102; Benvenisti and Lieblich, supra note, at 62-63. [↑](#footnote-ref-122)
123. Report of the OSCE Moscow Mechanism’s mission of experts, 10, <https://www.osce.org/odihr/515868>. [↑](#footnote-ref-123)
124. *See* HCJ 69/81 Abu Aita et al. v. Regional Commander of the Judea and Samaria Area et al., 37(2) PD 197, ¶ 50(c). [↑](#footnote-ref-124)
125. *Bosnia v. Serbia*, *supra* n. 105, para. 430. [↑](#footnote-ref-125)
126. Ibid.; *Responsibilities*, *supra* n., para. 117. See also Pisillo Mazzeschi (1992), p. 44; Lozano Contreras (2006), pp. 202–229. [↑](#footnote-ref-126)
127. Article 42 of the HR. [↑](#footnote-ref-127)
128. On the relationship between a source of risk and due diligence obligations, *see generally* Pasquale De Sena, *La «due diligence» et le lien entre le sujet et le risque qu’il faut prévenir: quelques observations*, *in* Le standard, *supra* note 2, at 243. [↑](#footnote-ref-128)
129. Pisillo Mazzeschi, *The Due Diligence Rule*, *supra* note, at 50. [↑](#footnote-ref-129)
130. 2005 DRC v Uganda, Declaration of Judge Tomka, para. 4. [↑](#footnote-ref-130)
131. 2022 DRC v Uganda, para. 277. [↑](#footnote-ref-131)
132. Ibid. [↑](#footnote-ref-132)
133. See Eritrea-Ethiopia Claims Commission, Partial Award: Central Front (Apr. 28, 2004), ¶ 112 (offering an example in which, when a state refuses to disclose its diligent conduct, it was considered responsible for the violation of an obligation of conduct). [↑](#footnote-ref-133)
134. See the discussion in Marco Longobardo, ‘Human Rights Council’s Fact-Finding Missions and the Assessment of Violations of the Principle of Precaution in Attack in the Absence of Cooperation by the Attacker’ in Gloria Gaggioli and Emilie Max (eds), *The Role of Human Rights Mechanisms in Implementing International Humanitarian Law* (Edward Elgar, fothcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4062658>. [↑](#footnote-ref-134)
135. Article 43 of the HR. [↑](#footnote-ref-135)
136. Article 54 of the GCIV. [↑](#footnote-ref-136)
137. On this presumption, see generally Longobardo, The Use, supra note, at 186-189. [↑](#footnote-ref-137)
138. See CPA Order no. 27, 4 September 2003, section 2.6. [↑](#footnote-ref-138)
139. Article 43 of the HR. [↑](#footnote-ref-139)
140. Lieblich and Benvenisti, supra note, 86-88. [↑](#footnote-ref-140)
141. This author has analysed this shift in Marco Longobardo, Legal Perspectives on the Role of the Notion of «Denazification» in the Russian Invasion of Ukraine under Jus contra Bellum and Jus in Bello” (2022) 55 Revue Belge de Droit International (forthcoming), section IV.A <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4214444>. On the boundaries of the occupying power’s legislative powers, see generally Adam Roberts, «Transformative Military Occupation: Applying the Laws of War and Human Rights», *A.J.I.L.*, 2006, p. 587; Marco Sassòli, «Legislation and Maintenance of Public Order and Civil Life by Occupying Powers», *E.J.I.L.*, 2015, pp. 671-673; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Leiden, Martinus Nijhoff, 2009, pp. 109-111; Michael Bothe, «The Administration of Occupied Territory», in Andrew Clapham, Paola Gaeta, Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford, Oxford University Press, 2015, p. 1462; Vaios Koutroulis, «Mythes et réalités de l’application du droit international humanitaire aux occupations dites “transformatives”», *R.B.D.I.*, 2007, pp. 365. [↑](#footnote-ref-141)
142. See Article 154 of the GC IV (according to which “In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.”). [↑](#footnote-ref-142)
143. Article 64(2) of the GC IV. [↑](#footnote-ref-143)
144. See Articles 7 and 8 of the GC IV. [↑](#footnote-ref-144)
145. See generally Marco Longobardo, The Italian Legislature and International and EU Obligations of Domestic Criminalisation” (2021) 21 *International Criminal Law Review* 623, 628, 630-631 (2021). [↑](#footnote-ref-145)
146. Bosnia v. Serbia, supra note 42, para. 426; Belgium v. Senegal, supra note 24, para. 75; Çamdereli v. Turkey, no. 28433/02, judgment, 1 December 2008, para. 38. See P. De Sena, ‘Responsabilité internationale et prévention des violations des droits de l’homme’, in E. Decaux and S. Touzé (eds.), La prevention des violations des droits de l’homme (Pedone, Paris, 2015), pp. 41–43. [↑](#footnote-ref-146)
147. Articles 146 and 146 of the GC IV. [↑](#footnote-ref-147)
148. See, with reference to obligations of domestic criminalisation in general, Obligation to Prosecute or Extradite (Belgium v. Senegal), 20 July 2012, I.C.J. Reports 2012, 422, para. 75. See also R. Pisillo Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’, 35 German Yearbook of International Law (1992) 9–51, at p. 48; N. van der Have, The Prevention of Gross Human Rights Violations Under International Human Rights Law (Springer, The Hague, 2018), p. 11; Monnheimer, Due Diligence, supra note, pp. 67–68. [↑](#footnote-ref-148)