Chapter 11
Occupation and Sovereignty – Still a Useful Distinction?

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Reality, we are told, is putting international law under pressure. In particular, new forms of violence and warfare are undermining the formal rules and institutions of international humanitarian law (or less euphemistically the ‘laws of armed conflict’). There is a need of new and unorthodox measures to engage equally unorthodox enemies operating within the expanding gray zones between peace and war. Much has been written about the challenges to humanitarian law emerging from the privatization of warfare by terrorists and private security companies, the hybrid nature of military action between traditional peacekeeping and formal war, new forms of internal violence, psychological and cyber-warfare and so on. The principal point of concern has been the apparent inability of the formal distinctions of international humanitarian law – particularly the law of the four Geneva Conventions of 1949 and the Additional protocols of 1977 – such as those between war/peace, internal/international, combatant/non-combatant and so on to capture the fluidity of today’s battlefield reality. On the contrary, it has often seemed that to stick to such distinctions will undermine the ability to respond effectively to some of the more important threats. The distinctions cannot have more force than the purpose for which they were introduced. If they positively thwart those purposes, what possible reason might there be for keeping them?

My intention is not to participate in this general discussion.1 Instead, I will focus on one traditional concept, namely belligerent occupation, and I will outline the stakes for different actors for the blurring of the boundary between that notion and that of its apparent obverse, territorial sovereignty. Despite the important role that the law of occupation plays in the corpus of international humanitarian law, there have not been many cases in the decades since World War II where it would have been applied as a result of a declaration to that effect by a belligerent party. Apart from the Israeli occu-

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1 The best analysis is D. Kennedy, War and Law (Princeton University Press, 2006) to which this discussion is greatly in debt.
pation of the West Bank and Gaza, and the early stages of the occupation of Iraq by the US-led coalition in 2003–2004, there are no cases of formally declared occupation – and even those two are far from school examples. There are many reasons for why a power undertaking military operations outside its own territory might want to refrain from adopting the status of an occupying power under the Fourth Geneva Convention but the principal among these is surely that this would limit its own liberty of action while providing no guarantee that it would do the same to the adversary that might continue to undertake operations from the relative safety of hiding amongst the civilian population. Becoming an occupying power might, in this respect, seem to constitute a trap.

Nevertheless, it cannot be denied that the notion of belligerent occupation is deeply embedded in the ideological firmament of international law. This presumes a stark contrast between the normality of peace and the exception that ‘war’ (or ‘armed conflict’) is understood to constitute to it. When territory is seized in connection with operations under armed conflict, ‘sovereignty’ on the territory is put in abeyance and is replaced by the temporary legal status of ‘occupation’. The distinction sovereignty/occupation thus translates the all-important distinction between ‘peace’ and ‘war’ into the language of territorial authority. This translation is assumed to have a significant legal impact. Where sovereignty denotes full, plenary authority, occupation (as an exception to it) is limited to the specific rights, powers and privileges that the occupier enjoys as laid out in the Fourth Geneva Convention and in customary law. Whereas ‘sovereignty’ does not look beyond itself – that is to any moment of future transcendence – ‘occupation’ anticipates the restoration of sovereignty after the conclusion of the peace treaty.

It is readily understandable why it appears so important to make a clear distinction between these two modes of territorial authority. ‘Sovereignty’ stands for order inside the territory as well as in the relations between that and other territories – indeed it is the principal notion through which ‘order’ has been approached in Western legal and political thought at least since the Peace of Westphalia, 1648. Although its meaning has been often debated and its moral significance has been sometimes put to doubt, no other notion has taken its place to address the basis and identification of territorial authority. By contrast, ‘occupation’ signifies the absence of a stable order in a territory, and permanent institutions exercising it. It is an intermediate status that accepts the fact of the collapse but aims to limit its consequences and to prepare the ground for the re-establishment of order and sovereignty in the future. To be an ‘occupying power’ is precisely not to be a ‘sovereign’. Where a sovereign is by definition not legally accountable to anyone, an ‘occupying power’ is accountable to the population and to the external world by reference to the specific rules and principles that govern occupation under international humanitarian law.

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3 Benvenisti, ibid., pp. 3–6.