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ESTABLISHING THE OBLIGATIONS OF THE OCCUPIER CONCERNING THE EXPLOITATION OF NATURAL RESOURCES IN TERRITORIES UNDER OCCUPATION: BETWEEN LEX LATA AND LEX FERENDA

Olena Nihreieva[1]
University of Cadiz, Spain / Odesa Mechnikov National University, Ukraine
Email: olena.nihreieva@uca.es

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Abstract. This article examines the legal regulation of the exploitation of natural resources in occupied territories to establish the obligations of the occupier. Consequently, the concept of usufruct as a cornerstone of this legal regime is analyzed considering its historical roots and civil law origins. The application of usufruct is also explored in various domains of international law. Examining usufruct in relation to the principles of the law of occupation clarifies the normative background that defines the obligations of the occupying power. The author concludes that the law of occupation should be updated to address the needs of local populations living under occupation and their right to development.

Keywords: occupation, natural resources, usufruct, sustainable use, protection of the environment.

Introduction

Natural resources have always been one of the main reasons for armed conflicts, both international and internal. Their potential exploitation in disputed territories often motivates states and other actors to commence military actions in order to occupy these areas. Beyond being a trigger for conflict, natural resources often serve as fuel for it, as they provide parties with the means to cover their military expenses. It has been suggested that natural resources were a significant factor in the 2022 Russian invasion of Ukraine, and a large portion of Ukraine's key natural resources is currently under the control of Russia in the occupied Ukrainian territories (Evans, 2022; Theise, 2023).

However, international law establishes limits on the actions of belligerents, particularly occupying powers, during armed conflicts. As set out in Art. 55 of the IV Hague Convention respecting the Laws and Customs of War on Land of 1907 (hereinafter the Hague Regulations), the occupying power is not entitled to explore and exploit resources in its own interests as if they were its property, but can do so only as an administrator and a usufructuary. However, the legal framework governing usufruct under international law is often ambiguous and outdated, which can lead to the abuse of power by the occupier and, in effect, the plundering of resources from the territory under its control.

Having been adopted at the beginning of the 20th century, the provisions of the Hague Regulations that are still considered to be a basis for the law of occupation do not correspond to the realities of modern conflict and do not satisfy the needs of the parties involved, namely the ousted government, the occupying power, and the local population living under occupation.

[1] PhD in Law; associate professor of international law at Odesa Mechnikov National University; visiting professor at the University of Cadiz. Main research areas: international maritime law, international humanitarian law, cyberlaw.

The interests of the latter should be a paramount foundation for the occupier's decisions inasmuch as, in accordance with Art. 43 of the Hague Regulations, it is obliged to ensure public order and safety or even civil life in the territory under occupation. However, this principle, directed at the protection of the interests of the ousted government, not only prevents the occupier from the over-exploitation of the natural resources of the territory, but also impedes their development as a consequence of lack of investment. This is especially relevant in cases of prolonged occupation. Thus, the modern realities of armed conflict and the increased need for the protection of human rights in territories under occupation require the modification of the law of occupation, and in particular the legal regime of the exploitation of occupied territories' natural resources, to establish a list of the occupying power's obligations concerning these activities and to protect the interests of the displaced government and the local population. In this regard, the concept of usufruct must be better defined and interpreted in the context of modern international law, stressing the need for human rights and environmental protection.

In light of the above, this paper is dedicated to the analysis of the concept of usufruct in international law based on the exploration of its civil law origins and historical evolution. Several practical issues relate to the exploitation of newly discovered and non-renewable natural resources.

The study is based on doctrinal legal research, which has prepared the ground for the establishment of the occupier's rights and duties related to the administration of the occupied territory. Taking into account the lack of an international normative framework regarding the usufructuary status of the latter, the comparative method is applied so as to enrich and particularize the above rules. Guided by teleological reasoning, which suggests that such a framework shall be developed in order to protect the interests of the local population, the article provides a comprehensive analysis of the occupier's obligations regarding the exploitation of natural resources from the perspectives of *lex lata* and *lex ferenda*.

The paper is structured as follows. Section 1 offers an overview of the legal regime of the exploitation of natural resources under occupation according to the current state of its legal regulation by international humanitarian law (hereinafter IHL). Since usufruct is the cornerstone of this regime, Section 2 focuses on this concept. It begins with an examination of the historical evolution and civil law origins of usufruct, followed by an analysis of its application in the domestic legal orders of several states and some areas of international law beyond the framework of humanitarian law in order to establish the general characteristics of this legal instrument relevant to the law of occupation. Consequently, the principles outlined serve as a foundation for establishing the underlying precepts that should guide the legal regulation of usufruct in IHL. Finally, Section 3 aims to clarify the legal obligations of the occupying power as a usufructuary of the natural resources of the territory it controls under the law of occupation in line with the above-mentioned principles and characteristics. The paper concludes with some final remarks.

1. The legal regime of the exploitation of natural resources under occupation

Before proceeding with the analysis of the legal regime of natural resource exploitation under the law of occupation, it is worth considering general rules regarding property, assets and resources in territories under occupation.

Obviously, the rules for public and private property differ significantly. Art. 46 of the Hague Regulations prohibits the confiscation of private property by an occupying power. It also mandates respect for "family honour and rights, the lives of persons, and private property, as well as religious convictions and practices." Unfortunately, these norms are not absolute and may be subject to certain restrictions. For example, specific private property, such as means of communication and transportation, may be used for military purposes (Art. 53(1) of the Hague Regulations). However, after hostilities have been suspended, such property must be restored and compensated for (Art. 53(2) of the Hague Regulations). The same restriction is imposed on the requisition of goods and services for the needs of the occupying army, which can only be carried out "in proportion to the resources of the occupied region." Additionally, the occupying power is obligated to pay for these requisitions in cash as soon as possible (Art. 52 of the Hague Regulations). The scope and purposes of requisitions are framed by IHL – for instance, according to Art. 55 of the IV Geneva Convention, food and medical supplies may be requisitioned only if the needs of the civilian population have been met and exclusively for the use of the

occupation forces and administration personnel themselves, which excludes the possibility of their exportation and use by persons different from the personnel of the occupying authority.

The latter is also empowered to collect contributions (Art. 51 of the Hague Regulations) and taxes "as far as is possible, in accordance with the rules of assessment and incidence in force" in order to cover the expenses of the administration of the occupied territory (Art. 48 of the Hague Regulations). It is not fully established whether the occupying power can impose new taxes. However, the Israeli Court of Justice in *Abu 'Aita et al v. Commander of the Judea and Samaria Region et al.* (1983) recognized such a possibility. Military necessity can explain some other limitations imposed on private property under occupation; however, it is granted the maximum possible level of protection. At the same time, public property, to which natural resources mostly belong, may fall under more restrictions.

In conformity with Art. 53 of the Hague Regulations, the occupier is entitled to:

> take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

These rules can be considered in conjunction with the provisions of Art. 55, which sets out that:

> the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.

Therefore, as stressed by Benvenisti (2009, para. 30), the utilization of public property by an occupier is constrained by two specific conditions. The first condition relates to the purpose of use, while the second establishes the status of the occupying power as administrator and usufructuary.

Regarding the purposes of public property utilization, occupation law stresses that it cannot be used in the interests of the occupier – e.g., for the needs of its domestic economy – but must be used exclusively to meet its security needs and to cover administration costs. It should also promote the needs of the local population (Institut de Droit International, 2003). For example, the occupants of Iraq in 2003 informed the President of the UN Security Council that they would "act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people" (Letter of the UK and US Representatives to the UN, 2003), even though, according to some experts, it would have amounted to pillage (Saadoun, 2017), which is directly prohibited by Art. 47 of the Hague Regulations and Art. 33 of the IV Geneva Convention.

Another condition establishing limits on the occupier's rights concerns public immovable property. As Benvenisti (2009) stated, "the usufructuary principle was interpreted as forbidding wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation" (para. 30). To better understand the occupier's usufructuary status, it should be stated that it is not the owner of immovable public property in the occupied territory, but only its temporary user and administrator. Nevertheless, it is entitled to make use of it, subject to the condition of safeguarding its capital value, in accordance with the law of usufruct.

Even though natural resources are not directly mentioned in the text of Art. 55 of the Hague Regulations, which cites "public buildings, real estate, forests, and agricultural estates," according to the majority of commentators they fall under its regulation (D'Aspremont, 2013, p. 4; Azarova, 2012; Benvenisti, 2009; Dam de Jong, 2015, p. 20). Their classification as movable or immovable property provokes a discussion, but as suggested by some (e.g., Saul, 2015), it seems reasonable to consider non-extracted natural resources (so-called *in situ* resources) as immovable property, while those resources that have already been processed as movable property (pp. 24–25). The case law also supports this approach, having considered crude oil to be immovable property (*N. V. De Bataafsche Petroleum Maatschappli & Ors. v. The War Damage Commission*, 1956, p. 809).

Thus, usufruct constitutes a basis for the international legal regime of the exploitation of occupied territories' natural resources. As a consequence, the first condition regarding the purposes of public property exploitation is equally valid for the utilization of natural resources. As Azarova (2012) emphasizes,

> an Occupying Power is required to safeguard the natural resources of the occupied territory, and permitted to exploit them only for the benefit of the local population, and exceptionally for the purpose of covering reasonable expenses of its military administration.

However, having been established at the beginning of the 20th century, the usufruct rule is clearly outdated and requires amendments that respect the political and economic realities of the present time. In this context, the rights and duties of the occupying power regarding the natural resources of territories under occupation must be better framed and defined.

As aforementioned, these rights stem from the provisions of Art. 55 of the Hague Regulations. According to legal scholarship, this rule is customary (D'Aspremont, 2013, p. 4), and is thus binding for all states. As D'Aspremont (2013) observed, there is a consensus among scholars about the applicability of Art. 55 of the Hague Regulations to the exploitation of natural resources in times of conflict, but it is emphasized that controversies have emerged in connection with the scarce content of its provisions that do not mention mines, oil, gas, or water, which are among those resources that are at the heart of contemporary conflicts (p. 4).

At the same time, Art. 43 of the Hague Regulations gives the occupying state the legitimate power to "take all the measures to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Moreover, the original French text of the convention contains a broader notion of "*l'ordre et la vie publics*" ("public order and civil life"), which potentially requires more efforts from the occupier in order to achieve this result (Sassoli, 2005, pp. 662–663). In truth, this can entail the need for the occupier to use the natural resources of the territory, but only in the interests of the local population. Benvenisti (2009) asserted that the occupying power is not only authorized, but obliged to assume control over natural resources, protect them against over-use and pollution, and allocate them equitably and reasonably among the various domestic users. He also suggested that "the utilization of these resources according to the above-mentioned guidelines would not constitute a violation of the principle of permanent sovereignty over its natural resources" (para. 31). This position was also taken by the ICJ in *Armed Activities on the Territory of the Congo* (2005, para. 244).

Despite this, according to D'Aspremont (2013), "the platform offered by IHL to develop a regulatory framework for natural resources brigandage has quickly shown its limits" (p. 8). It is difficult to disagree with this statement when considering the provisions of Art. 55 and 43, which, while limiting the authority of the occupier, also grant it discretion in decisions regarding the exploitation of public property.

The above provisions gave Longobardo (2016) reason to conclude that "the occupying power is not absolutely precluded from exploiting natural resources in the occupied territory. Rather, it may lawfully sustain its own occupation thanks to the exploitation of natural resources located in the occupied territory" (p. 255). However, this topic raises several practical questions, including: the understanding of the concept of usufruct; the classification of natural resources as movable or immovable property; the duty to safeguard capital, particularly concerning the exploitation of new oil wells; the legal purposes of natural resource exploitation and the mechanisms for verifying compliance; and the modification of the regulatory framework in cases of prolonged occupation. In the following sections, an attempt will be made to address some of these questions.

2. The concept of usufruct under international law

Due to the fact that usufruct as an international law concept has obviously been borrowed from national law, it seems that answers to the above-mentioned questions related to the status of the occupant as a usufructuary should also be sought from within the latter. Therefore, this study will encompass a brief overview of the historical roots of usufruct and its legal regulation under several jurisdictions pertaining mostly to the civil law system, based on a combination of the historical and comparative analytical approaches. Within the framework

of this paper, the focus will only be on the most relevant legal rules governing the relations concerning usufruct in these states.

2.1. Exploring the origins and domestic law experience of usufruct

In order to analyze the concept of usufruct in international law it seems reasonable to explore its origins, which can be traced back to Roman law. Here and in successive legal systems, usufruct had clear civil law characteristics, which can briefly be described through a few legal maxims: *iura in re aliena* (real rights on another's property), *ius rebus alienis utendi et fruendi, salva rerum substantia* (right to use and enjoy another's property, maintaining its substance), and *rei mutatione interit usufructus* (the total change of the asset extinguishes the usufruct).

Notwithstanding its long history, "the conception of usufruct has never yet been explained adequately" and "the *possessio* of the usufructuary has not yet been adequately determined" (Kopel, 1946, p. 159).

According to the Law Dictionary (n.d.), usufruct in civil law can be defined as:

> the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.

Thus, one of the core duties of the usufructuary is so-called *salva rerum substantia.*

In Roman law-based legal systems, usufruct is understood as the temporary right to use and enjoy of the property of another person, but without changing the character of the property, and the Latin term *usufructus* can be literally translated as "use and enjoyment." This shows that usufruct lacks one of the three necessary elements constituting property rights – namely *abusus*, i.e., the right to encumber or transfer a title. However, this provides the usufructuary with the other two entitlements, namely *usus*, which means the right to use the property, and *fructus*, which means the right to receive its fruits (Segal & Whinston, 2013). Looking ahead, it should be stressed that the exact content of the latter is of great interest for the purposes of the law of occupation, because it can clarify some aspects of the exploitation of natural resources under occupation such as the utilization of non-renewable and newly found resources, e.g., new oil wells.

In this regard, it is interesting that in civil law countries, where usufruct covers both movables and immovables (McClean, 1963, p. 654), two types of usufruct can be distinguished: perfect usufruct and imperfect usufruct. The former is used only for those things that can be exploited without changes in their substance, e.g., land, buildings, or movable property, even though changes that happen naturally over time are acceptable. Imperfect (or quasi-) usufruct relates to property that is "consumable or expendable, such as money, agricultural products, and the like, which would be of no advantage to the usufructuary if he could not consume them, expend them, or change their substance" (Segal & Whinston, 2013). Thus, usufruct under civil law can potentially give the right to a usufructuary to exploit natural resources that are consumable.

This type of usufruct is recognized in French, Spanish, French Quebec and South African law, which also establishes an additional requirement of returning others things "of like quality and quantity or their value at the end of the usufruct" (Art. 482 of the Civil Code of Spain; Art. 587 of the Civil Code of France; McClean 1963, p. 652). However, normally, usufructuaries "may not, for example, mine or quarry, where this was a normal method of exploitation." At the same time, in South Africa they have no right to minerals produced even in existing mines, so their value must be made good after the termination of the usufruct (McClean, 1963, p. 663). Interestingly, by way of exception, trees may be cut down (p. 663).

Under Spanish civil law, "usufruct gives the right to enjoy another's property with the obligation to preserve its form and substance, unless the title of its constitution or the law authorizes otherwise" (Art. 476 of the Civil Code of Spain). This provision establishes the usufructuary's obligation to conserve not only the substance of the property, which is often related to the value of the property, but also its form, which is connected to its economic destination (Castan Tobeñas, 1978, p. 22). Notably, the last approach is adopted in the Civil Code of

Italy (Art. 981), meaning that the usufruct can derive from the thing any utility that it can provide, subject to the limits established by law.

As a default rule, the Civil Code of Spain excludes the exploitation of mines from the rights of the usufructuary. According to Art. 476,

> the usufructuary of a property in which there are mines does not have the rights to the products of those reported, granted or being worked at the beginning of the usufruct, unless they are expressly granted to him in the constitutive title of the latter, or it is universal. (para. 1)

This means the usufructuary has the right to receive profits derived from the exploitation of extracted minerals, but no right to the minerals themselves (Enciclopedia juridica, n.d.).

However, para. 2 of this article introduces an exception establishing that the usufructuary may extract stones, lime, and plaster from quarries for repairs or works that they are obliged to do or that are necessary. Moreover, Art. 477 of the Civil Code of Spain provides that in the legal usufruct of a widowed spouse, the usufructuary may exploit the reported, granted or working mines existing on the property, taking as their own half of the profits resulting after the deduction of expenses, of which they will pay half with the owner.

The above provisions suggest that mines usufruct as a special type of usufruct is not directly allowed in Spain, because the provisions establish "rather usufruct of a property in which there are mines whose concession has been obtained by the same owner," leaving mines usufruct without special legal regulation that modern commentators find anachronistic (Aznar Domingo, n.d.). This can be explained by the fact that case-law prior to codification (1889) considered mines' products (mineral resources), which are not reproducible, not to be fruits, and therefore no usufruct could be established on them. This position has been changed recently, which requires modifications in usufruct law (Aznar Domingo, n.d.). Some commentators stress that although minerals are not fruits in the strict sense, they can be assimilated to them for the purposes of usufruct (McCleary, 1960, p. 776).

According to other comments, in accordance with their economic destination, minerals can be supposed to be separate from mines, which does not alter the substance of the mine (Diez-Picazo y Ponce De León, 1954, p. 374). Clearly, this activity entails obligations for the explorer to adequately handle the extraction of the minerals, complying with the regulations imposed by the law, with the aim of safeguarding respective social and geographical areas (Haro Bocanegra, 2020, pp. 281–282).

Now, Spanish doctrine accepts the constitution of usufruct over mines, even though Spanish civil regulation remains confusing (Haro Bocanegra, 2020, p. 282). As in many other countries, it requires administrative authorization. As for the usufruct regime, it is suggested that it should be deduced from the above articles 476 and 477, that is to say that the beneficiary of the encumbrance will only take half of the net profits that result. As stated by Aznar Domingo (n.d.), "the legislator appreciated here the fact that mines are exhaustible and that the material obtained is only partly a fruit, but is also part of the substance of the mine."

In Spanish legislation, the question of the possibility of exploiting newly-found natural resources remains unanswered, while it is completely prohibited in the Civil Code of France, which sets out that the usufructuary:

> enjoys, in the same manner as the owner, the mines and quarries that are in operation at the opening of the usufruct; … the usufructuary may only enjoy it after having obtained permission from the President of the Republic. He has no right to mines and quarries not yet opened, nor to peat bogs whose exploitation has not yet begun, nor to the treasure that could be discovered during the duration of the usufruct. (Art. 598)

A similar approach is adopted in Art. 987 of the Civil Code of Italy, in conformity with which, while mines belong to the State's assets and can be exploited only under its concession, "the usufructuary enjoys the quarries and peat bogs already opened and in operation at the beginning of the usufruct. He is not entitled to open others without the consent of the owner." The same can be found in Art. 552 of the old version of the Louisiana Civil

Code of 1870 (McCleary, 1960, p. 776). For the moment, these activities fall under regulation of the US Mineral Code of 1976.

In more recent national legal acts, the tendency to provide the usufructuary with the right to exploit mines can be observed. Thus, the Mining Code of Argentina of 1997, which regulates the usufruct of mines, specifically states in Art. 338 that "the usufructuary has the right to use the products and benefits of the mine, just as the owner can use them." Meanwhile, the Chilean Civil Code, as amended up to 2000, states that:

> if the usufructuary property includes mines and quarries currently being worked, the usufructuary may benefit from them and shall not be liable for any decrease in products that may arise as a result, provided that he has observed the provisions of the respective ordinance. (Art. 784)

Both codes do not directly prohibit the exploitation of newly found mines.

Thus, even a brief overview of the historical roots and civil law origins of usufruct allows it to be concluded that this legal instrument, which encumbers property, does not preclude the possibility of exploiting non-renewable resources; however, such exploitation is subject to strict limitations. The existence of so-called imperfect usufruct indicates that property owners may permit the use of their property in ways that can lead to its natural consumption and deterioration in pursuit of their economic interests. However, adequate compensation is required to incentivize this permission. The exploitation of newly discovered natural resources is more restricted, though not entirely excluded, as it may conflict with the interests of the naked owner. Nonetheless, the naked owner can grant permission for such activities.

2.2. Usufruct in other international law domains

Returning to the realm of international law, it should be stressed that for the moment, the law of occupation is the only institute in which a positive legal regulation of usufruct can be found. Despite this, there are proposals to introduce it in other spheres falling under international legal regulation. Their short consideration seems useful in order to make this research more comprehensive.

One sphere in which a resort to the concept of usufruct has been proposed is international space law. This branch of public international law is one of the few where the principle of the common heritage of humankind has supposedly been introduced, although with

> the lack of such key elements of its concept as a joint management mechanism and a resource allocation mechanism… it can be concluded that the principle of the common heritage of mankind in relation to outer space did not receive the status of international custom ... Instead, the generally recognized norm of international space law is the principle of non-appropriation of space territory. (Nihreieva, 2022, p. 32)

In light of the above, it has been argued that the Moon Agreement does not seek to preclude usufruct and use rights (Goldie, 1985, p. 702). The recent tendency towards the legalization of the commercial exploitation of the natural resources of outer space in the national law of some states supports the abovementioned suggestion (for more, see Nihreieva, 2022).

Another domain in which a similar proposal has been put forward is the international law of the sea. In this sphere, the principle of the common heritage of humankind concerning the natural resources of the deep seabed was fully established and confirmed by the United Nations Convention on the Law of the Sea in 1982. However, against the background of the adoption of the US Deepsea Ventures Notice of Discovery and Claim in 1975 and the US Deep Seabed Hard Mineral Resources Act of 1980, another interpretation of the principle based on the concept of usufruct was proposed. According to it, the deep seabed, although protected by the above principle, is covered by usufruct, where every state – and, consequently, private companies and individuals authorized by it – is a usufructuary that:

> enjoys privilege without needing to assert any titular right to the seabed adverse to the common heritage of mankind and, finally, may take mineral resources there from in his capacity as a participant in and beneficiary of that common heritage. (Goldie, 1985, p. 713)

This approach, although lacking broad support, would provide private companies with a right of ownership over the fruits of mining activity after their extraction from the seabed.

Finally, the concept of usufruct has been discussed in relation to environmental protection. From this perspective, humankind is regarded as a usufructuary of nature and its resources. In doing so, it should combine "the right to use with the responsibility to preserve" (Drew, 2016, p. 196). Under this obligation, it is "a steward whose uses of land are limited by his responsibility to others with rightful claims, most particularly those who will inherit the property in the future" (p. 199). The latter directly connects the concept of usufruct with the concept of sustainable development. One commentator suggests that this approach:

> provides a paradigm of sustainability that presents mastery and deference, anthropocentric use and ecocentric care, as compatible rather than contradictory goals, and makes humans morally responsible to a higher power for the well-being of the non-human world on which they rely. (p. 207)

Surprisingly, the broader philosophical understanding of the relationship between humankind and nature based on the concept of usufruct finds more concrete expression in the sphere of the law of occupation, where the sustainable use of natural resources is proposed as a substitute for the traditional usufruct approach (Lehto, 2018, para. 96).

2.3. Usufruct through the principles of the law of occupation

As depicted above, the concept of usufruct lies at the core of the legal regime of governing the exploitation of natural resources under occupation. Beginning in the 19th century (Arai-Takahashi, 2012, p. 57), the development of usufruct in international law, from a conventional norm to a customary rule, has been extensively described by Askary and Hosseinnejad (2023, pp. 1525–1531).

While considering the content and precise obligations of the occupying power under it, the provisional and temporary nature of usufruct must be taken into account. Initially, as has been demonstrated, usufruct under civil law is a temporary encumbrance. However, the situation in international law differs significantly: unlike civil-law usufruct, which is normally based on the owner's consent, occupational usufruct is coercive and often undesirable for both the displaced government and the local population. At the same time, it must remain functional, meaning it should address the needs of all actors involved in this triad: the occupying power, which has gained military advantage and strives to retain it; the ousted government, which seeks to reestablish its authority over the occupied territory and desires that it remains as unchanged as possible; and the local population, which primarily needs protection from the perils of war and guarantees for its basic rights – conditions that would be unattainable in an administrative vacuum. Thus, it is true that the concept of usufruct strikes "a careful balance between the realities of armed conflict and the provisional character of the situation" (Dam de Jong, 2015, p. 20).

In order to achieve the above, the concept of usufruct in IHL is based on several basic principles. First, it is essential to emphasize the temporary nature of the occupying power's rights to exploit natural resources and other public property in the occupied territory. This is an inherent feature of this legal institute, which also stems from the temporary character of occupation. However, in situations of prolonged occupation, the time-limits of such activities are unclear, which is explained by the uncertain criteria for determining the end of occupation under international law (Ferraro, 2012, p. 26).

In addition, usufruct under international law is purpose-based, which means that the occupant cannot simply exploit the natural resources of the occupied territories in its own interests, but is obliged to do so for the benefit of the peoples of those territories taking into account the principle of their permanent sovereignty over their natural resources. The relevance of the latter within the law of occupation represents a difficult issue, which, in

the author's opinion, requires further study. Meanwhile, it can be stated that permitted purposes of natural resource exploitation by the occupant are provided in Art. 43 of the Hague Regulations, which is often considered in conjunction with Art. 64 of the IV Geneva Convention. Art. 43 establishes that the occupant should restore and ensure public order and safety, which implies expenses that can be covered by the proceeds from the exploitation of public property.

On the one hand, the above purposes provide the occupant with the right to exploit public property, and offer a certain amount of discretion in doing so. On the other hand, they impose limits on such exploitation, which, if transformed into excessive consumption, may amount to pillage that is directly prohibited under IHL (Askari & Hosseinnejad, 2023, p. 1530).

Paradoxically, when acting in the interests of the local population the occupier has no explicit obligation to consult them (Wrange, 2019, p. 20), even though, as stated by Wrange (2019), "dealings in natural resources by a sovereign, an administrator or an occupier are legitimate only if it is for the good of the people and with their consent" (p. 27). In this regard, Benvenisti (2012) goes even further, arguing that the occupant is only a trustee, and that attention is to be paid "more to the indigenous community under occupation rather than to the wishes of the ousted government" (p. 7). In order to ensure the correct, purpose-based exploitation of the natural resources of a territory under the control of an occupier, it seems that the decision-making of the latter should involve representatives of the local population and be additionally guaranteed by external control mechanisms.

Any undertakings by the occupying power as a usufructuary are conditioned, as everything else within the law of armed conflicts, by the principle of military necessity, which can explain the restrictiveness of the regime of economic activities in the occupied territory. Among the few normative definitions of this principle, it is worth mentioning that given by an American Military Tribunal in the *Hostage Case* (1948), which stated that "military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money" (para. 1253). However, under the conditions of occupation, it can be supposed that the enemy, at least in this territory, has already submitted, because to be occupied the territory must be under the effective control of the occupant, which means hostilities are minimized. Thus, military necessity for the purposes of occupation law requires a different definition. In this regard, the definition provided by Art. 14 of the 1863 Lieber Code looks more appropriate. According to it, military necessity "consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (Lieber, 1863).

Thus, the question to answer is: What are "the ends of war" that should be secured in the territory under occupation? Obviously, this principle and its application in the context of occupation necessitate further study. However, at this stage of the research, it can be suggested that restrictions imposed on the local population in the circumstances of occupation should be less significant. This is because the occupant has already established effective control over the population, and is presumably primarily interested in maintaining the *status quo* and preventing the ousted government from benefiting from the exploitation of the natural resources of the occupied territory through the local population in order to regain control.

Even though, as stressed by Schmitt (2010), military necessity is intended to be the IHL mechanism for guaranteeing "an ability to pursue and safeguard vital national interests" (p. 799), a balance between military necessity and humanity is to be maintained. This balance is not stable and is subject to general changes within "the normative edifice" upon which "IHL has been built and upon which its functionality depends in operational practice" (Melzer, 2010, p. 833). This means that in the context of occupation, especially where hostilities have calmed down, humanity should prevail over military necessity, which cannot be construed too broadly, as this could lead to unnecessary limitations on the economic activities of the local population.

Finally, the conservationist principle that "requires that [the] occupying power does not change the status quo of the occupied territory" (Carbonell Yanez, 2019, p. 40) should also be taken into consideration. As outlined by Arai-Takahashi (2012), "this is one of the general principles that have governed the entire normative edifice of the law of occupation" (p. 53).

The main idea of the conservationist principle explains the choice of usufruct for the purposes of the law of occupation. As a usufructuary, an occupant "is not the sovereign and, therefore, cannot introduce disproportionate changes in the occupied territory" (Carbonell Yanez, 2019, p. 40). However, this statement can be considered in two ways: on the one hand, it deters the occupant from making intentional changes in the occupied territory in its own interests; on the other hand, it can be interpreted as the requirement to restore the territory to the initial condition in which it existed before the invasion. This suggestion is quite controversial and has been the subject of extensive discussion about the need for the development of *jus post bellum* (law after war), which could include the victor's responsibility of reconstructing the occupied state (Bamigboye & Ayeni, 2022, p. 65). It should be noted that *jus post bellum* is a concept (for more see Stahn, 2006) that could be considered *lex ferenda* rather than *lex lata*. Moreover, this concept is closely related to the context of so-called transformative occupations such as those in Iraq, East Timor, Kosovo, and Afghanistan (for more see Roberts, 2006; Fox, 2012), and was also developed in relation to the just war theory (Williams & Caldwell, 2006). Therefore, it cannot be considered as a common framework that covers all situations of occupation. The author here agrees with De Brabandere's (2014) notion that "notwithstanding the possibility of having a moral obligation to engage in reconstruction after the armed conflict, the lex lata does not permit any transposition of post-conflict responsibilities to an intervening state" (p. 130). Nevertheless, the idea of the occupier's reconstructing obligations cannot be completely dismissed, given its responsibilities under Art. 43 of the Hague Regulations to maintain and restore safety and civil life. The latter may require the reconstruction of essential infrastructure in the occupied territory that could have been destroyed during the invasion. Consequently, this task may necessitate significant investments, for which the exploitation of natural resources would be indispensable. Thus, the occupier would need to go beyond the limits of the classic conservationist approach. It is important to note that this obligation of the occupier stems from *jus in bello* rather than from *jus post bellum*.

3. The content of the occupier's obligations as a usufructuary of the occupied state's natural resources

Considering the above legal framework, a range of rights and obligations of the occupier as a usufructuary of the occupied state's natural resources can be identified. Some of these require further clarification and should be examined against the backdrop of modern international law, which is substantially different from that of the early 20th century.

Before delving into this issue, the term *occupier* (occupant, occupying power) requires clarification. Neither the Hague Regulations nor the Geneva Conventions, including Additional Protocol I, contain a definition of this term. However, due to the fact that only states can be parties to these agreements, they are supposed to be occupants in the context of the legal regime of occupation. This is clearly provided, e.g., in the text of the Hague Regulations, where Art. 55 directly refers to "the occupying state." However, the term most commonly used in these documents is "the occupying power."

The peculiarities of armed conflicts and situations of occupation, which the world has faced for the last hundred years, give reason to submit that occupation could possibly be established by the UN, or even a non-state entity (Roberts, 1984, p. 261). Though these suggestions remain highly controversial, the relevance and applicability of occupation law or some its provisions to territories under UN administration (Ferraro, 2012, pp. 78–87) or the control of non-state armed groups (Askari & Hosseinnejad, 2023) are subject to considerable debate. A thorough analysis of these issues is beyond the scope of this study. However, it is worth proposing that some provisions of the law of occupation, particularly those relating to the exploitation of natural resources, could be applicable to the above situations.

The primary entitlement of the occupying power is the right to exploit the natural resources of the occupied territory. However, this right is limited by the purpose of exploitation; that is, it should be aimed at maintaining public order and civil life for the population of the occupied territories, which can be understood as an obligation to ensure not only security, but also welfare (Sassoli, 2005, p. 663). Thus, the occupier can cover its expenses by using the resources of the territory, but it cannot do so in its own interests – e.g., "to cover the costs associated with military operations" (Dam de Jong, 2015, p. 21), or "to benefit the occupying state's own economy or companies" (Saul, 2015, p. 25). Therefore, the extent of exploitation is to be limited by and directly related to the needs of the local population. This approach was confirmed by the International Military Tribunal at Nuremberg, which stated that "the economy of an occupied country can only be required to bear the expense(s)

of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear" (*Trial of the Major War Criminals*, 1947, p. 239). A lower tribunal in the *Krupp case* (1950) added that:

> as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner. (p. 1341)

Moreover, Saul (2015) suggests that resources *in situ*, which are supposed to be immovable public property, are to "be treated in accordance with the principle of trusteeship," i.e., the occupier as a trustee should use them for the benefit of the local inhabitants, safeguarding their capital. "It cannot appropriate, acquire title to, or sell such public assets, but has the right to utilize the proceeds thereof for the benefit of the inhabitants" (p. 25).

This also means that the occupying power is prohibited from undertaking exploitation activities in the occupied territory to the detriment of the local population (Azarova, 2012). The latter statement could be perceived in two ways: on the one hand, the occupier cannot utilize proceeds from the exploitation of natural resources in a way that limits developmental opportunities for the local population; on the other hand, it should not restrict the development of the occupied territory by limiting the use of its resources by the local population.

The rules for the exploitation of these resources imply that the occupying power also has a positive obligation to protect the natural resources under its administration. This includes the prohibition against destroying them, except when absolutely necessary for military operations. Extracted or produced private natural resources, considered movable private property, cannot be confiscated, while public resources may only be requisitioned if they comprise military material, are necessary for the occupying army's needs, or can be used for military operations (Saul, 2015, p. 24). Moreover, the obligation to protect the natural resources under the occupier's jurisdiction includes the duty to "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory" (*Armed Activities on the Territory of the Congo*, 2005, para. 248). This duty applies not only to its officials and armed forces, but also to private individuals and companies under its jurisdiction.

The aforementioned conservationist principle requires that the occupying power respect, "unless absolutely prevented," the laws of the ousted government, including property laws. This implies that the occupier should not change the existing rules on the exploitation of natural resources that were in place before the occupation began. However, compliance with "international human rights law and other relevant international laws" is also emphasized (Saul, 2015, p. 25).

Moreover, the necessity of safeguarding the capital of properties covered by usufruct conditions the limits of exploitation. The occupier should act "subject to the principle of reasonableness, meaning usage must not lead to over-exploitation" (*Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank*, 2018, para. 8). As Azarova (2012) emphasizes, the rule prohibiting the occupying power from making permanent changes in the occupied territory "forbids it from either exploiting a mine at a rate more rapid than the previous level of production or opening mines that were not in use prior to occupation." Thus, the occupier should adhere to the principle of continuity.

These rules raise several practical questions that have emerged against the backdrop of the growing energy needs of the global population and, consequently, the increasing levels of exploitation of oil, gas and other relevant natural resources. They concern the possibility of processing newly found natural resources and the distinction (if any) between the exploitation of renewable and non-renewable natural resources in territories under occupation, especially those of a protracted nature.

One notable case of occupation in which the extensive exploitation of natural resources has emerged is the Israeli occupation of Palestinian territory. In this context, multiple judgments have been issued by the Israeli High Court of Justice, addressing, among other issues, the exploitation of newly discovered resources. For example, in a 2011 case concerning quarrying activities in the occupied Palestinian territory, the court analyzed different approaches to this issue. Although it did not reach a definitive conclusion, the court's findings appeared favorable regarding the exploitation of newly discovered natural resources by the occupier. Specifically, it

emphasized that the laws of occupation require adjustment "to the reality of prolonged occupation," and acknowledged the relevance of the "unique circumstances" of the situation in Palestine for resolving this dispute (*Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank*, 2018, para. 10).

The same approach is apparently upheld by the military manuals of the US and the UK, which provide the occupier with the right to conclude new leases and contracts or enter in other commitments regarding public immovable property in occupied territory, whose term, however, should not exceed the period of occupation (the American Military Manual of 1976; the U.K. Manual of the Law of Armed Conflict of 2004).

Legal scholarship also offers affirmative suggestions in this regard. For example, in Von Glahn's opinion (1957), "only the legitimate sovereign would seem to have the power to grant concessions, yet conditions in the territory make it desirable to have the occupant grant new concessions in the interest of the native population" (p. 209). Despite this, the issue of the exploitation of newly-found natural resources in territories under occupation remains highly controversial.

Regrettably, the ICJ did not express its position on the above issue in the Advisory Opinion on Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory (2024). While summarizing that "Israel's use of the natural resources in the Occupied Palestinian Territory is inconsistent with its obligations under international law" (para. 133), it particularly criticized the Israeli policy of granting mining concessions exclusively to Israeli-operated quarries in Area-C (para. 132). However, it did not specify whether these quarries are new and did not shed light on the legality of the exploitation of untapped resources.

Another scholarly discussion concerns the occupier's right to exploit non-renewable resources, such as oil and gas (Aruga, 2022). According to a significant proportion of legal scholarship, the usufructuary's obligation to give back property without altering its substance makes the exploitation of non-renewable natural resources more limited or, for some, doubtful in general (Wrange, 2019, p. 10). This is as a result of their exhaustibility, "particularly in cases of protracted occupation" (Saul, 2015, p. 25). For example, Saul suggests that "an occupying power may continue to extract non-renewable resources at the ordinary pre-occupation rate, but may not abusively increase production of existing assets or permit new resource developments" (Saul, 2015, p. 25). Askari and Hosseinnejad (2023) also propose to distinguish between the exploitation of renewable and non-renewable resources (p. 1542), and argue that from the beginning this is part of the occupier's obligations (p. 1527). However, Lehto (2018) posits that the occupier's right of usufruct "has traditionally been regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones" (para. 30).

This discussion seems to closely relate to the possible abusive exploitation of such resources by the occupier. In fact, regarding non-renewable resources – and taking into consideration the increased need for resources such as oil, gas and other energy-based raw materials in many countries – the occupied territory could easily be deprived of its wealth due to the uncontrolled activities of the occupier and private companies under its jurisdiction. Nevertheless, the territory and its population may require these resources during the period of occupation. As stated in the report of the 2012 expert meeting on "Occupation and Other Forms of Administration of Foreign Territory," "a freeze on the natural development of an occupied territory would inevitably result in stagnation, which would ultimately be detrimental to the population of that territory" (Ferraro, 2012, p. 72). According to this report, slight deviations from the conservationist principle are accepted if they are "carried out to benefit the population of the occupied territory" (p. 73). At the same time, the fulfilment of the above purpose requires an external mechanism of control that would prevent the occupier from abusing its powers or misusing profit from the exploitation of natural resources.

Another approach to protecting natural resources from over-exploitation argues for their sustainable use (Legal Consequences arising from the Policies and Practices of Israel, 2024, para. 124). This notion is proposed to be "the modern equivalent of the concept of 'usufruct,' which is in essence a standard of good housekeeping," requiring the occupier not to use more resources than necessary. It also means that "the occupying power shall exercise caution in the exploitation of non-renewable resources, not exceeding preoccupation levels of

production, and exploit renewable resources in a way that ensures their long-term use and capacity for regeneration" (United Nations, 2022, p. 169, para. 8).

Being part of the principle of sustainable development (Beyerlin, 2013, para. 21), the sustainable use of natural resources imposes on the occupier an obligation to exploit them "in so far as this would not harm the options of future generations to exploit the natural resources for their development" (Dam de Jong, 2015, p. 20).

As stressed by Lehto (2018) in her first report on the protection of the environment in relation to armed conflicts, the obligations of the occupant under Art. 43 of the Hague Regulations include "sustainability as a major consideration to be taken into account in the administration and exploitation of the natural resources of an occupied territory" (para. 96). This is part of a broader circle of environmental obligations of the occupying power concerning the territory under its authority (Nihreieva, 2024). The occupier is expected not only to assume control over natural resources, but also to "protect them against over-use and pollution, and allocate them equitably and reasonably among the various domestic users" (Benvenisti, 2009, para. 31). Obligations to maintain the good condition of the environment while exploiting its natural resources are supposed to stem from a general duty of the occupier as a usufructuary to restitute property *salva rerum substantia*, i.e., without altering the substance of the thing. This is also confirmed at the level of national legislation, where legal acts often include rules about the usufructuary's responsibility to compensate for environmental harm caused to property encumbered by usufruct (Haro Bocanegra, 2020, p. 287). Thus, the environmental obligations of the occupier have to become an inalienable part of its legal status (*Leg*al Consequences arising from the Policies and Practices of Israel, 2024, para. 124).

Conclusions

The exploitation of natural resources has always been of primary interest to states and their populations. In the context of military occupation, these activities remain crucial, and they become even more significant for both the development of the local population and the fulfilment of the occupying power's obligations regarding the occupied territory. Eventually, the very existence and duration of occupation become closely connected with the occupier's ability to exploit the natural resources under its control.

It can be stated that the legal regulation of the exploitation of natural resources under occupation, as provided by IHL, is vague and outdated. The concept of usufruct, as a cornerstone of this regime, requires further development and clarification. This is especially relevant for establishing the precise obligations of occupying powers regarding the maintenance of public order and civil life in the occupied territory.

It appears that the regulations in force, primarily set out by Art. 55 and 43 of the Hague Regulations, are designed mainly to protect the interests of the occupier, providing the means to cover its expenses while ensuring that the ousted government retains the maximum conservation of its territory and resources. However, the interests of the third party in the occupation triad – namely the local population, which has a right to development – are not adequately considered. Protecting their interests may require greater economic investment and, consequently, the more intensive exploitation of natural resources in the occupied territory, particularly newly discovered resources that are at risk of depletion.

The examination of the historical evolution and civil law origins of usufruct has shown that, although it was primarily developed for the use of renewable resources that had already been found and identified at the time of encumbrance, recent national practice also provides examples of usufruct being applied to the exploitation of non-renewable and newly discovered resources. Thus, it can be concluded that, notwithstanding the traditional law of occupation, which did not entitle the occupier as a usufructuary to exploit resources that had not been processed at the time that the occupation commenced, current economic realities and the need for the rapid development of occupied territories may justify the exploitation of their newly-found natural resources.

Obviously, such activities should be limited by the provisional character of occupation and strictly related to the needs of the people living under it. Since the exploitation of natural resources by the occupier is directly connected to satisfying these needs, its scale should reflect a reasonable balance between military necessity and the conservationist principle. Assumedly, modifications to the legal regime governing the exploitation of natural

resources under occupation are of paramount importance in situations of prolonged occupation, such as the Israeli occupation of Palestinian territories, the Moroccan occupation of Western Sahara, and the Russian occupation of Ukrainian territories.

In this regard, some suggestions, albeit of a propositional nature, might be made so as to put the above ideas into practice. First, taking into account the specificity of international law-making, it is hardly possible for a new international convention or an amended version of those in force to be concluded soon. At the same time, customary international law, shaped, in particular, by *soft law* and case law, may reflect the above developments.

From a practical perspective, several aspects require further research. As is apparent, the obligations of the occupying power concerning the exploitation of natural resources should include a duty to involve representatives of the local population in decision-making related to these activities, the forms of which are worth additional consideration. Furthermore, to ensure that the occupier meets the criterion of purpose-based exploitation and does not over-exploit resources for its own interests, mechanisms for external control are to be developed. Finally, an updated conservationist approach might be strengthened by including environmental obligations for the occupying power to ensure the sustainable use of natural resources under occupation.

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