International Law and De-Occupation Legislation

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Abstract

Recently, various States elaborated constitutional laws on the status and reintegration of parts of their territory under military occupation. "De-occupation" is understood as the (purported or actual) takeover of effective control over a temporarily occupied territory by the territorial State having the sovereign title over the area. After de-occupation, the classical concept of *postliminium* holds that it is a matter for domestic law to determine what legal status, rights, and duties shall attach to inhabitants, territory, and personal property restored to the jurisdiction of a State. As a main rule, contemporary international law still maintains this view: any measure carried out by the occupying power does not survive unless the territorial State so wishes. However, due to its expansion, international law restricts *postliminium* by requiring the territorial State to allow certain legal effects of the occupant's acts and policies, and to enhance local ownership in the de-occupied territory. By analysing the international obligations and dometic law of Georgia, the Republic of Moldova, Ukraine and Azerbaijan, selected as case studies on actual or prospective de-occupation, the paper identifies certain rules of international law that require the territorial State to enact its domestic law with a view to humanize and democratize transition.

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1. Introduction

International law has detailed normative framework regulating the obligations of the occupying power in belligerent occupation.[2] State practice and scholarship have however devoted much less attention to the obligations of the ousted sovereign or occupied State (hereinafter: territorial State) whose territory is controlled by another State without its consent. In the area outside its effective control, the territorial State is unable to effectively exercise its sovereignty: it cannot exercise its legislative, enforcement and judicial jurisdiction unless over persons within the government-controlled area, or once it retakes control over the occupied territory. Therefore, it is not exaggerated to consider the territorial State's constitutional powers as "suspended"[3] or limited to "*nudum jus*" in the occupied territory.[4]

International law has no legally binding instrument "that would regulate the issues related to transition periods and to transitional justice,"[5] including the phase where the territorial State regains control over its occupied territory. As under the conservationist principle "[t]he idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory,"[6] the end of occupation may lead to its effective application without any obligation on the sovereign to change it. This is called the concept of *postliminium*, according to which once belligerent occupation

> has ended, as by defeat or expulsion of the enemy or relinquishment of the territory by voluntary departure of the occupant, and the absent sovereign returns, the territory, its inhabitants and property come under the control of the original and now restored sovereign, and the legal state of things is conceived for many purposes to have been continuously in existence.[7]

An extreme interpretation of the concept leads to a "clean slate" – as if nothing had happened over the occupation period – where the territorial State may reinstall its pre-conflict law and

[2] E.g. The Hague Regulation entitled Convention (IV) respecting the Laws and Customs of War on Land and its annex, 18 October 1907; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Articles 27-78.
[3] U.S. Supreme Court, *United States v. Rice*, 17 U.S. 4 Wheat. 246 (1819); The Judge Advocate General's School, *Law of Belligerent Occupation*, J.A.G.S. Text no. 11, Ann Arbor, Michigan, 1944, pp. 34-35; Romulus A Picciotti, 'Legal Problems of Occupied Nations after the Termination of Occupation' (1966) 33 Military Law Review 25, 27.
[4] Georg Jellinek, *Die Lehre von Den Staatenverbindungen* (Hölder 1882) 54, 116; Valentina Azarova, 'Illegal Territoriality in International Law: The Interaction and Enforcement of the Law of Belligerant Occupation through Other Territorial Regimes' (NUI Galway 2015) 94.
[5] Venice Commission, Ukraine - Opinion on the draft law "On the Principles of State Policy of the Transition Period", Opinion No. 1046/2021, CDL-AD(2021)038-e, 18 October 2021, para 19.
[6] ICRC and Jean S Pictet (eds), *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (ICRC 1958) 335 (commentary of Article 64).
[7] Picciotti (n 3) 26.

institutions while considering the occupying power's law and acts null and void.[8] However, the changed circumstances in the area during the governance outside the State's territorial control might justify legislative and constitutional amendments, especially the legal, economic, cultural, and social reintegration of the area in the territorial State. For the purposes of this paper, legislation is defined as the elaboration of a normative system which establishes the fundamental legal rules and principles by which a State is governed. Such legislation can be unwritten or written, codified in one or more documents, such as a peace agreement.[9]

Recently, various States have elaborated constitutional laws on the status and reintegration of parts of their territory under military occupation. "De-occupation"[10] is understood as the (purported or actual) takeover of effective control over a temporarily occupied territory by the territorial State having the sovereign title over the area.[11] The paper focusses on regions that were or have been under belligerent occupation for a prolonged period, while the territorial State has kept governmental control over other parts of its territory. Georgia, the Republic of Moldova, Ukraine, and Azerbaijan are selected as these States recently elaborated legislative drafts or enacted constitutional reforms on the reintegration of occupied regions into their national territory. Various States and international organisations (IOs) either mediate settlements or comment on those constitutional processes. They express their views under general international law, treaties regulating the peaceful settlement of the territorial dispute, international humanitarian law (IHL), and international human rights law (IHRL). IOs involved in or commenting on the constitutional processes include the Council of Europe (CoE), especially the European Commission for Democracy through Law (Venice Commission), the CoE's advisory body on constitutional matters, the United Nations, and international human rights monitoring bodies. The paper analyses the above-mentioned case studies, comparing the impact of international law on the drafting of constitutional legislation governing areas prospectively or actually liberated form belligerent occupation.

[8] William Edward Hall, *A Treatise on International Law* (A Pearce Higgins ed, 8th ed., Clarendon Press 1924) 578.
[9] See this definition in Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making Symposium: UN Reform' (2005) 6 Chicago Journal of International Law 663, 664, fn. 6.
[10] See this term e.g. Statement of the MFA of Georgia, UN Doc. S/2008/725 (21 November 2008); Letter dated 28 December 2020 from the Permanent Representative of Azerbaijan to the United Nations, UN Doc. A/75/691–S/2020/1299 (20 December 2020); UN Doc. A/RES/76/70 (16 December 2021), para 3.
[11] In scholarship, see this term: Leon D Pamphile, *Contrary Destinies: A Century of America's Occupation, Deoccupation, and Reoccupation of Haiti* (2017) 45.

In the examples used as case studies, the context and outcome of the purported de-occupation vary: in Georgia (Abkhazia, South-Ossetia),[12] the Republic of Moldova (Transnistria),[13] and Ukraine (Crimea, Luhansk, Donetsk),[14] constitutional legislation is prospective, elaborated in the hypothesis of the successful de-occupation. However, in Azerbaijan[15] and Ukraine ,[16] domestic legislation applies to the territory and its population recently de-occupied in an armed conflict. In Azerbaijan, following the 44-days war between Armenia and Azerbaijan in the autumn of 2020, Azerbaijan regained control over a larger part of its Western territory around Nagorno-Karabakh and outside of the former Soviet Nagorno-Karabakh Autonomous Oblast (NKAO), occupied by Armenia during more than two decades.[17] In Ukraine, since the start of the Russian invasion on 24 February 2022, Ukraine has liberated a total of 74,443 sq km of territory from Russian control, in the northeast and east of the country (including the towns of Izyum, Kupiansk and Lyman), and in the south (towns in Kherson region, north of the Dnipro River).[18] Despite the contextual differences, all constitutional processes provided for certain common questions related to the transition: they enshrine rules on the status and ownership of land and other real estate property, the validity of acts of the *de facto* authorities, and the constitutional status of the territory.

International law scholarship on the obligations of the territorial State after the liberation of the occupied territory is limited. While some authors, especially before and in the aftermath of the Second World War addressed the question of *postliminium*,[19] they did not foresee the expansion of international law rules that impose obligations on the State while establishing a

[12] "Law of Georgia on occupied territories", October 23, 2008, in: Venice Commission, CDL(2009)004, 19 January 2009.
[13] Law no. 173-XVI of 22 July 2005 of the Republic of Moldova: Law on Fundamental Regulations of the Special Legal Status of Settlements on the Left Bank of the River Nistru (Transnistria), at https://www.osce.org/pc/16208 (27 July 2005).
[14] E.g. Law of Ukraine No. 2268-VIII of 18 January 2018 № "On the peculiarities of State policy on ensuring Ukraine's State sovereignty over temporarily occupied territories in Donetsk and Luhansk regions", cited in: Framework Convention for the Protection of National Minorities (FCNM), Fifth Report submitted by Ukraine, 10 January 2022, ACFC/SR/V(2022)001, 8.
[15] E.g. Azerbaijan's proposed draft law on "Reintegration and Great Return". 'Azerbaijan to Develop Draft Law on "Great Return and Reintegration"' *Azeri-Press News Agency (APA)* (25 January 2023).
[16] E.g. Venice Commission, Ukraine: Draft law on the Principles of State Policy of the Transition Period, CDL-REF(2021)055, 24 August 2021 (draft law applying both to the conflict and post-conflict periods, that is, before and after de-occupation); Law of Ukraine No. 2642 of December 6, 2018 "On mine action in Ukraine", signed into law by the President on January 22, 2019.
[17] See *infra*, § 2.2.
[18] 'Russia's Invasion of Ukraine in Maps — Latest Updates' *Financial Times* (2 February 2023).
[19] E.g. Florentino P Feliciano, 'The Belligerent Occupant and the Returning Sovereign: Aspects of the Philippine Law of Belligerent Occupation' (1953) 28 Philippine Law Journal 645; Hall (n 8) 577–585; Judge Advocate General's School (United States. Army) (ed), *Law of Belligerent Occupation* (Judge Advocate General's School 1945) 260–265; Gordon Ireland, 'Jus Postliminii and the Coming Peace' (1943) 18 Tulane Law Review 584.

transition from war to peace in the liberated territory. The expanding scholarship on the law applicable to the establishment of peace and order in the post-conflict phase called *jus post bellum*, considered either as a set of existing legal regimes (such as IHL and IHRL) applicable to a particular scenario[20] or a new emerging field of international law,[21] have scarcely addressed the obligations of the territorial State after the end of occupation. However, various works on *jus post bellum* analyse the obligations of the international community as a whole, including within the concept of "Responsibility to Protect" (R2P),[22] those of IOs and especially UN territorial administrations,[23] and the former occupant's obligation based on the dependence of the territory and its inhabitants on that former occupant.[24] The focus of *jus post bellum* studies on international actors other than the territorial State is understandable as it is their involvement that internationalizes the context and calls for international law regulation. Limited attention has been paid to obligations of the territorial State: they include the latter's consent to certain forms of engagement from the international community within its territory,[25] or its purported duty to take up the rights and duties of governance in its sovereign territory as then departing occupier gives theirs, with a good faith obligation to cooperate with the former occupying power or transitional administrator at the time of the takeover.[26] Yet, no analysis has addressed the limits on the exercise of sovereignty by the territorial State, if any, while re-establishing its constitutional order in the liberated area.

[20] Eric De Brabandere, 'The Responsibility for Post-Conflict Reforms' (2010) 43 Vanderbilt Journal of Transnational Law 119, 149; Robert Cryer, 'Law and the Jus Post Bellum: Counseling Caution' in Andrew Forcehimes and Larry May (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 233–248.

[21] Kristen Boon, 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers' (2005) 50 McGill Law Journal 285, 289–292; Carsten Stahn, '"Jus Ad Bellum", "Jus in Bello" . . . "Jus Post Bellum"? – Rethinking the Conception of the Law of Armed Force' (2006) 17 European Journal of International Law 921; Inger Österdahl and Esther van Zadel, 'What Will Jus Post Bellum Mean? Of New Wine and Old Bottles' (2009) 14 Journal of Conflict and Security Law 175, 176.

[22] E.g. International Commission on Intervention and State Sovereignty and others (eds), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) para 5.1; Österdahl and van Zadel (n 21) 188–191.

[23] E.g. Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008).

[24] Yaël Ronen, 'Post-Occupation Law' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014); Dana Wolf, 'Transitional Post-Occupation Obligations under the Law of Belligerent Occupation' (2018) 27 Minnesota Journal of International Law 5; Eyal Benvenisti, 'The Law on the Unilateral Termination of Occupation' [2008] Tel Aviv University Law Faculty Papers 1., repr. in: Thomas Giegerich and Ursula E Heinz (eds), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Duncker & Humblot 2009); Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 256–257.

[25] James Gallen, 'Jus Post Bellum: An Interpretive Framework' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 61.

[26] Wolf (n 24) 56–58, 59; Benvenisti, 'The Law on the Unilateral Termination of Occupation' (n 24) 11.

The paper claims that certain subject matters formerly considered as *domaine réservé*, exclusively subject to domestic regulation, have become governed by an expanding legal regime of international law. This is the case with the obligations of the territorial State to allow certain legal effects of the occupant's acts and policies affecting the inhabitants of the territory, and to enhance local ownership.

The paper proceeds as follows: Section 2 presents the factual and legal context in which de-occupation legislation takes place. It will point out that legislation serves as a narrative to assert sovereignty over the currently and previously occupied territory, and contributes to the construction of a reintegrated territory by its persuasive force. Section 3 discusses the classical concept of *postliminium* which holds that it is a matter for domestic law to determine what legal status, rights, and duties shall attach to inhabitants, territory, and personal property restored to the jurisdiction of a State after the end of military occupation. As a main rule, contemporary international law still maintains this view: any measure carried out by the occupying power does not survive unless the territorial State so wishes. However, due to its expansion, international law restricts *postliminium* by requiring the territorial State to allow certain legal effects of the occupant's acts and policies, and to enhance local ownership in the de-occupied territory. Sections 4-5 illustrate certain rules of international law that require the territorial State to enact its domestic law with a view to humanize and democratize transition. Section 4 demonstrates that de-occupation legislation is expected to ensure certain continuity with the previous governance: under the principle *ex injuria jus non oritur*, the territorial State has to consider acts of the occupying authorities "null and void," while the principle has exceptions where de-occupation legislation is expected to offer legal validity to certain acts of the unlawful *de facto* authorities. Under the principle *ex factis jus oritur* (rights arise from facts), the absolute nullity rule does not apply to certain acts concerning the inhabitants of the territory which shall enjoy legal recognition. Finally, Section 5 explains another tendency of recent State practice: the territorial State is required to ensure an enhanced protection of the local interests in the de-occupied area, that is, establish local ownership. The conclusions will assess the novelty of the recent de-occupation State practice and its contribution to *jus post bellum*.

2. Context: legislation for de-occupation

The context is the regime change from belligerent occupation to territorial control by the formerly ousted sovereign, that is, the territorial State. Under the Hague Regulations of 1907, considered as enshrining customary international law,[27] "[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.[28]" "Actual authority" is understood as the exercise of governmental functions;[29] however, the majority of IHL experts require the ability of enemy foreign forces to exert authority over a specific area rather than the exercise of full authority over the territory.[30] At the end of the occupation, in the absence of a treaty definition, IHL experts resort to the criteria that establish the beginning of belligerent occupation.[31] Accordingly, occupation ends once any of the three cumulative prerequisites of belligerent occupation ceases to exist: the physical presence of foreign forces, their ability to enforce authority over the territory concerned while substituting the *de jure* local governmental authority, and the absence of the local governmental authority's consent to the foreign forces' presence.[32] Generally, a belligerent occupation ends at the actual dispossession of the territory by the occupying power, regardless the cause of the dispossession.[33] In practice, occupation of part of the State's territory most often ends with military withdrawal when the occupying power stops to exercise actual authority over the territory.[34] This scenario occurs as

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports* 2004, 167, para 78; Venice Commission, Opinion on the Law on occupied territories of Georgia, Opinion No. 516/2009, CDL-AD(2009)015-e, 17 March 2009, para 9; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Rules) (Cambridge University Press 2005) xxxvi.
[28] The Hague Regulation (n 2), Article 42.
[29] 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory' (International Committee of the Red Cross 2012) 19 <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>.
[30] ibid; Knut Dörmann and others (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 302 (Commentary of Common Article 2); Adam Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 International & Comparative Law Quarterly 27, 34.; *DRC v. Uganda* (n **Error! Bookmark not defined.**), Separate opinion of Judge Kooijmans, 316-319, paras 37-49; ICTY, *The Prosecutor v. Mladen Naletilić*, IT-98-34, judgment, 31 March 2003, 73–74, para 217; *The Hostages Trial – Trial of Wilhelm List and Others*, United States Military Tribunal, 19 February 1948, Case No. 47, *LRWTC*, vol. 8, 56.
[31] Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 International Review of the Red Cross 133, 156; Wolf (n 24) 17; Yuval Shany, 'Faraway, so Close: The Legal Status of Gaza after Israel's Disengagement' (2005) 8 Yearbook of International Humanitarian Law 369, 389.
[32] Ferraro (n 31) 156; Wolf (n 24) 17; Shany (n 31) 389.
[33] Wolf (n 24) 18.
[34] Adam Roberts, 'Occupation, Military, Termination Of', *Max Planck Encyclopedia of Public International Law* (2009) paras 20–24.

a result of either the defeat or expulsion of the occupying power, or the relinquishment of the territory by its voluntary departure.[35]

The process of the handover of territorial control may take various forms. First, it may take the form of instantaneous takeover of authority following unilateral withdrawal by the occupant or military victory by the territorial State: in these cases, authority of the territorial State will be fully restored with the end of occupation.[36] Second, and more common, is the gradual handover of the administration by the occupying power(s), or by a successor transitional administration, to the territorial State.[37] The end of the process marks the termination of belligerent occupation and the return the occupied territory to its legitimate sovereign. While there are real-life scenarios where the returning territorial State cannot independently perform all the activities required to ensure safety and public order for the local population because of the remaining authority that the former occupying power(s) or IOs exercise within the territory,[38] the present paper focuses on the ideal scenario of the takeover of full-scale State functions by the territorial State.

In the selected States, part of the State territory was or has been controlled either by an occupying power, or by a proxy, that is, a subordinated *de facto* administration of the occupying power whose conduct is attributable to that State.[39] In both scenarios, the rules of the law of occupation apply once the occupying power's or the non-state *de facto* administration's troops establish their "actual authority" in the sense of the Hague Regulations of 1907.[40] As the following case studies illustrate, the context is slightly different in belligerent occupations where de-occupation is envisaged to result from peaceful dispute settlement prospectively, in the future,[41] and where the territorial State has already de-occupied part of its territory by the use of force.[42] All cases have led to de-occupation legislation that the territorial State uses to construct a certain narrative on its sovereignty.[43]

[35] Picciotti (n 3) 26.
[36] Wolf (n 24) 53.
[37] This is the solution that Article 6(3) of GC IV implies. See ICRC and Pictet (n 6) 62–64; Wolf (n 24) 53–55.
[38] Christine Bell and Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 262, 269; Wolf (n 24) 39–42.
[39] Tom Gal, 'Unexplored Outcomes of Tadic: Applicability of the Law of Occupation to War by Proxy' (2014) 12 Journal of International Criminal Justice 59; Antal Berkes, *International Human Rights Law Beyond State Territorial Control* (Cambridge University Press 2021) 26–34.
[40] The Hague Regulation (n 2), Article 42.
[41] *See infra* § 2.1.
[42] *See infra* § 2.2.
[43] *See infra* § 2.3.

2.1. Prospective de-occupation

In Georgia and the Republic of Moldova, part of the territory has been under prolonged occupation without progress and renewal of armed hostilities. In Moldova, in 1924, Stalin created the Moldovan Autonomous Soviet Socialist Republic (MASSR) on the left bank of Nistru river (Transnistria) within the Ukrainian Soviet Socialist Republic.[44] In 1940, the Soviet Union annexed Bessarabia, merging it and the MASSR into the Moldavian Soviet Socialist Republic.[45] In 1991, the soviet republic declared its independence as the Republic of Moldova, while separatists on the left bank of the Nistru river proclaimed independence as the "Moldavian Republic of Transdniestria" ("MRT"), which has not been recognised by the international community.[46] An armed conflict broke out in November 1990 between pro-Transnistria forces and the armed forces of the Republic of Moldova that ended with a ceasefire on 21 July 1992.[47] The agreement provided for peacekeeping forces charged with ensuring observance of the ceasefire, composed of Russian, Moldovan and Transnistrian battalions under the orders of a joint military command structure; it also required the 14th ex-Soviet Army or Russian Operational Group in the Transnistrian region of Moldova (ROG), stationed in the territory of the Republic of Moldova, to remain strictly neutral.[48] In 2001, the ROG had some 2,200 troops, while in 2002, its numbers had shrunk to just under 1,500 troops.[49] In 1999, at the OSCE Summit in Istanbul, Russia committed to complete withdrawal of its troops from Moldova's territory by the end of 2002[50] but has not complied with its commitment.

[44] Christopher Borgen, 'Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova: A Report from the Association of the Bar of the City of New York' [2006] St. John's Legal Studies Research Paper No. 06-0045 13 <https://papers.ssrn.com/abstract=920151> accessed 25 January 2023.
[45] ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], 48787/99, judgment of 8 July 2004, para 28.
[46] For the detailed factual context: *Ilaşcu* (n 45), paras 28-110.
[47] Agreement on the Principles for a Peaceful Settlement of the Armed Conflict in the Dniester Region of the Republic of Moldova, 21 July 1992, at https://www.peaceagreements.org/view/1024 (accessed 12 January 2023).
[48] *Ibid.*, Articles 2(3) and 4.; *Ilaşcu* (n 45), paras 90-91.; In April 1992, the President of the Russian Federation placed the military formations of the USSR stationed in Moldovan territory, including those in Transnistria, under the jurisdiction of the Russian Federation, so that the 14th Army became the ROG or, as previously, "the 14th Army". After this date, those troops are stationed in Transnistria without the consent of the Republic of Moldova. *Ilaşcu* (n 45), para 70; 'Military occupation of Moldova by Russia', RULAC: Rule of Law in Armed Conflicts, Geneva Academy, available at https://www.rulac.org/browse/conflicts/military-occupation-of-moldova-by-russia#collapse2accord (visited on 4 January 2023).
[49] *Ilaşcu* (n 45), para 131.
[50] Organization for Security and Cooperation in Europe (OSCE), *Istanbul Summit Declaration*, 1999, at https://www.osce.org/files/f/documents/6/5/39569.pdf (accessed 3 January 2023), para 19.

The European Court of Human Rights (ECtHR) consistently holds that the MRT is able to continue in existence only because of Russian military, economic and political support.[51] In these circumstances, the Court concluded that the MRT's high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the MRT administration in the periods considered by the Court.[52] The UN, the EU and the CoE have all urged the Russian Federation to fully and unconditionally withdraw its military forces from the territory of the Republic of Moldova.[53] The Republic of Moldova[54] and the CoE consider Transnistria as territory under Russia's belligerent occupation.[55]

During the Soviet rule, Georgia had three special administrative entities: the Autonomous Republics of Abkhazia and Adjara, and the Autonomous District ('Oblast') of South Ossetia.[56] After Georgia proclaimed its independence from the Soviet Union in 1991, an armed conflict broke out between Georgian forces and separatist forces, first in South Ossetia in 1991-1992 and then in Abkhazia in 1992-1994, after which Georgia lost control over large parts of both territories.[57] In South Ossetia, in summer 1992, the parties agreed on the deployment of joint peacekeeping forces that included Russian troops.[58] Likewise, the armed conflict in Abkhazia ended upon the signature of the Moscow Agreement in 1994, which provided for the deployment of the peacekeeping force of the Commonwealth of Independent States.[59] On August 8, 2008, an interstate armed conflict erupted that involved Russian, Georgian, South Ossetian, and Abkhaz forces, where Russian forces took full control of both Abkhazia and

[51] *Ilaşcu* (n 45), para 392; *Catan and Others v. Moldova and Russia* [GC], 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, para 122; *Mozer v. the Republic of Moldova and Russia* [GC], 11138/10, judgment of 23 February 2016, para 110.
[52] *Ilaşcu* (n 45), para 392; *Catan* (n 51), para 122; *Mozer* (n 51), para 110.
[53] UN General Assembly (UNGA) Res. 72/282, UN Doc. A/RES/72/282 (26 June 2018), para 2; European Parliament resolution of 5 May 2022 on the state of play of EU-Moldova cooperation (2022/2651(RSP)), para 24; CoE Parliamentary Assembly (PACE), Resolution 1896 (2012), 2 October 2012, para 25.4; Resolution 1955 (2013), 2 October 2013, para 27.
[54] E.g. Republic of Moldova, Constitutional Court, *Judgment on the interpretation of Article 11 of the Constitution (permanent neutrality)*, Complaint no. 37b/2014, 2 May 2017, English translation at http://www.rulac.org/assets/downloads/Cst_Court_of_Moldova_Judgment_Neutrality.pdf (accessed 4 January 2023), paras 12, 30, 53, 134, 177, 179-181, 183, and dispositive para 2.
[55] PACE, Opinion 300 (2022), 15 March 2022, para 5; PACE, Revised decision to establish a Sub-Committee on Conflicts concerning CoE Member States, in: Doc. 15682, 9 January 2023, para 6.
[56] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, September 2009 (IIFFMCG), vol. I, at https://www.mpil.de/files/pdf4/IIFFMCG_Volume_I2.pdf (accessed 14 January 2023), 13, and *idem.*, vol. II, at https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf (accessed 14 January 2023), 4.
[57] 'Military occupation of Georgia by Russia', RULAC: Rule of Law in Armed Conflicts, Geneva Academy, at https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia#collapse3accord (accessed 4 January 2023).
[58] Ibid.
[59] Agreement on a Cease-Fire and Separation of Forces, signed in Moscow on 14 May 1994, UN Doc. S/1994/583 (17 May 1997), Annex, Protocol.

South Ossetia.[60] On August 12, 2008, Georgia and Russia signed the EU-mediated Six-Point Ceasefire Agreement, providing for the withdrawal of the Russian armed forces back on the line, preceding the start of hostilities.[61] Following the 2008 war, both Abkhazia and South Ossetia declared their independence, while only six States including Russia recognized them as independent States.[62] IOs condemned the recognition[63] and confirmed the territorial integrity of Georgia.[64]

Russia established military bases in the separatist regions and in April 2009, it concluded five-year agreements with South Ossetia and Abkhazia allowing Russian troops to control their frontiers.[65] Various States[66], IOs,[67] and the International Criminal Court[68] qualified Abkhazia and South Ossetia as territories under belligerent occupation by Russia. Likewise, in *Georgia v. Russia (II)*, the ECtHR concluded that Russia exercised effective control over South Ossetia and Abkhazia and the "buffer zone" from August 12, 2008 to October 10, 2008 and beyond.[69] The Court furthermore established that "the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation" indicated Russia's "continued 'effective control' over South Ossetia and Abkhazia."[70] Consequently, Russia exercised extra-territorial jurisdiction under Article 1 of the European Convention on Human Rights (ECHR) after August 12, 2008 in the two regions.[71] The Court considered the situation as "occupation".[72]

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[60] 'Military occupation of Georgia by Russia' (n 57).
[61] Six-Point Ceasefire Plan, 12 August 2008, Moscow, at https://civil.ge/archives/117441 (accessed 5 January 2023), Article 5.
[62] Since 2008: Russia, Nicaragua, Venezuela, Nauru, Tuvalu and Syria. See 'Military occupation of Georgia by Russia', RULAC (n 58).
[63] Extraordinary European Council, Presidency conclusions of 1 September 2008, 12594/2/08 REV 2, 6 October 2008, para 2; OSCE, 'OSCE Chairman condemns Russia's recognition of South Ossetia, Abkhazia independence', 26 August 2008, at https://www.osce.org/cio/50011 (accessed 4 January 2023).
[64] E.g. UN Doc. S/RES/876 (19 October 1993), para 1; UN Doc. S/RES/1615 (29 July 2005), para 1; UN Doc. S/RES/1808 (15 April 2008), para 1.
[65] Report of the Secretary-General, UN Doc. S/2009/254 (18 May 2009), paras 8-9.
[66] E.g. the USA: Ambassador Daniel B. Baer, Violations of the Rights of Residents of Georgia's Occupied Regions: Statement to OSCE Permanent Council, 3 March 2016; Consolidated Appropriations Act, 2017, Sec 7070 (C)(1); Human Rights Council, Report of the Working Group on the Universal Periodic Review: Georgia, UN Doc. A/HRC/31/15 (13 January 2015), paras 35 (Estonia), 47 (Latvia).
[67] PACE, Opinion 300 (n 55), para 5; European Parliament resolution of 14 June 2018 on Georgian occupied territories 10 years after the Russian invasion, *O.J.* C 28, 27 January 2020, 97-100.
[68] International Criminal Court, *Situation in Georgia*, ICC-01/15, 27 January 2016, Decision on the Prosecutor's request for authorization of an investigation, para 27.
[69] ECtHR, *Georgia v. Russia (II) (merits)* [GC], 38263/08, judgment of 21 January 2021, paras 174, 52 (headline), 83, 145 (headline), 173, 214.
[70] *Ibid.*, para 174.; confirmed previously in: Opinion No. 516/2009 (n 27), para 38.
[71] *Georgia v. Russia (II)* (n 69), para 175.
[72] E.g. *Ibid.*, paras 194-199, 291, 310-311, 336.

2.2. Actual de-occupation

In two other case studies however, in Azerbaijan and Ukraine, an ongoing or re-escalated armed conflict accompanied the prolonged occupation. Moreover, contrary to the above-mentioned prolonged occupations, Azerbaijan and Ukraine recently de-occupied part of their occupied territories. The legality of the use of force by the occupied State in self-defence to recover control over its territory under prolonged occupation after a long-term absence of active hostilities is controversial.[73] This was the case of the 2020 war between Azerbaijan and Armenia, but not the case of Ukraine where the Ukrainian response to the armed attack was undoubtedly immediate.[74] However, the end result: the effective exercise of sovereignty by the territorial State over its sovereign territory, is undoubtedly lawful.

In Ukraine, since March 2014, Russia has occupied the Autonomous Republic of Crimea and the city of Sevastopol ("Crimea"), based on the alleged consent expressed by ousted President Yanukovych to the Russian intervention,[75] which the international community has not considered as a lawful use of force by invitation.[76] After a referendum held by the *de facto* occupying authorities where the majority of voters allegedly wished to join Russia, on March 21, 2014, Russia decided to annex Crimea.[77] States and IOs considered the referendum as having no validity under international law and Ukrainian constitutional law.[78]

In the eastern part of Ukraine, in April 2014, armed separatist groups began to take control of towns and proclaimed the "Donetsk People's Republic" and the "Lugansk People's Republic,"

[73] A first reading presumes that prolonged occupation constitutes a continuous armed attack, and thus the element of immediacy of the response in self-defence is (continuously) met. Dapo Akande and Antonios Tzanakopoulos, 'Legal: Use of Force in Self-Defence to Recover Occupied Territory' (2021) 32 European Journal of International Law 1299; Chris O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford University Press 2021) 71.; A second reading claims however that prolonged occupation does not create a continuous armed attack, and thus the right to self-defence expires, as the occupied State can only exercise the right to self-defence in line with the immediacy requirement. Tom Ruys and Felipe Rodríguez Silvestre, 'Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War' (2021) 32 European Journal of International Law 1287.

[74] E.g. on February 28, 2022, Ukraine declared that it has activated its right to self-defence in line with the Charter: UN Doc. GA/12404 (28 February 2022).

[75] UN Doc. S/PV.7125 (3 March 2014), 3-4 (Russian Federation).

[76] Olivier Corten, 'The Russian Intervention in the Ukrainian Crisis: Was Jus Contra Bellum "Confirmed Rather than Weakened"?' (2015) 2 Journal on the Use of Force and International Law 17.

[77] 'Military occupation of Ukraine by Russia', RULAC: Rule of Law in Armed Conflicts, Geneva Academy, at https://www.rulac.org/browse/conflicts/military-occupation-of-ukraine#collapse3accord (accessed 4 January 2023).

[78] E.g. Venice Commission, Opinion no. 762/2014, CDL-AD(2014)002, 21 March 2014; European Council, Conclusions, EUCO 7/1/14 REV 1, 21 March 2014, para 29; UNGA Res. 68/262, UN Doc. A/RES/68/262 (1 April 2014), paras 5-6; OSCE Parliamentary Assembly, Resolution on Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation, 1st July 2014, SC (14) SI 2 E, paras 4, 13.

unrecognized by the overwhelming majority of States.[79] On May 11, 2014, the two separatist entities both organised "independence referendums" and announced that a majority had voted in favor of independence.[80] On February 21, 2022, the Russian Federation, and later North Korea and Syria, officially recognised the "Luhansk and Donetsk People's Republics,"[81] contrary to other States and IOs that insist on the territorial integrity of Ukraine. In the *Ukraine and the Netherlands v. Russia* case, the ECtHR concluded that the Russian Federation exercised effective control over the conflict-affected eastern Ukraine from May 11, 2014 and subsequently due to its military presence and "the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities."[82] Thus, the situation in the two separatist regions fall within Russia's jurisdiction *ratione loci* within the meaning of Article 1 of the ECHR.[83]

As a result of Russia's invasion of Ukraine on February 24, 2022, Russia has been controlling a large part of Ukraine as a belligerent occupant through proxies or directly through its military forces.[84] While at the early phase of the invasion, Russia controlled areas in northern Ukraine during the following months Ukrainian forces managed to de-occupy areas around Kiev, Kharkiv, and Kherson, shrinking the Russian occupied territories to the regions of Luhansk, Donetsk, Kherson, and Zaporizhzhia.[85] IOs consider all the above-mentioned Ukrainian regions outside the Ukrainian government's control as occupied territories.[86]

In Azerbaijan, in 1991, after the authorities withdrew the autonomous status from the Soviet NKAO, Nagorno-Karabakh declared independence. This triggered an internationalised armed conflict between Azerbaijan and the self-proclaimed Nagorno-Karabakh forces, supported by and with the intervention of Armenia. Following the end of the Nagorno-Karabakh War in

[79] ECtHR, *Ukraine and the Netherlands v. Russia* [GC], 8019/16, 43800/14 and 28525/20, decision on the admissibility of 25 January 2023, paras 47-58, 690-691.
[80] *Ibid.*, para 59.
[81] 'Syria formally breaks diplomatic ties with Ukraine', *Independent*, 20 July 2022, at https://www.independent.co.uk/news/syria-ap-ukraine-kyiv-damascus-b2127195.html (accessed 4 January 2023); 'Ukraine breaking off diplomatic relations with Pyongyang over recognition of DPR, LPR', *Interfax*, 14 July 2022, at https://interfax.com/newsroom/top-stories/81293/ (accessed 4 January 2023).
[82] *Ukraine and the Netherlands v. Russia* (n 79), para 695.
[83] *Ibid.*, paras 696-697.
[84] 'Military occupation of Ukraine by Russia' (n 77).
[85] *Ibid.*
[86] E.g. UNGA Res. 71/205, UN Doc. A/RES/71/205 (1 February 2017), para 1; UN Doc. A/RES/72/190 (19 January 2018), para 1; PACE, Opinion 300 (n 55), para 5; Security in the Eastern Partnership area and the role of the common security and defence policy, European Parliament resolution of 8 June 2022, *O.J.* C 493/70, 27 December 2022, 70-95, preambular paras BB, BC, CB, and dispositive para 12.

1994 until the renewal of hostilities on September 27, 2020, the unrecognized "Republic of Nagorno Karabakh" ("NKR") exercised effective control over the Nagorno-Karabakh region, as well as the seven surrounding districts of Azerbaijan.[87] However, the ECtHR consistently held that Armenia exercised "significant and decisive influence over Nagorno Karabakh, that the two entities were highly integrated in virtually all important matters," and consequently, Armenia exercised "effective control over Nagorno-Karabakh and the surrounding territories."[88] Armenia is the occupying power in those areas: first, one could consider the situation as occupation by proxy, through the subordinated NKR, and secondly, various IOs called for "the withdrawal of Armenian forces from all occupied territories of Azerbaijan"[89] or "the withdrawal of all occupying forces."[90] Furthermore, the CoE qualified Nagorno-Karabakh and the surrounding areas as "occupied territory."[91]

The 44-days war between Armenia and Azerbaijan in 2020 ended by the signature of the nine-point ceasefire agreement on November 9, 2020, mediated by Russia and signed by Azerbaijan, Armenia, and Russia.[92] Under this agreement, Azerbaijan regained control of all seven surrounding districts and part of the NKR proper, whereas the remaining parts of Nagorno-Karabakh remain under the control of the NKR.[93] The lines of the NKR are guaranteed by Russian peacekeeping troops who are deployed along the line of contact in Nagorno-Karabakh and along the Lachin Corridor.[94] Thus, the return of large part of the formerly occupied territories under Azerbaijani control constitutes an actual case of de-occupation.

[87] 'Military occupation of Azerbaijan by Armenia', RULAC: Rule of Law in Armed Conflicts, Geneva Academy, available at https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia?fbclid=IwAR2bsS5z8Jxn__DKJasgwhyir7Xo3WG6eq9BJspDgrkXsu87723vOgvSrLI#collapse3accord (visited on 4 January 2023).
[88] E.g. *Chiragov v. Armenia* [GC], 13216/05, judgment of 16 June 2015, para 186; *Zalyan and Others v. Armenia*, 36894/04 and 3521/07, judgment of 17 March 2016, para 214; *Nana Muradyan v. Armenia*, 69517/11, judgment of 5 April 2022, paras 88, 91.
[89] UNGA Res. 62/243, UN Doc. A/RES/62/243 (25 April 2008), para 2; European Parliament resolution of 20 May 2010 on the need for an EU strategy for the South Caucasus (2009/2216(INI)), para 8.
[90] UN Doc. S/RES/822 (30 April 1993), Preamble and para 1; UN Doc. S/RES/853 (29 July 1993), Preamble and paras 1, 3; UN Doc. S/RES/874 (14 October 1993), Preamble; UN Doc. S/RES/884 (14 November 1993), Preamble and para 4.
[91] PACE, Resolution 1416 (2005), 25 January 2005, para 1.
[92] Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation, in: UN Doc. S/2020/1104 (11 November 2020), Annex.
[93] *Ibid.*; 'Military occupation of Azerbaijan by Armenia' (n 87).
[94]UN Doc. S/2020/1104 (n 92); *Nana Muradyan v. Armenia* (n 88), para 91.

2.3. Legislation as a power discourse

The above-mentioned States facing belligerent occupation within their jurisdiction have adopted public law legislation of either constitutional or ordinary legislative status that provides for the status of the area and its population during the provisional period of occupation or in case of the territory's de-occupation. According to the material scope of application envisaged, one can distinguish between the following types of legislation:

- Legislation regulating the ongoing occupation as a temporary measure. As the Venice Commission held, such regulation implements "the intention of the State to regulate the legal relations within the occupied territory may represent an indication of its responsibility for the respective territory."[95] This arises from the territorial State's continued jurisdiction, in the sense of IHRL, over situations in part of its sovereign territory outside its effective control.[96] While this interpretation was first elaborated by regional human rights courts, geographically broader State practice have confirmed this continued jurisdiction notwithstanding the lacking territorial control.[97] Accordingly, the territorial State is obliged to take "all the political, judicial and other measures at its disposal to re-establish its control over that territory,"[98] and to promote the protection of human rights.[99] As the ECtHR formulated in a non-exhaustive manner, the territorial State shall take "appropriate and sufficient" measures in order to guarantee human rights of individuals in an area outside its effective control.[100] The State may fulfil those positive obligations through legislative measures, as an expression of its efforts to re-establish its authority over the occupied region and protect individuals.[101]
- Legislation regulating a future or actual re-integration of the territory into the territory controlled by the government. Such legislation can only be enforced once the factual

[95] Opinion No. 516/2009 (n 27), para 38.
[96] *Ilaşcu* (n 45), para 331; IACHR, Report No. 41/02, Petition 11.748, *José Del Carmen Álvarez Blanco et al. (Pueblo Bello) v. Colombia*, Admissibility, 9 October 2002, para 20; IACtHR, *Pueblo Bello Massacre v. Colombia*, judgment of 31 January 2006 (Merits, Reparations and Costs), para 4; see other case law cited in: Berkes (n 39) 69–73; 76–84.
[97] E.g. OSCE Parliamentary Assembly, Resolution on the continuation of clear, gross and uncorrected violations of OSCE commitments and international norms by the Russian Federation, in: Helsinki Declaration, 5-9 July 2015, 20-24, para 14; Human Rights Council, Situation of human rights in Crimea Sevastopol, UN Doc. A/HRC/36/CRP.3 (25 September 2017), para 41.
[98] *Ilaşcu* (n 45), para 340 ; *Catan* (n 51), para 145.
[99] *Ilaşcu* (n 45), para 331; *Catan* (n 51), paras 109–110; *Mozer* (n 51), paras 99–100; IACtHR, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988 (Merits), para 175.
[100] *Ilaşcu* (n 45), para 334.
[101] *Ibid.*, para 343; ECtHR, *Sandu and Others v. the Republic of Moldova and Russia*, 21034/05 and 7 others, judgment of 17 July 2018, paras 20, 87; Opinion No. 516/2009 (n 27), para 38.

condition of retaking control over the area is satisfied. An example is the Moldovan "Law on Fundamental Regulations of the Special Legal Status of Settlements on the Left Bank of the River Nistru (Transnistria)" ("Moldovan Framework Law") that regulates the constitutional status and competences of Transnistria within the unified Republic of Moldova '[a]fter the conditions of demilitarisation' are met.[102] A legislation adopted for an actual de-occupation is for instance Azerbaijan's proposed draft law on "Reintegration and Great Return" to the territories liberated from occupation.[103] In Ukraine, among other regulations, the Strategy of de-occupation and reintegration of the temporarily occupied territories of the Autonomous Republic of Crimea and the city of Sevastopol,[104] and the Law "[o]n the peculiarities of State policy on ensuring Ukraine's State sovereignty over temporarily occupied territories in Donetsk and Luhansk regions"[105] provide for the rights of Ukrainian citizens in the scenario of de-occupation of the currently occupied territories.

- Finally, legislation may regulate both the temporarily occupied and de-occupied territories and their population. An example is the Ukrainian draft law "On the Principles of State Policy of the Transition Period" which applies both to the conflict and post-conflict periods, that is, before and after de-occupation.[106] Likewise, the "Law on occupied territories of Georgia", adopted by Georgia on October 23, 2008,[107] regulates the legal effects of administrative or judicial acts of the *de facto* authorities both during and after the end of occupation.

For all types of de-occupation legislation, discourse theory conceptualizes the role that domestic law plays in a post-conflict transition. A premise of the discourse theory is the way we think and talk about a subject influence the ways we act in relation to them.[108] Narratives in constitutional norms not only enshrine consensus of the given moment but they are deemed "to provide a justificatory narrative for the state as a whole" as "a more enduring set of social

[102] Law no. 173-XVI (n 13), Article 1(2).
[103] 'Azerbaijan to Develop Draft Law on "Great Return and Reintegration"' (n 15).
[104] Strategy of deoccupation and reintegration of the temporarily occupied territories of the Autonomous Republic of Crimea and the city of Sevastopol (adopted by Decree of the President of Ukraine No. 117 of 24 March 2021), cited in: FCNM, Fifth Report submitted by Ukraine (n 14), 8; see a summary in English at https://www.ppu.gov.ua/en/sogodni-prezydent-ukrayiny-volodymyr-zelenskyj-pidpysav-ukaz-117-2021-vid-24-bereznya-2021-roku-pro-rishennya-rady-natsionalnoyi-bezpeky-i-oborony-ukrayiny-vid-11-bereznya-2021-roku-pro-strategiyu-deo/ (accessed 3 January 2023).
[105] Law of Ukraine No. 2268-VIII (n 14).
[106] Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Article 1(1)(1)-(2).
[107] Law of Georgia on Occupied Territories (n 12).
[108] Michael Karlberg, 'The Power of Discourse and the Discourse of Power: Pursuing Peace through Discourse Intervention' (2005) 10 International Journal of Peace Studies 1, 1.

understandings."[109] De-occupation legislation serves a justificatory narrative for the temporary state of belligerent occupation and the ideal state of de-occupation, and therefore implies a normalisation of constitutionality over the State's territory. The discursive force of those norms resides in the expressions that relate to the ongoing occupation by another subject and/or de-occupation by the sovereign: they use terms such as "aggression",[110] "illegal military occupation",[111] "deoccupation" of the temporarily occupied territories,[112] "demilitarisation",[113] etc. It is apparent that this narrative overwhelmingly focusses on past wrongdoings and is likely to exclude alternative narratives; the relevant regulations address specific messages to the domestic public.[114] This approach risks of providing for a political programme instead of a normative act; the Venice Commission recommends including such programmatic provisions in the preamble, while "the body of laws should be limited to normative provisions."[115]

Furthermore, de-occupation legislation tends to reiterate the commitment to applicable international law[116] such as IHRL,[117] IHL,[118] international criminal law,[119] or the law of IOs involved in the post-conflict situation.[120] Such references to international law constitute another discursive tool to express an intended normalisation of constitutionality in the de-occupied territory.

[109] Christine Bell, 'Introduction: Bargaining on Constitutions – Political Settlements and Constitutional State-Building' (2017) 6 Global Constitutionalism 13, 19–20.
[110] Law of Georgia on Occupied Territories (n 12), Clause 1; Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), preamble.
[111] Law of Georgia on Occupied Territories (n 12), preamble.
[112] Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), preamble; Law of Georgia on Occupied Territories (n 12), Clause 6(2).
[113] Law no. 173-XVI (n 13), Article 1(2).
[114] Opinion No. 1046/2021 (n 5), para 17.
[115] *Ibid.*
[116] E.g. Law of Georgia on Occupied Territories (n 12), preamble; Ukraine: Law No. 1207-VII of 2014, on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine, 15 April 2014, at https://www.refworld.org/docid/5379ab8e4.html (accessed 4 February 2023), Article 17(1)-(2); Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Articles 2(1), 7(2)(3).
[117] E.g. Ukraine: Law No. 1207-VII (n 116), Article 5(1).
[118] E.g. Law of Georgia on Occupied Territories (n 12), preamble; Ukraine: Law No. 1207-VII (n 116), preamble; Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Articles 22(5), 24(2).
[119] E.g. Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Articles 7(2)(8), 9(2)(1)-(3).
[120] E.g. Law no. 173-XVI (n 13), Article 4(2) (electoral monitoring); Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Articles 16(4), 16(5)(5) (electoral monitoring), 30(4)-(5) (sanctions and international criminal justice).

3. Postliminium

Postliminium is a concept derived from the Roman law principle of *jus postliminii*, a legal fiction by which a person, and, in some cases, a thing, taken by an enemy captive in war, upon his recapture or his return to his own country, was restored to his former civil status.[121] In international law, the concept means the return to the legitimate sovereign of that which has been for a time under the control of the occupying power.[122]

Scholars before and in the aftermath of the Second World War agreed that it was a matter for domestic law to determine what legal status, rights and duties shall attach to inhabitants, territory and personal property restored to the jurisdiction of the territorial State after the end of military occupation.[123] For instance, whether and how far the constitution of the State or its laws are automatically revived on the return of the sovereign was considered a question of domestic law, not subject to international law.[124] Nonetheless, scholars have pinpointed certain trends that they found, at least *de lege ferenda*, reflecting international law: the occupied State is bound on restoration to respect acts performed and things done by the occupying power within certain limits.[125] Acts within the limits of the law of occupation would be, for instance, the collection of ordinary taxes, the sale of the fruits of immovables owned by the State, the appropriation of movable State property and its produce (young of animals). In general, those conducts that the occupying power could perform in conformity with the law of armed conflict.[126] A further example would be civil judgments rendered by courts, subject to the respect of fair trial guarantees.[127] If the occupying power performed conducts that it was not competent to perform, such as selling immoveable State property, *postliminium* makes them null and void.[128]

Prior to 1945 scholarship, these limits as to the occupied State's conduct concerned only a few domains: the revival of the former condition of things, the validity of acts that are lawful under

[121] Ireland (n 19) 585; Judge Advocate General's School (United States. Army) (n 19) 260.
[122] Lassa Oppenheim, *International Law: A Treatise*, vol II (Ronald F Roxburgh ed, Third Edition, Longmans, Green & Co 1921) 374; Judge Advocate General's School (United States. Army) (n 19) 262.
[123] Ireland (n 19) 587.
[124] Hall (n 8) 578; Oppenheim (n 122) 375; Judge Advocate General's School (United States. Army) (n 19) 262–263.
[125] Ireland (n 19) 591–592; Oppenheim (n 122) 376; Hall (n 8) 578–579; Felice Morgenstern, 'Validity of the Acts of the Belligerent Occupant' (1951) 28 British Yearbook of International Law 291, 298–299.
[126] Ireland (n 19) 592; Oppenheim (n 122) 376–377.
[127] Ireland (n 19) 593; Hall (n 8) 579.
[128] *Affaire relative à l'or de la Banque nationale d'Albanie (Etats-Unis d'Amérique, France, Italie, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord)*, 20 February 1953, *UNRIAA*, vol. XII, 40; Oppenheim (n 122) 377; Hall (n 8) 580.

the law of belligerent occupation, and invalidity of unlawful acts of the occupying power.[129] Furthermore, State practice was contradictory to solidify obligations of positive international law in this regard[130] and only the recent decades helped to clarify the obligations of the formerly occupied State after de-occupation.[131]

Post-1990 scholarship has not fundamentally altered the dominant view: all measures taken by the occupying power are temporary.[132] Thus, any temporary measure carried out by the occupying power does not survive unless the local population or, alternatively, the returning territorial State so wishes.[133] However, due to the expansion of international law, various legal regimes limit the regulatory competence of the territorial State: rules of State responsibility, IHRL, IHL, the internal law of IOs, etc. Particular norms that the post-1990 development of international law formulated and limited de-occupation legislation include the obligation not to recognise as lawful situations arising from a serious breach of peremptory norms of general international law,[134] the right to self-determination of people, especially its internal aspect,[135] the rules and principles of democratic governance, and the rights of persons belonging to national or ethnic minorities.[136]

The involvement of the international community in the post-conflict situation further strengthens constraints on the domestic legislation. International actors and organisations offer their technical expertise and often purport to bargain a certain type of political settlement.[137] First, States and IOs mediating in the dispute settlement, or offering their expertise regularly, rely on international law to influence the legislation. The Venice Commission prepared detailed opinions on the concerned de-occupation laws and recommended various amendments,[138]

[129] Oppenheim (n 122) 375; Morgenstern (n 125) 314–315.
[130] Benvenisti, *The International Law of Occupation* (n 24) 299–304; Morgenstern (n 125) 298 ('there is little authority in the practice of states' regarding the retroactive invalidation of the acts of the occupying power).
[131] *See infra*, §§ 4-5.
[132] E.g. Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 58; Benvenisti, *The International Law of Occupation* (n 24) 6, 299.
[133] Wolf (n 24) 43, fn. 144, 50; Orna Ben-Naftali, Aeyal M Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 Berkeley Journal of International Law 551, 606.
[134] ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), with commentaries 2001, (2001)2(2) *YbILC* 31-143 (ARSIWA Commentary), 113-114, Article 41(2).
[135] See below, Section 6.
[136] E.g. International Covenant on Civil and Political Rights, 1976(999) *UNTS* 171, Article 27; International Convention on the Elimination of All Forms of Racial Discrimination, 1969(660) *UNTS* 195; Framework Convention for the Protection of National Minorities, (1995) ETS No. 157 (FCNM).
[137] Bell (n 109) 21.
[138] Opinion No. 516/2009 (n 27); Opinion No. 1046/2021 (n 5); on the Republic of Moldova, see e.g. Joint Opinion on the draft Law amending the electoral legislation of Moldova, Opinion No. 749/2014, CDL-AD(2014)003-e, 24 March 2014, paras 39-40; Republic of Moldova - Draft Joint Opinion on the Draft Laws on amending and completing certain legislative acts (Electoral system for the election of the Parliament) (Draft Laws no. 60 and 123), Opinion No. 884/2017, CDL(2017)016-e, 2 June 2017, paras 52-53; Republic of Moldova - Joint opinion

backed by various bodies of the United Nations and the CoE.[139] International human rights treaty monitoring bodies also commented on the de-occupation laws: the ECtHR expressed its views on the de-occupation legislation of Moldova,[140] whereas UN monitoring bodies[141] and the CoE[142] have expressed their views on the legislation of Azerbaijan applied to the re-integrated territories.

Furthermore, various international instruments regulate de-occupation: dispute settlement arrangements and peace or ceasefire agreements increasingly impose obligations on the territorial State that require domestic legislation. Examples include the duty to ensure the return of internally displaced persons and refugees,[143] the provision of free access for humanitarian assistance,[144] the adoption of a certain pardon and amnesty,[145] or a program for the economic reconstruction of the territory.[146]

4. Humanizing transition: *ex factis jus oritur*

In line with the concept of *postliminium*, upon de-occupation, the territorial State as a main rule, places its laws previously applied to the territory in force, and is free to qualify the acts and policies of the occupying authorities invalid. However, the State is obliged to qualify

on the law for amending and completing certain legislative acts (Electoral system for the election of Parliament), Opinion No. 907/2017, CDL-AD(2018)008-e, 19 March 2018, paras 44-49.

[139] E.g. regarding the "Law of Georgia on occupied territories": Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, UN Doc. A/HRC/10/13 (9 February 2009), para 43; Addendum, Mission to Georgia, UN Doc. A/HRC/10/13/Add.2 (13 February 2009), paras 55-56; Addendum Follow-up to the report on the mission to Georgia (A/HRC/10/13/Add.2), UN Doc. A/HRC/13/21/Add.3 (14 January 2009), paras 35-36; Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia, Report of the Secretary-General, UN Doc. A/66/813 (22 May 2012), paras 40-42; Special follow-up mission to the areas affected by the South Ossetia Conflict, Implementation of the Commissioner's six principles for urgent human rights and humanitarian protection, by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Doc. CommDH(2008)33 (21 October 2008), paras 79-82; PACE, Resolution 1647 (2009), Implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, 28 January 2009, para 8.5.

[140] E.g. *Ilaşcu* (n 45), para 343.

[141] UN High Commissioner for Refugees (UNHCR), *Key Considerations for Returns to Nagorno-Karabakh and the Adjacent Districts*, November 2020, at https://www.refworld.org/docid/5fc0e1e24.html (visted on 16 May 2022).

[142] PACE, Resolution 2391 (2021), paras 14-15.

[143] Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation (n 92), para 7.

[144] Six-Point Ceasefire Plan (n 61), Article 3; Agreement on the Principles for a Peaceful Settlement… (n 47), Article 5(3).

[145] Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan, in: UN Doc. S/2015/135 (25 February 2015), Annex (Minsk I), Article 6; Package of Measures for the Implementation of the Minsk Agreements Minsk, 12 February 2015, in: UN Doc. S/RES/2202 (17 February 2015), Annex I (Minsk II), Article 5.

[146] Minsk II (n 145), Article 11.

certain acts arising from the situation invalid. Such an obligation is based on the principle, *ex injuria jus non oritur*, according to which any State has to consider the consequences of the unlawful situation – occupation arising from the unlawful use of force – null and void.[147] Under the law of State responsibility, States are obliged not to recognize as lawful situations arising from a serious breach of peremptory norms of general international law.[148] "Situations" include territorial acquisitions brought about by the unlawful use of force or the "attempted acquisition of sovereignty over territory through the denial of the right of self-determination of people."[149] The rule obliges all States not to grant legal validity to any claim or transaction that results from a serious breach of *jus cogens* norms. For example, the resolutions of the UN Security Council on Namibia,[150] Kuwait,[151] and Northern Cyprus,[152] used such wording: the Council obliged States not to recognize the validity of acts of *de facto* authorities that had unlawfully used force to control foreign territory. In all the selected case studies too, the international community called on States not to recognize the occupying power's claim to sovereignty over the occupied territory.[153] Even unilateral acts such as an independence referendum or an annexation proclamation that intend to create a new international legal status for the territory unlawfully acquired remain without legal effect towards other States.[154]

Despite the obligation to reject the validity of acts and transactions directly contributing to a situation arising from serious breaches of *jus cogens*, there are certain acts and transactions that the territorial State must respect as valid. In the *Namibia* advisory opinion, the International Court of Justice (ICJ) declared that "official acts" performed by South Africa concerning Namibia are "illegal and invalid". However, it identified one exception of the absolute invalidity rule:

[147] ILC, Seventh report on State responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/469 (9 May 1995), para 64; James Crawford, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 24 January 2012, available at https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf (visited on 4 April 2023), para 46.
[148] ARSIWA (n 134), Article 41(2).
[149] ARSIWA Commentary (n 134), 114, paras 5-6.
[150] UN Doc. S/RES/276 (30 January 1970), para. 2.
[151] UN Doc. S/RES/662 (9 August 1990), para. 2.
[152] UN Doc. S/RES/550 (11 May 1984), paras. 2 and 3.
[153] E.g. UN Doc. A/RES/62/243 (n 89), para 5; UN Doc. A/RES/68/262 (n 78), para 6; UNGA Res. ES-11/4, UN Doc. A/RES/ES-11/4 (13 October 2022), paras 3-4; OSCE Permanent Council No 1021, EU Statement on the Violation of OSCE Principles and Commitments by the Russian Federation and the Situation in Ukraine, Doc. PC.DEL/1240/14 (31 October 2014); Security in the Eastern Partnership area… (n 86), preambular paras Q, BB; European Parliament resolution of 5 May 2022 on the state of play of EU-Moldova cooperation (n 53), para 24.
[154] Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017) 200.

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international Co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[155]

This holding creates an exception from the strict rule of *ex injuria jus non oritur*, "an element of flexibility in the doctrine of collective non-recognition."[156] Although the scope of these acts is not clearly defined,[157] at least one can conclude that the so-called *Namibia* exception, i.e. the non-application of the absolute nullity rule to certain acts concerning the inhabitants of the territory has humanitarian considerations. Subsequent State practice confirms that facts arising from an unlawful situation, such as a belligerent occupation resulting from the unlawful use of force or the violation of the people's right to self-determination, might produce legal effects after de-occupation, if they fulfill certain constitutional requirements and international law standards.

The case law of the ECtHR confirms the *ex factis jus oritur* principle: the Court consistently holds that acts of unrecognised occupying authorities might have legal validity if they satisfy the guarantees of the ECHR. For instance, this is the case with decisions of *de facto* courts of occupying authorities if the given tribunal "forms part of a judicial system operating on a 'constitutional and legal basis' reflecting a judicial tradition compatible with the Convention."[158]

The practice of the Venice Commission also solidifies the *Namibia* exception. In 2009, the CoE Parliamentary Assembly asked the Venice Commission to give an opinion on the Georgian "Law on occupied territories of Georgia." This is a domestic act that aims at defining the status of the two regions, Abkhazia and South Ossetia, that established a special legal regime applied to those territories.[159] While the law envisages its special legal regime on the occupied territories during occupation,[160] some of its provisions on the legal validity of acts of

[155] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), I.C.J. Reports 1971, 56, para 125.
[156] Opinion Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, James Crawford SC, at https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf (accessed 13 February 2018), 20, para 49.
[157] Joe Verhoeven, 'Relations Internationales de Droit Privé En l'absence de Reconnaissance d'un État, d'un Gouvernement Ou d'une Situation' (1985) 192 Recueil des Cours 9, 92.
[158] *Ilaşcu* (n 45), para 460; *Mozer* (n 51), paras 144, 147; *Cyprus v. Turkey (merit)* [GC], 25781/94, judgment of 10 May 2001, paras 236-237; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 36925/07, judgment of 29 January 2019, para 249.
[159] Law of Georgia on Occupied Territories (n 12), Clause 1.
[160] *Ibid.*, Clause 3.

the *de facto* authorities seem to apply to the post-occupation period too. Article 8 regulated the "illegal authorities" of the occupied regions; its original paragraph 2 provided that "[a]ny act issued by the authorities stipulated in Article 1 of this Clause shall be deemed invalid and shall not lead to any legal consequences."[161] The German commenting member of the Venice Commission, Angelika Nussberger expressed a human rights-based view in this respect:

> Generally speaking, each State is free to recognize or not to recognize acts of State issued by other States. On the basis of international customary law there is no obligation to recognize such acts. Nevertheless, this freedom ends where basic human rights would be violated. If Georgia refuses to accept e.g. basic documents concerning the personal status such as birth or death certificates, that would violate Article 8 of the ECHR.[162]

As a pragmatic solution, Nussberger proposed to insert a clarifying provision into the text of the law about the recognition of certificates issued by the *de facto* authorities.[163] Although the two other commentators of the Venice Commission approved the draft Article 8, the Government of Georgia accepted Nussberger's proposal and added a new Article 8(3) according to which the "establishment of facts of civil importance in the occupied territories shall take place in accordance with Law on 'Registration of Civil Acts' of Georgia."[164] The Venice Commission welcomed the introduction of this provision, while it asked for some detailed information about the said Act and its application to the occupied territories.[165] On the one hand, the Venice Commission does not challenge the State's freedom to consider acts issued by the *de facto* authorities invalid.[166] On the other hand, as it stressed,

> [T]his freedom ends where basic human rights would be violated. If Georgia refuses to accept e.g. basic documents concerning the personal status such as birth or death certificates, that would violate Article 8 of the ECHR. It is therefore to be welcomed that special regulations have been adopted concerning degrees of general and higher education. According to the report of the Georgian authorities, birth and death certificates are also acknowledged through a simplified procedure.[167]

Therefore, the Venice Commission recommends the territorial State the recognition "of certificates and similar documents issued by the authorities of the occupied territories through

[161] *Ibid.*, Clause 8(2) .
[162] Venice Commission, Comments on the Law on occupied territories of Georgia, Ms Angelika Nussberger, Opinion No. 516/2009, CDL(2009)045, 4 March 2009.
[163] *Ibid.*
[164] Venice Commission, Interim opinion on the Draft amendments and annexes to the Law on occupied territories of Georgia, Opinion No. 552/2009, CDL-AD(2009)046, 13 October 2009, para 18.
[165] *Ibid.*, para 19.
[166] *Ibid.*, para. 18; Venice Commission, Comments on the Law on occupied territories of Georgia, by Mr Bogdan Aurescu (Substitute Member, Romania), Opinion No. 516/2009, CDL(2009)047, 4 March 2009, para 15; Opinion No. 516/2009 (n 27), para 43.
[167] Opinion No. 516/2009 (n 27), para 43.

simplified procedures."[168] Like the Venice Commission, the Commissioner for Human Rights of the CoE and the Representative of the UN Secretary-General on the human rights of internally displaced persons gave similar interpretation and denounced the invalidation of 'civil acts carried out by the *de facto* authorities, such as the issuance of birth, marriage or death certificates' issued by the *de facto* authorities.[169]

The Georgian experience is instructive: even if formally acts of the *de facto* authorities are invalid in domestic law, they may produce legal effect as a relevant fact if the concerned individuals ask for their recognition through "simplified procedures."[170] This pragmatic solution seems to follow the *Namibia* exception since the effects of certain acts of the illegal administration affecting everyday life are not ignored.[171] This solution distinguishes between the validity of the acts covered by the *Namibia* exception and granting legal effects to otherwise invalid acts covered by the *Namibia* exception, considering the latter interpretation as pertinent. Willem Riphagen, Special Rapporteur of the International Law Commission on State responsibility in the 1980s, proposed also this latter view. Citing the ICJ's the *Namibia* exception, he noted:

> It would not seem that this statement should be construed as an exception to the duty of non-recognition, but rather as a reminder of the fact that—like any other right or obligation—the obligation not to recognize as legal should not be interpreted blindly, but in its context and in the light of its object and purpose, as a countermeasure against the international crime—that is, an act of a State—itself.[172]

In other words, international law does not necessarily oblige States to automatically recognize as valid the acts covered by the *Namibia* exception but requires them to take into account the interests of the local population while deciding on the legal effects of administrative acts.

The Venice Commission justifies the obligation to consider the legal validation of those acts on personal status under IHRL, as the absolute nullity of acts issued by unrecognised *de facto* authorities would lead to the disproportionate restriction of human rights. Regarding the

[168] Interim opinion on the Draft amendments (n 164), para 22.
[169] Special Follow-Up Mission to the Areas Affected by the South Ossetia Conflict, Commissioner for Human Rights of the Council of Europe, Doc. CommDH(2008)33, 21 October 2008, para. 81; Human Rights Council, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, UN Doc. A/HRC/10/13/Add.2 (13 February 2009), para 56.
[170] Interim opinion on the Draft amendments (n 164), para 22.
[171] The Georgian Government accepted the Venice Commission's recommendation about a more binding wording, but not that on the simplified procedures. Venice Commission, Draft amendments and explanatory notes with annex to the "Law on occupied territories" of Georgia, Opinion No. 552/2009, CDL(2009)186, 4 December 2009, Explanatory note, paras 8, 8(a).
[172] ILC, 1982 II(1) *YbILC* 49, para 8.

Ukrainian draft law "On the Principles of State Policy of the Transition Period" declared all regulations and property transactions performed by the unrecognised occupying authorities null and void,[173] the Venice Commission held that

> the proposed legislation is very far-reaching, especially taking into account that the relevant territories have already been outside the control of the Ukrainian authorities since 2014 so that a "clean slate" – as if nothing had happened over the years – is illusory. For the sake of safeguarding the human rights of those living in those territories, a more differentiated approach is recommended.[174]

Contrary to acts concerning personal status, acts concerning private property require a balancing exercise that should consider both the rights of original owners – acquiring property before the occupation – and the subsequent owners, acquiring titles during the occupation. For instance, the initial version of the Law of Georgia on Occupied Territories adopted on October 23, 2008 allowed for the annulment of the acquisition act after a long period of time and without any compensation.[175] In line with IHRL, especially the case law of the ECtHR, the Venice Commission recommended that it might "be necessary to find regulations balancing the interests of the old and the potential new owners."[176]

Regarding the balancing test between old and new owners, peace agreements prepared by or with the assistance of IOs, especially the United Nations, are noteworthy as they benefit from the support of the international community. In April 2004, the UN Secretary General authored a draft Comprehensive Settlement of the Cyprus Problem (the "Annan Plan"), foreseeing a federated United Cyprus Republic.[177] Under the Annan Plan, the validity of acts of the unrecognized *de facto* authorities of northern Cyprus (the "Turkish Republic of Northern Cyprus" or "TRNC") on matters of property ownership shall ends unless they are in conformity with the relevant provisions of the Annan Plan.[178] The real estate property surrendered involuntarily since 1963 due to intercommunal strife, armed conflict, or the unresolved division of the island shall be subject to compensation due to compulsory acquisition.[179] Dispossessed owners have the option to choose between restitution and compensation, the latter subject to

[173] Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Articles 5(3), 5(12).
[174] Opinion No. 1046/2021 (n 5), para 44.; Opinion on the Law on occupied territories of Georgia (n 27), para 43.
[175] Opinion No. 516/2009 (n 27), paras 21-26.
[176] *Ibid.*, para 25.
[177] Comprehensive Settlement of the Cyprus Problem, 31 March 2004, at https://peacemaker.un.org/node/2961 (23 April 2022) (Annan Plan).
[178] *Ibid.*, Foundation Agreement Main, Article 12(1), observation no. 4.
[179] *Ibid.*, Annex VII, Attachment 1 Item 1.

various restrictions.[180] Various provisions gave priority to current occupants over dispossessed owners who are entitled to compensation only.[181]

In Georgia, the de-occupation legislation likewise relies on the *ex factis* rule: the law "on Property Restitution and Compensation on the territory of Georgia for the Victims of Conflict in the Former South Ossetia District" recognised the acquired rights of a "secondary resident," defined as an "individual presently residing (*bona fide* or *mala fide*) in the original residence of a forced migrant."[182] While assuring the rights of the original owners, the law recognizes the right of the secondary *bona fide* resident to own adequate (substitute), safe and reasonable residential and immovable property.[183] This has been the result of the close consultation with the Venice Commission that held that "evicting the current inhabitants will of course result in the need to provide adequate compensatory housing to these persons."[184] It approved the distinction between *bona* and *mala fide* owners[185] and referred to the case law of the ECtHR which held:

> However, it [the Court] considers it necessary to ensure that the attenuation of those old injuries does not create disproportionate new wrongs. To that end, the legislation should make it possible to take into account the particular circumstances of each case, so that persons who acquired their possessions in good faith are not made to bear the burden of responsibility which is rightfully that of the State which once confiscated those possessions.[186]

It is reasonable to require from the State the same balancing exercise for the validity of any act or policy of the *de facto* authorities of which performance was not unlawful under international law but concerns individuals' conflicting rights and interests. This requires an analysis of proportionality between the means employed and the aim pursued by the restriction of human rights, especially the right to property or the right to privacy. Such a legitimate aim might be

[180] *Ibid.*, Foundation Agreement Main, Article 10 and Annex VII.
[181] See a detailed analysis in: Yaël Ronen, 'The Dispossessed and the Distressed: Conflicts in Land-Related Rights in Transitions from Unlawful Territorial Regimes' in Eva Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008).Yaël Ronen, 'The Dispossessed and the Distressed: Conflicts in Land-Related Rights in Transitions from Unlawful Territorial Regimes' in Eva Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008).Yaël Ronen, 'The Dispossessed and the Distressed: Conflicts in Land-Related Rights in Transitions from Unlawful Territorial Regimes' in Eva Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008).
[182] Law of Georgia on Property Restitution and Compensation on the territory of Georgia for the Victims of Conflict in the Former South Ossetia District, related legislation and explanatory memoranda, in: Venice Commission, Opinion no. 364/2005, CDL(2006)043, 31 May 2006, Article 2(f), (n).
[183] *Ibid.*, Article 5(2).
[184] Venice Commission, Interim Opinion on the Draft Law on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict of Georgia, Opinion no. 364/2005, CDL-AD(2006)007-e, 20 March 2006, para 23.
[185] *Ibid.*, para 26.
[186] ECtHR, *Pincová and Pinc v. the Czech Republic*, 36548/97, judgment of 5 November 2002, para 58.

to attenuate the consequences of certain infringements of property rights caused by the occupation regime, that is, the protection of the State's socio-economic development or public order.[187] The balancing between the means employed and the aim pursued by non-recognition would enable the State to consider the interests of the local population while deciding on the legal effects of administrative acts of the occupying authorities, in line with the *Namibia* exception.[188] This interpretation reflects the tendency called "humanisation of international law,"[189] which integrates IHRL in the interpretation and application of international norms, including the obligation of non-recognition. Therefore, with respect to everyday administrative acts concerning individuals' rights and interests, transition requires continuity with the belligerent occupation where international law has no interest in rejecting the legal validity of acts of the occupying power.

5. Democratizing transition: obligation to enhance local ownership

Beyond regulating the transitory effects of the belligerent occupation, the territorial State is obliged to establish local ownership. A contextual point that justifies an enhanced protection of the local interests of the occupied area after de-occupation is the likely restriction of the right to self-determination of the people by the occupying power. Experts of international law have recognised that belligerent occupation, especially of a prolonged or coercive nature, is likely to violate the right to self-determination of the people of the occupied territory[190]. If the local population constitutes "people," subject of the right to self-determination, such as the Palestinians, the people of Timor-Leste or Western Sahara, its subjection to alien subjugation, domination and exploitation constitutes a violation of the principle of self-determination, fundamental human rights and the UN Charter.[191] Belligerent occupation denies namely the so-

[187] *Ibid.*
[188] Regarding considerations in balancing the respective interests: Benvenisti, *The International Law of Occupation* (n 24) 312–317.
[189] E.g. Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239.
[190] Michael Bothe, 'Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory' (Norwegian Refugee Council 2017) 4 <https://www.nrc.no/globalassets/pdf/legal-opinions/bothe.pdf> accessed 4 April 2021; Stefano Silingardi, 'Belligerent Occupation and ITS Discontents: On the Relationship between International Human Rights Law and Belligerent Occupation's Law' (2019) 19 Global Jurist 1, 4.
[191] UNGA Res. 1514 (XV), UN Doc. A/RES/1514 (14 December 1960), Preamble, Articles 1-2; UNGA Res. 2625 (XXV), UN Doc. A/RES/2625 (24 October 1970) (Friendly Relations Declaration), Principle V.

called external aspect of self-determination, that is, the right of the people to establish a sovereign and independent State without external interference.[192]

Another aspect of self-determination, the internal one, is understood as the right of the people to choose freely its own political, economic and social system within an existing State.[193] As discussed in Section 2, in the selected case studies, the majority of States do not consider the population of Abkhazia and South Ossetia, Transnistria, Crimea, the eastern districts of Ukraine, Nagorno-Karabakh and the surrounding districts as "people", self-determination unit, but as part of the people of the existing State of Georgia, the Republic of Moldova, Ukraine, and Azerbaijan, respectively.[194] If the population is not considered a self-determination unit, belligerent occupation unduly restricts the internal aspect of self-determination to the extent that part of the people of the occupied State is unable to "freely determine their political status, and freely pursue their economic, social and cultural development" within the existing State without outside interference.[195] For instance, this is the case when the occupying power introduces significant changes to the legal system of the occupied territory.[196] Furthermore, a military occupation resulting from aggression undermines the attacked people's foundation of independent statehood; for instance, one possible reading of the Russian aggression against Ukraine in 2014 is that it violated internal self-determination interpreted as the ability of the Ukrainian people to choose European integration over Russian hegemony.[197] The contrary

[192] Friendly Relations Declaration (n 191), Principle V; Daniel Thürer and Thomas Burri, 'Self-Determination', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para 23.
[193] ibid.
[194] On Abkhazia and South Ossetia: Farhad Mirzayev, 'Abkhazia' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 200–201.; On Crimea: Christopher J Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea Ukraine Forum' (2015) 91 International Law Studies Series. US Naval War College 216, 227.
[195] Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (Part I) (13 October 1993), 22, para 2; OSCE, Helsinki Final Act, 1 August 1975, Principle VIII(2); OSCE Parliamentary Assembly, Helsinki Declaration, 5-9 July 2015, para 45; Summary report of the International Conference on Basic Principles for the Settlement of the Conflicts on the Territories of the GUAM States, in: UN Doc. A/62/916 (25 July 2008), Annex, 5, Conclusion 3; *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits*, Judgment. *I.C.J. Reports* 1986, 108, para 205.
[196] E.g. Manuela Melandri, 'Self-Determination and State-Building in International Law: The Need for a New Research Approach' (2015) 20 Journal of Conflict & Security Law 75, 86.
[197] Umut Özsu, 'Ukraine, International Law, and the Political Economy of Self-Determination' (2015) 16 German Law Journal 434, 444.; Certain States expressed this view, see e.g. 'Ongoing Violations of International Law and Defiance of OSCE Principles and Commitments by the Russian Federation in Ukraine' as delivered by U.S. Chargé d'Affaires, Vienna, 6 June 2019, at https://osce.usmission.gov/on-russias-ongoing-violations-in-ukraine-21/ (accessed 4 January 2022); German Ministry of Foreign Affairs, '"Putin is lonelier and more isolated than ever". Foreign Minister Annalena Baerbock in an interview with the newspaper Neue Osnabrücker Zeitung', 11 October 2022, at https://www.auswaertiges-amt.de/en/newsroom/news/interview-baerbock-noz/2557114 (accessed 6 January 2023); Joint Statement European Parliament Japan Delegation and Japan-EU Interparliamentary League of Friendship of the National Diet of Japan, 20 April 2022, at https://www.europarl.europa.eu/cmsdata/247202/SIGNED%20DJP-

view according to which the dependence of the inhabitants of the occupied territory does not violate the right to self-determination of the people if the occupied territory does not constitute a self-determination unit[198] overlooks the interference with the self-determination of the entire people of the occupied State.

Another legal policy ground for enhancing local ownership is to stabilise the situation: local ownership in the post-conflict reconstruction fosters goodwill towards long-term decisions.[199] The occupying power and the international community are also expected to achieve local ownership because upon de-occupation, it is the territorial State and local society who have to assume the responsibility to rebuild.[200] Therefore, once the territorial State re-established its territorial control, it is logical to expect to ensure local ownership of the inhabitants, be they a unit of the right to self-determination or a local group forming part of the entire people of the territorial State. For these two reasons, the interference with the right to self-determination during the occupation and the interest to stabilise the situation, the territorial State must protect and promote local ownership.

Some authors consider the right to self-determination fulfilled once the occupying power withdraws and the ousted sovereign is enabled to retake control.[201] Recent de-occupation State practice, however, clarified three layers of rules that require the territorial State to guarantee the internal aspect of the right to self-determination in a certain way. First, the protection of persons belonging to national or ethnic minorities within the State as a general legal framework.[202] Second, more specifically, the territorial State is obliged to ensure political rights for the inhabitants of the territory, especially the right to participate in public affairs of the State and in affairs locally affecting the inhabitants.[203] Third, as a specific form of self-governance, the territorial State should ensure a right to autonomy to the de-occupied territory where a pre-existing autonomy arrangement has been unilaterally abrogated.[204]

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[198] Ronen (n 24) 434.

[199] Matthew Saul, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement' (2011) 16 Journal of Conflict & Security Law 165, 166.

[200] International Commission on Intervention and State Sovereignty (ed), *The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 45, paras 5.30-5.31.

[201] Nehal Bhuta, 'New Modes and Orders: The Difficulties of a "Jus Post Bellum" of Constitutional Transformation' (2010) 60 The University of Toronto Law Journal 799, 821.

[202] *See infra* § 5.1.

[203] *See infra* § 5.2.

[204] *See infra* § 5.3.

5.1. De-occupation and minority protection

The right to self-determination and especially its internal aspect has a particular importance in the de-occupied territory. Because an occupied territory, especially in prolonged occupations, is typically subject to ethnic changes due to internal displacement, migration of refugees, forced population changes and settlement policies, the national and ethnic composition of its population might be different from that of the unoccupied part of the territorial State. Belligerent occupations – as the four case studies (Abkhazians in Abkhazia and Ossetians in South-Ossetia, Russian-speaking population in Transnistria or Ukraine, Armenians in Nagorno-Karabakh) – often trigger or aggravate pre-existing conflicts between national or ethnic minorities and the majority population of the territorial State.[205]

The term "minority" is distinct form the term "people," but there are certain links between the two. There is no international consensus[206] on the term or legally binding definition of "minority"[207] (and of "people" either[208]). For the purposes of this paper, minority is defined on account of the essential elements that most international proposals include: certain objective characteristics (national or ethnic origin, language and/or religion), self-identification (the subjective sense of belonging to the group), the numbers (a numerical minority in relation to the population of the State as a whole), and long-term presence of the group on the territory concerned (well-established in the State over a significant period of time before it is accorded the status of a minority).[209] While IHRL recognises the rights of persons belonging to national, ethnic, religious or linguistic minorities (hereinafter: "national or ethnic minorities") as individual rights, the rights of the people are collective rights.[210] People is defined within the

[205] Chow Pok Yin Stephenson, 'The International Court of Justice and Ethnic Conflicts: Challenges and Opportunities' (2021) 56 Texas International Law Journal 1, 11–12.
[206] On the debates, see e.g. Study on the rights of persons belonging to ethnic, religious and linguistic minorities, by Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/SUB.2/384/REV.1 (1 January 1979) (Capotorti report), 5-15.
[207] Proposed definitions include, e.g.: UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Resolution on definition of minorities for purposes of protection by the United Nations, UN Doc. E/CN.4/358-E/CN.4/SUB.2/119 (30 January 1950), para 32; PACE, Recommendation 1201 (1993), 1 February 1993, Article 1; Capotorti report (n 206), para 568.
[208] Gudmundur Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law' in Alexandra Xanthaki and Nazila Ghanea-Hercock (eds), *Minorities, Peoples and Self-Determination. Essays in Honour of Patrick Thornberry* (Brill Nijhoff 2004).
[209] ibid 165–167.
[210] Human Rights Committee (HRC), General comment No. 23(50), UN Doc. CCPR/C/21/Rev.1/Add.5 (26 April 1994), para 3.1; Capotorti report (n 206), para 208.

existing boundaries of a State, and thus territorially determined, as well as independent of the national, ethnic, etc. composition of the State, whereas the population of the State could include various minorities without regard to their territorial distribution.[211] While peoples have the right of self-determination in its external aspect, that is, the right to decide on the form of their statehood with the option of independence, minorities enjoy protection only within the confines of an existing State.[212]

However, there is a link between internal self-determination and minority rights.[213] Commentators of international law increasingly recognise that national or ethnic minorities, as constituent part of the people, should enjoy the internal aspect of the right of self-determination, meaning the right of effective participation of national minorities in public life.[214] To pacify inter-group tensions and the territorial integrity of the State, the international community, States and IOs oft reaffirm that that the most effective means is to ensure the right of persons belonging to national or ethnic minorities to participate fully in the political, economic and social life of their country.[215] As it will be illustrated, the rights of persons belonging to national or ethnic minorities constitute a legal regime that has cross-fertilised two specific rights that the territorial State should ensure: the right to participate in public affairs of the State and in affairs locally affecting the inhabitants, and the right to autonomy of the de-occupied territory where a pre-existing autonomy arrangement has been unilaterally abrogated.

5.2. Local participation in public affairs

Belligerent occupations are likely to unduly restrict the self-governance of the local population and national minorities in the occupied territory.[216] Therefore, upon de-occupation, it is crucial

[211] Alfredsson (n 210) 170–171.
[212] ibid 164.
[213] HRC, *Apirana Mahuika et al. v. New Zealand*, No. 547/1993, Views of 27 October 2000, UN Doc. CCPR/C/70/D/547/1993 (16 November 2000), para 9.2; *J.G.A. Diergaards et al. v. Namibia*, No. 760/1997, Views of 26 July 2000, UN Doc. CCPR/C/69/D/760/1997 (6 September 2000), para 10.3; Kalana Senaratne, *Internal Self-Determination in International Law: History, Theory, and Practice* (Cambridge University Press 2021) 85–86.
[214] E.g. Alfredsson (n 210) 164; Senaratne (n 215) 79–91.
[215] E.g. Capotorti report (n 206), para 268; OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, September 1999, at https://www.osce.org/files/f/documents/0/9/32240.pdf (accessed 4 January 2023), Principle 1; World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, Durban, 8 September 2001, at https://www.un.org/WCAR/durban.pdf (accessed 15 January 2023), para 47.
[216] See e.g. in Crimea under Russian control: OSCE, Report of the Human Rights Assessment Mission on Crimea (6–18 July 2015), 17 September 2015, at https://www.osce.org/files/f/documents/0/2/180596.pdf (accessed 13 January 2023), paras 225-241; PACE, Resolution 2133 (2016), 12 October 2016, para 17.2.4.

that the territorial State ensures political rights, especially the right to vote and participate in public affairs.

IOs called on territorial States that face de-occupation to strengthen local and regional authorities and to decentralise government.[217] The reason for this requirement is the assumption that the best manner to counteract the divide between different regions and stabilize the State is to strengthen local and regional authorities and to decentralize government.[218] Decentralisation can be implemented in two different ways: either in the form of decentralised state bodies or in self-governing communities.[219] The former allows local agencies some leeway to implement decisions taken at the center, as power delegated from the center to local bodies.[220] The latter, self-governance, is a means to ensure the effective participation of minorities in public life in non-territorial or territorial arrangements of self-governance or a combination thereof.[221] Regarding the specific form of required self-governance, international law instruments on the right to vote and local self-governance in general, and on the given status settlement in particular restrict the territorial State's domestic law.

Enhancing local ownership in public law is all the more important that territorial States often have recourse to temporary measures of centralisation or re-centralisation while the occupation is ongoing,[222] and might be tempted to maintain those measures after de-occupation. A reform of the local and/or regional administration of the de-occupied territory must comply with international and regional instruments – in Europe it is first and foremost the European Charter of Local Self-Government that provides for basic rules guaranteeing the political, administrative and financial independence of local authorities.[223] Furthermore, under Article 15 of the CoE Framework Convention for the Protection of National Minorities (FCNM), a binding treaty, States parties "shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs."[224] Under Article 16 of the FCNM, States parties "shall refrain from

[217] PACE, Resolution 1988 (2014), 9 April 2014, para 9.
[218] PACE, Recent developments in Ukraine: threats to the functioning of democratic institutions. Explanatory memorandum, Doc. 13482, 8 April 2014, paras 50, 93.
[219] Venice Commission, Opinion on the draft Constitution of Ukraine (text approved by the Constitutional Commission on 11 March 1996), CDL-INF(1996)006-e, 16.
[220] Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 European Journal of International Law 111, 115.
[221] The Lund Recommendations (n 215), Principle 14; Commission on Human Rights, Report of the independent expert on minority issues, Gay McDougall, UN Doc. E/CN.4/2006/74 (6 January 2006), para 26.
[222] See this tendency in Ukraine: CoE, Centre of Expertise for Good Governance, Policy Advice on the Roadmap for Local Self-Government Recovery from the Consequences of the War, 30 June 2022, CEGG/PAD(2022)3, 1.
[223] European Charter of Local Self-Government, (1985) ETS No. 122.
[224] FCNM (n 136), Article 15.

measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention."[225] States are therefore recommended, when redrawing administrative boundaries, to ensure "that effective participation of persons belonging to national minorities in discussions at local level is guaranteed."[226]

Beyond Europe, there is a universal expectation that minority communities enjoy effective participation in the governance of the entire State,[227] and in relations to affairs or regions representing special interest to them.[228] Under the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, persons belonging to minorities have "the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation."[229] Accordingly, if minorities are present in the de-occupied area, the territorial State has an evolving obligation to ensure that persons belonging to minorities have effective means to be adequately represented in elected bodies at all levels so that they may participate fully in public affairs.[230]

The four examined territorial States are parties to the above-mentioned treaties (European Charter of Local Self-Government, FCNM) and have a good faith obligation to cooperate with the treaty monitoring bodies and take into consideration their recommendations.[231] As the next examples illustrate, the international community increasingly required those States to guarantee self-governance in their domestic law.

First, the State has to respect, that is, refrain from violating the right of persons belonging to minorities to participate in public affairs.[232] The context of the Azerbaijani de-occupation indicates how post-conflict violence might restrict this right: before the International Court of

[225] *Ibid.*, Article 16.
[226] CoE Committee of Ministers, Resolution CM/ResCMN(2020)13 on the implementation of the FCNM by Ukraine, 8 December 2020.
[227] E.g. World Conference against Racism Declaration (n 215), para 47.
[228] Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press 2009) 263.
[229] UNGA Res. 47/135, UN Doc. A/RES/47/135 (18 December 1992), Article 2(3).
[230] E.g. Resolution CM/ResCMN(2020)13 (n 226).
[231] Vienna Convention on the Law of Treaties, 1987(1155) *UNTS* 331 (VCLT), Article 26; HRC, General Comment No. 33, UN Doc. CCPR/C/GC/33 (25 June 2009), paras 15, 19.
[232] FCNM (n 136), Article 15: while the rule primarily expects a positive conduct ('shall create the conditions necessary for the effective participation'), the prevention of a minority from effective participation in public affairs does violate the provision. Advisory Committee on the FCNM, Second opinion on Georgia, 17 June 2015, ACFC/OP/II(2015)001, para 119.

Justice, Armenia accuses Azerbaijan of violating Armenians' right to take part in government, political life and the conduct of public affairs, in violation of Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination,[233] and of expelling ethnic Armenians of the region.[234] The alleged conduct may also violate Article 16 FCNM on the prohibition to alter the proportions of the population in minority-inhabited areas.[235] Likewise, a Georgian example shows that practices like the prohibition of political parties on a territorial basis disproportionately restricts the right of persons belonging to national minorities to participate in public affairs. In Georgia, a 2017 amendment of the Constitution prohibits "[t]he establishment of a political party on a territorial principle,"[236] with the legislative objective "to neutralise separatist threats."[237] Both the Venice Commission and the Advisory Committee on the FCNM criticised the provision as a disproportionate restriction of the right of persons belonging to national minorities to participate in public affairs (Article 15 FCNM), having a chilling effect on the establishment of political parties representing national minorities, and recommended other less intrusive measures into those rights.[238] As the two occupied regions are dominantly inhabited by national minorities and Georgia insists on maintaining the provision in force,[239] it is likely to violate its human rights treaty obligations once de-occupation would take place.

Second, the State has positive obligations to restore the right to vote in the de-occupied territory as early as possible after creating an enabling environment for local elections. Before de-occupation, the Co-Chairs of the OSCE Minsk Group (France, Russian Federation, U.S.A.) called for the 'return of the territories surrounding Nagorno-Karabakh to Azerbaijani control' and 'an interim status for Nagorno-Karabakh providing guarantees for security and self-

[233] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Application instituting proceedings and request for the indication of provisional measures, 16 September 2021, 61-62, para 96.
[234] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Request for the indication of provisional measures, 28 December 2022, para 8.
[235] FCNM (n 136), Article 16.
[236] Constitution of Georgia, 24 August 1995, at https://matsne.gov.ge/en/document/view/30346?publication=36 (accessed 6 January 2023), Article 23(2).
[237] FCNM, Fourth Report submitted by Georgia, 31 July 2022, ACFC/SR/IV(2022)001, 57, para 330.
[238] Venice Commission, Opinion 876/2017 on the draft revised constitution as adopted on 23 June 2017, CDL-AD(2017)013, 19 June 2017, paras 70-71, 97; Opinion 918/2018 on the draft constitution amendments adopted on 15 December 2017, CDL-AD(2018)005, 19 March 2018, paras 15, 40; Advisory Committee on the FCNM, Third Opinion on Georgia, 7 March 2019, ACFC/OP/III(2019)002, paras 74-75.
[239] Fourth Report submitted by Georgia (n 237), 57, para 331.

governance',[240] while the UN General Assembly called for 'an effective democratic system of self-governance to be built up in this region within the Republic of Azerbaijan'.[241]

More expressly, for Eastern Ukraine in September 2014, the Minsk consultations of the Trilateral Contact Group (Ukraine, Russia, and the OSCE) adopted a peace plan ("Minks I Agreement")[242] that obliged Ukraine to ensure "the holding of early local elections in accordance with the Law of Ukraine '[w]ith respect to the temporary status of local self-government in certain areas of the Donetsk and the Lugansk regions' (Law on Special Status)"[243] In early February 2015, France, Germany, Ukraine and Russia (the "Normandy Four") adopted a new ceasefire and a package of measures for the implementation of the Minsk agreements ("Minsk II Protocol"), co-signed by pro-Russian separatists, and endorsed by the UN Security Council.[244] The instrument provided that regarding the Ukrainian Law on Special Status, "questions related to local elections will be discussed and agreed upon with representatives of certain areas of the Donetsk and Luhansk regions in the framework of the Trilateral Contact Group."[245] Therefore, the question how "early local elections should be held," that is, prior to – preferred by Russia[246] or only after complete de-occupation, preferred by Ukraine and its allies,[247] is subject to the negotiation of the Trilateral Contact Group.[248] In other words, the controversy was about the chronological order between the entry into force of the "Law on Special Status for the eastern regions of Luhansk and Donetsk not under the control of the Government", on the one hand, and the holding of local elections, on the other [249] In the peace talks, the majority of States confirmed that de-occupation and legislation about local self-governance must precede local elections. As local self-government inherently relates to self-determination that must be guaranteed without third-party intervention, local elections

[240] OSCE, Statement by the OSCE Minsk Group Co-Chair countries, L'AQUILA, 10 July 2009, at https://www.osce.org/mg/51152 (accessed 5 January 2023).
[241] UN Doc. A/RES/62/243 (n 89), para 4.
[242] Minsk I (n 145).
[243] *Ibid.*, para 9.
[244] Minsk II (n 145), Article 1.
[245] *Ibid.*, Article 12 and Note.
[246] UN Doc. S/PV.8726 (18 February 2020), 7 (Russian Federation).
[247] E.g.: S/PV.8726 (n **Error! Bookmark not defined.**), 11 (United Kingdom); UN Doc. S/PV.8575 (16 July 2019), 12 (Poland).
[248] Opinion No. 1046/2021 (n 5), para 76.
[249] Federal Foreign Office of Germany, 'Important agreement reached in the conflict in eastern Ukraine', 8 October 2019, at https://www.auswaertiges-amt.de/en/aussenpolitik/steinmeier-formula/2254244 (accessed 4 January 2023).

should only take place once occupation has completely ended and the territorial State is able and willing to give its genuine consent.[250]

In August 2021, the Ukrainian government elaborated the draft law "On the Principles of State Policy of the Transition Period" in the form of a bill which envisaged local elections and referenda in the formerly occupied territories upon de-occupation.[251] The bill made the holding of elections, referenda and the establishment of local bodies conditional on the fulfilment of certain requirements, namely the ability to comply with certain electoral standards such as international electoral monitoring.[252] The Venice Commission welcomed the bill's compliance with international standards but warned that "the provision shall not be interpreted in such a way as to unnecessarily delay the restoration of the right to vote in any territories," and that "the preconditions for holding or not holding local elections should be regulated more precisely."[253] The above-mentioned State practice confirms that any territorial State is bound to restore the right to vote in the de-occupied territory as early as possible after creating an enabling environment, as well as adopt clear domestic regulation that allows for the organisation of local elections.

Third, another positive obligation is to increase efforts to ensure the effective consultation of national minorities on relevant issues affecting them both at central and local levels. For instance, in 2019 the Advisory Committee on the FCNM urged the Georgian authorities "to step up their efforts to create the conditions for proportional representation of persons belonging to national minorities in elected bodies" and adopt incentivising measures to increase the interest of political parties in taking into account the needs of persons belonging to national minorities and in proposing to those persons to participate as candidates in elections.[254] Likewise, CoE bodies have called on the Moldovan authorities 'to ensure that national minority representatives are effectively consulted at central and local levels on all issues that concern

[250] Natia Kalandarishvili-Mueller, 'Guest Post: The Status of the Territory Unchanged: Russia's Treaties with Abkhazia and South Ossetia, Georgia' (*Opinio Juris*, 20 April 2015) <http://opiniojuris.org/2015/04/20/guest-post-the-status-of-the-territory-unchanged-russias-treaties-with-abkhazia-and-south-ossetia-georgia/> accessed 25 January 2023.; also see the "Moldovan Framework Law" in this sense: Law no. 173-XVI (n 13), Article 1(2); UN Doc. A/60/PV.23 (23 September 2005), 29 (Republic of Moldova).
[251] Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Articles 16-17; nonetheless, the Ukrainian government withdrew the bill in early February 2022. 'Macron confirms Kyiv scrapped crucial bill upholding Ukraine's interests to appease Russia', *Euromaidan Press*, 8 February 2022, at https://euromaidanpress.com/2022/02/08/ukraine-scrapped-crucial-law-at-russias-behest-to-get-normandy-meeting/ (accessed 4 January 2023).
[252] Ukraine: Draft law on the Principles of State Policy of the Transition Period (n 16), Article 16(5).
[253] Opinion No. 1046/2021 (n 5), para 75.
[254] Third Opinion on Georgia (n 238), paras 142-143; Resolution CM/ResCMN(2020)5 on the implementation of the FCNM by Georgia, 17 June 2020, para 1(b).

them […], and that their views are seriously taken into account during relevant decision-making processes'.[255] The Advisory Committee on the FCNM also called on the authorities to take the necessary legislative measures "towards increasing the representation of national minorities in elected bodies and public administration at all levels, including within the context of broader decentralisation measures."[256] While these recommendations only concerned the government-controlled areas, international treaty law confirms that the State must extend the treaty's implementation to its entire territory once it re-established its territorial control.[257]

De-occupation laws must be flexible enough to implement any negotiated arrangement for the self-governance of the occupied territories. While the degree of local ownership is fact-sensitive and depends on political bargaining and the concrete circumstances in the given State, some form of power sharing between the central government and local bodies is necessary to effectively achieve integration in a plural society by democratic means.[258] As the next part will demonstrate, among possible solutions, autonomy settlements constitute the highest degree of self-governance within the territorial State.

5.3. Autonomy for the de-occupied territory

"Autonomy" is defined in the context of a sovereign and independent State: means "an asymmetrical feature in the State" in which "the State level remains with the residual powers, while the sub-State level relies on enumerated powers."[259] The autonomous entity remains under the sovereignty of the State, but it can exercise its autonomous powers independently of the centre.[260] While the level of law-making, executive, and judiciary competences transferred from the central government to the autonomous entity may vary from one State to the other, autonomy arrangements are different from federal constitutions "because a federation entails a

[255] Advisory Committee on the FCNM, Fourth Opinion on Ukraine, 5 March 2018, ACFC/OP/IV(2017)002, para 94; Resolution CM/ResCMN(2021)16 on the implementation of the FCNM by the Republic of Moldova, 7 July 2021.
[256] Fourth Opinion on Ukraine (n 255), para 99; Resolution CM/ResCMN(2021)16 (n **Error! Bookmark not defined.**).
[257] E.g. Fourth Opinion on Ukraine (n 255), para 3; VCLT (n 231), Article 29; Berkes (n 39) 19.
[258] Rein Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia Agora: Kosovo' (2009) 8 Chinese Journal of International Law 2, 23.
[259] Markku Suksi, 'Autonomy', *Max Planck Encyclopedia of Public International Law* (2021) para 2.
[260] Marc Weller, 'Self-Determination and Peace-Making' in Andrea Varga, Marc Weller and Mark Retter (eds), *International Law and Peace Settlements* (Cambridge University Press 2021) 409.

more or less symmetrical designation of (exclusive) law-making powers – on the basis of the constitution of the federal State – to two or more entities at the sub-State level."[261]

International law is far from imposing any duty to guarantee autonomy for local or regional entities, especially those representing a national or ethnic minority. It is telling that Article 15 of the FCNM on the right to effective participation of persons belonging to national minorities in public affairs was preferred to another, broader draft article on the right of persons belonging to a national minority to local or autonomous authorities or to a special status.[262] Thus, positive international law does not oblige States – many of them fearing that territorial autonomy for minorities leads to destabilisation and even to secession[263] - to ensure national or ethnic minorities territorial autonomy.[264] Generally speaking, the most that State practice has recognized is that there is one possible means to ensure the right of persons belonging to national minorities to effective participation in public affairs is to establish "appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned."[265] Certain best practices suggest however that territorial autonomy arrangements contribute to the protection of minority rights, democratisation and conflict prevention.[266]

In post-conflict contexts, State practice provides some evidence that a right to autonomy can be legitimately expected where pre-existing autonomy arrangements have been unilaterally abrogated.[267] A reason for this claim is that the withdrawal of autonomy of a national or ethnic minority is a permanent source of conflict that the State is expected to prevent.[268] The opponents of this idea, however, claim that simply withdrawing a status in domestic law or

[261] Suksi (n 261) para 3.
[262] Venice Commission, Annual Report of Activities for 1996, CDL-RA(1996)001-e, 8 March 1997, 59.
[263] Athanasios Yupsanis, 'Autonomy for Minorities: Definitions, Types and Status in International Law' (2015) 25 Finnish Yearbook of International Law 3, 5.
[264] Commission on Human Rights, Report of the Working Group on Minorities, UN Doc. E/CN.4/Sub.2/2005/27 (8 July 2005), para 53; Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, UN Doc. E/CN.4/Sub.2/2000/10 (19 July 2000), para 10; Venice Commission, Annual Report for 1996 (n 262), 59; Borgen (n 44) 6; Yupsanis (n 265) 5.
[265] Document of the Copenhagen meeting of the Conference on the human dimension of the CSCE, Copenhagen, 29 June 1990, at https://www.osce.org/files/f/documents/9/c/14304.pdf (accessed 12 January 2023), Article 35(2); The Lund Recommendations (n 215), Principle 20.
[266] Contribution of the Committee on the Elimination of Racial Discrimination to the preparatory process for the World Conference against Racism, UN Doc. A/CONF.189/WG.2/3 (30 April 2001), para 75; PACE, Resolution 1985 (2014), 8 April 2014, para 7; Yupsanis (n 265) 46.
[267] In the same sense: Weller, *Contested Statehood* (n 230) 262–263.
[268] Commission on Human Rights, Minorities Report of the High Commissioner, UN Doc. E/CN.4/2003/87 (28 February 2003), para 31.

denouncing a treaty that abolished a territorial autonomy[269] does not justify a duty to revert the political system to the *status quo ante*.[270]

Before occupation, this was the case of South Ossetia and Abkhazia within the Soviet Socialist Republic of Georgia and after Georgia's independence in 1991,[271] Nagorno-Karabakh within the former Soviet NKAO;[272] Crimea in Ukraine under the 1996 Constitution of Ukraine;[273] and Transnistria as the MASSR and as a candidate for a "special form of autonomy" in the 1994 Constitution of Moldova.[274] As the case studies will demonstrate, the territorial State should grant the de-occupied territory a right to autonomy where a pre-existing autonomy arrangement – applying prior to or during the occupation – has been unilaterally abrogated.

The Georgian Constitution of 1995 provides for a unitary State with nine regions and two autonomous regions, the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara,[275] while South Ossetia has remained part of one of the nine regions without autonomous status.[276] Multilateral negotiations convened by the OSCE have led to peace proposals, such as the draft 'Baden document',[277] that relied on the principles of the territorial integrity of Georgia, the right to self-determination, and South Ossetian autonomy, among others.[278] The CoE Parliamentary Assembly also recommended 'extensive autonomy status for Abkhazia […] to be negotiated by all the parties concerned'.[279] In various peace plans, Georgia envisaged a wide-ranging degree of autonomy of Abkhazia and South Ossetia within a federal Georgia.[280] While Russia precluded any agreement providing for the full inclusion of Abkhazia and South

[269] An example is the argument in favour of Transnistria's autonomy within Moldova, according to which 'due to the denunciation by the USSR of the Molotov-Ribbentrop Pact, which had established the modern boundaries of Moldova, Transnistria should revert to an autonomous state'. Borgen (n 44) 6.
[270] ibid.
[271] IIFFMCG (n 56), vol. I, 13, and *idem.*, vol. II, 67-68, 70-71.
[272] Decree of the Azerbaijani Central Executive Committee of July 7, 1923 "About formation of the autonomous Region of Nagorno-Karabakh", see Arsène Saparov, 'Why Autonomy? The Making of Nagorno-Karabakh Autonomous Region 1918-1925' (2012) 64 Europe-Asia Studies 281, 315.
[273] Constitution of Ukraine (n **Error! Bookmark not defined.**), Articles 133-139; Suksi (n 261) para 5.
[274] Constitution of the Republic of Moldova, 29 July 1994 (text without later amendments), at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/41173/73129/F1743609028/MDA41173%20English.pdf (accessed 5 January 2023), Article 111(1).
[275] Constitution of Georgia (n 236), Article 7(2).
[276] Hansjörg Eiff, 'The OSCE Mission to Georgia and the Status of South Ossetia' in Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed), *OSCE Yearbook 2008* (Nomos 2009) 40–41.
[277] Agreement (Declaration) on Basic Principles of Political and Legal Relations between the Sides in the Georgian-Ossetian Conflict, Draft, Baden (Austria), 13 July 2000. For further details: International Crisis Group, Georgia: avoiding war in South Ossetia, ICG Europe Report No. 159, 26 November 2004, 5, 23, 27.
[278] Eiff (n 278) 41.
[279] PACE, Resolution 1119 (1997), 22 April 1997, para 5.3.
[280] IIFFMCG (n 56), vol. I, 28-29; Weller, *Contested Statehood* (n 230) 274; Christopher Waters, 'South Ossetia' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 177; Mirzayev (n 196) 196.

Ossetia within a federal Georgia, the international community, such as EU member States, backed those proposals.[281] During the Russian-Georgian war of 2008, Russia recognised the independence of both regions as States, based on the controversial right to remedial secession,[282] contrary to the view of the overwhelming majority of States.[283] IOs, moreover, recommended Georgia to follow other detailed forms of autonomy of the two separatist regions such as 'the creation of a second parliamentary chamber to provide for the representation of its autonomous regions at state level'.[284]

In Moldova, Article 111 of the 1994 Constitution, grants Gagauzia autonomous status.[285] For Transnistria, the same constitutional article provides that "[p]laces on the left bank of the Dniester River may be assigned special forms and conditions of autonomy according to the special statutory provisions adopted by organic law."[286] However, federalization was raised in two consecutive status proposals: the "Kozak memorandum" proposed by the Russian Federation in 2003[287] and the Joint proposals by the OSCE, by Russia and Ukraine in 2004.[288] Despite the initial intention of the Moldovan government to accept the idea of federalization, it rejected both the former[289] and the latter proposals.[290] The subsequent status dialogue abandoned the idea of federalization but not that of a special status granted to Transnistria. The "Moldovan Framework Law" foresees the creation of a "special autonomous territorial unit – Transnistria" in the Republic of Moldova with a substantial autonomy, including legislative and executive power and local public administration.[291] The international community,

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[281] E.g. Statement on the presidential election and referendum in Abkhazia issued on 6 October 1999 by the Presidency of the European Union, in: UN Doc. S/1999/1040 (8 October 1999), Annex.
[282] Letter dated 28 August 2008 from the Permanent representative of the Russian Federation to the Conference on Disarmement, UN Doc. CD/1849 (4 September 2008), esp. 5; Weller, *Contested Statehood* (n 230) 274.
[283] *Supra*, n 62-63.
[284] PACE, Resolution 1415 (2005), 24 January 2005, para 9.
[285] Constitution of the Republic of Moldova 1994 (rev. 2016), at https://www.constituteproject.org/constitution/Moldova_2016?lang=en (accessed 13 January 2023), Articles 110(1), 111.
[286] Constitution of the Republic of Moldova 1994 (n 285), Article 110(2).
[287] *Memorandum Kozaka: Rossijskij Plan Obedineniya Moldovy i Pridnestrovya* ['Kozak Memorandum': Russian Plan of Uniting Moldova and Transnistria], *Regnum*, 23 May 2005, at https://regnum.ru/news/458547.html (13 January 2023).
[288] OSCE, Proposals and recommendations of the mediators from the OSCE, the Russian Federation, Ukraine with regards to the Transdniestrian settlement, CIO.GAL/11/04, 13 February 2004, at https://www.osce.org/files/f/documents/a/4/23585.pdf (accessed 3 January 2023), 4-5; on both proposals: William H Hill, 'The OSCE and the Moldova-Transdniestria Conflict: Lessons in Mediation and Conflict Management' (2014) 24 Security and Human Rights 287; Maryna Rabinovych, 'The Domestic Dimension of Defining Uncontrolled Territories and Its Value for Conflict Transformation in Moldova, Georgia, and Ukraine' in Hanna Shelest and Maryna Rabinovych (eds), *Decentralization, Regional Diversity, and Conflict: The Case of Ukraine* (Springer International Publishing 2020) 112–113.
[289] See in detail: Hill (n 290) 293–294; Rabinovych (n 290) 113.
[290] See in detail: Hill (n 290) 294–295; Rabinovych (n 290) 113.
[291] Law no. 173-XVI (n 13).

especially the OSCE, the EU and the United States – both observers in the so-called 5+2 talks (consisting of the representatives of Moldova, Transnistria, the OSCE, the Russian Federation, Ukraine, the US and the EU) aimed at finding a negotiated solution for the Transnistrian conflict – supports the territorial integrity of Moldova "with a special status for Transnistria."[292] Recently, Moldova's Deputy Prime minister for Reintegration declared that "the country was considering putting in place a 'decentralized autonomy' for the Transnistrian region."[293]

In Ukraine, after the 2014 Maidan Revolution and the appointment of a pro-European government, Russia exerted pressure on the new Ukrainian government to pursue federalization[294] - a pressure that the international community condemned.[295,] Later, peace talks have focussed on decentralization but not on federalization.[296] According to the Constitution of Ukraine and current legislation, the Autonomous Republic of Crimea and the City of Sevastopol have a special constitutional status since 1996[297] but other occupied regions do not. The Minsk I Agreement provided for the need to "[i]mplement decentralization of power, including by enacting the Law of Ukraine on the interim status of local self-government in certain areas of the Donetsk and Luhansk regions (Law on Special Status)"[298] and the 2014 Law on Special Status[299] aimed at implementing this requirement. The Minsk II Protocol furthermore, in its Article 11 provided for

> [c]onstitutional reform in Ukraine, with the new Constitution to come into effect by the end of 2015, the key element of which is decentralisation (taking into account peculiarities of particular districts of Donetsk and Luhansk Oblasts, agreed with representatives of these districts), and also approval of permanent legislation on special

[292] OSCE, Mandate of the mission to Moldova, 4 February 2003, CSCE/19-CSO/Journal, No.3, Annex 3 (4 February 1993); Statement by the Permanent Representative of the United States of America to the United Nations, Linda Thomas-Greenfield, in: UN Doc. S/2021/256 (15 March 2021), Annex XIII; Commission Opinion on the Republic of Moldova's application for membership of the European Union, COM(2022) 406 final, 17 June 2022; Council Decision (CFSP) 2021/2136 of 2 December 2021 on an Assistance Measure under the European Peace Facility to support the Armed Forces of the Republic of Moldova, *O.J.* L 432/63, 3 December 2021, preambular para 2.

[293] PACE, The functioning of democratic institutions in the Republic of Moldova, Doc. 14963, 16 September 2019, para 95.

[294] Tadeusz A Olszański, 'Ukraine: Sovereign Decentralisation or Federalism without Sovereignty?' [2014] OSW Commentary 1, 1.

[295] Resolution 1988 (2014) (n 217), para 9; Eastern Partnership countries and in particular destabilisation of eastern Ukraine, European Parliament resolution of 17 April 2014 on Russian pressure on Eastern Partnership countries and in particular destabilisation of eastern Ukraine, *O.J.* C 443/58, 22.12.2017, para 1.

[296] Resolution 1988 (2014) (n 217), para 9; Eastern Partnership countries and in particular destabilisation of eastern Ukraine, European Parliament resolution of 17 April 2014 on Russian pressure on Eastern Partnership countries and in particular destabilisation of eastern Ukraine, *O.J.* C 443/58, 22.12.2017, para 1.

[297] Constitution of Ukraine (n **Error! Bookmark not defined.**), Articles 133-139.

[298] Minsk I (n **Error! Bookmark not defined.**), para 3.

[299] See *supra* (n **Error! Bookmark not defined.**).

> status of particular districts of Donetsk and Luhansk Oblasts in accordance with the measures spelt out in the footnotes, by the end of 2015.[300]

Using an uncommon drafting method, the signatories added a "note" to Article 11 that lists a number of decentralization measures.[301] Russia held that Article 11 on Ukraine's obligation to provide for a constitutional reform and consultations with the representatives of Donetsk and Luhansk should "be done in accordance with the note in the document, which contains eight paragraphs on what the special status of these areas of Ukraine should be."[302] Ukraine, on its part, has not expressed its readiness to amend its constitution in line with all measures included in the note.[303] The 2022 Russian invasion of Ukraine has however completely changed those positions. On March 8, 2022, President Zelenskyy of Ukraine nevertheless announced that Ukraine was open to "compromise" on the status of two breakaway pro-Russian territories, Luhansk and Donetsk.[304] Since then, the Normandy Format and Minsk I & II Agreements have proved ineffective and failed to end the hostilities between Ukraine and Russia.[305] The State practice regarding Ukraine confirms that in the absence of a negotiated settlements in an atmosphere of trust, the territorial State is not expected to recognise any autonomy for a region that did not enjoy any similar status in the past. The Minsk peace process did not discuss the status of Crimea whose autonomy, once de-occupied, would be maintained under Ukrainian law.

For Nagorno-Karabakh, the consecutive peace proposals elaborated within the OSCE Minsk process and the CoE Parliamentary Assembly envisaged, without definitely addressing the status question, a wide-ranging autonomy within Azerbaijan.[306] To some extent, Azerbaijan also subscribed to the idea of autonomy when it proclaimed that "there is no doubt that some forms of territorial division may in certain cases be a practical means of ensuring the existence of a national identity or ethnic group," and reiterated "its willingness to confer on Nagorny

[300] Minsk II (n 145), Article 11.
[301] *Ibid.*
[302] UN Doc. S/PV.7683 (28 April 2016), 27 (Russian Federation).
[303] "No separate status for occupied areas of Donbas laid down in Constitutional amendments draft – MP", *UKRINFORM*, 25 August 2021, at https://www.ukrinform.net/rubric-polytics/3303880-no-separate-status-for-occupied-areas-of-donbas-laid-down-in-constitutional-amendments-draft-mp.html (accessed 14 January 2023).
[304] 'In Nod to Russia, Ukraine Says No Longer Insisting on NATO Membership' *Agence France Presse English Wire* (8 March 2022).
[305] Security in the Eastern Partnership area… (n 86), preambular para Z.
[306] E.g. Statement of the OSCE Chairman-in-Office, in: 'Organization for Security and Co-Operation in Europe: Lisbon Document 1996' (1997) 36 International Legal Materials 486, 496.; Minsk Group proposal ('package deal'), July 1997, at https://www.legal-tools.org/doc/4b2ddb/pdf/ (accessed 5 January 2023), Agreement I, Articles II/B, IV, V-IX; PACE, Resolution 1119 (n 279), para 5.3.

Karabakh the highest degree of self-rule within Azerbaijan."[307] During and after the 2020 war however, the Azerbaijani government withdrew its autonomy offer.[308] Since July 2021, the liberated areas form part of Karabakh Economic Region and East Zangezur Economic Region.[309] While the seven adjacent districts de-occupied in the 2020 war have not enjoyed any autonomy or special status before the first Nagorno-Karabakh war, this is not the case with certain areas of Nagorno-Karabakh proper that Azerbaijan de-occupied, including Shusha/Shoushi, second largest city of the "NKR". Whereas that area had been part of the former Soviet NKAO, and during three decades was part of the "NKR," the Azerbaijani authorities plan to govern it as any other territory of mainland Azerbaijan.[310] The fact that third States and IOs have not insisted on any autonomy status for the liberated areas might result from the fact that Armenian population of the area largely fled.[311] The silence of the international community also indicates that autonomy proposals are more compelling in case of prospective de-occupation than in actual de-occupations where the territorial State retook territorial control without compromises.

The above-mentioned evolution of international law requires a constitutional setting in which persons belonging to national or ethnic minorities enjoy self-governance in line with past experience of local self-rule. If the given region enjoyed, prior to or during the occupation, certain autonomy in line with the protection of minority rights, the territorial State is expected not to curtail but to restore that status. More generally, this relates to the expectation that the territorial State restores constitutional and internationally recognised human rights of groups affected by the armed conflict.[312]

[307] Annex to the letter dated 16 March 2004 from the Permanent Representative of Azerbaijan to the United Nations, UN Doc. A/59/66–S/2004/219 (17 March 2004), 21; confirmed in: UN Doc. A/60/952-S/2006/564 (24 July 2006), 7; UN Doc. A /62/835– S /2008/303 (8 May 2008), 3.
[308] 'Briefing: Armenia Signals Willingness to Compromise on Karabakh's Status' *BBC Monitoring* (14 April 2022).
[309] Committee on the Elimination of Racial Discrimination, 2904th meeting, 16 August 2022, UN Doc. CERD/C/SR.2904 (26 August 2022), para 36 (Azerbaijan); UN Doc. S/PV.9228 (2022), 13 (Azerbaijan).
[310] See *supra*, n 309; Local self-government has not yet established as the de-occupied areas are 'currently managed by special representatives of the state government who in practice are functional equivalent to local executive authorities'. Monitoring of the application of the European Charter of Local Self-Government in Azerbaijan, Committee on the Honouring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee), CG(2021)40-21final, 17 June 2021, para 78.
[311] PACE, Humanitarian consequences of the conflict between Armenia and Azerbaijan. Explanatory memorandum, Doc. 15363, 13 September 2021, para 79; 'Nagorno-Karabakh: Azerbaijan troops begin retaking land from Armenia', *The Guardian*, 20 November 2020.
[312] African Union, Executive Council Ninth Ordinary Session 25-29 June 2006, Report on the elaboration of a framework document on post conflict reconstruction and development, EX.CL/274 (IX), para 41(a)(i).

As autonomy arrangements are highly politicised, the context matters. In prospective de-occupations, where belligerent occupation is ongoing and peaceful dispute settlement procedures may facilitate the territory's status quo, the territorial State is more likely to offer autonomy proposals than in actual de-occupations like in Azerbaijan where the State has less incentive to compromises. Furthermore, ensuring some form of autonomy for the de-occupied territory is more compelling where the territorial State's constitutional law recognises the institution in other regions. In all but one of the selected case studies, the State has granted certain autonomy to other, government-controlled regions within its territory: Gagauzia in Moldova, Ajaria in Georgia, the Autonomous Republic of Nakhchivan in Azerbaijan. The precedent in the domestic law provides a basis for extending similar status to the de-occupied areas too.

The insistence of the international community on certain forms of autonomy in the regions discussed is all the more remarkable that IOs have been traditionally reluctant to pronounce on the structure of internal governance of States.[313] This pertains to the freedom of "choice of a political, economic, social and cultural system"[314] of any State. Even human rights courts generally allow a wide "margin of appreciation" to States parties in arranging their constitutional and political system.[315] When based on the consent of the territorial State and the conflicting party or parties to the territorial dispute however, an autonomy arrangement is likely to be supported by the international community and to contribute to a stable constitutional system.

6. Conclusions

State practice on de-occupation legislation depicts various simultaneous developments of international law.

First, subject matters formerly considered as *domaine réservé*, exclusively subject to domestic regulation such as life in the de-occupied territory are governed by an expanding legal regime of international law. This is the case with de-occupation legislation, traditionally explained

[313] Weller, *Contested Statehood* (n 230) 262.
[314] *Nicaragua v. United States of America* (n 195), 108, para 205.
[315] E.g. ECtHR, *Zdanoka v. Latvia*, 58278/00, judgment of 16 March 2006, paras 103, 115(c), 121; *Sitaropoulos and Giakoumopoulos v. Greece* [GC], 42202/07, judgment of 15 March 2012, para 65; *Savickis and Others v. Latvia* [GC], 49270/11, judgment of 9 June 2022, para 211; IACtHR, *Proposed amendments to the naturalization provision of the Constitution of Costa Rica*, Advisory opinion OC-4/84, 19 January 1984, paras 62-63.

through the concept of *postliminium*, that is, the continued regulation of conducts in the de-occupied territory by the sovereign, whereas evolving rules of international law require the territorial State to allow certain legal effects of the occupant's acts and policies, and to enhance local ownership in the de-occupied territory. This development relies on the evolution of rules, such as the obligation not to recognise as lawful situations arising from a serious breach of peremptory norms of general international law, the internal aspect of the right to self-determination of people, the rules and principles of democratic governance, and the rights of persons belonging to national or ethnic minorities. These rules of international law do impose certain limits on the territorial State's sovereignty with a view to humanize and democratize transition from belligerent occupation to peace.

The vital role of international law in de-occupation laws is a reminder that legislation is not purely a domestic process but forms part of the State practice of post-conflict transition which is increasingly regulated by international law. The territorial State is likely to comply with international law norms as a concession towards the opposing party to the armed conflict withdrawing from the territory. This is obvious in peace agreements but even present in ongoing occupations where de-occupation legislation proactively signals confidence-building measures for the purported withdrawal by the opposing party.

Second, the limits imposed on de-occupation legislation implies the international recognition of the prospective or actual territorial status quo, the reintegration of the territory under the control of its sovereign. The context of the case studies is crucial: they all result from prolonged occupations, where de-occupation is either prospective, subject to a continued status settlement process in a frozen conflict (Georgia, Republic of Moldova), or actual, following an armed conflict (Azerbaijan, Ukraine). In none of the recent case studies has the UN Security Council intervened as a regulator of the post-conflict political transformation within its binding decision-making powers under Chapter VII of the UN Charter. Accordingly, no peacebuilding mission or international territorial administration has been mandated for the purpose of de-occupation transition. In the 2000s however, the focus of *jus post bellum* was on the principles and rules governing interim administrations by occupying powers and international peace missions (peacebuilding missions or even international territorial administrations).[316] Nowadays, as de-occupation transition is increasingly led by the territorial State, international law requires certain guarantees from the newly enacted constitutional order. This is in line with

[316] E.g. Jean Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations"' (2006) 51 New York Law School Law Review 497; Boon (n 21).

the State's widely recognised primary responsibility to protect its populations from major atrocities,[317] and to establish sustainable peace and post-conflict peace-building.[318]

Third, another tendency that explains this State practice is the shift away from the abstraction of the State in its sovereignty towards a sense of empowerment and protection of the population in the de-occupied area.[319] A scholarly view on the right to self-determination of people is that the latter is fulfilled once the occupying power withdraws and the ousted sovereign is enabled to retake control. Contrary to this opinion, the case studies illustrate that the territorial State is obliged to enhance local ownership through local self-governance and is recommended to grant the territory an autonomous status where a pre-existing autonomy arrangement had been curtailed.

This conclusion contributes to the already prolific scholarship on the concept of democratic governance: internal self-determination is defined as the systematic involvement of all minority groups in the national democratic process, allowing for the preservation of their cultural identity, and their development on an equal footing with the majority population.[320]

[317] UNGA Res. 60/1, UN Doc. A/RES/60/1 (24 October 2005), para 138.
[318] E.g. UN Doc. S/RES/2009 (16 September 2011), preambular para 7; UN Doc. S/RES/2447 (13 December 2018), para 8.
[319] Weller, *Contested Statehood* (n 230) 260–261.
[320] Peter Hilpold, 'Self-Determination and Autonomy: Between Secession and Internal Self-Determination' (2017) 24 International Journal on Minority and Group Rights 302, 326; Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46; Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 Virginia Journal of International Law 1, 8, 17, 34–35.