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Prolonged Military Occupation: Rethinking the Israeli Occupation on the Occupied Palestinian Territories

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Abstract

This research focuses on an increasingly important question associated with the state of military occupation as part of International Humanitarian Law, namely, to what extent the rights and duties of an occupying power are to be broadened or otherwise minimized when an occupation of a foreign territory lasts for a long period of time? This question is necessitated by the practices of some occupying powers that claim their 'original' authority over occupied areas should exceed the original rights embodied in the legal corpus on military occupation due to the prolonged nature of their military presence. This research focuses on the state of the Israeli military occupation over the Occupied Palestinian Territories (OPTs.) and found that the Israeli practices are calculated in this direction, i.e., the expansionist policy, which ultimately conflict with the corpus of rules of international law on military occupation.

Keywords

Israeli High Court of Justice – occupied Palestinian territories – prolonged military occupation

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1 Introduction

Military occupation, as part of International Humanitarian Law (IHL), is the situation where the military forces of one State are in effective control over a territory of another State without the latter's consent.[1] This definition is consistent with Article 42 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land (hereinafter, 'Hague Regulations') which reads '[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'.[2] The provisions of this Article define the start and end of military occupation by determining the conditions required for a state of military occupation to be established. It follows that the application of this part of humanitarian law depends on the fulfillment of the criteria embodied in the Article. Article 43 of the same convention states the authority and powers vested in the occupying force during military occupation. However, these two articles — alongside other articles — constitute the legal corpus of the law of military occupation drafted more than a century ago and derived mainly from contemporary circumstances.

However, since the drafting of this corpus, many new circumstances have come to the surface as 'new forms of occupation' that could be considered but have not been incorporated into the legal canon. One of these is the phenomenon of prolonged or protracted military occupation. Yet, this phenomenon has been the center of customary practices, case law, and scholarly discussions.[3] As far as this situation is concerned, the debate is centered on: (1) the existence of such a category called 'prolonged military occupation', and (2) the effect of this situation on the 'original authority' given to the occupying power in 'normal

1 For detailed understanding on the situation of belligerent occupation, *see* A. Roberts, 'What is Military Occupation', *British Yearbook of International Law* 55 (1985): 249–305; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden: Brill-Martinus Nijhoff, 2009); Y. Dinstein, *The International Law of Belligerent occupation* (Cambridge: Cambridge University Press, 2009).

2 First Hague Peace Conference, Regulations concerning the Laws and Customs of War on Land, annex to the Convention (IV) respecting the Laws and Customs of War on Land, October 18, 1907.

3 *See* R. Falk, 'Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank', *Journal of Refugee Studies* 2 (1989): 40–51; A. Roberts, 'Prolonged Military Occupation: The Israeli-occupied Territories since 1967', *American Journal of International Law* 84 (1990): 44–103; Dinstein, *supra* note 1 at 31–49; O. Ben-Naftali, A.M. Gross & K. Michaeli", 'Illegal Occupation: Framing the Occupied Palestinian Territory', *Berkeley Journal of International Law* 23 (2005): 551–614.

belligerent occupation'. Some scholars went to argue that the passage of long time on military occupation would split such a military presence from the corpus on military occupation and transform it into 'illegal occupation'. The logic behind this argument is that temporariness is a pillar of military occupation and elongation would put it in a different category.[4]

This argument, however, may not be consistent with the bulk of the position on military occupation, especially, the position of authoritative bodies such as the Security Council of the UN and the International Court of Justice. These see the legal corpus on military occupation is still applicable regardless of the duration of time.[5] This article, therefore, examines this aspect of military occupation in different sections which will, altogether, cover the subject-matter of this research and propose the best result. To this end, the article is divided into three main sections with additional subsections. The first highlights the authorities of an occupying power during military occupation; the second section deals with the complexity of defining a prolonged military occupation. The third section handles the positions on the authorities in times of prolonged military occupation including the position of the International Court of Justice on the Wall Case, the position of the Expert Meeting on Occupation and Other forms of Administration of Foreign Territories, and the position of the Israeli High Court of Justice.

1.1 *Research Problem*

This research paper is centered on two major *contradicting* positions concerning the authorities vested in the occupying power during prolonged military occupation. The first is adopted by, *inter alia*, the Expert Meeting on Occupation and Other Forms of Administration of Foreign Territories 2012 (hereinafter, the Expert Meeting)[6] which maintains that long lasting military occupation is not a justification for the occupying power to depart from the legal corpus on military occupation. Yet, according to the Experts, some exceptions may be carefully reached on the condition that they are to the benefit of the occupied population. The second position is adopted by the Israeli High Court of Justice (hereinafter, IHCJ) and maintains that a prolonged belligerent occupation would constitute leeway for the occupying power to depart

4 *Ibid.*

5 *See, infra,* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. (July 9), available online at https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

6 T. Ferraro, 'Expert Meeting: Occupation and other Forms of Administration of Foreign Territory', *ICRC* (2012), available online at https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf.

from certain duties originally designated, according to the Court, to short-lived occupations.

1.2 *Significance of the Research*

The significance of this research stems from the ongoing Israeli practices in the OPTs and aims, *inter alia,* at the Israeli confiscation of privately-owned Palestinian land on the pretext of building housing colonies (referred to by Israel as settlement projects) which, in many times, come under the guise of their right under the rules of military occupation. Furthermore, the research contributes to disseminate knowledge in this grey area of international law which has not been sufficiently examined despite the fact that it touches upon a 'sacred' right of national and international law, namely, the right to ownership.

1.3 *Research Questions*

This research has one prime question to answer and that is: what is the latitude of authorities given to the occupying power because of the protraction of the state of military occupation? In other words, what is the effect of time passage on the authorities given to the occupying power during the state of military occupation?

1.4 *The 'Original' Authorities of the Occupying Power*

The discussion on the authorities vested in an occupying power during military occupation departs from Article 43 of the Hague Regulations 1907. This is because Article 43 is contemplated as the 'mini-constitution'[7] of the occupying power when interacting with the occupied territory, including its population. This is regardless of whether the occupation is classified as short-term or prolonged. Therefore, the present section will handle these 'original' authorities according to Article 43 before an extensive examination to the extent to which these authorities are affected and in which direction when an occupation is classified as prolonged one.

Article 43 reads 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[8]

7 L. Cameron & V. Chetail, *Privatizing War: Private Military and Security Companies Under Public International Law 237* (Cambridge: Cambridge University Press, 2013); E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 1993).

8 First Hague, *supra* note 2, Article 43.

At first glance, the Article seems to adopt a restrictive approach *vis-à-vis* the authorities given to the occupying power. The pure textual reading of the Article shows a positive duty on the occupying forces 'to restore and ensure … public order and safety' of the occupied during the entirety of its effective control. Only in one case, according to the Article, the occupying power may depart from this strict positive duty, that is when it 'absolutely prevented' from respecting the laws in force.

Though the term 'absolutely prevented' should not be interpreted literally (as will be explained later); it shows a tendency of the drafters that measures taken by the occupying power (especially in the environment of an occupied territory) should be very limited. This tendency can be further evidenced by referring to Article 3 of the Brussels Declaration of 1874 which constitutes the historical origin of Article 43 of The Hague Regulations. Article 3 of the Brussels Declaration provides that the occupying forces shall 'maintain the laws which were in force in the country in the time of peace, and shall not modify, suspend or replace them *unless necessary* [Emphasis Added]'.[9] The reading of this part of Article 3 and Article 43 show the restrictive approach by the passage of time *vis-à-vis* the authority of the occupying power during military occupation. This is evident in the evolution of the terminology used between the two articles, i.e., first 'unless necessary' of Brussels and then 'absolutely prevented' of that of The Hague.[10]

Apart from the historical aspect of Article 43 of The Hague Regulations, two major questions related to the Article call for elaboration in relation to the

9 Project of an International Declaration concerning the Laws and Customs of War, Article 3, 27 August 1874.

10 One may explain the situation in light of Article 3 of the Brussels Declaration by referring to the occupation of Bulgarian territories by the Russians during 1877–1878. When the Russians troops stabilized the Bulgarian territories, they had to consider their rights, as an occupant, based on the Brussels Declaration. The Russians main concern related to the right of the occupant towards the re-structuring of the administrative system in light of Article 3 of the Brussels Declaration. The occupant, according to this Article, has to maintain this structure 'unless necessary'. In light of this term, it was easy for the Russians to advance many reasons justifying the necessity of restructuring the Bulgarian administrative system that existed prior to occupation. Ultimately, the Russians made a profound change in the Bulgarian administrative system, justified under Article 3 of the Brussels Declaration. Friedrich Martens, a diplomat and jurist in service of the Russian Empire, explained the legality behind such profound changes. According to him, the institutional and administrative change was necessary because it had been impossible to restore the local regime under which the Bulgarians had suffered for centuries. He argued that the ultimate aim of the Brussels Declaration is the benefit of the local populations. Therefore, the Declaration is irrelevant when its application would only harm those populations. Fedor De Martens, *Traité De Droit International* 3 (Paris: Chevalier-Marescq, 1877), 257.

authority of the occupying power during a state of military occupation. First, what is the meaning of the term 'public order and safety' used in the Article or, alternatively what constitutes public order? Second, based on the assumption that the term 'absolutely prevented' never interpreted literally, how the term should be perceived?[11] Based on the importance of these questions to this research, they will be examined in two separate parts.

2 Public Order and Safety: the Meaning

As far as the meaning of 'public order and safety' of Article 43 is concerned, a reference should be made to the French (authentic) text of Article 43. In this version of the treaty, the term that was coined is '*l'ordre et la vie publics*'.[12] This French term is perceived as being broader than that of the English version 'public order and safety' in that it covers the entire civil life of the occupied population.[13] Therefore, based on this interpretation, an occupying power could handle several domains in the occupied territory under the title of public order. This position was further clarified and then adopted by case law. For instance, the Court of Criminal Appeal established in Germany held that the term "public order" of Article 43 encompasses 'the whole social, commercial and economic life of the community'.[14] This position was further established by the Israeli High Court of Justice when the Court held that the term 'public order' of Article 43 includes 'economic, social, educational, hygienic, medical, traffic and similar matters that are connected with life in a modern society'.[15]

11 E. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, DC: Carnegie Endowment for International Peace, 1942); Y. Dinstein, *Legislation Under Article 43 Of The Hague Regulations: Belligerent Occupation and Peacebuilding*. Occasional Paper Series 1 (Cambridge, MA: Program on Humanitarian Policy and Conflict Research, 2004).

12 The French version of the Article reads: « L'autorité du pouvoir legal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'ilest possible, l'ordre et la vie publics en respectant, saufe mpêchement absolu, les lois envigueurdans le pays. » Convention (II) Concernant Les Lois EtCoutumes De La Guerre Sur Terre Et Son Annexe: Règlement Concernant Les Lois Et Coutumes De La Guerre Sur Terre, La Haye, 1907, Regalement 43.

13 M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by the Occupying Power', *European Journal of International Law* 16 (2005): 661–694.

14 Court of Criminal Appeal established at the British Zone of Control in Germany, '*Grahame v. The Director of Prosecutions*, 26 July 1947', *Annual Digest and Reports of Public International Law Cases* 14 (1951): 228–233.

15 IHCJ: 393/82, Jamait Askan *et al. V. IDF Commander of Judea and Samaria et al.*, p.19, para.18, 1982.

Besides, both courts justify such a broad perception of the term on the needs of the occupied which neither existed nor were envisioned at the time the Article was drafted. This appears most vividly in the term 'modern society' used by the IHCJ.

2.1 *Absolutely Prevented: the Meaning*

As far as the meaning of the term 'absolutely prevented' of Article 43 is concerned, reference has to be made to Article 64 of the Fourth Geneva Convention. In particular, the term should be read in conjunction with paragraph 2 of this Article based on the inextricable tie between Article 43 of the Hague Regulations and that of Article 64 of the Fourth Geneva Convention.[16] Based on the submission, Article 64 constitutes the only exception and the outmost boundaries of the term 'absolutely prevented' of Article 43.[17] Paragraph 2 of Article 64 reads '[t]he Occupying Power may … subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments of lines of communication used by them'.[18] This paragraph introduces a three-dimensional exception that would necessitate the introduction of prescriptions by the occupying forces. The first dimension is associated with the ability of the occupying forces to discharge its duties under the Fourth Geneva Convention. It is to be noted that this dimension includes not only the duties of the occupying power under the Fourth Geneva Convention but also extends to other principles within the corpus of international law.[19] In this context, the occupying forces may, for example, introduce or repeal rules in the context of protecting human rights

16 On this tie between the two articles, *see* J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958); Sassòli, *supra* note 14 at 669–671; V. Koutrouils, 'The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time', *International Review of the Red Cross* 94 (2012): 165–205; Dinstein, *supra* note 12 at 5–7.

17 E.H. Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations', 54 *Yale Law Journal* 54 (1944): 393–416; Sassòli, *supra* note 14 at 669–671; Koutrouils, *supra* note 17 at 178.

18 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949, Article 64, para. 2.

19 Dinstein, *supra* note 12 at 5–7.

within the occupied territories.[20] The second dimension relates to the authority of the occupying power to generate prescriptions geared towards an orderly government of the occupied territory and population. In fact, this dimension of necessity is looked at as open-ended: meaning that no inclusive definition can be reached on the exact borders of 'the orderly government' of Article 64.[21]

Therefore, based on this reading, the occupying power may feel free in terms of introducing new legislation under this term. However, one must not forget that this dimension of 'orderly government' and the entirety of Article 64 of the Fourth Geneva Convention constitute an exception to the principles embodied in Article 43. The latter Article emphasizes that public order and safety must be a paramount purpose of any measure taken by the occupier (including the introduction of prescriptions). Therefore, what needs to be done to limit the dimension of 'orderly government' is grafting this term of Article 64 onto the term 'public order and safety' embodied in Article 43.

The third dimension of necessity relates to the ability of the occupying forces to create prescriptions intended for the security of its forces in the occupied territory. This dimension is understood as to make the occupying power able to pass prescriptions that prevent direct threats to its armed forces, its administrative staff, and the belongings of the occupying power within the occupied territory.[22]

Thus far, it is becoming clear that the contours of the authority of the occupying power are restricted in Article 43 of The Hague Regulations and paragraph 2 of Article 64 of the Fourth Geneva Convention. Still, one prime question associated with these two articles that has to be considered is: to what extent are these exceptions affected by prolonged military occupation? In other words, should these authorities be broadened or otherwise restricted as the state of military occupation goes on? The answer to this question is approached in the following section.

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20 On this particular issue, a reference can be made to the term 'transformative occupation' where occupying powers assume larger margin of authority when they are replacing, e.g., a dictatorship.. On this, *see* A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', *American Journal of International Law* 100 (2006): 580–622; N. Bhuta, 'The Antinomies of Transformative Occupation', *European Journal of International Law* 16 (2005): 721–.

21 Dinstein, *supra* note 12 at 6.

22 *Ibid*.

3 The Problem of Defining a Prolonged Military Occupation

The discussion on the concept 'prolonged military occupation' in terms of its meaning and its legal environment concerning the timeframe requires an examination of the concept 'military occupation' itself.

Two main legal provisions could be brought to the discussion concerning the demarcation of the timeframe of the state of military occupation. First, Article 42 of the 1907 Hague Regulations, and second, Article 6 of the Fourth Geneva Convention 1949. Article 42 of the 1907 Hague Regulations reads: '[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'.[23] A mere textual reading of this Article does not support the presence of different categories of military occupation. The Article, which is the basis of other subsequent articles concerning the right and duties of the occupying force relied on an objective criterion in order to activate the system of military occupation, *i.e.*, the effective control of the hostile army over a foreign territory.

At the same time, Article 42 has not placed any time limit on this situation. This could be interpreted as: "military occupation could, from a legal standing, last for an indefinite period of time. As Meir Shamger puts it, '[a]ccording to international law the exercise of the right of military administration over the territory and its inhabitants had no time limit, because it reflects a factual situation and pending an alternative political or military solution. This system of government, could from a legal point of view, continue indefinitely'.[24] Article 6 of the Fourth Geneva Convention reads in part: '…[i]n the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.'[25] This Article comes in the section of the Convention

23 First Hague, *supra* note 2 at Article 6.

24 M. Shamgar (ed.), 'Legal Concepts and Problems of the Israeli Military Government — The Initial Stage', in *Military Government In The Territories Administered By Israel* (Jerusalem: The Harry Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1982), 13–60.

25 The Article reads in full: 'The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall

designated to the beginning and end of application of the convention including the case of military occupation. Though the Article has made reference to the timeframe of its application, *i.e.*, *one year after the general close of military operations,* which could mislead some to believe in the existence of another category of military occupation called 'prolonged military occupation'; it, in reality, does support the nonexistence of such a category. Yet, the Article does not alter the occupying power's duties under the regime of military occupation.

Two reasons have led to this conclusion. First, the Article itself has conditioned the suspension of *some* of its provisions after the expiration of one year from the general close of military operations, something that is inconceivable from a practical point of view during military control. A case in point is the Israeli military control over the OPTs. The second reason is no less important since none of the exempted articles are relevant to the responsibilities of the occupying power towards the occupied territories and its inhabitants. On the contrary, the *travaux préparatoires* of this Article shows the tendency in the drafters' minds to put limitations on the occupying power for the benefit of the civilian population. As Jean Pictet put it, the one year clause came out of the belief that 'if the occupying power is victorious, the occupation may last more than a year, but the hostilities have ceased, stringent measures against the civilian population will no longer be justified'.[26]

Therefore, the Article was designed to counter any oppressive measures taken by the occupying power in 'normal' time after the close of hostilities. This is important knowing that oppressive measures can also be taken by an occupying power during 'normal' times.[27] One may add the logic behind the state of military occupation, that is, the non-annexationist approach of international law. This approach is based on the conservation of sovereignty in the face of, *inter alia,* foreign military control which should not be affected by the passage of time. Annexation, according to this approach, is tantamount to aggression

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cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143. Protected persons whose release, repatriation or reestablishment may take place after such dates shall meanwhile continue to benefit by the present Convention'. IV Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War, Article 6 (12 August 1949).

26 Pictet, *supra* note 16.

27 *See* N. Sultany, 'Roundtable on Occupation Law: Part of the Conflict or Solution?', *Jadaliyya* (22 September 2011), available online at https://www.jadaliyya.com/Details/24424.

and should be prohibited.[28] Therefore, it is very difficult to present a pure legal definition on what constitutes a state of 'prolonged military occupation'. The difficulty stems from the fact that the formal sources of this branch of humanitarian law do not provide such a definition, or at least, value or devalue the passage of time on the foreign military occupation. This difficulty in defining or at least accommodating protracted occupation in the corpus of occupation law has pushed some to believe that this phenomenon shifts the military presence in a foreign territory to become illegal occupation. Orna Ben-Naftali, who has made this proposition, believed that one pillar of occupation is its temporary nature, 'as distinct from indefinite'. Accordingly, indefinite occupation loses one intrinsic legal qualification and would become illegal in its entirety.[29]

Nevertheless, the term 'prolonged military occupation' itself has been extensively used by international organizations, courts, and legal scholars. The use of the term by these authorities was sometimes reflecting on situations wherein the period of the military control over a foreign territory becomes exceptional and there is an imminent need to end it. In other cases, the term was advanced to alter the rights and duties of the occupying power. An example of the former is the position of the United Nations Security Council which has — as early as 1982 — referred twice to the Israeli military control over the OPTS as a prolonged military occupation (Security Council Res. 471 and 476).[30] In these resolutions, the Security Council recalled the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and in particular article 27, which reads, '[p]rotected persons are entitled, in all circumstances, to respect for their persons … They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof …'.[31] It is, therefore, evident that the use of the term was meant to reaffirm the application of the legal corpus of the IHL. An example of the latter, is the IHCJ's position on the nature of the Israeli military presence in the OPTS as prolonged and therefore justifying leeway for Israeli military authorities to deviate from some of its obligations.[32] Between these two opposing positions,

28 International Committee of the Red Cross, *Annexation* (*prohibition of*), *International Humanitarian Law Databases*, available online at https://casebook.icrc.org/glossary/annexation-prohibition.

29 Naftali, *supra* note 3.

30 UNSC Res. 471, 5 June 1980, p.2. Par.6. The same term was used by the Council in UNSC Res. 476, 30 June 1980, p. 1, para. 1.

31 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Article 27 (1949).

32 In the context of introducing new taxes the Court referred to this concept in HCJ: 69/81, *Bassil Abu Aita v. The Regional commander of Judea and Samaria*, (1983); in the context of a housing project the Court referred to the concept in HCJ: 393/82, *Jamait Askan et al. V.*

some distinguished scholars have made their contributions to examine this phenomenon. Adam Roberts, for example, has supported the presence of a distinct category named prolonged occupation which is equivalent to an occupation that 'lasts more than 5 years and extends into a period when hostilities are sharply reduced …'[33] It is important to note that Robert's hypothesis was based on interpreting the term 'general closing of hostilities' of Article 6 of the Fourth Geneva Convention as a sharp reduce of hostilities. His thought is purposed to solve the dilemma that the 'general close of hostilities' could not be realisticlly envisioned. Alternatively, Yoram Dinstein concedes to the existence of a state of prolonged occupation but only when it endures for decades rather than years.[34]

3.1 *Authorities in Contexts of Prolonged Military Occupation*

Thus far, the analyses offered regarding the main powers of the occupying forces are grounded in Articles 43 of The Hague Regulations and 64 of the Fourth Geneva Convention. Textual reading of the related provisions of both conventions do not offer direct answers to one supreme question, i.e., what are the limits of the authorities when the military occupation becomes protracted.[35] Despite this, reference should be made to other articles of the same conventions or articles of other related conventions which have actively, yet implicitly, dealt with this question. Specifically, the position of The Expert Meeting on Occupation and Other Forms of Administration of Foreign Territories 2012, the position of the International Court of Justice, and the scholarly work in the field of military occupation.

An important text relevant to the current discussion is Article 48 of the 1907 Hague Regulations which could accommodate the situation of prolonged occupation and give a sense of the Drafter's position regarding prolonged military occupation. The Article reads '[i]f, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and

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IDF *Commander of Judea and Samaria et al.*, (1982). For a deep understanding on the basis on which the Court deal with the issue of occupation over the OPTs, *see* D. Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel', *International Review of the Red Cross* 94 (2012): 207–236.

33 Roberts, *supra* note 3 at 47.

34 Dinstein, *supra* note 12 at 116.

35 It is to be noted that other conventions and articles thereof have dealt with the state of military occupation but never mentioned nor envisioned the category of prolonged occupation. Examples are The 1954 Hague Cultural Property Convention and the 1977 Geneva Protocol I.

incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound'.[36] A careful reading of this Article would support the conclusion that an occupant has the power to increase the taxes in an occupied territory in times of both short or long-term occupations. Yet, this increase of taxes is limited to the extent that it reflects the need for administering the occupied territory. Therefore, there is room for power to increase taxes, according to this Article, for prolonged military occupation on the condition, among other cases, such an increase would help in improving the economic situation in an occupied territory. By the same token, any increase of taxes outside the need of the economic life of the occupied conflicts with the provisions of this Article.[37]

The same line of thinking had been introduced as early as 1942 by Ernst Feilchenfeld who wrote, commenting on the Article, '[t]he provision [of Article 48] would not seem to exclude, as has been asserted, taxation increases, particularly such changes as have been made desirable through war conditions or, in the case of an *extended occupation*, general changes in economic conditions' (emphasis added).[38] Furthermore, the Article has put on the shoulders of the occupant a duty in times of a prolonged occupation to introduce changes intended for the benefit of the occupied. Another important conclusion is that this legal corpus on military occupation would still accommodate circumstances arising out of the prolongation of the status of military occupation. This conclusion conforms with the position which had been taken by the International Court of Justice in its Advisory Opinion in a Namibian Case when the Court insisted on the 'applicability of international law rules even though this occupation was seen as being marked by several exceptional features'.[39]

The International Humanitarian Law Research Initiative adopted the same reasoning on the Coalition occupation of Iraq regarding the Iraqi oil wells. It stated '[i]f Iraqi oil wells were government owned, the U.S. may administer them and sell the oil … not only for the benefits of the local population but

36 First Hague, *supra* note 2 at Article 48.

37 On profitable occupation see, Israeli Agritech Profits from Military Occupation, *Electronic Intifada*, available online at https://electronicintifada.net/blogs/maureen-clare-murphy/israeli-agritech-profits-military-occupation.

38 Feilchenfeld, *supra* note 12 at 62.

39 ICJ, Legal Consequences for States of The Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1970 ICJ Rep. at 55 (27 October).

also, similar to levies, to cover the cost of the occupation'[40] One may conclude that the approach toward the resources of the occupied territory in both short and long-lived military occupations is still the same; requiring the occupying power to use the resources limited to that which is required to keep up with a healthy economic situation across the occupied territory.

3.2 *The Position of the ICJ in the Wall Case on Prolonged Occupation*

The International Court of Justice has to confronted different questions and given answers in relation to military occupations. Among these was the decision of the Court in aNamibia Case where the Court insisted on the applicability of international law on occupations regardless of any special feature.[41] The major focus in this section will, nevertheless, be on the Court's opinion in connection with the Israeli occupation on the OPTs in the Wall Case.[42] In this case, the Court — in light of General Assembly Resolution ES-10/14, adopted on 8 December 2003 — had to answer the legal consequences of constructing a wall, built by Israel as an occupying power in the occupied Palestinian Territory, including in and around East Jerusalem. The Court had to give its opinion in light of international law, and, more specifically, in light of the legal corpus of human rights and humanitarian law.[43] Before deciding on the question before it, the Court established the legal premise on which its opinion should be built. *I.e.*, the Court had to decide on the applicable law which governed the relationship between Israel and Palestinian. In this regard, the Court recalled Article 2 (4) of the United Nations Charter and General Assembly Resolution 2625 (XXV) which together prohibit the threat or use of force and also any territorial acquisition as a result of this action.[44] In connection with the corpus of humanitarian law, the Court found that the Fourth Geneva Convention of 1949 and the Hague Regulations of 1907 are both applicable to the case before it. This conclusion of the Court was consistent with the conclusion which had been drawn in the 1970 Namibia case. When it came to the Hague Regulations, the Court based itself on the customary nature of these regulations which means its applicability to both signatories and non-signatory states.

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40 The International Humanitarian Law Research Initiative, *Military occupation of Iraq: 1. Application of IHL and the maintenance of law and order,* Harvard Program on Humanitarian Policy and Conflict Research, 2003.

41 *See* ICJ, *supra* note 40.

42 ICJ, *supra* note 5.

43 Including the Fourth Geneva Convention of 1949, the Hague Regulations 1907, and relevant Security Council and General Assembly resolutions.

44 ICJ, *supra* note 5.

Coming to the main issue before the Court, *i.e.*, the legal consequences of building the Wall, the Court decided that such measure by Israel conflicts with the above mentioned rules of international law. The logic of the Court rested on the temporary nature of the occupation and the non-annexationist approach as a result of military occupation based on Article 2(4) of the Charter and General Assembly Resolution 2625 (XXV). Based on this, the Court found that the Wall would, due to its rout, confiscate a huge portion of the occupied territory permanently and would create in the words of the Court 'fait accompli' on the ground which could lead to *de facto* annexation, something that conflicts with the temporary nature of occupation.[45] The Court also focused on the demographic changes as a result of building this wall. On the other side of the aisle, the Court discussed the impact of building the wall on human rights and decided that building the wall would impede, *inter alia*, the right to movement, work, health, and education guaranteed to the population by both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Court did not address the issue of prolonged occupation directly, however, it has drawn an outside boundary to the occupying power's authority during belligerent occupation. The Court has made it clear that any permanent changes in an occupied territory would conflict the legal corpus on belligerent occupation. The Court went further to decide that such changes would be still illegal even in the case of military necessity.[46]

3.3 *The Position of the Expert Meeting on Prolonged Occupation*

Another important reference in the context of military occupation is the document produced by the International Committee of the Red Cross in 2012 titled "Expert Meeting: Occupation and Other forms of Administration of Foreign Territories"[47] This document, which came to rethink new questions, horizons, and challenges arising out of military presences classified as military occupations such as transformative and prolonged military occupations, contributed significant legal analyses and interpretations to some provisions. The report tried to examine the adequacy of the legal corpus on occupation law to the new realities, among them, prolonged occupation. The Experts in this document made two major conclusions regarding this point. First, they admitted that 'nothing under IHL would prevent occupying powers from embarking on

45 *Ibid.*
46 *Ibid.*
47 Ferraro, *supra* note 6.

long-term occupation'.[48] This conclusion re-emphases the position of the conventions and customary law concerning military occupation explained earlier. In that sense, it reemphasizes the nature of military occupation of a foreign territory as it is a temporary state of affairs, yet, not limited in time which results in an open-ended timeframe. However, a line separating between the authorities of the occupying power and those vested in the sovereign should be kept. The second and *most important* conclusion made by the Experts is related to the authorities when military occupation is prolonged. In an answer, the Experts maintained that the '[d]ecisions made by the occupying power should always respect the principles contained in the Hague Regulations and the Fourth Geneva Convention, which are flexible enough to accommodate *most of the needs* that arise during prolonged occupation' (emphasis added).[49] This position was based on the dynamic nature of much of the legal corpus on military occupation which should be, according to the Experts, consistent with the ultimate purpose of this body of law, i.e., protecting the most fundamental interests of the occupied population during the state of military occupation. Also, this statement is consistent with the position of the ICJ stated earlier in its advisory opinions on the Namibia case and the Wall case. What is of a special importance regarding this position is the explicit connection between the increase in power to the occupant and the needs of the occupied population.

In other words, the growth of authorities, according to the Experts, should be necessitated by the appearance of new horizons connected directly with the occupied community's needs. However, in all circumstances, these powers must not touch upon long lasting irrevocable changes in the occupied territory. This could be matched, again, with the position of the ICJ and the scholarly work on the authorities during military occupation. As long as scholarly work is concerned in this regard, the conclusion of the Experts has been consistent with Ernst Feilchenfeld's position on Article 48 of the Hague Regulations stated earlier.[50] This conclusion affirms Adam Roberts' thoughts, who supported the adoption of prolonged occupation as a distinct category from military occupation which 'if not adapted to special problems arising in a prolonged occupation, could be used or abused in such way as to contribute to leaving a society politically and economically underdeveloped'.[51] Roberts' description of the political and economic dimensions would signal the exclusion of certain

48 *Ibid.*, at 13.
49 *Ibid.*
50 Feilchenfeld, *supra* note at 63.
51 Roberts, *supra* note 3 at 52.

domains, altering them would constitute irrevocable change such as demographic and borders related changes.

At the domestic level, the time element *vis-à-vis* belligerent occupation has been handled several times by the Israeli High Court of Justice in relation to actions taken by the different military commanders in the occupied Palestinian territories.[52] The Court, which did not contest the applicability of The Hague Regulations, has in these cases adopted what is termed a non-restrictive approach, meaning that the occupier in relation to the occupied has a rather wider authority as the occupation goes on. The Court based its decision on the Laissez-faire policy thinking necessitated, according to the Court, by the 'demands of the modern times'. Though the approach of the Court is misaligned, its position on this issue is of special value and has to be considered in the context of studies on prolonged belligerent occupation. This is based on the fact that the Court is part of the case law that should be considered.

3.4 *The Position of the Israeli High Court of Justice on Prolonged Belligerent Occupation*

The position of the Israeli High Court of Justice concerning the effect of time on military occupation can be best illustrated via linchpin judgments delivered by the Court.

One landmark case is the Christian Society case in 1971.[53] The background of this case is that hospital workers of the Christian Society for Holy Places, which runs several institutions in the city of Bethlehem (part of the occupied West Bank), went on a labour strike. As a result of the strike, the hospital services for the public were interrupted. In response, the Officer in Charge of the Labour Disputes (representing the Israeli Military Government) issued a military order by which he decided that the dispute between the Society and the workers must be solved in light of the Jordanian Labour Law of 1960.[54] Article 95 of said law provides that at a certain stage of a given labour dispute, a process of arbitration should take place and the parties to the dispute must obey the arbitrators' decision. The Article supposes, however, the establishment of

52 HCJ: 69/81, *Bassil Abu Aita v. The Regional commander of Judea and Samaria* (1983); HCJ: 393/82, *Jamait Askan et al. V. IDF Commander of Judea and Samaria et al.*, (1982); HCJ 33/71, *The Christian Society for the Sacred Places v. Minister of Defence* (1971).

53 As will be seen shortly, the Court considered this period enough to classify a state of belligerent occupation a prolonged one. Nevertheless, this assertion by the Court is consistent with the already established definitions of prolonged belligerent occupation introduced by legal scholarship.

54 Worth noting that the applicable law was the one concerning labor disputes prior to the start of occupation, 1967.

a permanent association consisting of employers and employees to perform the process of arbitration. Based on the fact that such an association had not been established in Jordan yet, the Israeli regional commander issued an order which ultimately altered the said Jordanian law whereby *ad hoc* arbitrators could be appointed directly by the parties to a given dispute or by the Officer in Charge of the military authority. This order was challenged before the Court based on the arguments that the military commander does not have such a wide authority to change the Jordanian legislation by the meaning of Article 43 of The Hague Regulations. At the end, the Court approved the measures taken by the regional commander when it decided that the measures are consistent with Article 43 taking into account the new circumstances that were never envisioned by that Article. To that effect, the Court asserted that '[l]ife does not stand still, and no administration, whether an occupation administration or another, can fulfill its duties with respect to the population if it refrains from adapting the legal situation to the exigencies of modern times'.[55]

What is of a special importance in this case is not the way the Court handled the subject-matter of the dispute before it but rather the larger logic of the Court towards the authorities vested in the occupier as occupation goes on.[56] This logic represents an unequivocal position of the Court assuming that: once a state of military occupation endures for longer, the level of authorities attributed to the occupier increases simultaneously. This is based, according to the Court, on the logic that 'life does not stand still'. Basically, this assumption vests the Israeli military authorities in the Israeli Occupied West Bank with greater power to, *inter alia*, legislate in order to fulfill new demands of the 'modern times'. To the researcher's mind, this judgment of the Court went too far in recognizing 'unlimited authority' or at least without defining the outer border to be vested in the military commander merely because the state of belligerent occupation has endured for long time. To that effect, the judgment is virtually contradicting the direct text as well though the Court had built its entire position on the premises of that Article.

As far as the textual reading is concerned, the Court missed the proper reading of the term 'absolutely prevented' introduced by the Article. As explained earlier, though the term cannot be interpreted literally, its outer frontiers must be learned in conjunction with paragraph 2 of Article 64 of the Fourth Geneva Convention. In particular, the exception relates to the proper administration of the occupied territory. That is to say, the reading of Article 43 and paragraph 2

55 HCJ 33/71, *The Christian Society for the Sacred Places v. Minister of Defence* (1971).

56 It is of special value to note that this judgment was passed six years after the beginning of the Israeli occupation on the then-termed Occupied Palestinian Territories.

of Article 64 would permit the occupier to pass or change the laws when this change is necessitated by the proper administration of the occupied territory. Therefore, the question hinges on the following: to what extent the changes made to the Jordanian Labour Law of 1960 constitute a 'state of necessity' according to that meaning? Or, alternatively, what measures could have been taken by the military commander other than changing the said law that would serve the same purpose? In my opinion, the kind of necessity as implied by the two Articles did not exist in the Christian Society Case. The Officer in Charge could have, for example, ordered both parties to form an arbitration panel to handle their dispute without changing the entire 'logic' of the law issued by the sovereign who better knows the needs of the society. In this case, the Officer exceeded his powers under Article 43 and that of the 'necessity' of paragraph 2 Article 64 which both from the outer border of the occupier even in the context of prolonged military occupation scenarios.

Furthermore, the judgment of the Court contradicts one of the strong assumptions made by Article 43 that the entire law of belligerent occupation is to prevent the occupier from passing legislation which might have permanent or otherwise long term effects in the occupied territory. This is especially true knowing that the corpus body of law concerning belligerent occupation is built on the assumption that occupation of a foreign territory is temporary in nature.[57] To this end, Article 43 of the Hague Regulations intended to create a line that separated the authority of the occupier whose presence is temporary (though not defined), and the authorities vested in the real sovereign. Based on this assumption, the occupier must keep a distance from interfering in issues that might have a long lasting effect on the life of the occupied based on the premise that such measures are preserved for the sovereign who would better reflect the needs of the occupied than that of the occupier. Apparently, the Court did not follow this line of thinking when it 'equalized' between the duty of the normal administrator (the sovereign) and that of the occupier.

Another landmark case that came before the Israeli High Court of Justice is *Abu Aita* Case.[58] This case was brought before the Court by a group of Palestinian traders to petition the introduction of new legislations by the Israeli military commander imposing on Palestinians excise duty to be paid by local manufacturers in the occupied West Bank and on goods and services in the Gaza

57 G. von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (1957); Roberts, *supra* note 3 at 44–103; E. Benvenisti, *The International Law of Occupation*, 2nd edn. (Princeton, NJ: Princeton University Press, 2004), 144.

58 HCJ: 69/81, *Bassil Abu Aita v. The Regional commander of Judea and Samaria* (1983).

Strip. The basis of the petition is that such measures contradict the essence of Article 43 which regulates the powers of the occupier and on Articles 48 and 49 which are designed to put parameters on the introduction of taxes in the occupied area.[59] At the end, the Court approved the new legislations basing its decision on, *inter alia*, the prolonged nature of the Israeli military presence in the OPTs. The Court found that a prolonged military occupation would constitute a leeway to depart from certain duties which are applicable, according to the Court, in short-lived occupations. In this context, the Court maintained that 'the duration of the military government is an extremely important element, in weighing the needs of the military, in weighing the needs of the territory, and in maintaining the balance between them.' In another place, the Court held that '[a]ll powers of government, legislation or administration respecting the [r]egion or its residents were vested in the Regional Commander of the Israel Defence Forces entitling him to exercise or to appoint any other person to exercise them or act on his behalf'.[60] Worth noting, this ruling of the Court is to somewhat reiterate the conclusion made in the Christian Society Case and therefore the same reasons that were put forward to form a critique to that decision apply here too.[61] In addition, some special critique to the Court's approach in this case should also be emphasized.

The Court in this case based its decision, mainly, on Article 48 of the Hague Regulations concerning the parameters on the introduction of taxes in occupied territories which reads '[I]f, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound'.[62] The Article prohibits the introduction of new taxes of any form in an occupied territory, and even collected taxes based on previous legislation should be used solely for the proper administration of the occupied area. What supports this reading is the connection that should be made between Article 48 and 43 of the Hague Regulations. The latter Article introduced the term 'absolutely prevented' which should be incorporated with regime of military occupation. Importantly, the Court in this judgment did agree with this conclusion when it maintained that 'such taxes in the occupied

59 For more details about the background of the case *See* https://versa.cardozo.yu.edu/opinions/aita-v-regional-commander-judea-and-samaria.

60 *See* HCJ, *supra* note 59.

61 Look at the critique made by the researcher to the Court's decision in the Christian Society Case in this part of the research.

62 First Hague, *supra* note 2 at Article 48.

territories should not in any way be diverted to the treasury of the State in whose name [the occupying forces] act'.[63] At the same time, the Court did agree with the respondent in this case (the military commander) who argued that such measures were necessitated by the economic integration between Israel (which had introduced similar legislations) and the occupied region.[64]

With all due respect, the Court did not consider that such an economic integration between the occupier and the occupied region should be prohibited in the first place. This conclusion is based on the logic of the legal corpus of military occupation where the occupier has to distance its actions from the *firewall* separating between its actions and any sovereign practices. Surprisingly, the Court itself believed in this when, in connection with the nature of the military presence in the OPT, asserted that '[t]he authority of such government is temporary and it shall continue in power as long as it is effective'.[65] In another part of the Judgment, the Court asserted that the Hague Provisions fall short of answering some questions on issues facing long term occupation. This is evident when the Court maintained '[t]his means that a lengthy military occupation, which would be required to find solutions for a wide range of day-to-day problems, similar to those an ordinary government would encounter, is likely not to find answers to its questions in the provisions of the Regulations'.[66] In this regard, the Court grappled with the interplay between the different Articles of the Hague Provisions, the Hague Regulations, and Article 64 of the Fourth Geneva Convention which introduced the three dimensional exceptions on the introduction of new legislation which have been seen as a gap filler of any *non liquet* from the Hague.

4 Concluding Remarks

It has been established that the occupier's authorities *vis-à-vis* the occupied stems, mainly, from Article 43 of The Hague Regulations. The Article has opted for some very strong expressions of intent in order to restrict the authority of the occupier to the maximum possible extent. It maintained that an occupier might introduce pieces of legislation only when it becomes impossible for him to cope with the legislation issued by the sovereign before the start of occupation. This approach of the Article intends to demonstrate two points; the first is

63 *See* HCJ, *supra* note 59.
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*

that belligerent occupation is a temporary state of affairs, and second, to draw a line distinguishing between the occupier's authority and that of the sovereign. In other words, the two premises of Article 43 are the provisional nature of the state of belligerent occupation and the non-annexationist principles of territories controlled as a result of wars. Regardless, given the fact that Article 43 is perceived as the mini constitution guiding the occupying power, it cannot be read alone. This is the moreso in cases where the period of the state of belligerent occupation endures for long time. In this case, the occupying power is confronted with real life situations that might exist outside the purview of Article 43. The 'exigencies of modern society' of the inhabitants under prolonged occupation is an example. The question then becomes, how would an occupier be able to respond to the needs of the occupied in light of the strong terms obliging him not to legislate during belligerent occupation? The answer to this question is not to depart from the conditions stipulated by Article 43, but rather, to establish a link between Article 43 of the Hague Regulations and 64 of the Fourth Geneva Convention. The latter article provides three dimensional exceptions within which an occupier might be legally entitled to alter the legal situation in order to, *inter alia*, approach an 'orderly government'. This exception, which might be vague enough, enables the occupier to respond to these demands in time of prolonged occupation. Nonetheless, the position of the Israeli High Court of Justice that the occupier should feel free in terms of legislation over the occupied is far from legality. That is based on the fact that even the exception of 'orderly government' must be read in conjunction with the limits of the term 'public order and safety' embodied in Article 43 of The Hague Regulations itself.