

**Expert Opinion on the Occupier's Legislative Power over an Occupied Territory
Under IHL in Light of Israel's On-going Occupation**

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RATIONALE AND SCOPE OF THE EXPERT OPINION

This Expert Opinion was requested by the Norwegian Refugee Council (NRC) as part of a series of initiatives this organization is organizing to reflect on the 50-year-long occupation of the Palestinian territory by Israel and its policy and legal implications. While such an exercise can be conducted against different set of norms of international law, this Expert Opinion is primarily based on international humanitarian law (IHL), and when relevant on other bodies of international law such as international human rights law (IHRL). In particular, within IHL it is mostly concerned with the specific web of obligations under the law of belligerent occupation in relation to the specific occupying power’s duty to respect the legislation of the occupied territory. The focus on Israel’s conduct in this regard requires delving into complex domestic regulatory frameworks. This being said the undersigned are not experts on Israeli military orders, on Jordanian Law, on British mandate law or on Ottoman law. As far as this opinion refers to such matters, notably Israeli military orders or pre-existing local laws, this is for the purpose of assessing their significance and value under IHL in general and whether Israel complied with its obligation to respect local legislation. References to relevant Israeli military orders and other legislation as well as local laws applicable in the occupied Palestinian territory (oPt) will be based on data and information obtained from sources identified in the footnotes.

The Israeli occupation of the West bank and East Jerusalem (this opinion does not cover the Gaza Strip) reaching the symbolic mark of 50 years gave rise to a renewed interest by scholars into not only assessing Israel’s conduct as an occupying power under the relevant IHL norms, but also reflecting on the nature of the occupation and its implications.² While this may be seen as a usual exercise for any landmark date of a continuous phenomenon, the undersigned wish to stress that this temporal dimension lies at the heart of this Expert Opinion for two main reasons.

First by its prolonged character the Israeli occupation challenges the main assumption underlying the law of belligerent occupation according to which in nature the

¹ The views expressed in this Expert Opinion are solely those of the authors and do not necessarily reflect those of the organizations and institutions the authors have worked for in the past or currently work for or of which they are part.

² See for example, *AJIL Unbound*, “Symposium on Revisiting Israel’s Settlements”, Vol. 111, 2017, available at:

<https://www.cambridge.org/core/journals/american-journal-of-international-law/volume/AB96AEDAFFEE503674B493BDBF8E5ACD>

occupation is meant to be transitional and temporary.³ Secondly, an occupation continuing over a long period of time impacts on the way the duties and obligations of the occupying power under IHL are considered and interpreted.⁴ The most acute example of that dimension is the central IHL norms addressed in this Expert Opinion, namely the obligation to restore and ensure public order, safety and civil life and the duty to respect local laws save certain exceptions. By definition the notions of “public order”, “safety”, and even more so “civil life” evolve as time elapses, when moving away from combat-like situations, with the necessity for the occupying power to adapt to the needs of the population under occupation and to do more than what those notions would require right after the beginning of the occupation. Similarly the limitations and exceptions to the legislative prerogatives of the occupying power may also be interpreted differently as time passes and facts on the ground change. This very logic can also serve as a reason for the occupying power to argue for the need to change local laws. As stressed by the Israeli Supreme Court sitting as the High Court of Justice (HCJ), “A prolonged military occupation brings in its wake social, economic and commercial changes which oblige [the occupier] to adapt the law to the changing needs of the population.”⁵ A prolonged occupation may thus influence the interpretation of the scope of legislative measures to be adopted by the occupying power to let the occupied country evolve. However such an approach must remain within the constraints contained in IHL norms.

In light of this, the undersigned are of the view that a fundamental distinction is to be made when considering a prolonged occupation, even though there may be links between those different aspects. The question of the duties and obligations of the occupying power under IHL and whether those were violated is different from the question of the nature of the occupation itself. The latter relates to whether a prolonged occupation constitutes a distinct legal category of occupation or whether such occupation as such qualifies as a violation of other norms of international law, for example if one considers the occupation or some of the measures adopted by the occupying power as a form of *de facto* annexation. This being said, certain legislative changes adopted by an occupying power, may not only constitute violations of the law of belligerent occupation, but also amount to a certain form of annexation, prohibited by the *jus ad bellum*, the international law on the use of force.

This Expert Opinion aims at providing an assessment of the changes to local legislation and institutions through the enactment of new laws introduced by Israel

³ See for example, L. Oppenheim, *International Law: A Treatise*, Vol. II: *Disputes, War and Neutrality*, (6th edition by H. Lauterpacht, 1944), pp. 432-434 and C. Greenwood, “The Administration of Occupied Territory in International Law”, in Playfair, Emma (ed.), *International Law and the Administration of Occupied Territories*, Oxford University Press, Oxford, 1992, p. 244.

⁴ See for example T. Ferraro, “The law of occupation and human rights law: some selected issues”, in *Research Handbook on Human Rights and Humanitarian Law*, R. Kolb and G. Gaggioli (ed.), 2013, Edward Elgar Publishing, p. 279. This author notes that “prolonged occupation clearly affects the implementation of the occupying power’s obligations under the law of occupation and calls for special measures”, concluding that “the occupation law should be interpreted with flexibility when an occupation endures”. See also on the need for the law of occupation to adapt to address special problems arising from a prolonged occupation, A. Roberts, “Prolonged military occupation: the Israeli-occupied territories since 1967”, *AJIL* 84, 1990, p. 52 and on the impact of prolonged occupation on the scope of the legislative power of the occupier, Y. Dinstein, “Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, *HPCR*, 2004, p. 14.

⁵ *Christian Society for the Holy Places v. Minister of Defense*, No. H.C. 337/71, 26(1) Piskei Din 574 (1972), as summarized in 2 *IsR. Y.B. HuR. RTs.* 354, 355 (1972).

over the past 50 years in light of the limits imposed by relevant norms of IHL on belligerent occupation. However the undersigned wish to highlight the following as to the scope of this analysis. First, it is not meant to present an exhaustive account of all the changes made by Israel in all affected fields. It focuses on identifying key significant legislative developments based on a combination of factors, notably the type of legislations adopted by Israel and their application *rationae materiae*, *rationae loci* and *rationae personae* as well as the type of local laws and institutions that have been modified and the field concerned. Furthermore, this Expert Opinion does not purposely address the sole cases that amount of violations of the law on belligerent occupation. This approach is justified out of scientific considerations of objectiveness.

Despite those methodological limitations, and although Israel modified local legislation in many cases without violating IHL obligations as an occupying power, the undersigned are of the view that over the past 50 years it has increasingly gone beyond the limitations and related justifications provided for under IHL. The undersigned further contend that there seems to be trend of a growing legislative expansion, illustrated by the nature and scope of application of the Israeli legislation reviewed in those landmark developments that range from legislating for prohibited purposes (settlements) and in the interest of Israel and Israelis (including settlers) rather than that of the local population to Israel abusing its personal jurisdiction over Israelis to govern life in Israeli settlements largely by legislation adopted by the Israeli parliament to most recently, the adoption by that Parliament of legislation openly territorially applicable in the oPt.

The Expert Opinion first provides an in-depth analysis of the meaning, scope and interplay of the relevant IHL norms on belligerent occupation related to the duties and obligations of the occupying power limiting changes to local laws and institutions. These are contained primarily in Article 43 of the Hague Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (1907 Hague Regulations) and in Article 64 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GCIV). The occupying power must respect, including but not only when restoring public order, the laws in force in the occupied territory. Exceptions are admitted where necessary for the security of the occupying power, for the respect of IHL, to maintain public order and civil life in the occupied territory and arguably where necessary to respect its human rights obligations for the benefit of the protected persons. Furthermore protected persons must not be deprived of their rights under GCIV as per Article 47. The Expert Opinion will then assess the most significant changes introduced by Israel in light of those IHL norms over the 50 years of occupation, considering in particular the different type of legislation adopted, from military orders that are the only type of legislation allowed under IHL to laws passed by the Israeli Parliament. While this Expert Opinion is not meant to discuss in detail the question of when an occupation can turn *de facto* or even *de jure* into an annexation under the *jus ad bellum*, it will briefly address this question in relation to the implications of legislative changes and the extent to which some of those changes may impact on the nature of the occupation, which may amount to a functional annexation. Finally the Expert Opinion will identify Israel's obligations to rectify unlawful changes and third States' obligations.

I. APPLICABLE LAW

A. The international law of belligerent occupation

This Expert Opinion is primarily concerned with the rules of the international law of belligerent occupation. Pursuant to Article 42 of the 1907 Hague Regulations and Article 2 of GCIV, and as recognized by the International Court of Justice⁶ and by the doctrine and as accepted by the Israeli Supreme Court, sitting as a High Court of Justice⁷, Israel has the status of occupying power in the West Bank. In that regard, the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, while establishing a distinction between three areas (A, B and C) with various degrees of responsibility and power devoted to the Palestinian Authority, did not change the overall status of the oPt.⁸ Despite the initial arguments put forward by Israel challenging the *de jure* applicability of the Geneva Convention IV provisions related to occupation, including the fact that the West Bank was not a “territory of a High Contracting Party” prior to 1967 as per Article 2 of the GC IV, and the maintenance of this official line of reasoning to this date, the Israeli State Attorney, expressing a governmental position apparently acknowledged the *de facto* application of the humanitarian provisions of the GV IV.⁹

The main principle underlying the law of belligerent occupation is that occupation does not transfer any title of sovereignty to the occupier on the occupied territory. As highlighted earlier the occupation is by nature to be considered transitional and temporary. As stated in the British Military Manual, “Occupation differs from annexation of territory by being only of a temporary nature” and “During occupation, the sovereignty of the occupied state does not pass to the occupying power. It is suspended.” Furthermore, “[t]he law of armed conflict does not confer power on an occupant. Rather it regulates the occupant’s use of power. The occupant’s powers arise from the actual control of the area.”¹⁰

This principle is best reflected in the core norms that strike at the heart of this Expert Opinion and that limit the occupying power’s legislative prerogatives. Article 43 of the 1907 Hague Regulation imposes a duty on the occupier to respect, unless absolutely prevented, existing law. At the same time, as will be discussed below, Article 43 obliges an occupying power to restore and maintain public order and civil life, but while doing so it must respect, except absolutely prevented, local laws. This duty is further specified in Article 64 of GCIV that spells out the exceptions that may justify an alteration by the occupying power of the local legislation in force prior to the occupation. Finally the undersigned wish to underline that those specific norms

⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 78.

⁷ For example, H.C. 390/79, *Mustafa Dweikat et al. v. the Government of Israel et al.* (the *Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 *Israel YbkHR* 345.

⁸ E. Benvenisti, “The Status of the Palestinian Authority”, in E.Cotran and C.Mallat (eds.), *The Arab-Israeli Accords: Legal Perspectives*, 1996, pp. 58–60.

⁹ See Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge CUP, 2009, pp. 20-21 and 24 and section 12 of the Complementary Argument on Behalf of the State in HCJ 1526/07 Ahmad `Issa `Abdullah Yassin et al. v Head of the Civil Administration et al., 5 July 2007, cited by Bimkom – Planners for Planning Rights, *The Prohibited Zone - Israeli planning policy in the Palestinian villages in Area C*, June 2008, p. 8.

¹⁰ UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 11.19.

must also be interpreted taking into account the fundamental concern of GCIV, that is the protection of “protected persons”, i.e. persons “who at any given moment and in any manner whatsoever, find themselves, in cases of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.¹¹ In that regard, a more general, yet highly relevant norm to consider is that contained in Article 47 that states that protected persons may not be deprived of the benefit of that Convention as a result of changes introduced into the institutions or government of the territory as a result of the occupation or annexation, nor by any agreements concluded.

An enduring situation of occupation, such as in the case of the oPt, unprecedentedly put to test those obligations and duties, not only because the occupying power is expected to do more to ensure public order and civil life but also because more cases may arise and qualify as justifications provided for in those norms to change local laws are applicable.

B. Other sets of international norms

Interestingly the continuous occupation over a long period of time is the very reason why some additional sets of international norms are to be considered.

First the development of IHRL over the past 50 years lead to these rules being both gradually recognized as formally applicable to a situation of occupation and increasingly taken into account when interpreting IHL norms.

It is indeed now acknowledged by third States, United Nations practice and judicial decisions that IHRL also binds an occupying power with respect to the population of an occupied territory save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.¹² Even in cases where IHL constitutes the *lex specialis*, such as the law of belligerent occupation defining the occupying power’s specific duties related to respecting local laws and under which conditions it is allowed to amend them, IHRL continues to apply. As a result in this field, IHRL can also be the *lex specialis* and help clarify the content and meaning¹³ of what the occupying power’s obligations are, for example when it is complying with its IHL obligation to maintain public order, notably for law enforcement operations as the occupation lasts over a long period of time.

¹¹ See Article 4 of GCIV.

¹² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, op. cit., paras. 107-112. See also references in W. Kalin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26, 16 Jan. 1992. at paras 5C-59; Concluding Observations of the Human Rights Committee: Israel. 18/08/98. UN Doc. CCPR/C/79/Add.93. at para. 10; *Loizidou v Turkey*, Merits. ECHR (1996), Series VI, 2216 at 2235-2236, para. 56 and *Cyprus v Turkey*, 10 May 2001. at paras. 69-77; General Comment No. 31 of the UN Human Rights Committee, (CCPR/C/74/CRP.4/Rev.6. of 21 Apr. 2004, at para. 10; and UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at para. 11.19.

¹³ For an overview of how IHRL can serve to interpret IHL, see M. Sassòli, “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in: BEN-NAFTALI (ed.), *International Human Rights and Humanitarian Law*, Oxford, OUP, 2011, pp. 74-76.

The undersigned also wish to mention another branch of international law that is often referred to when discussing Israeli occupation, namely the question of the nature and validity of the said occupation when qualified as an annexation under the *jus ad bellum* or the law on the use of force between states. While this goes beyond the scope of this Expert Opinion that is primarily meant to assess Israel's conduct with regard to legislative changes under IHL norms, the concept of annexation and the application of the related norms of international law are a recurrent issue. This relates to the underlying debate over the interaction between IHL and *jus ad bellum*. An author would present the dilemma as follows:

How should a process of “creeping” annexation—in which a putative acquisition of territory is undertaken not in one fell swoop, but gradually through a pattern of oblique and sometimes informal measures - be characterized under international law? **Does the sum of its parts rise beyond a violation of the *jus in bello* to contravene the *jus ad bellum*?**¹⁴

The undersigned wish to stress that if measures undertaken by Israel and amounting to IHL violations may qualify as evidence under the *jus ad bellum* of the violation of the latter body of norms, as far as a strict legal assessment is concerned this Expert Opinion focuses on the extent to which changes by the occupying power to local laws and related institutions in the oPt qualify as violations of IHL. This opinion is not meant to take a position as to the significance and implications of such changes under the *jus ad bellum*. However, considering the prolonged character of the Israeli occupation and the focus of this analysis being on the increasing legislative interventionism of Israel into the oPt, the question of the *de facto* annexation is understandably the “elephant in the room”. Consequently references to the *jus ad bellum* and how it has been interpreted when it comes to the notion of annexation and Israel will be included when relevant to put into perspective the implications of the fact that Israel went beyond what IHL allows.

C. The significance of domestic legal frameworks

Domestic legal frameworks are of the utmost importance for this Expert Opinion in that they are the primary subject-matter of the IHL norms mentioned above. The undersigned wish to stress that domestic legal frameworks must be understood as referring to of course the local laws in force in the occupied territory prior to the situation of occupation but also to the legislation of the occupying power itself. As mentioned, the occupying power exercises a limited legislative power with regard to the territory it occupies and may enact or abolish laws under certain conditions set out by the international law of belligerent occupation. Furthermore, the type of legislation the occupying power may take is also limited.

In the case at hand, the former correspond to the domestic law applicable in the oPt before it was occupied by Israel. For the West Bank and East-Jerusalem, before 1967, this territory was under Jordanian rule and consequently Jordanian laws were applied. The Jordanian law is a complex amalgam of Ottoman codes, British Mandate amendments thereto and regulations adopted before 1947, and Jordanian law. All those laws remain in force if they were not abrogated before the occupation

¹⁴ O. M. Dajani, “Israel’s Creeping Annexation”, in *Symposium on Revisiting Israel’s Settlements*, *AJIL Unbound*, Volume 111, 2017, p. 51 [emphasis added].

started and if they are not contrary to international law. With regard to Israel, in conformity with its legal obligations as an occupying power, when it started occupying the West Bank in 1967, the IDF military commander issued proclamations and military orders as such acts were the only ones allowed under IHL to regulate the West Bank, as opposed to the Israeli parliament adopting a legislation governing that territory, which would be an aspect of *de jure* annexation. Indeed annexation by law is defined in reference to a State extending its own legislation to a foreign territory, subjecting this territory to its own territorial jurisdiction as if it was its own. If the legislative power adopts a law that is territorially applicable to the territory this State occupies, this amounts to a *de jure* annexation of that territory in the field covered by the legislation.¹⁵

II. THE REGIME GOVERNING THE LEGISLATIVE POWER OF THE OCCUPIER UNDER THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

The international law of belligerent occupation contains two key provisions governing specifically the legislative power of the occupier, namely Article 43 of the Hague Regulations and Article 64 of GCIV. Identifying the meaning and scope of the related obligations is a challenging endeavour, in part due to the different ways in which those articles are constructed and how closely intertwined they are.

Additionally other norms of belligerent occupation may also be relevant, be they general rules, in particular Article 47 of GCIV whereby protected persons must not be deprived of their conventional protections as a result of certain changes nor by any agreements concluded, or specific obligations, such as the duty for an occupying power to make public any rules it subjects protected persons to.¹⁶

While Article 43 and 64 are often addressed separately with some references to one another, the undersigned consider that the purpose of this Expert Opinion, namely to assess Israel's most significant uses of its legislative power as an occupier, requires presenting the relevant norms as a legal 'regime' governing that question, with a certain degree of coherence between norms, rather than proceeding article by article. This also allows to properly account for the rationale, the normative logic and the complex interplay between Article 43 and Article 64. This is particularly significant when considering the context of a prolonged occupation.

A. The principle of leaving local laws and institutions in force

Despite the adoption of Article 64 in GCIV providing for more permissive terms with regard to the occupying power's ability to amend local laws, those are to be understood as exceptions to the principle contained in Article 43 of the Hague Regulations, namely that the occupier must leave the local legislation in force.

¹⁵ See for further developments on this, *infra*, p. 31 and footnote no. 100.

¹⁶ Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge CUP, 2009, at 129, and, for penal provisions explicitly, Article 65 of GCIV.

1) The construction of Article 43: The recognition of a conditional legislative power

Article 43 of the 1907 Hague Regulations reads in the most widely adopted English translation of the original authentic French text:

“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.”

The International Military Tribunal at Nuremberg and the International Court of Justice have recognized that this provision is part of customary international law, and therefore binding upon all States.¹⁷ The Israeli Supreme Court has also recognized the applicability and justiciability of the 1907 Hague Regulations based on the acceptance that they have a customary value.¹⁸

Past occupying powers have sometimes invoked the vagueness of this provision to justify broad legislative powers, and, at other times, have relied on the obligation to respect local laws ‘unless absolutely prevented’ in order to ignore their responsibility to ensure the welfare and normal life of the local population.¹⁹

First, Article 43 recognizes that the legislative power has, in fact, passed into the hands of the occupier.²⁰ A literal reading of the text of this provision could lead to conclude that the respect for local legislation by the occupier comes only into play when the occupying power is restoring and ensuring public order and safety and/or that it can only legislate within those fields. Such interpretation is however inconsistent with the introductory sentence of this provision and its drafting history. Articles 2 and 3 of the Brussels Declaration of 1874 suggested respectively a broad legislative authority of the occupier and a limitation of the possibility to change the existing laws pertaining to circumstances of necessity. However both provisions were merged in the Hague Regulations²¹, confirming that Article 43 of the 1907 Hague

¹⁷ Trial of the Major War Criminals, International Military Tribunal in Nuremberg. published in 41 *AJIL* (1947) 172, in particular at 248-249, and ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, op. cit., paras. 89 and 124. See also E. Benvenisti, *The International Law of Occupation* (1993), op. cit., p. 8, G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation* (1957), p. 95, D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State of University New York Press, New York, 2002, p. 57, and M. Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, 16 *EJIL* 661, 2005, p. 663.

¹⁸ Judgment in the *Beth-El* case (H.C. 606/78 and 610/78), in *Military Government in the Territories Administered by Israel: the Legal Aspects* (M. Shamgar ed. 1982). See also *A Teachers’ Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82, PO 37 [4], 785, 793.

¹⁹ E. Benvenisti, *The International Law of Occupation* (1993), op. cit., p. 11.

²⁰ E. Schwenk, “Legislative Power of the Military Occupant Under Article 43, Hague Regulations”, 54 *Yale LJ* (1944–1945), p. 395.

²¹ Article 43 of the 1899 Hague Regulations reads as follows: “The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

Regulations provides for a general rule regarding the legislative powers of the occupying power.²²

However, the occupier not being sovereign over the occupied territory, it cannot act as a sovereign legislator, even less so in fields that involve long-term consequences, going beyond the duration of the occupation. An occupying power may only introduce changes for the duration of the occupation.²³ The drafting history of the Brussels Declaration illustrates another key element enunciated in Article 43 to understand how this provision is constructed: the obligation to respect local laws as a general principle that plays as a limitation to the legislative power of the occupier.²⁴ This demonstrates that Article 43 is articulated in such a way that the general rule on the legislative authority of the occupying power must be carried out in compliance with the other general principle of respect for local legislation.

Article 43 spells out two obligations for the occupier: the obligation to restore and ensure public order and civil life and the obligation to leave local legislation in force. While the former is to be understood as an obligation in and of itself, this Expert Opinion will focus on its meaning and function as an exception to the principle of leaving local laws in force.

2) Meaning and scope of the principle

In restoring and ensuring public order and civil life, but also as matter of principle vis-à-vis other activities as highlighted earlier; the occupier must respect the laws in force in the occupied territory at the beginning of the occupation. Consequently, Article 43 bars also an occupying power from extending its own legislation over the occupied territory. While the first obligation to restore public order called for the adoption of positive measures, this obligation is a negative one, prohibiting the occupier from suspending or repealing local legislation.²⁵

Article 43 refers to “laws”. However it is widely recognized that the term must be understood in a broad manner, to include, not only the laws in the strict sense, but also the constitution²⁶, decrees, ordinances,²⁷ court precedents (especially in territories of common law tradition)²⁸, as well as administrative regulations and executive orders²⁹, provided that the ‘norms’ in question are general and abstract. While the rule refers to the entire legal system, exceptions apply only to the individual provisions covered by the exceptions that allow an occupying power to legislate.

²² Y. Dinstein, 2009, op. cit., 90-91; E. Schwenk, op. cit., p. 397. See also M. Sassòli, 2005, pp. 663-664, and Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2009, p. 94.

²³ Oppenheim, *International Law – A Treatise*, 7th edition edited by Hersch Lauterpacht, Vol. II, Disputes, War and Neutrality, (1952), pp. 436 and 437.

²⁴ E. Schwenk, op. cit., p. 397.

²⁵ Y. Arai-Takahashi, op. cit., p. 98.

²⁶ UK Manual, op. cit., at para 11.11.

²⁷ E. Schwenk, op. cit., p. 397.

²⁸ E. Benvenisti, *The International Law of Occupation* (1993), op. cit., p. 16.

²⁹ G. Von Glahn, op. cit., pp. 97 and 99; E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (2000) (reprint of the original 1942 edition), p. 89.

Article 43 also constitutes the legal parameter governing potential changes to institutions by the occupier, except in cases where *lex specialis* exists such as for changes affecting courts, judges and public officials as discussed further with regard to Article 64 of GCIV.³⁰ Considering the general principle set by Article 43 prohibiting changes to local legislation, this principle prevents the occupier from abolishing existing local administrative institutions because local institutions of the occupied country are established by and operate under the law. Institutions and the constitutional order are only one aspect of ‘the laws in force in the country’.

Article 47 of the GC IV refers to institutional changes introduced by an occupying power. It states that protected persons:

“shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the . . . territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory”.

This provision is sometimes misunderstood as prohibiting such changes as, for instance, annexations. Such prohibition is, however, an issue of *jus ad bellum*. *Jus in bello* simply continues to apply despite such changes and such changes do not justify violations of its provisions – including those on the admissibility of legislative changes. The ICRC Commentary stresses that “[c]ertain changes might conceivably be necessary and even an improvement. . . . [T]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such.”³¹

Article 47 must be read in conjunction with the principle spelled out in Article 7 para. 1 of GCIV that reads as follows: “No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them”. IHL norms continue to apply despite such institutional changes and such changes do not justify violations of its provisions – including those on the admissibility of legislative changes. Both provisions also apply to prescriptions of the Hague Regulations, because the Geneva Convention was supplementary to the Hague Regulations³² and because the principle prohibiting legislative changes has been reaffirmed in Article 64 of GCIV as outlined below.

B. The interplay between Article 43 and Article 64

As provided for in Article 154 of GCIV, this Convention is supplementary to The Hague Regulations. As a result Article 43 must be read in conjunction with Article 64. However there seems to be an apparent contradiction in the way these two provisions regulate the occupier’s legislative power. Article 64 appears to be more permissive than Article 43. There is therefore a need to clarify how both articles can be reconciled in their application as part of the legal regime governing the occupier’s

³⁰ M. Sassòli, 2005, p. 671.

³¹ J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1958), p. 274.

³² See Article 154 of GCIV.

legislative power, in particular the implications of Article 64 with regard to the principle enshrined in Article 43.

Before analysing the relationship between this article and Article 43, it is critical to clarify the meaning and scope of Article 64 in light of diverging interpretations. This is more so given the logic of this provision that appears to give more leeway to the occupying power with respect to local laws.

1) Meaning and scope of Article 64

Article 64 of GCIV is the other key provision dealing with the legislative power of the occupier. It reads as follows:

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, 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 and lines of communication used by them.”

A first question arises as to the material scope of the rules contained in Article 64. The issue is whether Article 64 only deals with penal laws or whether it also provides for norms regulating other types of legislation. While the first paragraph explicitly refers to ‘penal laws’, the ‘provisions’ referred to in the second paragraph are not so qualified.

Many scholars apply the second paragraph exclusively to penal legislation.³³ This provision belongs to the section of the Convention devoted to penal legislation. Apart from the context of the section, they may rely on the fact that Article 66 refers to ‘penal provisions promulgated . . . by virtue of the second paragraph of Article 64’, which seems to underline that these ‘provisions’ are ‘penal’. However, this reasoning is not compelling. The second paragraph could also have a broader sense and cover other types of legislation adopted by the occupying power, provided that they meet the goals included in Article 64.

The preparatory work of Article 64 shows that ‘it is not a mere coincidence that the adjective “penal” is missing in the second paragraph’.³⁴ Drafting Committee No. 2 of Committee III (in charge of the draft convention on the protection of civilian persons in time of war) at the 1949 Diplomatic Conference had a long debate about future Art. 64 and in particular precisely about whether the adjective ‘penal’ should

³³ Y. Dinstein, “The International Law of Belligerent Occupation and Human Rights”, [1978] *Israel Yb Hum Rights*, p. 114; D. Kretzmer, op. cit., p. 125 and 151; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. II – The Law of Armed Conflict (1968), pp. 194–195.

³⁴ E. Benvenisti, op. cit., pp. 101-103.

be added to the term “provisions” in the second paragraph.³⁵ The draft submitted by the ICRC stated: ‘The *penal* laws of the Occupied Power shall remain in force ...’.³⁶ The UK, whose suggested amendment was closest to the finally adopted text, formulated it without specific reference to *penal* laws.³⁷ The USSR wanted to limit the provision to penal norms.³⁸ The Netherlands, a State having been subject to occupation, insisted, as a way of compromise, on the insertion of an article clarifying the complementary character of the Hague Regulations and the Geneva Conventions.³⁹ The Drafting Committee finally let Committee III choose between two versions, one referring to ‘penal provisions’, another one more generally to ‘provisions’. The latter was adopted by 20 votes to 8.⁴⁰ In addition, Article 154 stating that the Convention was ‘supplementary’ to The Hague Regulations was added as part and parcel of the compromise reached about Article 64.

In light of the above, the second paragraph of Article 64 has then been understood as allowing an occupying power to subject the local population to any (penal, civil, administrative etc.) laws essential for the purposes it exhaustively enumerates.⁴¹ The undersigned are also of the view that this provision permits, in the cases it specifies, changes to all existing local laws.

Furthermore, it is worth noting that the construction of Article 64, including with regard to the justifications admitted to change existing legislations confirms this reading. The first paragraph of Article 64 refers to local penal laws that must remain in force followed by two exceptions, namely if they are a threat to the security of the occupying power or if they are an obstacle to the application of GCIV. On the other hand the second paragraph related to the ‘provisions’ that may be adopted by the occupying power is drafted as an exception dedicated in its entirety to purposes for which the occupier can legislate. The positive form of this paragraph and the fact that the security of the occupying power is also listed as a goal would make it redundant if it were to only cover penal laws. Additionally Article 64(2) allows the introduction of new legislation for a purpose – namely, ‘to maintain the orderly government of the territory’ – for which the first paragraph does not permit the repeal or suspension of existing penal legislation. However, according to the maxim *lex posterior derogat legi anteriori* any new legislation repeals previous contradictory legislation. The admissibility of penal legislation for the purpose of maintaining orderly government would therefore depend on whether, by chance, any legislation existed on the very same point prior to the occupation. Thus, an occupying power could introduce criminal liability of public officials in an occupied territory for unlawful official acts if no such legislation existed, but not if the previous legislation specifically excluded such liability. This absurd result can be avoided if we consider that legislation permissible under the second paragraph may necessarily derogate from previous legislation. Also, legislation contrary to the needs of orderly government may be considered an obstacle to the application of the Convention (one of the justifications for derogations under the first paragraph), given that Article 154 also refers to Article

³⁵ See *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne, 1950) vol. III at 139.

³⁶ *Ibid.*, vol. I at 122 [emphasis added].

³⁷ *Ibid.*, vol. III at 139.

³⁸ *Ibid.*, vol. IIA at 670.

³⁹ *Ibid.*, vol. IIA at 672.

⁴⁰ *Ibid.*, vol. III at 139.

⁴¹ See E. Benvenisti, *op. cit.*, p. 101; Y. Dinstein, 2009, p. 111.

43 of the Hague Regulations, which, of course, obliges an occupying power to maintain such orderly government.

Finally Article 64 addresses the specific issue of the court system in place in the occupied territory by stating the principle that they must remain in place, save for the considerations allowing the suspension or abolition of penal laws and for the purpose of the good administration of justice. Articles 66 and 54 of GCIV respectively deal with changes affecting judges and public officials.

2) Article 64 as *lex specialis* to Article 43

Article 64, in particular in its paragraph 2, is often described as a ‘restatement’ of the principle that the occupying power can legislate on various matters.⁴² However it is also considered as adding further norms governing the occupier’s legislative power. For example it is argued that Article 43 remains applicable as per the operation of Article 154 because GCIV does not contain similar provisions and that Article 64 provides for substantial additions compared to Article 43.⁴³

It is indeed necessary in order to better understand the complex interplay between those two provisions to consider again their normative logic. The undersigned wish to stress that if both provisions show that international law does not recognize a general legislative competence where the occupier could legislate without limitations, they do so in a different manner. Article 64 would appear to impose fewer restrictions on legislative powers than the negative wording of Article 43. The ICRC *Commentary* even qualifies the legislative powers of an occupying power as ‘very extensive and complex’.⁴⁴

While Article 43 is formulated as a general duty for the occupier to respect local laws when restoring and ensuring public order and safety save the rather vague and broad exception, namely “unless absolutely prevented”, Article 64 uses a less restrictive formulation due to its construction. This provision is definitely more precise than the expression “absolutely prevented” in that it details the various purposes allowing the occupying power to legislate. The ICRC *Commentary* notes that the second paragraph of Article 64 expresses ‘in a more precise and detailed form’ the terms ‘unless absolutely prevented’ of Article 43.⁴⁵ Some of the purposes listed, such as the security of the occupier’s forces, amount to specific situations in which the occupier could claim it is absolutely prevented from respecting local laws. The fact that, as noted in the ICRC *Commentary*⁴⁶, Article 64 was introduced in part because Article 43 was not sufficiently observed in past conflicts with regard to the particular issue of penal laws supports this reading. Article 64 is a provision strengthening, rather than weakening, Article 43. In that regard, both provisions strike a balance between on the one hand the conservative approach of the law of belligerent

⁴² G. von Glahn, *The Occupation of Enemy Territories: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 115.

⁴³ R. T. Yingling and R. W. Ginnane, “The Geneva Conventions of 1949”, *AJIL*, Vol. 46 (1952), pp. 417-419.

⁴⁴ J. Pictet, *op. cit.*, p. 337.

⁴⁵ *Ibid.*, p. 335, and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, 1967, p. 193.

⁴⁶ See J. Pictet, *op. cit.*, p. 335.

occupation when it comes to the occupied territory and the interference of the occupying power, with on the other hand the imperatives of necessity and the needs of the occupied population.

However, Article 64 also contains new elements that may not fall within the expression “absolutely prevented”. The newest element is the recognition of the power of the occupier to modify the existing laws in order to ‘fulfil its obligations under the ... Convention’. While it may be argued that the term ‘unless absolutely prevented’ refers not only to cases of material but also of legal necessity, the inclusion of the purpose of applying the GVIV as a reason justifying the suspension or abolition of local penal laws is, in the undersigned’s view, evidence that Article 64 goes further than merely specifying what constitutes cases of being absolutely prevented from respecting local laws. The undersigned contend that Article 64 therefore operates as *lex specialis* to Article 43, not only as a more precise and specific formulation of what the occupying power can do, but in that it also contradicts to a certain extent Article 43 and must therefore prevail over that provision. Indeed Article 64 allows the occupier to change local laws for purposes not strictly envisaged under Article 43.

This being said, despite this apparent permissiveness, Article 64 remains a provision to be read in a restrictive way. It allows only changes ‘essential’ for the admissible purposes. In that regard the term ‘indispensable’ used in the French version of GCIV is even more restrictive and closer to The Hague Regulations.

The undersigned thus contend that Article 64 certainly provides a *lex specialis* in that it is to be considered a more precise, albeit less restrictive formulation of when an occupying power is ‘absolutely prevented’ from applying existing local legislation.

C. Exceptions to the prohibition to legislate and admissible purposes to legislate as standards of conduct for the occupying power in the context of a prolonged occupation

While Article 64 provides for more permissive grounds than Article 43 with regard to the occupier’s legislative power to interfere with local laws, the undersigned wish to recall a fundamental aspect of the relevant IHL norms: First the principle remains the prohibition to legislate as a key aspect of the conservative approach of IHL towards belligerent occupation. The aim of Article 43 being to maintain the existing legislation as far as possible and to limit changes by an occupying power, and because the occupation does not transfer any title of sovereignty, every legislative change made by the occupying power should be commensurate with the transitional and temporary nature of the occupation. The occupier can only legislate for the time of the occupation. However even Article 43 does allow for significant flexibility when it comes to legislative changes.

In this regard the undersigned consider that the prolonged character of an occupation may provide for a contextual element that requires interpreting some of the admissible purposes to change local laws in a broader manner. This, on the other hand, does not mean that a prolonged occupation amounts to a specific category of occupation governed by somehow different norms. The same rules contained in Article 43 and 64 as *lex specialis* apply. It is only that some of the exceptions to the

prohibition to legislate, such as the admissible maintaining the orderly government or restoring public order and safety, have the potential to cover further fields or topics that would only arise as the occupation moves away from combat-like situations.

Furthermore, the exceptions to the prohibition to legislate must be understood as covering both exceptions in the strict sense of the term, on the basis of the negative formulation of Article 43, as well as admissible purposes related to the occupier's fulfilment of its duties under the law of belligerent occupation. However any new legislation adopted for those purposes must not breach other specific IHL prohibitions.

Despite the rather strict wording of the exception contained in Article 43, state practice, judicial decisions and scholars show that there is a certain amount of flexibility on the part of the occupier to exercise its legislative power, as also confirmed by the content and interpretation of Article 64. It is necessary to unpack the meaning and components of the exception "unless absolutely prevented" from respecting local laws in a graduated manner: from its somehow obvious link to the concept of necessity to the broader way it was interpreted in relation to the occupier's duties and various areas of intervention.

1) The exception of being "absolutely prevented" as an expression of necessity

Article 43 states that the occupier must respect local laws, "unless absolutely prevented" (*sauf empêchement absolu*). The meaning of this formulation is controversial. Some scholars suggest that it refers to 'military necessity'.⁴⁷ The words 'unless absolutely prevented' were, however, a mere reformulation of the term 'necessity' contained in Article 3 of the 1874 Brussels Declaration, which, according to its preparatory works, was not meant as a synonym for 'military necessity'.⁴⁸ At the other extreme, some authors simply require sufficient justification to deviate from local legislation.⁴⁹ Others consider that 'absolute prevention means necessity' and that the adverb 'absolutely' is therefore of small consequence.⁵⁰ After the two world wars, courts have accepted a great variety of legislation by occupying powers (including by those that were finally vanquished) as valid.⁵¹

2) The occupier's security as a valid ground to legislate

Under both Article 43 of the 1907 Hague Regulations and Article 64(2) of GIV, the most uncontroversial case of legislation an occupying power may introduce is that which is essential to ensure its security. Such legislation may not, however, prescribe any measure specifically prohibited by IHL (such as collective punishment,

⁴⁷ E. Schwenk, op. cit., p. 393; M. Greenspan, *The Modern Law of Land Warfare* (1959), p. 224; M. Bothe, "Occupation, Belligerent", in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), iii, p. 765.

⁴⁸ E. Schwenk, op. cit., p. 401.

⁴⁹ E. H. Feilchenfeld, op. cit., p. 89.

⁵⁰ Y. Dinstein, 1978, op. cit., p. 112, citing G. Schwarzenberger, op. cit., p. 193. Dinstein adds that "[t]he necessity . . . may be derived either from the legitimate interests of the occupant or from concern for the civilian population".

⁵¹ For examples see reference to various court cases in E. David, *Principes de droit des conflits armés* (3rd ed., 2002), p. 511.

house demolitions, deportations or transfer of the occupier's own population)⁵² or establish adverse distinctions prohibited by Article 27 of GCIV.

3) The extensive scope of the occupier's legislative power: admissible purposes and duties

The undersigned wish to stress that from the duty to ensure and restore public order and safety contained in Article 43 to the obligation to apply IHL included in Article 64, the occupying power can potentially legislate in various fields, provided that this power remains within the limits set up by the international law of belligerent occupation, notably the requirement of necessity.

It also has been suggested that the exception of Article 43 must be interpreted more extensively the longer an occupation lasts.⁵³ This broader interpretation also corresponds to the practice of allied occupying powers during World War II. The British Military Manual states that "The occupying power may amend the existing law of the occupied territory or promulgate new law if this is necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population."⁵⁴

a) The power to legislate to maintain public order and civil life for the interests of the occupied population

Beyond the protection of its own security, under the explicit wording of Article 43, the protection of the security of the local population is a legitimate aim for legislation by an occupying power. As it must restore and maintain public order, it may also legislate where absolutely necessary for that purpose. Indeed most authors mention that, as confirmed by Article 64 of GCIV, not only the interests of the army of occupation, but also those of the local civilian population may prevent an occupying power from applying local legislation.⁵⁵

An extensive reading of what constitutes public order and civil life seems to also give rise to a broad interpretation of the exception contained in Article 43. Regarding the definition of the field of application of this obligation, the expression 'public order and safety' does not only refer to security issues. The French version of Article 43, which is the only authentic text, uses the words 'l'ordre et la vie publics'. The legislative history of this provision offers evidence of a broader interpretation of those terms, which cover 'des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours' ('social functions, ordinary transactions which constitute daily life').⁵⁶

⁵² See Articles 33(1), 53, 49(1) and 49(6) of GCIV.

⁵³ R. Kolb, *Ius in bello, Le droit international humanitaire des conflits armés* (2002), p. 186.

⁵⁴ UK Military Manual, op. cit., para. 11.25.

⁵⁵ E. Schwenk, op. cit., p. 400; J. Pictet, op. cit., p. 274; O. Debbasch, *L'occupation militaire – Pouvoirs reconnus aux forces armées hors de leur territoire national* (1962), p. 172; G. von Glahn, op. cit., p. 97. A. D. McNair and A. D. Watts, *The Legal Effects of War* (1966), p. 369 mention three grounds for being 'absolutely prevented' from respecting local laws, namely the maintenance of order, the safety of the occupier, and the realization of the legitimate purpose of the occupation.

⁵⁶ This explanation has been proposed by Baron Lambert, the Belgian representative at the negotiations for the Brussels Convention of 1874, which never entered into force, but is known as the 'Brussels Declaration', considered as a codification of many old rules of IHL. See Ministère des

Several courts endorsed this broad construction. A tribunal set up in the British occupied zone of Germany after the World War II interpreted the French phrase ‘l’ordre et la vie publics’ as relating to “the whole social, commercial and economic life of the community”.⁵⁷ The Israeli Supreme Court endorsed the same approach when stating that the obligation to restore and ensure public life and order encompasses “a variety of aspects of civil life, such as the economy, society, education, welfare, health, transport and all other aspects of life in a modern society”.⁵⁸ The obligation to restore and ensure public order and civil life is therefore broader than just guaranteeing security.

This obligation is one of means and not of result, the public order and the civil life being only aims that the occupier must pursue with all available, lawful and proportionate⁵⁹ means, as confirmed by the expressions ‘all the measures in his power’ and ‘as far as possible’ contained in Article 43. However, some measures the occupying power may take under this obligation are governed in detail by specific IHL rules.⁶⁰ Furthermore, the measures the occupier can take are also limited by numerous prohibitions set out in Geneva Convention IV, such as the prohibition of the destruction of civilian constructions/objects.⁶¹

The most important contribution of an occupying power to civil life in an occupied territory is to maintain the orderly government of the territory. Article 64(2) of Convention IV explicitly allows it to legislate for that purpose. Beyond that, it must also ensure civil life among the inhabitants of the territory and may legislate for that purpose if the existing legislation or its absence absolutely prevents it from accomplishing that aim.

b) New legislation essential for the implementation of IHL

The Occupying Power may also adopt legislation essential for the implementation of IHL. The reference in Article 64 to legislation essential for (or an obstacle to) the respect of ‘Convention [IV]’ must be extended to all applicable IHL, since IHL cannot possibly require specific conduct from an occupying power and also prohibit it to legislate for that purpose, which may even be necessary under the principle of legality.

Affaires Etrangères de Belgique, *Actes de la Conférence de Bruxelles de 1874*, at 23, reproduced in E. Schwenk, op. cit., p. 393. Similarly Y. Dinstein, 2009, op. cit., p. 94.

⁵⁷ Germany, British Zone of Control, Control Commission Court of Criminal Appeal, *Grahame v. Director of Prosecution*, 26 July 1947. 14 AD Case no. 103, 228, at 232.

⁵⁸ *A Teachers’ Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82 (1983), 37 [4] *Piskei Din*, English summary in: (1984) Israel YbkHR 301, at 306.

⁵⁹ This requirement includes proportionality between the interest of the population to have civil life restored and the adverse impact the means chosen by the occupying power to restore civil life may have for the population.

⁶⁰ For the 1907 Hague regulations, see Article 46 on family rights, property and religious practice, Articles 48–52 on taxation, contributions and requisitions, and Articles 53, 55, and 56 on public property.

⁶¹ See article 53 of GCIV.

- c) The power to legislate to enhance civil life in an occupied territory provided it benefits the local population and takes its needs as it expressed them into account

From the outset, the undersigned wish to stress that while the recognition of the occupier's power to legislate to enhance civil life in an occupied territory is in keeping with the requirement to serve the interests of the occupied population, as highlighted above, it carries the potential for abuses in light of the temporary and transitional nature of the occupation. This also reflects best the implications of time over the interpretation of IHL norms on belligerent occupation.

Indeed sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve.⁶² As the legislative function is a continuous, necessary function of every state on which the evolution of civil life depends, a **legislative vacuum** created by the disruption of the legitimate sovereign must at a certain point in time be filled by the occupying power.⁶³ This is even more so taking the principle of legality under Human Rights Law into account. In turn this means that any legislative change motivated by the duty to enhance civil life is dependent on fulfilling the local population's needs and serving its interests as conditions for it to be lawful under the law of belligerent occupation. As noted by Justice Shamgar of the Israeli Supreme Court this duty is a "subsequent and continuous" one, to be adjusted to changing social needs.⁶⁴ Therefore the extent to which an occupying power may legislate, in particular in case of long-term occupation, to satisfy new needs of the local population,⁶⁵ remains constrained by the fact that if the changes do not satisfy the needs of the local population better than the previous institutions and legislation, they are unlawful. To the undersigned it seems obvious, including taking International Human Rights Law into account, that the determination of what is needed to enhance the civil life of the local population must take the opinion of this local population about those needs into account – contrary, e.g., to what is the case in the determination of what is necessary to protect the security of the occupying forces. It must be stressed in this context that the local population whose needs have to be fulfilled includes only protected persons as defined in Article 4 of GCIV and not settlers brought into the oPt in violation of Article 49(6) of GCIV.

While the obligation to enhance civil life is an obligation of means, changes to the existing legislation or institutions justified by this exception are only lawful if they actually enhance civil life compared to the situation under the previous legislation. It is up to the occupying power to prove that the situation under the legislation it has introduced is better than that under the previous legislation, including by showing that it took the local population's needs into account as the population expressed them. It

⁶² Lerquin, "The German Occupation in Belgium and Article 43 of The Hague Convention of the 18th October 1907", 1 *International Law Notes* (1916), p. 55.

⁶³ L. von Kohler, *The Administration of the Occupied Territories, Vol. I – Belgium* (1942), p. 6, cited in McDougal and F. P. Feliciano, *Law and Minimum World Public Order* (1961), p. 746, writes that 'the life of the occupied country is not to cease or stand still, but is to find continued fulfillment even under the changed conditions resulting from occupation'.

⁶⁴ See H.C. 69 +493/81, *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) Piskei Din 197; English excerpt in: (1983) 13 *Israel YbkHR* 348, at 356-357, quoted by Y. Arai-Takahashi, *op. cit.*, p. 98, footnote 24.

⁶⁵ Y. Dinstein, 2009, *op. cit.*, pp. 115-123.

is not a determination to be made only by the occupier on its own account. If, in a situation of long-term occupation it turns out that such enhancement did not occur, the change introduced cannot be justified and must be repealed. Indeed any legislative change to be admissible under the law of occupation requires to be justified by its necessity⁶⁶ in achieving one of the admissible purposes. Consequently the goal to enhance civil life can only be used as a justification to change local laws for so long as the changes serve that purpose. In addition, the occupier continues to be bound by the obligation to enhance civil life, irrespective of the use of this purpose to change local laws. If such changes failed to fulfil that obligation and have detrimental effects on civil life, the occupier must repeal those changes and adopt another measure in order to comply with this obligation of means. Furthermore under the obligation of means of Article 43 of the Hague Regulations, the changes must meet the requirement of “all steps in [one’s] power” to be taken by the occupying power to ensure, as far as possible, public order and civil life. Furthermore the temporary nature of occupation should be taken into account when considering changes that could have far-reaching consequences within the context of long-term occupation.

Because the risk of abuse of a broader interpretation of the exception set out in Article 43 should not be neglected, as it is the occupying power that decides whether a legislative act is necessary, and its interpretation is rarely subject to revision during the occupation⁶⁷, the expression ‘unless absolutely prevented’ must still be construed narrowly as an exception to the general principle prohibiting changes to local laws.⁶⁸

d) The power to legislate to implement IHRL

The relevance of IHRL with regard to the occupier’s legislative power stems from two closely linked elements: First, as highlighted earlier IHRL continues to apply, as a matter of principle, save any derogations allowed, to the situation of occupation. Second, the specific duty for the occupying power to maintain public order and civil life requires taking into account IHRL. The ICJ has confirmed this latter obligation and its relevance for the interplay between IHL and IHRL obligations binding an occupying power in the *Armed Activities* case in the following terms:

The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.⁶⁹

⁶⁶ Y. Dinstein, HPCR, op. cit., p. 14.

⁶⁷ G. von Glahn, op. cit., p. 100. Exceptionally, the ICJ was able in *Legal Consequences of the Construction of a Wall* (para. 137), to give an opinion on whether certain measures taken by an occupying power were necessary.

⁶⁸ G. Schwarzenberger, op. cit., pp. 182-183, cited by Y., op. cit., p. 103, footnote 44. For judicial decisions recalling the restrictive understanding of the necessity exception, see also Y. Arai-Takahashi, op. cit., p. 103, footnote 44.

⁶⁹ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 178.

The occupying power therefore has an obligation to abolish legislation and institutions which contravene international human rights standards. While it may derogate from certain provisions due to a situation of emergency, it is certainly not obliged to do so and may therefore change any legislation contrary to the full guarantees of international human rights law. That IHL does not mention this additional exception to the continuing applicability of local legislation can be easily explained by the fact that when the Hague Regulations were adopted in 1907, international human rights law did not yet exist, and in 1949, when Convention IV was drafted, it had just come into being.

Furthermore although the standard of conduct required under the obligation to restore and ensure public order and civil life is not the same as that which human rights instruments expect states to comply with in fulfilling human rights, this obligation is actually twofold: an obligation to restore public order and a duty to ensure that public order and civil life are guaranteed.

When fulfilling its duty to restore and ensure public order and civil life, the occupier must respect its obligations under international human rights law. This is particularly relevant because public order is restored **and ensured** through law enforcement operations that are governed by human rights norms. As recalled earlier, international human rights law continues to apply in times of armed conflict, including in situations of occupation, save cases of derogation or suspension for derogable rights under certain conditions. It is true that restoring or ensuring public order may constitute an emergency where the occupier is entitled to derogate from some of those rights.

However it may be argued that in cases of prolonged occupation, the duty of the occupier to ensure civil life in the broad meaning of the term may be subject to more limitations under international human rights law in as much as lawful reasons for derogation may not be invoked. In the case of Israel, the International Court of Justice held that with regard to the ICCPR, due to the fact that Israel notified derogation concerned only Article 9 of the Covenant, “the other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory”.⁷⁰ As for the ICESCR, the Court, referring to the Concluding Observations of the Committee on Economic, Social and Cultural Rights on Israel, concluded: “In the exercise of the powers available to it [as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”⁷¹ The occupying power therefore does not enjoy in an occupied territory the leeway a state enjoys for its own territory and population in deciding which measures best fulfil economic, social and cultural rights. It must respect the choices made by the previous legislator, except when they lead to clear violations.

In light of the above, the undersigned conclude that despite the more permissive terms of Article 64 of GCIV, the legal regime governing the

⁷⁰ ICJ, *Legal Consequences of the Construction of a Wall*, op. cit., para. 127.

⁷¹ Ibid., para. 112.

occupier's legislative power remains based on the principle of the duty to keep the local laws and related institutions in force. Furthermore, if the exception contained in Article 43 of The Hague Regulations and the additional purposes admitted in Article 64 offer a significant flexibility for changing the legislation of the occupied territory, the occupier remains bound by those limitations that must be interpreted in a restrictive manner as well as by other general and specific norms of the law on belligerent occupation. Any legislation of the occupying power other than that indispensable to guarantee its security must be guided by the interests of the protected persons.

III. ASSESSMENT OF ISRAEL'S LEGISLATIVE CHANGES TO LOCAL LAWS UNDER THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

Following the Six-Day War in 1967, Israel gained control over the Gaza Strip, the Egyptian Sinai Peninsula, the West Bank, including East Jerusalem, and the Golan Heights. As a result and over the five decades that ensued, with variations depending on the territory concerned, Israel as an occupying power, adopted a wide range of policies and legislations in the conduct of the occupation that raised questions as to their compatibility with the IHL regime of the occupier's legislative power described above.

From the outset, it is however necessary to emphasize that the current Expert Opinion does not intend to provide an exhaustive assessment of all legislative changes introduced by Israel. This Opinion will primarily focus on the most significant developments that affected local laws and related institutions linking it to the relevant practice of Israeli courts concerning legislation in the oPt that is very permissive.⁷²

In that regard, the undersigned do not thus pretend to offer an evaluation of all the changes adopted by Israel, nor identify a definitive pattern that would only be possible through a detailed analysis. Despite this limitation, the undersigned contend that a trend can be extrapolated, in the manner in which Israel went increasingly beyond what the international law of belligerent occupation permits and what lawful purposes require with respect to changes to local laws. It indeed appears that contrary to the normative logic of the legal regime analysed above, combining a conservative approach requiring that local laws are left in force while providing for significant flexibility for the occupier, Israel engaged in changes to the legislation applicable in the oPt in an exponential fashion both in terms of the types of substantive changes, the fields concerned and the nature of the legal acts introducing those changes.

This being said the lawfulness of each significant change will be assessed on its own under the law of belligerent occupation, rather than evaluating this trend as a whole. Most importantly the undersigned will rely on the construction, terms and normative logic of Article 43 and Article 64 to identify and discuss those changes: starting with the principle of keeping the local laws in force and reviewing the exceptions and admissible purposes, from the most traditional and uncontroversial areas and grounds, such as the security of the occupier and the needs of the population of the occupied territory to the most permissive grounds. In doing so, the undersigned

⁷² For the practice of the Israeli Supreme Court see D. Kretzmer, *op. cit.*, pp. 61–72.

will consider both whether the changes fall within the limits of the grounds and exceptions foreseen under international, including the claims by Israel that changes were necessary for security reasons and for the population's needs and whether the field of intervention goes beyond the admissible purposes. Finally the recent far-reaching developments of the types of legislative changes warrant a specific attention given their more drastic nature: from Israel's use of its personal jurisdiction over Israelis to govern life in Israeli settlements largely by legislation adopted by the Israeli parliament, to most recently, the adoption by parliament of legislation openly territorially applicable in the oPt.

This assessment also requires considering the prolonged nature of the occupation, within the parameters highlighted earlier, within the temporary character of occupation. In this regard, it is worth noting that the HCJ considered that a prolonged occupation result in more legislative powers for the occupier. The HCJ explained this interpretation as follows:

Life does not stand still, and no administration, whether an occupation administration or another, can fulfil its duties with respect to the population if it refrains from legislating and from adapting the legal situation to the exigencies of modern times.⁷³

Finally the undersigned wish to stress that, in itself, the fact that Israel from a domestic point of view, kept the status of those territories as uncertain, namely being merely "administered" by or under "administrative control" of the Israeli army⁷⁴ has no legal bearing over the applicability of the international law on belligerent occupation.

Before addressing the above aspects it is necessary to clarify the scope and implications of the Oslo Agreements for the international law on belligerent occupation with regard to the subject-matter. As noted earlier according to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Israel retains exclusive control over Area C. However the combined reading of Article 7 and Article 47 of Geneva Convention IV limits the effects of "agreements" between the occupying power and enemy authorities or the authorities of the occupied territory. Pursuant to those provisions, such accord shall not "adversely affect the situation of protected persons", restrict their rights, or deprive them of the benefits of the Convention "by any change introduced, as the result of the occupation ..., into the institutions or government" of the occupied territory. The authority conferred to Israel on various topics in Area C under the Oslo agreements can therefore not justify legislative powers of the occupying power which go beyond what International Humanitarian Law admits under Article 43 and Article 64, nor deprive the Palestinian residents of the benefit of the local legislation in place at the time the occupation started. This is confirmed by the 1995 Oslo Interim Agreement itself, which contains an explicit reference to the respect for international law. Article XVII states that "the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities in accordance, with international law".

⁷³ See HCJ 337/71 *The Christian Society for the Sacred Places v Minister of Defence*, 26(1) PD 574, 582 (1971), cited by E. Benvenisti, *op. cit.*, p. 246, footnote no. 243.

⁷⁴ A. Cohen, "Administering the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories", *Israel Law Review*, Vol. 38, No. 3, 2005, pp. 38-39.

Ultimately this means the following: first the Oslo Agreement could only transfer to Israel the authority in as much as this does not conflict with IHL norms protecting Palestinian residents in Area C, in particular the obligation to respect the local legislation conferring authority and creating certain institutions. Second the Oslo Agreements could not confer legality to practices and policies that were already unlawful under IHL before their signature.

A. The continued reaffirmation of the principle of leaving local laws in force

At the very beginning of the occupation in 1967, Israel made clear through military orders and proclamations that the local laws would remain in force (i.e. Jordanian Law and British Mandate regulations), subject to changes made by such acts.⁷⁵ While such position would not by itself amount to respecting the principle of leaving the local laws in force, given the potential to amend existing legislation, it was taken under the understanding that changes would only be made to laws contradicting Israel security needs.⁷⁶

For the West Bank, excluding East-Jerusalem, the “Proclamation concerning Law and Administration (no. 2)” of 7 June 1977 June 7 stated:

The law in existence in the Region on June 7, 1967, shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamation or any other proclamation or Order which may be issued by me, and subject to modifications resulting from the establishment of government by the Israeli Defense Forces [IDF] in the Region.⁷⁷

The HJC confirmed this principle, save future changes made through proclamations and military orders by the area commanders. For example, referring to its past jurisprudence and to Proclamation no.2, the HCJ held in 2007:

[T]here are two main elements of the legislation applicable to the Palestinian inhabitants of the territories: one element is the law that was in force in the occupied territories until 1967, and in the case of Judaea and Samaria this is Jordanian law; the other element is the orders made by the area commander, which serve as primary and subordinate legislation in the territories. This normative position is also consistent with the outlook of customary international law with regard to the law applicable in a territory that is held under a belligerent occupation, as laid down in article 43 of the regulations appended to the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1907 (...) — see HCJ 61/80 Haetzni v. State of Israel (Minister of Defence) [5], at pp. 597-598.⁷⁸

In the *Haetzni* case in 1980 the HCJ had also specified that respecting existing legislation was necessary to maintain public order.⁷⁹ On that basis, and apart from the

⁷⁵ See for example, D. Kretzmer, op. cit., p. 25, and R. Shehadeh, “The Legislative Stages of the Israeli Military Occupation”, in *International Law and the Administration of Occupied Territories*, E. Playfair (ed), Oxford University Press, Oxford, 1992, pp. 151-168.

⁷⁶ A. Cohen, op. cit., p. 39.

⁷⁷ Military Proclamation No. 2 Concerning Regulation of Authority and the Judiciary (West Bank) (1967), published in CPOA, No. 1, p. 3, Article 3.

⁷⁸ See HCJ 5666/03 Kav LaOved v. National Labour Court, p. 262

⁷⁹ HCJ 61/80 Ha’etzni v State of Israel (Minister of Defence), 34(3) PD 595 (1980), quoted by E. Benvenisti, *The Israeli Occupation of the West Bank and Gaza*, op. cit., footnote no. 55.

specific case of East-Jerusalem, a scholar stressed that “this basic principle of retention of preoccupation law, subject to the occupant’s power under the Hague Regulations to modify it from time to time, has been adhered to” with the exception of the Golan Heights where, according to Israeli authorities, due to the lack of local executive and judicial personnel, the Israeli law had to be introduced.⁸⁰

However, the undersigned wish to stress again that statements reaffirming the respect for local laws save the necessary changes needed do not by themselves guarantee compliance with IHL relevant norms. While they reflect a commitment to keeping the local legislation in force, the lawfulness of any amendment by Israel needs to be assessed against the admissible exceptions and purposes provided for in Articles 43 and 64. On the other hand, the content of the proclamations and military orders may give an indication as to the rationale used to justify changes to local laws. In this regard, it was reported that:

“Originally, these powers were exercised cautiously, with explanations for the justification or necessity for the order in question. As time went on, however orders which change the Jordanian law drastically so as to adapt it to Israeli policies, have become commonplace and issued without explanation.”⁸¹

It is therefore necessary to review the most significant changes on a case-by-case basis, taking into account how the exceptions admitted under Articles 43 and 64 were interpreted by State practice and international authorities. This is more so when considering the following paradox: despite the restrictive formulation of Article 43, from the early days of the occupation onwards, this provision and the related obligation to maintain public order have served as a key rationale for Israel to adopt far-reaching military orders, leading a scholar to consider that such orders “issued in the name of public order have influenced all aspects of life, effecting radical changes in taxation, land use, financial systems, trading practices, municipal structures, local court systems, and innumerable other areas”.⁸² On the other hand, the extensive scope of Israel’s legislative interferences is not sufficient in and of itself to conclude that those changes amount to violations of the relevant IHL norms.

B. Review of significant legislative changes in light of exceptions and admissible purposes

Israel had adopted a wide range of legislative changes, claiming those were necessary for security reasons, to fulfil its duty to maintain public order and civil life, notably that such changes would benefit the occupied population, or other

⁸⁰ Ibid. p. 212. See Order Concerning Courts (Ramat Hagolan [the Golan Heights]) (No. 273) (1970), reproduced and translated in Military Government, *supra* note 7, appendix C, no. 3, at 453. Similar situations, with similar solutions, occurred in British-occupied Iraq after World War I, see Gertrude L. Bell, Review of the Civil Administration in Mesopotamia 1920, Cmd 1061, quoted by Benvenisti, footnote no. 56.

⁸¹ *The Legal Status of the West Bank and Gaza*, Prepared for, and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 1 January 1982, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/9614F8FC82DCA5DF852575D80069E0C0>

⁸² E. Playfair, “Playing on Principle? Israel’s Justification for its Administrative Acts in the Occupied West Bank”, in *International Law and the Administration of the Occupied Territories*, ed. Emma Playfair (Oxford: Clarendon Press, 1992), p. 208.

justifications or a combination thereof. On the other hand, it has also, at times, relied on existing local laws to justify certain measures.

The undersigned wish to stress that if the regime of the occupier's legislative power under the law on belligerent occupation requires to consider other IHL norms and if this Expert Opinion focuses on assessing legislative amendments, those are also closely related to different types of measures, policies, and practices that amount to the violations of other IHL norms. They do not constitute, but either use or imply changes in local legislation. For example, the creation of settlements is outlawed under Article 49(6) prohibiting the transfer of the occupier's population into the occupied territory. However, a tool for this policy of settlements consists of changing or relying on existing local laws as interpreted by the occupying power. As a result, it is imperative to also assess those aspects of a broader policy against Articles 43 and 64.

1) The security of the occupier's forces

The reference by Israel to security reasons is among the most common grounds invoked to justify the adoption of measures in the oPt. As noted earlier, with regard to changes to local laws, under both Article 43 and Article 64(2) this ground is explicitly recognized as a valid justification. Undeniably the most uncontroversial case of legislation an occupying power may introduce is that which is essential to ensure its security. Traditional examples of laws that may be suspended are those concerning conscription, rights of public assembly, and bearing arms.⁸³ While it is not sufficient that legislation furthers its security, an occupying power has broad discretion in deciding what is essential to its security.

Conversely, like for any other IHL norms providing for security considerations to justify certain measures, this ground is not to be interpreted in an abusive way and the occupying power must prove that there is a genuine causation between a given measure and the protection of its security. Furthermore, the undersigned highlight that the adoption of a measure specifically prohibited by IHL cannot then lead to legislative changes for which the occupier claims that they are essential for security reasons. For example the security of the occupying power cannot validly cover the security of Israeli settlements whose establishment in the oPt amounted in itself of a violation of IHL, namely Article 49(6) of GCIV.

One of the most extensive legislative changes introduced by Israel at the initial stages of the occupation was the enactment of new criminal legislation. Following the first two proclamations by the military commander for the West Bank, a new proclamation and orders were issued setting up criminal law and a system of military courts⁸⁴, amended several times, including through the Security Provisions Order (No. 378, SPO), which is rather exhaustive in defining offences, detailing the jurisdiction

⁸³ UK Manual, op. cit., para. 11.25.

⁸⁴ *Proclamation Concerning the Entry into Force of the Order Concerning Security Provisions (West Bank Area)* (No. 3), 5727-1967; *Order Concerning Security Provisions*, 5727-1967; and *Order Concerning the Establishment of Military Courts (West Bank Area)* (No. 3), 5727-1967.

and procedures before military courts as well in regulating the arrest of, search for and detention of suspects and accused persons.⁸⁵

While providing a detailed analysis of the content of these orders goes beyond the scope of this Expert Opinion, the undersigned wish to point out that under Articles 43 and 64, in particular the first paragraph of the latter, the adoption of such criminal legislation by an occupying power limiting the freedom of assembly and defining offences related to curfew and the bearing of firearms fall within the remit of legislative changes essential to its security. However this general assessment does not mean that all provisions of these orders are assumed to be lawful. Some, to this day raise concern as to their compatibility with IHL norms, as *lex specialis*, and IHRL.

2) The controversial case of legislating for maintaining public order and enhancing civil life to the benefit of the occupied population

As noted earlier maintaining public order is both a specific obligation for the occupying power as well as a purpose justifying changes to local laws. It was also interpreted as allowing the occupying power to legislate to enhance civil life within the occupied territory. These considerations also require the need to consider whether measures adopted by the occupier are in the interest of the occupied population⁸⁶ as one of the primary objectives of the relevant norms on occupation contained in GCIV.

In light of the central role these interrelated notions played in the narrative of Israel to explain and justify the wide range of legislative measures it adopted, the undersigned intend to review some of the most emblematic cases in light of Articles 43 and 64.

a) Local labour law

Interestingly, the first situations in which the occupier found itself legislating on issues linked to the daily life of the occupied population arose only few years following the beginning of the occupation.

In the first judgment of the HCJ related to the oPt, about a labor dispute between the Christian Society for the Holy Places and hospital workers who had gone on strike, the HCJ in 1971 had to review whether the concerned regional military commander for the West Bank could have lawfully amended the Jordanian Labor Law to address the lack of associations being mandated to appoint arbitrators as part of establishing a compulsory arbitration procedure under that law through allowing the employers and employees parties to the concrete dispute or the Officer in Charge of Labor Affairs to appoint arbitrators. The key contention was whether the Order amending the Jordanian Labor Law complied with Article 43. The HJC held that the Order was valid considering that “[a] prolonged military occupation brings in its wake

⁸⁵ For a detailed analysis of the Israeli military justice system in the oPt, see S. Weill, “The judicial arm of the occupation: the Israeli military courts in the occupied territories”, *IRRC*, Vol. 89, 2007, No. 866, pp. 395-419.

⁸⁶ Y. Dinstein, 1978, op. cit., p. 112.

social, economic and commercial changes which oblige [the occupant] to adapt the law to the changing needs of the population.”⁸⁷

This case, like many other emblematic cases of legislative changes brought by Israel, revolves around assessing the extent to which the amendment in question does benefit to the welfare of the occupied population. Questioning whether the HCJ was right in upholding the Order and noting that compulsory arbitration in labor disputes has not yet been introduced in Israel, Yoram Dinstein, pointed out that:

[T]he litmus test for distinguishing between legitimate and illegitimate concern for the welfare of the civilian population — under Article 43 — should hinge on whether the Occupying Power shows similar concern for the welfare of its own population. Differently put, if the Occupying Power enacts a law – say, against cruelty to animals in the occupied territory — the crux of the issue is whether a parallel (not necessarily identical) law exists back home. If the answer is negative, the ostensible concern for the welfare of the civilian population deserves being disbelieved.⁸⁸

This scholar also conceded, citing Theodor Meron’s comments⁸⁹, that this test for assessing the motives of the Occupying Power is “conclusive only when the answer is negative” and that otherwise “that is not the end of the matter, given the general rule (embedded in Article 43) that the laws in force in an occupied territory ought to be left intact.”⁹⁰ On that basis Dinstein concluded that in that case the Order should have been considered invalid.

The undersigned contend, that while this case relates to a very specific procedural question under the Jordanian Labor Law, it illustrates the complexity of assessing genuinely what the notion of “the interests of the occupied population” really is and the implications of this concept within the broader construction of Article 43 and vis-à-vis the principle of leaving the local laws in force. We contend that even though, as demonstrated below, those interests play a more decisive role to establish a violation of Article 43 or Article 64 when the legislative change is manifestly detrimental to the local population, they demand a thorough and detailed assessment, taking into account the specificities of the various aspects of civil life prevalent in the occupied territory.

b) Taxation

Unlike the case of the compulsory arbitration procedure in labor disputes where the amendment to the local laws had no similar provision in Israeli law, the adoption of a Value Added Tax (VAT) for the West bank and Gaza followed a similar legislative reform in Israel. The imposition of new taxes also raises an additional legal issue due to the fact that the Hague Regulations contain specific norms on taxation in occupied territories. Articles 48 and 49 only allow the occupier to collect existing taxes as per local laws and in addition to levy “other money contributions in the

⁸⁷ *Christian Society for the Holy Places v. Minister of Defense*, No. H.C. 337/71, 26(1) Piskei Din 574 (1972), as summarized in 2 *IsR. Y.B. HuR. RTs.* 354, 355 (1972).

⁸⁸ Y. Dinstein, HPCR, op. cit., p. 9 (footnotes omitted), available at:

<http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf>

⁸⁹ Th. Meron, “Applicability of Multilateral Conventions to Occupied Territories,” 72 *AJIL*, 1978, pp. 549-550.

⁹⁰ Y. Dinstein, HPCR, op. cit., p. 9.

occupied territory” but for strict purposes, namely “the needs of the army or of the administration of the territory in question”.

In the *VAT case* the HCJ had to review the validity of an Order imposing a VAT in the oPt. While it noted that with regard to the possibility to impose new taxes the occupier cannot act freely, it relied on the principles set down in Article 43 to supersede the prohibition on new taxes not falling within the scope of those provided for under Article 49, on the basis that introducing VAT was justified both in order to fulfil a military need and to ensure the welfare of the population. It concurred with the Respondents’ claim that:

[T]he introduction of the value added tax in Israel also necessitates as a consequence the introduction of parallel taxation in the territories, that is, that the fiscal solution adopted was necessitated by the complex of economic facts confronting the military government, and that it was in the nature of an essential measure in the existing political reality, in order to facilitate continuation of a situation embracing a variety of positive economic phenomena that are most important for the territories and its population, in the given situation, and further, and this is the main thing, the argument denied that the opposite approach, which is pleaded by the Petitioners, is likely to bring serious economic harm to the territories and its population, which would cause security dangers.⁹¹

With regard to the HCJ’s position on the effect of Article 43, Y. Dinstein noted that:

The Court’s logic is based on the grafting of the exception clause as regards necessity (appearing in Article 43) onto the overall prohibition of new taxes not constituting “money contributions” (as per Articles 48 and 49). The notion of subordinating Articles 48 and 49 to the necessity exception in Article 43 is far from self-evident but it is not incongruous.⁹²

While the norms of international law on belligerent occupation are closely related, the undersigned wish to stress that Articles 48 and 49 may be seen as *lex specialis* compared to Article 43. Indeed, the interpretation of the HCJ would lead to apply the necessity exception to the principle on leaving the local laws in force to all potential legislative changes even those governed by specific rules pertaining to particular topics and contained in the Hague Regulations, even though those provisions did not envisage such exceptions. The undersigned argue that this runs against the normative logic of the law on belligerent occupation.

As for the application of Article 43 itself, it may be argued that in this particular case, it is doubtful that the dominant motive behind the imposition of new taxes was the benefit of the local population.⁹³ While the HCJ held that the interests of the occupied population, albeit balanced with military interest, are to be taken into account in conjunction with the evolution of social and economic needs of the territory, the primary reason for introducing a VAT in the oPt seems to be related to the same measure being introduced in Israel.

⁹¹ HCJ 69/81 Abu-Aita et al. v Commander of Judea and Samaria et al., 37(2) PD 197, (1983), para. 53.

⁹² Y. Dinstein, HPCR, op. cit., p. 11 (footnotes omitted).

⁹³ D. Kretzmer, op. cit., p. 72.

c) The planning and building regime in Area C of the West Bank

The amendments adopted by the Israeli authorities to the 1966 Jordanian Law through Military Order 418 and its successive revisions, especially pertaining to planning authorities on the local and district level, provide a clear cut case where the changes in local laws amount to violations to Article 43. Indeed not only were the changes made to the local legislation not justified under the recognized exceptions, but the current planning and building regime leads to a planning failure that fails to meet the needs of the Palestinian residents, which is contrary to the occupying power's obligations to maintain public order and civil life.

When Israel started occupying the West Bank in 1967, planning and building were governed by the *Towns, Villages, and Building Planning Law* (hereinafter the Jordanian Law), a Jordanian law enacted in 1966. Israel refrained from abolishing this Law but it revised it comprehensively through Military Orders on the grounds that the law required the inclusion of Jordanian government representatives in the planning process. However, beyond simply replacing Jordanian central government representatives, the *Military Order Concerning Towns, Villages, and Building Planning Law (Judea and Samaria)* (No. 418) of 1971 significantly amended the Jordanian Law.

It is understood that the changes made in 1971 through Order 418 and its numerous amendments since that date go far beyond the need to adjust the planning institutions to the new situation of occupation by the Israeli authorities and radically modify the Jordanian Law as well as the entire planning system in the West Bank. In particular, protected persons have practically no say in the newly established planning institutions. Such changes, including the revisions of the Order 418 after 1971, exceed the legislative powers of the occupier under international law.⁹⁴ For example as stated earlier, the general principle of Article 43 prohibits changes to local legislation, including abolishing existing local administrative institutions because local institutions of the occupied country are established by and operate under the law. Consequently this rule prevents Israel from abolishing existing institutions under the Jordanian Law, except under certain circumstances. Although changes related to the composition of the planning institutions could have been allowed, these should only be limited to the provisions related to the representative/s of the Jordanian Government. It is clear that the amendments go far beyond this aspect and significantly affect the planning and building system established by this law.

3) Legislating (or not legislating) for prohibited purposes: the case of the settlements

The establishment of settlements in the oPt is among the most uncontroversial violation of IHL, over the 50-year-long occupation, which has in addition serious humanitarian consequences. From a legal point of view, as noted earlier, their lawfulness has mainly been addressed through the perspective of Article 49(6) of

⁹⁴ For a detailed analysis of these changes against Article 43, see M. Sassòli and T. Boutruche, *Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions*, November 2016, available at: <https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf>

GCIV prohibiting the occupier deportation or transfer of parts of its own civilian population into the territory it occupies. In this regard it is commonly recognized that settlements amount to a violation of this provision⁹⁵, despite the argument made by Israel that as the transfer is done on a voluntary basis it would not amount to a breach of this norm.⁹⁶

The lawfulness of the settlements is rarely discussed in light of the rules limiting the occupier's legislative power.⁹⁷ The undersigned wish to stress that considering article 49(6), any type of legislative changes adopted by Israel to facilitate or set up settlements would be in violation of Article 43, in that this would not fall within any of the admissible purposes. It is however necessary to focus on two issues reflecting the evolution of the Israeli practice in relation to the changes to local laws to permit Israel to appropriate itself land for new settlements and to reflect on how the IHL norms regulating the occupier's legislative power were used by Israel in that respect.

In the first years of the occupation, the requisition of land through military orders to establish settlements was justified by Israel for "security reasons".⁹⁸ This translated into Israel's argument that settlements were allowed considering that under Article 43 the occupying power is required to maintain public order and authorized to take measures to ensure its forces' security, and that settlements contributed to that security. However in the *Elon Moreh* case, the HCJ in 1979, while referring to Article 43 and the related duty of the occupier to maintain public order and safety like in previous rulings, held that security considerations could not justify the requisition of land to be used for civilian needs of Israelis in the oPt.⁹⁹

In part due to this jurisprudence shift, other justifications than security were used to proceed with the appropriation of land for the purpose of establishing new settlements. The undersigned wish to stress in particular the resort to existing laws in the West Bank, such as the designation of state land through the Ottoman Land Code of 1858, later incorporated into Jordanian legislation, and the declaration of public land on the basis of the Jordanian Land Law, although the latter was more used in East-Jerusalem than in the West-Bank. Israeli authorities relied on these legal provisions, combined with other policies, in order to use land owned by Palestinians, to deprive the latter of this use and to allow the use by settlers.

These practices raise a particular issue when considering the extent to which they amount to violations of Articles 43 and 64. Indeed the principle of leaving the local laws in force would in principle support such an approach. However these practices are not strictly speaking cases where the occupying power merely applies existing local laws. They in fact amount to a "change" to local laws due to the extensive or abusive way Israel has interpreted them and in conjunction with other policies and preventing in practice Palestinians from meeting the conditions for the

⁹⁵ See for example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, op. cit., para. 120.

⁹⁶ See E. Benvenisti, MPEPIL, op. cit., p. 240.

⁹⁷ Ibid., p. 222.

⁹⁸ B'Tselem, "Settlements", 13 March 2013, available at:

http://www.btselem.org/settlements/seizure_of_land_for_military_purposes

⁹⁹ HCJ 390/79, Duweikat et al., v. Government of Israel et al.

land not to be considered state land under Ottoman Law or public land under Jordanian Law. For example, under Ottoman Law a land could not be appropriated by the State if it was formally registered. However in 1968, through Military Order 291, Israel froze all land registration in the West Bank. While those practices are not *per se* changes to local laws, the undersigned wish to stress that the way local laws have been interpreted, in conjunction with those policies could be seen as resulting in a change to the conditions of application of those local laws.

In any case the purpose of these practices was to establish settlements that amount to a violation of another IHL norm. In as much as the exception contained in Article 43 could not be transposed for the interpretation and operation of other provisions of the Hague Regulations in the case of imposing new taxes, the duty to respect local laws could not serve to justify the violations of another IHL norm. Furthermore, Article 64(2) provides for the possibility to subject the occupied population to new laws in order to apply IHL and therefore amend local legislation that would be an obstacle to that purpose. The undersigned contend that if certain local laws are to be changed in order to implement IHL, they cannot be used to engage in a conduct that is contrary to IHL and clearly not required by the interest of the local population. In addition, local laws may not be interpreted in an abusive way that amounts to changing their application in practice.

The undersigned conclude that be it with respect to the obligation to ensure public order and safety, the exception based on the security of the occupier's force or with the convoluted use of the principle to leave local laws intact, settlements and any legislative changes or the absence thereof in favour of such initiatives amount to a violation of IHL.

4) Crossing the legislative Rubicon: the extension of the Israeli personal jurisdiction over Israelis in Israeli settlements and the adoption of legislation openly applicable in the oPt

While the previous issues addressed in this Expert Opinion focused on specific areas or practices involving legislative changes, this section reviews two of the most significant legislative developments undertaken by Israel, namely extending its personal jurisdiction over Israeli settlers in the West Bank and the adoption by the Israeli parliament of legislations openly territorially applicable in the oPt.

Unlike previous cases, where the Israeli authorities heavily relied on Article 43 of the Hague Regulations to justify a wide range of measures, including changes to local laws, using in part the flexibility provided for under this provision, those two developments challenge the core principles governing the occupier's legislative power. This is so despite the fact that from the early days of the occupation, Israel was well aware of the impossibility for the occupying power, under the international law of belligerent occupation, to apply Israeli law to the oPt.

The undersigned recall that under Article 43 two main limitations, as a matter of principle, prohibited Israel from applying Israeli law to the oPt. Firstly, based on this provision the sole legislative authority to be exercised over the territories rested upon the military commander in that the occupying power cannot act as a sovereign legislator due to the temporary and transitional nature of the occupation and may not

apply its own legislation, adopted by its own legislative authorities, to the occupied territory. The only lawful legislator of the occupying power in the occupied territory is the military commander.¹⁰⁰ This would bar the application of any legislation adopted by the Israeli parliament. Secondly, the principle requiring the occupier to respect local laws also constitutes another obstacle to the formal application of Israeli law to the oPt as this would have meant a radical change to such legislation.

These two limitations, together with the prohibition of annexation under the *jus ad bellum*, were the main reasons explaining why Israel was reluctant to formally apply Israeli law to the territories it gained control over in 1967. As a result, the Israeli authorities, through the Knesset, decided that Israeli laws would be made applicable to settlers through extending Israel's personal jurisdiction. These took the form of the Defense (Emergency) Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance) but this move was not limited to criminal law provisions.¹⁰¹ As noted by an Israeli NGO:

[I]n a de facto manner, and parallel to the development of the military legal system, Israeli lawmakers applied extensive sections of Israeli law to Israelis living in the West Bank - on a personal and extraterritorial basis. This included criminal law, National Health Insurance Law, taxation laws, laws pertaining to Knesset elections and more. The military commander further subjected the settlements and their residents to a long line of Israeli legislative articles in various civil areas, through different orders that were only applied to Jewish communities in the area.¹⁰²

This NGO further noted that at the end of the 1970's and beginning of the 1980's "the military commander significantly extended the application of Israeli civil and administrative laws to the Israeli residents of the West Bank, by means of orders that were only applied to Israeli settlements in the territory. The two main orders are the ones arranging the administration of Israeli local councils: the Order Concerning the Administration of Local Councils and the Order Concerning the Administration of Regional Councils."¹⁰³

Despite being in appearance less drastic than a formal territorial application of Israeli laws, the undersigned stress that this is abuse of Israel's jurisdiction, which amounts to a violation of Article 43.

The most recent and radical legislative development consists of a series of bills and laws related to the settlements¹⁰⁴, in particular the adoption by the Israeli parliament on 6 February 2017 of the *Law for the Regularisation of Settlement in*

¹⁰⁰ See for example, L. Oppenheim, *International Law: A Treatise*, Vol. II: *Disputes, War and Neutrality*, (7th edition by H. Lauterpacht, 1952), p. 438. This is manifested by the very wording of the title of Section III of the Hague Regulations (which comprises all provisions - Arts. 42-56 – on occupation) and reads "**Military** Authority over the Territory of the Hostile State" (emphasis added).

¹⁰¹ *Defense Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance)*, 5727-1967, quoted in ACRI, "One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank", Association for Civil Rights in Israel (ACRI), 2014, available at: <http://www.acri.org.il/en/2014/11/24/twosysreport>

¹⁰² ACRI, op. cit., p. 6.

¹⁰³ Ibid., pp. 18-19.

¹⁰⁴ O. M. Dajani, op. cit., p. 51.

Judea and Samaria 5777-2017.¹⁰⁵ The law is meant to legalize retroactively illegal settlements built on private Palestinian lands. A petition against its legality is still pending before the Israeli Supreme Court. If for East-Jerusalem, the Knesset had enacted the “Basic Law: Jerusalem the Capital of Israel” in 1980, revised in 2000, originally the Government had adopted an order in June 1967 applying the Israeli law to this area.¹⁰⁶ For the West Bank, it is therefore the first time the Israeli Parliament enacts a law applying openly to that territory. This is therefore in clear breach of Articles 43 and 64, in particular because through this law Israel is acting as a sovereign legislator. Furthermore, the new regulations of land ownership under this law would result in significant changes to local laws, notably the Jordanian Land Law, outside any of the admissible grounds recognized under those provisions. The undersigned also wish to stress that, the articles of the law providing for compensation for the owners of the land, under certain conditions, have no legal bearing over the unlawful character of the law as such under the international law on belligerent occupation.

The undersigned conclude that the extension of Israeli personal jurisdiction and the application of Israeli laws to the West Bank violate the IHL norms on the occupier’s legislative power.

C. The implications of repeated legislative changes violating IHL on the question of annexation

The above analysis aimed at reviewing the legislative developments and changes adopted by Israel under the international law on belligerent occupation. As highlighted earlier, it focused on the conduct of Israel in light of the norms governing the legislative power of an occupier under this specific legal framework. The undersigned concluded that some of Israel’s acts, including in one case the abuse of existing legislation to facilitate the establishment of settlements, amount to violations of those rules.

However given the prolonged character of the occupation of the oPt and the particular nature of the conduct under review, namely Israel’s legislative interventions, the undersigned note that this situation is often associated with a different legal question: the extent to which the prolonged occupation of the oPt amount to an annexation of this territory by Israel. This revolves around a distinct issue in principle in that this is regulated by another set of norms of international law, primarily the *jus ad bellum*, in particular the prohibition on the acquisition of territory through the use of force against the territorial integrity and political independence of the occupied territory. IHL does not address in one way or another the nature of the occupation and its lawfulness, apart from stating in Article 47 of GCIV that:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or

¹⁰⁵ Regulation of Settlement in Judea and Samaria Law, 5777-2017, Sefer HaHukim [SH] [Book of Laws (official gazette)] No. 2604 p. 394 at 410 (Feb. 13, 2017), available on the Ministry of Justice website, available at: <http://www.justice.gov.il/Units/Reshomot/publications/Pages/BookOfLaws.aspx>

¹⁰⁶ E. Benvenisti, MPEPIL, op. cit., p. 204.

government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

As far as the obligations of the occupier are concerned the lawful or unlawful character of the occupation has no legal bearing.¹⁰⁷

This being said numerous scholars, in part on the basis of repeated IHL violations, in particular through changing local laws and extending the reach of domestic law, discuss whether Israeli occupation classifies as an annexation.¹⁰⁸ An author noted that “A raft of legislative proposals introduced in the Knesset over the last several years has raised the specter of Israeli annexation of additional West Bank territory”.¹⁰⁹ However as noted by another scholar, “Occupation law was never intended to account for cumulative and compounded violations of IHL such as those resulting from *de facto* or *de jure* annexation of parts of an occupied territory.”¹¹⁰

While this Expert Opinion does not intend to reach a conclusion as to whether, from the perspective of the *jus ad bellum*, the increasing number of cases where Israel went beyond the limits contained in the IHL norms on belligerent occupation amounts to an annexation, it provides an overview of the debate over the implications of excessive legislative changes under IHL for the classification of an occupation as an annexation.

Annexation has been defined as “the forcible acquisition of territory by one State at the expense of another”.¹¹¹ At the time annexation was not prohibited under international law, the two main conditions required for an annexation to exist were the “effective possession of the territory” and the State’s “intention to hold the territory permanently under its dominion.”¹¹² Those elements remain relevant since the adoption of the UN Charter and the prohibition on the use of force.¹¹³ The main challenge relates to how this intention is displayed. Indeed, while *de jure* annexation consists of a formal declaration or enactment in law, *de facto* annexation relates to such intention stemming from “practices and policies of an occupying state towards the occupied territory”.¹¹⁴

The undersigned wish to recall that since the adoption of the UN Charter, annexation is prohibited under international law, even if the annexation followed an

¹⁰⁷ See for example, “Hostages trial” (US Military Tribunal, Nuremberg, 1948), 8 LRTWC 34, 59, available at https://www.loc.gov/rr/frd/Military_Law/pdf/LawReports_Vol-8.pdf and Dinstein, *The International Law of Belligerent Occupation*, p. 3, as well as Valentina Azarova citing those references in V. Azarova, *Israel’s unlawfully prolonged occupation: consequences under an integrated legal framework*, June 2017, ECFR, available:

http://www.ecfr.eu/page/-/ISRAELS_UNLAWFULLY_PROLONGED_OCCUPATION_ECFR216.pdf, p. 4 footnote 25.

¹⁰⁸ See for example, E. Benvenisti, op. cit., pp. 203 and ff; O. M. Dajani, op. cit., p. 51 and ff; V. Azarova, op. cit., pp. 7-8.

¹⁰⁹ O. M., Dajani, op. cit., p. 51.

¹¹⁰ V. Azarova, op. cit., p. 5.

¹¹¹ R. Hoffman, “Annexation”, in Max Planck Encyclopedia of Public International Law, 2011, para. 1.

¹¹² C. Phillipson, *Termination of war and treaties of peace*, New York, E. P. Dutton & company, 1916, at 10, quoted by O. M. Dajani, op. cit., p. 51.

¹¹³ O. M. Dajani, op. cit., pp. 52-53.

¹¹⁴ V. Azarova, op. cit., p. 7.

occupation that resulted from a lawful use of force under international law. Indeed the forcible acquisition of territory is prohibited by the UN Charter under Article 2 paras. 3 and 4 that respectively require Member States to “settle their international disputes by peaceful means” and to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”. Whatever form the use of force may take, it is considered “in principle, as an internationally wrongful act from which no rights may be derived (...); consequently, annexation are illegal.”¹¹⁵ While it has been argued that annexation may be lawful in the context of the exceptions on the use of force, in particular self-defence, this was rejected as contrary to the necessity and proportionality requirements for self-defence to be lawful and by State practice.¹¹⁶ In addition, it would necessarily violate the right of self-determination of the people living in the annexed territory.

This being said situations of occupation are often linked to the notion of annexation: the conditions of application of the law on belligerent occupation, in particular the effective exercise of authority, and the occupier’s related conduct under that body of norms are associated with evidence of the elements of annexation. While this is less so for *de jure* annexation, as occupying powers usually refrain from making a formal declaration or adoption a law in this regard due to the now widely-recognized prohibition of annexation, this is particularly the case for *de facto* annexation. It is therefore not surprising that the practices and measures of an occupying power in the field of legislative changes to local laws are among the most prominent elements to be considered when discussing whether an occupation amounts to an annexation. An extension of all domestic legislation of the occupying State to the occupied territory would in our view even constitute a *de jure* annexation. However the undersigned wish to highlight that such practices and measures are to be considered in their own right and in relation to the *jus ad bellum*, in that repeated IHL violations of the principle of respect for local laws cannot by themselves account for an intention for the purpose of qualifying an occupation as an annexation. That *de facto* annexation remains an unclear concept as to its content¹¹⁷ complicates the application and interpretation of this notion.

With regard to Israel numerous scholars qualified the impact of the construction of the Wall and of the establishment of settlements in the West Bank, in Area C, as a *de facto* annexation.¹¹⁸ In its advisory opinion on the Wall the ICJ held that the wall and its related regime resulted in “a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.”¹¹⁹

As a noted by a scholar, Israel’s “institutional and legal practice has increasingly absorbed and integrated the settlements into Israel”.¹²⁰ With respect to

¹¹⁵ R. Hoffman, “Annexation”, in Max Planck Encyclopedia of Public International Law, 2011, op. cit., para. 4. See also this author for subsequent State practice confirming this prohibition.

¹¹⁶ Ibidem.

¹¹⁷ O. M. Dajani, op. cit., p. 52

¹¹⁸ Ibidem, footnote no. 6.

¹¹⁹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, op. cit., para. 121.

¹²⁰ V. Azarova, op. cit., p. 7.

legislative changes, the undersigned contend that while many of the above emblematic cases pertaining to specific amendments of local laws might not as such constitute evidence of an intention to annex the Area C, the most recent far-reaching legislative developments could account for such as an intention, the condition of the effective control being also met, at least for Area C. However the undersigned would submit that this would rather amount to a functional annexation, limited to those parts of Area C, given the scope of those new laws meant to only apply to settlements, and to those aspects covered by the legislation only. This being said, such laws could be seen as evidence of “exercising (...) functions of government over an extended time”.¹²¹

In the absence of a formal declaration of annexation by the Israeli authorities, and considering that from the early days of the occupation in 1967, at least for the West Bank, Israel refrained from going as far as applying Israeli law to the oPt, the most recent legislative developments may provide additional evidence for classifying Israeli legislation on certain parts of Area C as a functional annexation in violation of the jus ad bellum.

IV. ISRAEL’S OBLIGATIONS AND THIRD STATES’ OBLIGATIONS UNDER INTERNATIONAL LAW AS A RESULT OF ITS UNLAWFUL USE OF LEGISLATIVE POWER

In light of the findings related to Israel’s violations of the IHL norms governing its legislative power in the oPt, the undersigned will briefly identify both the occupying power’s obligations and third States’ obligations under international law resulting from the abovementioned violations, noting that even if they do not qualify as grave breaches to GCIV, they still constitute violations of IHL norms.¹²² With regard to the specific obligations under IHL, the undersigned will only provide few key elements, as this question has been analysed in depth in another Expert Opinion they drafted for the NRC.¹²³

The undersigned wish to stress that those two sets of obligations must be considered with regard to the specific type of acts under review. Indeed, the unlawful acts consist of legislative changes. As a result, the related obligation to rectify the unlawful situation on the part of Israel or the obligation for third States not to recognize those violations need to take into account the scope of the relevant legislative changes, the type of legislation used and their effects and cover all the range of unlawfulness, including any subsequent act carried out on the basis of an unlawful legislative change.

Furthermore, while IHL provides for specific obligations, in particular the obligation to ensure respect for IHL contained in Common Article 1 (CA1) to the 1949 four Geneva Conventions (GCI-IV), the general secondary rules on State responsibility, applicable in case of any violation of international law, are relevant to identify obligations for both the State to which the international wrongful act is attributed and for third States.

¹²¹ O. M. Dajani, op. cit., p. 52.

¹²² Article 147 of GCIV.

¹²³ See M. Sassòli and T. Boutruche, Expert Opinion, op. cit.

A. Israel's obligations arising from its unlawful legislative changes

1) The Israeli obligation to respect and ensure respect for IHL

CA1 reads as follows: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” The inclusion of the duty to respect the GCI-IV is widely considered as a “truism”¹²⁴, in that it merely restates the general principle *Pacta sunt servanda* of the international law of treaties, codified in Article 26 of the Vienna Convention on the Law of Treaties, that binding treaties must be implemented in good faith.

On the other hand, the obligation to ensure respect contained in CA1 unquestionably carries what was called an “internal compliance dimension”.¹²⁵ The primary purpose of including this wording in this provision during the negotiations of the GCI-IV was to highlight that the State Parties commit to guarantee the respect of those Conventions by both their own organs as well as their population as a whole.

The obligation to respect the GCI-IV reflects the existing general rule under the international law on State responsibility that any breach, by act or omission of those treaties attributable to that State triggers its international responsibility, under the well established grounds for attribution, such as its organs or individuals or groups of persons under its control.¹²⁶ The obligation to ensure respect however goes a step further in requiring the States to proactively take measures to prevent violations.¹²⁷ In that regard the obligation not to violate the GCI-IV (obligation to respect) is strengthened by a positive obligation to ensure respect.¹²⁸ This duty is also complemented by specific measures envisaged explicitly in the GCI-IV that States must respect, such as criminalizing and punishing grave breaches to the Conventions (Articles 49/50/129/146).

Most importantly the obligation to ensure respect in its internal dimension also extends to a duty to guarantee the respect for the GCI-IV by the whole population under the jurisdiction of a State Party. This understanding was already recognised by the State delegations during the Diplomatic Conference in 1949.¹²⁹ This is also widely confirmed in the majority of the doctrine¹³⁰ and the Updated ICRC Commentary.¹³¹ As noted by an author, this obligation “applies to and is activated by any private activity that impairs the enjoyment of the protection granted by the Geneva Conventions” and such an interpretation is further supported by the object and

¹²⁴ R. Geiss, “The Obligation to Respect and to Ensure Respect for the Conventions”, in *The 1949 Geneva Conventions - A Commentary*, Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), OUP, Oxford, p. 117.

¹²⁵ *Ibidem*.

¹²⁶ *Articles on the Responsibility of States for internationally wrongful acts*, annexed to UN General Assembly Resolution 56/83, 12 December 2001, Articles 4-6 and 8-11.

¹²⁷ *ICRC Updated Commentary to the Geneva Convention I*, 2016, Article 1, available at: <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AF A66200C1257F7D00367DBD>, para. 145 and J. Pictet, *1952 Commentary*, op. cit., pp. 25-26.

¹²⁸ R. Geiss, op. cit., p. 119.

¹²⁹ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 53.

¹³⁰ See for example, F. Kalshoven, “The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit”, *YIHL*, Vol. 2, 1999.

¹³¹ *ICRC Updated Commentary*, op. cit., para. 150.

purpose of CA1.¹³² State Parties are therefore required to act against “lower-level interferences”.¹³³

While legislative changes adopted by Israel and deemed unlawful under Articles 43 and 64 primarily relate by their nature to the obligation to respect IHL and to acts adopted by Israeli *de jure* organs, such as military commanders or the Israeli parliament as recalled below, the undersigned wish to highlight that CA1 would also require that Israel takes measures to ensure settlers do not further use such excessive changes in local laws to carry acts in violation of IHL. Indeed, settlers as anyone else in an occupied territory, find themselves under the jurisdiction of the occupying power. This would mean for example that pending the respect of the obvious obligation to repeal those unlawful legislative changes, Israel would need to make sure that those new provisions are not used by persons under its jurisdiction to undertake actions that would also be in violation of IHL as they are carried out on a legal basis that is contrary to the law on belligerent occupation.

2) The obligations under the general international law on State responsibility

Under the international law on State responsibility, the origin of the responsibility of a State is an international wrongful act consisting of two cumulative elements, a conduct amounting to a breach of an international obligation, which is attributable to that State.¹³⁴ Those norms on State responsibility, called secondary rules of international law, describe under which conditions a State can be responsible for the violation of a primary rule of international law, in other words substantive norms. Before analyzing the content of obligations arising from the violations of IHL, few questions must be addressed in light of the specific context and facts at hand.

a) Preliminary remarks on specific issues related to legislative changes

First the undersigned wish to recall that under the rules on attribution, international law on State responsibility makes clear that “the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”¹³⁵ In addition, an organ is defined as “any person or entity which has that status in accordance with the internal law of the State.”¹³⁶ As confirmed by the International Law Commission (ILC) Commentary of the Articles on State Responsibility, “[t]he reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf.”¹³⁷ This includes any organ of the State, as per internal law, that performs legislative functions. As the Permanent Court of International Justice (PCIJ) held in the case on *Certain German Interests in Polish Upper Silesia*:

¹³² R. Geiss, op. cit., p. 118.

¹³³ Ibidem.

¹³⁴ *Articles on the Responsibility of States for internationally wrongful acts*, annexed to UN General Assembly Resolution 56/83, 12 December 2001, Article 2.

¹³⁵ Ibid., Article 4(1).

¹³⁶ Ibid., Article 4(2).

¹³⁷ ILC, *Report of the International Law Commission*, 53rd Session, A/56/10 (2001), p. 40.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.¹³⁸

Any decision of a legislative character by any organ of the State matters for the purpose of attributing that act to the State. In that regard, it is uncontroversial that any act of State armed forces is considered an act of an organ of the State. Under Article 3 of the Hague Convention No. IV and Article 91 of Additional Protocol I of 1977 a party to the conflict “shall be responsible for all acts by persons forming part of its armed forces”. In light of the above, the undersigned wish to stress that the changes made by Israel with respect to the entity in charge of administering the oPt has not legal bearing on the question of attribution. Indeed both the IDF and then, following the establishment of the Israeli Civil Administration (ICA) pursuant to Military Order No. 947 mandated to administer the civil affairs in the area [West Bank]... for the welfare and benefit of the population and for provision and operation of public services, the ICA are considered organs of the State of Israel the same way the Israeli parliament is. Similarly military enactments adopted by the military commander amending local legislation qualify as conducts attributable to Israel.

The undersigned also note that the acts themselves, be they a new law adopted by the Israeli parliament or a military order, require addressing an additional question related to the existence of a breach of an international obligation as the second condition for a State to be responsible under international law. Article 12 of the ICL Articles provides that “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” The ILC Commentary however refers to a particular issue:

The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation prima facie conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases. Certain obligations may be breached by the mere passage of incompatible legislation. Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility. In other circumstances, the enactment of legislation may not in and of itself amount to a breach, especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.¹³⁹

Given the content of the obligation to respect local laws under the law on belligerent occupation, it is clear that the mere adoption of a military order, amending local legislation or the enactment of a legislation by the Israeli parliament that applies to the settlements amount to a breach of that obligation. The undersigned wish to stress that the content of those legislations whereby they replace existing laws or

¹³⁸ *Certain German Interests in Polish Upper Silesia*, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, at p. 19, cited by the ILC Commentary, p. 41, footnote no. 109.

¹³⁹ ILC Commentary, p. 57 (footnotes omitted).

contradict existing laws but prevail *prima facie* in violation of the obligation to leave local in force, provided one of the admissible exceptions is not met.

Finally it is important to highlight that under the general law on State responsibility, “[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”.¹⁴⁰ This means that as long as a military order or legislation in violation of IHL relevant norms is in force, this constitutes a continuing breach of an international obligation, as confirmed by the ILC Commentary that referred to “the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State” as an example of a continuing wrongful act.¹⁴¹

b) Obligations arising from the breach of the obligation to respect local laws

Under the international law on State responsibility, the breach of an international obligation attributable to the State triggers a range of obligations that are the substance of State responsibility.

First, the legal consequences arising from the State’s responsibility “do not affect the continued duty of the responsible State to perform the obligation breached.”¹⁴² The responsible State must cease the unlawful conduct and make full reparation, which includes restitution, compensation or satisfaction.

The obligation to cease the unlawful act obviously relates to continuing breaches of international law. In the case of Israel, this would mean suspend legislative changes that are going beyond the constraints imposed by Articles 43 and 64 and cease to use local laws provisions in violation of IHL. However the undersigned wish to stress that, with regard to these types of acts, namely legislative changes, introduced by military orders or by a formal piece of legislation, Israel obligations also include an obligation to modify, when a mere modification is sufficient for the legislative change to comply with IHL norms, or to repeal legislation that is *per se* a breach of those norms, such as laws applying territorially to the settlements in the oPt.

This obligation derives from the obligation for the responsible State “to make full reparation for the injury caused by the internationally wrongful act.”¹⁴³ Indeed the content of this obligation has far-reaching consequences when the wrongful act consists of legislation. The PCIJ specified in the *Chorzów* case that:

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all

¹⁴⁰ *Articles on the Responsibility of States for internationally wrongful acts*, annexed to UN General Assembly Resolution 56/83, 12 December 2001, Article 14(2).

¹⁴¹ ILC Commentary, p. 60.

¹⁴² *Articles on the Responsibility of States for internationally wrongful acts*, Article 29.

¹⁴³ *Ibid.*, Article 31(1)

the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.¹⁴⁴

While the principle of reparation in full may be limited for each form of reparation¹⁴⁵, in the case at hand, under the international law on State responsibility, Israel is expected to modify or repeal those legislative changes and to the extent possible address the consequences of those unlawful changes, such as changes to the planning regime and related institutions to ensure the pre-occupation laws are reintroduced. In certain other cases, in which the reintroduction of pre-occupation law would not ensure public order and civil life, the occupying power would have to adopt new legislation which is in the interest of the local population and retroactively legalize acts which were contrary to previous unlawful legislation it had introduced. If it is not possible to thus re-establish the situation as it was, compensation must be paid.

B. Third States' obligations arising from Israel's unlawful legislative changes

As noted above this section is not meant to address in details third States' obligations, an issue that was the focus of another Expert Opinion the undersigned drafted. It will therefore briefly discuss the question of the scope and meaning of CA1 and the additional norms of the international law on State responsibility.

States did not seem to have envisaged giving any "external dimension" to CA1 in 1949, i.e. did not consider that it would carry authorizations and obligations for State Parties to adopt measures to induce the respect of the GCI-IV by other States, in particular those involved in an armed conflict. However, the meaning of this provision evolved over time to include such a dimension.

Despite the original restrictive understanding of the obligation to ensure respect, subsequent practice over the past three decades account for an evolution of what this duty entails. The UN Security Council, the UN General Assembly and an overwhelming majority of the State Parties to GCIV have relied on this obligation to call on third States to react to Israeli violations of that Convention in the oPt.¹⁴⁶ In particular the process launched by the UN General Assembly between 1997 and 2001 gave an opportunity to States to consider various measures to give effect to their obligation in the context of the IHL violations committed by Israel in the oPt.¹⁴⁷

¹⁴⁴ *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 47.

¹⁴⁵ ILC Commentary, p. 96.

¹⁴⁶ See for example, UN Security Council Resolution 681 (1990), operative para. 5; UN General Assembly Resolutions ES-10/2 of 5 May 1997, ES-10/3 of 30 July 1997, ES-10/4 of 19 November 1997, ES-10/6 of 24 February 1999 and the Report of the Chairman of an Experts' meeting held on the Fourth Geneva Convention in Geneva, 27-29 October, 1998 (all of them reproduced in M. Sassòli and A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 2011, pp. 1196 and ff., and the Declaration adopted by a Conference of the High Contracting Parties to the Fourth Geneva Convention convened on the basis of common Article 1 in Geneva, 5 December 2001, available at: <http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html>, in which 114 States Parties participated. For more recent related practice, see M. Lanz, E. Max and O. Hoehne, *The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the duty to ensure respect for international humanitarian law*, IRRC, No. 96, 2014, pp. 1115-1133.

¹⁴⁷ See for example, P-Y. Fux and M. Zambelli, "Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997-2001)", IRRC, No. 847, 2002, pp. 661-691.

Furthermore, in other conflicts, although to a much lesser extent than the Israeli-Palestinian conflict, States also referred to that obligation as a basis to induce respect for IHL by other States.¹⁴⁸ The ICJ confirmed the “external dimension” of that obligation as well as its customary law status.¹⁴⁹

Unlike the obligation to respect and most of the corresponding substantive obligations foreseen by IHL, that are negative obligations of result (not to violate those norms), the obligation to ensure respect is a positive obligation of means or conduct, including in its external dimension.¹⁵⁰

The 2016 Updated ICRC Commentary of the 1949 Geneva Convention I derives negative obligations from the obligation to ensure respect (such as that High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict).¹⁵¹ However, and most importantly, the duty to ensure respect is primarily positive in nature, demanding proactive steps to be taken, or in the words of the 2016 Updated ICRC Commentary, States “must do everything reasonably in their power to prevent and bring such violations to an end”.¹⁵²

As highlighted in another Expert Opinion they authored, the undersigned wish to stress that the factors to be taken into account in the assessment of whether a State discharged its obligation to ensure respect of IHL by other States through the due diligence standard should include a wide range of elements. This derives from the very essence of the due diligence standard that depends on the specific circumstances of each State and each case. *A contrario*, this means that all factors relevant for a State to discharge its obligation and that may contribute to ensuring respect for IHL must be considered.

Furthermore, under the international law on State responsibility, Article 41 of the Articles on State Responsibility spells out the specific consequences of a serious breach of peremptory norms (and as manifested by Articles 6/6/6/7 common to the GCs, the rules of the GCs, including Art. 64 of GC IV, may be considered to have a peremptory character)¹⁵³: 1) states shall cooperate to bring to an end through lawful

¹⁴⁸ For a comprehensive review of the relevant practice, see *ICRC Customary International Humanitarian Law Study*, Online updated version, Rule 144, available at:

https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule144#_VIOTNaPr. See also R. Geiss, “Common Article 1 of the Geneva Conventions : scope and content of the obligation to 'ensure respect' - 'narrow but deep' or 'wide and shallow'?” in H. Krieger (ed.) *Inducing Compliance with International Humanitarian Law : Lessons from the African Great Lakes Region*, Cambridge University Press, pp. 417-440.

¹⁴⁹ See ICJ, *Legal Consequences of the Construction of a Wall*, *op. cit.*, para. 158., and *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, *ICJ Reports*, 1986, para. 220.

¹⁵⁰ M. Sassòli, “State responsibility for violations of international humanitarian law”, *IRRC*, No. 846, 2002, p. 412, N. Levrat, *op. cit.*, pp. 274-291, and R. Geiss, *op. cit.*, pp. 118 and 133.

¹⁵¹ *ICRC Updated Commentary to the Geneva Convention I*, Article 1, *op. cit.*, paras. 158 and ff. This interpretation has been questioned by R. Geiss, *op. cit.*, p. 130.

¹⁵² *ICRC Updated Commentary to the Geneva Convention I*, Article 1, *op. cit.*, para. 154.

¹⁵³ See for example, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, *ICJ Reports* 1996, para. 79; United Nations, International Law Commission, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, Fiftyfifth Session, Supplement No. 10 (A/56/10), p. 284 (para. 5 on Art. 40); “Report of the International Law Commission on the work of its thirty-second session”, *Yearbook of the International Law Commission* 1980, Vol. II, Part Two, p. 46, para. 28; *The Prosecutor v. Zoran Kupreskic and*

means any serious (gross or systematic) breach of a peremptory norm of general international law; 2) no State shall recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation.

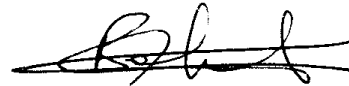
According to the ILC Commentary, the latter paragraph refers to a “duty of abstention”¹⁵⁴ consisting of two obligations. The first obligation takes the form of an “obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches”.¹⁵⁵

In light of the above and with regard to unlawful legislative changes, in particular those leading to other violations of IHL, States would be required not to consider as lawful the situations created by such changes, in particular settlements, introduced by Israel, in as much as most of IHL norms have a peremptory character¹⁵⁶, but also prohibit “acts which would imply such recognition” as noted by the ILC Commentary.¹⁵⁷ Specifically this implies that they may not recognize in their courts as lawful rights (e.g. civil rights) created or transferred under such unlawful legislation.¹⁵⁸ It may also be argued that they must allow under their jurisdiction protected persons from the oPt to exercise (e.g. private) rights they had under local legislation but which were abolished or altered by unlawful legislation introduced by the occupying power.



Prof. Marco Sassòli

Signature



Dr. Theo Boutruche

Signature

Date: 22 June 2017

others, ICTY Trial Chamber, Judgment, 14 January 2000, Case No. IT-95-16-T, para. 520; L. Condorelli and L. Boisson De Chazournes, 1984, op. cit., pp. 33-34; and Draft Art. 19(3)(c) as adopted on first reading by the ILC, Yearbook of the ILC 1976, Vol. II, Part Two, p. 95.

¹⁵⁴ ILC Commentary, op. cit., Article 41, para. 4.

¹⁵⁵ Ibid., para. 5.

¹⁵⁶ ICJ, *Legal Consequences of the Construction of a Wall*, op. cit., para. 157.

¹⁵⁷ Ibidem.

¹⁵⁸ This does not preclude the recognition of certain acts produced by the occupying power that violated the peremptory norm of international law on the legislative powers of an occupying power as valid provided they benefit the population (see. ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion I.C.J. Reports 1971, p. 16, at p. 56, para. 125, and ECtHR, *Cyprus v. Turkey, application No. 25781/94, Judgement of 10 May 2001*, Eur. Court H.R., Reports, 2001-IV, para. 90.