

Prolonged Occupation Under International Humanitarian Law

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## **Abstract**

*At a time when international law has become interpreted by reliance on the policy of powerful States, the Israeli occupation of the Palestinian territories was and still is the longest occupation in history. Making some convinced and believed that public international law has become impractical, hopeless and pointless at such times. One of these dangerous interpretations is justifying the existence of the Israeli occupation for a long period of time as a “prolonged occupation”, while the temporariness of an occupation is one of the criteria of what makes it legal. Accordingly, the “prolonged occupation” argument raises two main legal issues. The first is the application of international humanitarian law since its interpretation implies that occupation is for a short period of time. And the second issue is that occupation is based on the idea of preserving the status of the occupied population, however, if the occupation has no end in sight, it would certainly change the status of the occupied population because preservation will lead the population to a legal and political limbo. For this, we dedicate this article to cover these issues.*

## **Introduction**

In 1874, the occupation regime first evolved internationally during the Brussels Peace Conference after the battles of the great powers of the 19<sup>th</sup> century, more precisely the Franco-Prussian War of 1870 between France and Prussia backed up by Germany. Article (1) of the Brussels Declaration in 1874 sets the legal condition for the belligerent occupation, which is also found and remained unchanged in article (42) of The Hague Convention in 1907. After this period, many territories were under the belligerent occupation of the occupying state, such as, the Occupation of Nicaragua by the United States in 1912, the Occupation of Belgium and Luxembourg by Germany in the World War I, the Occupation of Rhineland by the United States, the United Kingdom, France and Belgium in 1918 and many more. The Brussels Declaration and The Hague Convention, both left the civilians out of protection and did not consider them in their provisions because in the 19<sup>th</sup> century wars had a limited scope and civilians were kept unharmed as much as possible during war times. Moreover, most of the belligerent occupation regimes that occurred were very brief and short-lived, they ended after maximum 5 years. Therefore, the provisions of the Brussels Declaration and the Hague Convention did not take civilians or the period of the occupation regime into consideration.<sup>1</sup>

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<sup>1</sup> Eyal Benvenisti, *The International Law of Occupation : Occupations During and After World War I: Early Challenges to the Traditional Law of Occupation* (Oxford University Press, Oxford, 2012), 108.

However, this all has changed before and during World War II. The Occupations by the Axis Power imposed a cruel reality on the civilians and the occupying power started implementing the occupation regime in ways that promote its interests but the duration of the occupation was never an issue at that time because occupations were very brief.<sup>2</sup> After World War II and the nightmare it caused for civilians, the Geneva Conventions were drafted because the protection afforded to civilians during war times was inadequate. Moreover, at the time the Geneva Conventions were drafted, the occupation regimes were very brief and for a short period of time, maximum a duration of 5 years. Therefore, its drafters did not indicate any time-frame. However, the occupation regime according to Jean Pictet's commentary, is a 'temporary state of affairs'.<sup>3</sup>

The Geneva Conventions stipulated in article (2),<sup>4</sup> its applicability to international armed conflict and occupations. Therefore, the Geneva Conventions governed the conduct of occupation in order to protect civilians from the occupying power and to balance their rights and obligations. From this point, the occupation regime has not been considered illegal, on the contrary, it is a justification for a power to temporarily exist in a territory.

However, in today's world, it marks year 51 of Israel's belligerent occupation of the Palestinian territories. The prolonged nature of this occupation appears to be at odds with the temporary nature of occupation as envisioned by Jean Pictet. Therefore, the problem that arises within the context of this paper is, whether The Fourth Geneva Convention is still applicable and relevant to prolonged belligerent occupation? In other words, whether prolonged occupation is a new category under international law which international humanitarian law did not regulate?

This article proposes to examine these issues across three areas. First, it will examine the principles of law of occupation using the four-part test in order to determine if the status of the

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<sup>2</sup> Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary On The Law And Practise of Belligerent Occupation* (The University of Minnesota Press, Minnesota, 1957), 16.

<sup>3</sup> Jean S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (International Committee of the Red Cross, Geneva, 1958), 275.

<sup>4</sup> International Committee of the Red Cross (ICRC). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*. 12 August 1949, article (2).

occupying power is legal. During this test, it will then analyze the conduct of prolonged occupation.

Second, it will analyze the legal status of “prolonged occupation” by drawing on international humanitarian law instruments and undertaking an examination of the opinion of international law scholars. This is an important contribution because the long-term occupation regime has not been extensively discussed by academic commentary.

Third, we devote this section to examine the dangers of advancing the “prolonged occupation” claim in the occupied territory by highlighting how it collides with the Conservationist Principle.

## A. The Guidelines of International Law

The principal rules of international law that regulate the conduct of occupation are established in international humanitarian law or *jus in bello*. These are the regulations relating to the laws and customs of war on land stipulated in the 1907 Fourth Hague Convention [“The Hague Regulations”], and the provisions of the 1949 Fourth Geneva Convention (which relates to the protection of civilians during times of war), both of which are part of the binding corpus of customary international law.<sup>5</sup> International humanitarian law does not prohibit the occupation regime. But while it allows the occupant to exercise a certain kind of power over the occupied population, it also prohibits and places limits on the occupying power.<sup>6</sup> This is because international humanitarian law does not concern the legality of armed conflicts, instead, its main focus is to provide protection for civilians and to regulate the methods and means of war.<sup>7</sup>

In Professor Michael Lynk’s second report to the General Assembly, he proposed a test to determine the legality of belligerent occupation.<sup>8</sup> This test includes four principles that are derived from international law instruments; which are, the UN Charter, the 1907 Hague Regulations, the Fourth Geneva Convention and its addition first protocol, and customary international law. These four main elements define the legality of the occupying power. Any breach of these fundamental elements “renders an occupation illegal *per se*”.<sup>9</sup> The four elements of the test are:

### i. The Non-Sovereign Principle

The ‘Non-Sovereign’ Control Principle is a fundamental obligation under international law that prohibits the occupying power from acquiring the right to conquer, annex or transform occupied land

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<sup>5</sup> The customary nature of the Hague Regulations was declared by the International Criminal Tribunal at Nuremberg in the Trial of prominent German war criminals, Cmd. 6964 (1946) 65. International Court of Justice (9 July 2004), "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," para. 78.

<sup>6</sup> See Adam Roberts, ‘Prolonged military occupation: the Israeli-occupied territories since 1967’, in *American Journal of International Law*, Vol. 84, No. 1, 1990, p. 46.

<sup>7</sup> *Occupation under International Law?* (International Humanitarian Law Center, Diakonia, 2013), 1.

<sup>8</sup> Michel Lynk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, (19 October 2016, A/71/554), para.27.

<sup>9</sup> *Ibid.*

with the intention of advancing a claim of sovereignty. Its roots can be traced back to Article 2(4) of the UN Charter,<sup>10</sup> which forbids its members from “the threat or use of force against the territorial integrity or political independence of any state”.<sup>11</sup>

Therefore, any acquisition by force is not a valid title to that territory. Article (47) of the Fourth Geneva Convention reflects the prohibition of acquiring sovereignty through annexation.<sup>12</sup> Moreover, public international law scholars, such as Antonio Cassese and Malcolm Shaw, have agreed that the ‘non-sovereign’ control principle is a peremptory norm in public international law.<sup>13</sup> The International Court of Justice {“hereinafter referred to as ICJ”} reaffirmed this principle as paramount importance in its *Advisory Opinion on the International Status of South West Africa*,<sup>14</sup> and in its Advisory Opinion in the case concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.<sup>15</sup>

This absolute principle (also known as *jus cogens*)<sup>16</sup> has no exceptions that apply under any circumstance and it is therefore irrelevant if the territory was acquired through self-defence or aggression.<sup>17</sup>

## ii. The Best Interest Principle

The Best Interest Principle requires the occupying power to administrate in the best interest of the occupied people and, by implication, this imposes an obligation to uphold their human rights .<sup>18</sup>

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<sup>10</sup> Also known as the Charter of the United Nations.

<sup>11</sup> 26 June 1945, 59 Stat. 1031, entered into force 24 October 1945, Article 2(4).

<sup>12</sup> Article 47 of the Fourth Geneva Convention.

<sup>13</sup> Malcolm Shaw, *International Law* (8<sup>th</sup> edition, Cambridge University Press, Cambridge, 2017), 372 (“It is, however, clear today that the acquisition of territory by force alone is illegal under international law”); and Antonio Cassese, *International Law* (2<sup>nd</sup> edition, Oxford University Press, Oxford, 2005), 57 (“{C}onquest does not transfer a legal title of sovereignty, even if it is followed by de facto occupation, and assertion of authority over the territory.”)

<sup>14</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ( ICJ Reports 1971), p.14.

<sup>15</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, (9 July 2004, ICJ Reports 2004) p. 115. The Court held: “The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination”.

<sup>16</sup> For further insight into the status of the prohibition on the use of force as peremptory norms (*jus cogens*), see Dinstein, *War Aggression and Self-Defence*, p.104.

<sup>17</sup> S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), at pp. 259-60

<sup>18</sup> E. Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 2004). Benvenisti observes: “When the Security Council announced the applicability of the law of occupation to 2003 Iraq, it had to adapt a law that initially reflected the

Moreover, the Best Interest Principle is reflected in international humanitarian law provisions that place prohibitions on the occupied territory and regulate the acts of the occupier while providing protection to the occupied people by preserving their rights.<sup>19</sup> These rules, in addition to human rights provisions, constitute the Best Interest Principle.<sup>20</sup>

### **iii. The Good Faith Principle**

The principle of Good Faith has been described as the “cornerstone principle of the international legal system”.<sup>21</sup> The ICJ previously reiterated its importance in the 1974 *Nuclear Tests Case* where it stated that “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith”.<sup>22</sup>

The Good Faith principle, therefore, requires that the occupying power should, during its occupation, temporarily administrate the occupying territory in good faith and act in accordance with its duties and obligations established under international law while complying with international humanitarian law and human rights. Furthermore, it should abide by the three principles of the test, while fully complying with the expressed will and position of the United Nations in relation to the occupation regime.

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### **iv. The Temporariness of an Occupation**

The occupation regime is inherently temporary. This is evident in the provisions of international humanitarian law instruments. Article (43) of of the 1899 and 1907 Hague

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premise that kings were sovereigns and that international law should protect their possessions during wartime, to a new philosophy – the philosophy of international humanitarian law – which posited that peoples were the true sovereigns and that human rights had to be protected.”

<sup>19</sup> For example, Article 43 of The Hague Regulations requires the occupying power to “restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country”. The Fourth Geneva Convention requires the occupying power to ensure a wide spectrum of protections, including positive duties to protect children, maintain hospitals, preserve natural resources, and provide medical supplies and food. It also prohibits the occupant from inflicting collective punishment, pillage, corporal punishment, and engaging in individual or mass forcible transfers or deportations.

<sup>20</sup> Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Michael Lynk, 19 October 2016, A/71/554, para. 34.

<sup>21</sup> M. Lynk, para. 35.

<sup>22</sup> *Nuclear Tests Case (Australia v. France) (Merits)*, [1974] ICJ Rep 253, at para 46. See also, The Charter of the United Nations article 2 para. 2, The Vienna Convention on the Law of Treaties article 26, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Conventions imposes a duty on the occupying power to respect, unless "absolutely prevented," the laws in force in the country.<sup>23</sup> This article prevents the occupying power from creating laws that are not absolutely necessary for the specific temporary context of occupation.<sup>24</sup> Moreover, an interpretation of article (47) of the Fourth Geneva Convention, the stipulation of the non-recognition of annexation informs the occupying power that occupation has a temporary nature.<sup>25</sup> Therefore, a protracted occupation will amount to de facto annexation.<sup>26</sup> Furthermore, articles (54) and (64) of the Convention which stipulates that the status of judges and public officials in the territory shall not be altered and requires the occupying power to respect the law in force, indicate the limitation of the occupation regime to preserve the status quo which also indicates that occupation is temporary. This prohibition reaffirms the maintenance of the country's judicial and administrative structure, which is expected keep on functioning without any obstacles.

A reading of these normative provisions indicates that the occupation regime is "inherently temporarily"<sup>27</sup> since it is a "temporary state of affairs".<sup>28</sup> It cannot be "permanent nor indefinite".<sup>29</sup> Professor Gross has emphasized on the importance of analyzing whether an indefinite or permanent occupation has become illegal, so as to counter "...the risk of occupation becoming conquest or a new form of colonialism while hiding behind an imagined temporality."<sup>30</sup> This analysis enhances the conclusion that the occupant authority must be temporal and non-sovereign.<sup>31</sup>

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<sup>23</sup> International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, article (43).

<sup>24</sup> Von Glahn, *supra* note 2, at 97.

<sup>25</sup> Pictet, *supra* note 4, at 274; Benvenisti, *supra* note 1, at 99.

<sup>26</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, *supra* note 14, Oral Statement by counsel Georges Abi-Saab, p. 46; Separate Opinion of Judge Al-Khasawneh, p. 237, para. 9.

<sup>27</sup> Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory* (Volume 23, Issue 3, Berkeley Journal of International Law, Berkeley, 2005), 43. Pictet, *supra* note 4, at 275.

<sup>28</sup> Iain Scobbie, *International Law and The Prolonged Occupation of Palestine*. (University of Manchester, Manchester, 2015 ), 1.

<sup>29</sup> Ben-Naftali, Gross, Michaeli, *supra* note 21, at 555. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, *supra* note 14, Separate Opinion of Judge Koroma, para.2.

<sup>30</sup> Aeyal Gross, *The Writing on the Wall*, (Cambridge University Press, Cambridge, 2017), 51. Also see Ardi Imseis, "Prolonged Occupation of Palestine: The Case for a Second Advisory Opinion of the International Court of Justice"; Lecture, 7 October 2015 (unpublished).

<sup>31</sup> Christopher Greenwood, *Historical Development And Legal Basis In The Handbook Of Humanitarian Law In Armed Conflicts* (Oxford University Press, Oxford, 2008), 257.



## B. The Legal Status of Prolonged Occupation

This paper showed in its previous section the main principles for the legality of occupation. However, when it concerns the temporariness principle, no time limit has been set. The absence of any time limit has been explained that it indicates occupation may continue for a long period of time ‘prolonged occupation’.<sup>32</sup> The Israeli Supreme Court has admitted that occupation is ‘inherently temporary’.<sup>33</sup> But held that this ‘temporariness can be long-lived’.<sup>34</sup> This controversy has led to a debate on how long is temporary because its duration seems to be indefinite? In the absence of any answer in the legal instruments of international law, the paper will stop by the opinion of UN bodies and international law scholars to try to set the legal time limit for the occupation regime.

### ❖ How Long is Prolonged?

The main principles that relate to the legality of occupation have already been discussed. But it has also been established that the temporariness principle does not have a specific time limit. This absence has been interpreted as indicating that any occupation that lasts for a long period of time can be appropriately labelled as ‘prolonged occupation’.<sup>35</sup> The Israeli Supreme Court appears to demur when it observes that occupation is ‘inherently temporary’,<sup>36</sup> although it strikes a note of confusion by adding that ‘temporariness can be long-lived’, while stopping short of the claim that it is indefinite.<sup>37</sup> The exact duration of ‘temporary’ is therefore a matter of controversy. It has already been acknowledged that legal instruments of international law do not provide a clear answer in this

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<sup>32</sup> Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government: The Initial Stage, in Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects* (Hebrew University, The Harry Institute for Legislative Research and Comparative Law, Jerusalem, 1982) at 43.

<sup>33</sup> Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, 2056/2004, 30 June 2004, para. 27

<sup>34</sup> Supreme Court of Israel, *Jamayat Askan Alma’Almun Althaunia Almahduda Almasaulia, Lawfully registered Cooperative in regional Command of Judea and Samaria v. Commander of IDF Forces in the Judea and Samaria region*, 393/1982, 12 December 1983, p. 13, para. 12.

<sup>35</sup> Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government: The Initial Stage, in Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects* (Hebrew University, The Harry Institute for Legislative Research and Comparative Law, Jerusalem, 1982) at 43.

<sup>36</sup> Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, 2056/2004, 30 June 2004, para. 27

<sup>37</sup> Supreme Court of Israel, *Jamayat Askan Alma’Almun Althaunia Almahduda Almasaulia, Lawfully registered Cooperative in regional Command of Judea and Samaria v. Commander of IDF Forces in the Judea and Samaria region*, 393/1982, 12 December 1983, p. 13, para. 12.

regard, and this study will therefore engage with the opinion of UN bodies and scholars of international law in order to try to establish a legal time limit for the occupation regime.

The UN Security Council first used the term “prolonged occupation” to describe the Israeli occupation of the Palestinian territories in 1980.<sup>38</sup> During *Democratic Republic of Congo vs Uganda*, the ICJ did not however use this term, despite the fact that Uganda’s occupation had lasted for almost five years.<sup>39</sup>

Adam Roberts observes that it is ‘a pointless quest’ to attempt to define the word ‘prolonged’.<sup>40</sup> But he offers a partial concession by observing that it ‘is taken to be an occupation that lasts for more than five years’.<sup>41</sup> Vaios Koutroulis concurs that there is no need to define the word, on the basis that it is only descriptive. He also contends that any effort to define the word may give rise to a new category of occupation that needs to be governed by a different legal regime.<sup>42</sup> Ben-Naftali further clarifies that an indefinite occupation is an illegal occupation.<sup>43</sup>

This paper accepts Koutroulis’s claim that the concept of prolonged occupation is descriptive rather than legal. On this basis, it maintains that it should only be used to describe Israel’s existence in the Palestinian territories.<sup>44</sup> This suggests there is no need to set an exact time limit to establish the point when an occupation becomes prolonged, for the reason that if an occupation crosses this duration, it will correspond to a new category known as ‘prolonged occupation’. This is very important because there is nothing in international law that establishes a long-lasting occupation as illegal. This is particularly true in relation to the Israeli occupation regime, whose illegality rests on political grounds.

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<sup>38</sup> UNSC Res. 471, 5 June 1980, p. 2, para. 6; UNSC Res. 476, 30 June 1980, p. 1, para. 1.

<sup>39</sup> Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures, ICJ (ICJ), 1 July 2000, at pp. 254–255, para. 254.1

<sup>40</sup> Adam Roberts, “*Prolonged military occupation: the Israeli-occupied territories since 1967*” (1990) in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 47.

<sup>41</sup> *Ibid.*

<sup>42</sup> Vaios Koutroulis, “*The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation*” (2012) in *International Review of the Red Cross*, Vol. 94, No.885, 2012, p. 6.

<sup>43</sup> Ben-Naftali, Gross, Michaeli, *supra* note 21, at 213

<sup>44</sup> Tristan Ferraro, “*Enforcement of occupation law in domestic courts: issues and opportunities*”, in *Israel Law Review*, Vol. 41, Nos 1–2, 2008, p. 338.

Richard Falk's contribution contributes an added dimension to the debate. In observing that the legal duration for the occupation regime is a maximum of five years,<sup>45</sup> he argues that any occupation that extends beyond this point is 'illegal' and, as such, can be argued to be a crime against humanity with reference to the Rome Statute.

### ❖ **Prolonged Occupation and International Humanitarian Law**

This paper has already noted that the temporariness of the conduct of occupation is one of the core-elements of legality. However, the lack of any time limit in international law instruments provides added impetus to the argument that 'prolonged occupation' is a new category under international law,<sup>46</sup> a development that was clearly not anticipated by international humanitarian law, whose provisions regulate short-term occupation regimes. This explains why, in its current form, international humanitarian law is inadequately adjusted to prolonged occupation.<sup>47</sup> This also informs the Supreme Court of Israel's (repeated) claim that, when an occupation is prolonged, the occupant can employ measures that would not be permitted during a short-term occupation.<sup>48</sup> In advancing this line of argument, the Court sought to legitimize an inherently unlawful situation by using the doctrine of 'prolonged occupation' to surpass the limits of Israel's authority. The Israeli Government has argued that during a prolonged occupation, such as the one in Palestine, "the Occupying Power will become less, and not more, bound by the legal regime."<sup>49</sup>

This section will now proceed that this legal reasoning is flawed. In doing so, it will demonstrate that the duration of occupation cannot be invoked to exclude the application of rules established by

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<sup>45</sup> Richard Falk, "Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank", *Journal of Refugee Studies*, Volume 2, Issue 1, 1 January 1989, 15.

<sup>46</sup> For example Yoran Dinstein 10, *supra* note, at 55.

<sup>47</sup> O. Ben-Naftali, 'A la recherche du temps perdu': *Rethinking Article 6 of the Fourth Geneva Convention in the light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion* (2005) *Israel Law Review*, 211 - 215 and 218; D.A. Graber, *The Development of the Law of Belligerent Occupation 1863-1914: a Historical Survey* (Columbia UP, New York, 1949), p. 290-291; and Roberts, *supra* note 37, at 47.

<sup>48</sup> Israel Supreme Court, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of IDF Forces in the Judea and Samaria Region*, 1984, 307-308; *Dwadin et al v. Commander of IDF Forces in the West Bank*, 1985, 333-334; *Economic Corporation for Jerusalem Ltd v. Commander of IDF Forces in the Judea and Samaria Region*, 2000.

<sup>49</sup> Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories (E/CN.4/2002/32).

international humanitarian law. In addition, it will also demonstrate that these rules apply in their entirety until the termination of occupation.

### **The Application of International Humanitarian Law**

The conduct of occupation is governed by The Hague Regulations and The Fourth Geneva Convention. Article 42 of the Regulations sets out the scope of its provisions. It states:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

This means that the provisions of the Regulations will continue to apply for as long as the conduct of occupation falls within the scope of this Article.<sup>50</sup> But things become much more complicated when Article 6 (3) of the Geneva Convention is considered. It states:

“In [the] case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.”<sup>51</sup>

This interpretation applied in the OPT, with the exception of enumerated provisions that would continue in force for the duration of the occupation. Literal interpretation of this Article would appear to indicate that, during prolonged occupation, the application of the Convention would cease, with the consequence that the occupant would be permitted greater freedom of action. This interpretation was reiterated by the ICJ in an advisory opinion on the legal consequences arising from the construction of the wall in the OPT. This stated that since “the military operations leading to the occupation of the West Bank in 1967 ended a long time ago only those articles specified in Article 6(3) remained applicable.”<sup>52</sup>

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<sup>50</sup> ICJ, *DRC v. Uganda*, Judgment, above note 19, pp. 228, 231, and 254–255, paras. 167, 178–179, and 254. The Court maintained that Uganda had violated international humanitarian law (including the Hague Regulations) up until 2 June 2003, the date when Ugandan military forces finally withdrew from the DRC’s territory.

<sup>51</sup> GC IV, p. 292

<sup>52</sup> Legal consequences of the construction of a wall in the occupied Palestinian territory advisory opinion, ICJ Rep, 2004, 136 at 185, para.125.

This appalling interpretation has restricted Israel's responsibilities under international humanitarian law and has also been widely criticized by public international law scholars on the grounds that it fails to fulfill the purposes of international humanitarian law<sup>53</sup> and "poses a danger to the civilian population, inasmuch as it reduces the scope of protection that the population enjoys under the Convention".<sup>54</sup>

Ardi Imseis observes :

"The problem with the Court's interpretation of Article 6 is its misguided focus on 'military operations leading to occupation'. Article 6 in fact provides that insofar as occupied territories are concerned, application of the Convention 'shall cease one year after the general close of military operations', not on the 'general close' of military operations leading to the occupation', as asserted by the Court."<sup>55</sup>

A further difficulty arises from the fact that only 43 of the Convention's 159 articles continue to apply one year after the close of military operations. But the emphasis is on articles 47-78 in section III of the Convention because they address the OPT. Accordingly, of the 32 articles that address the OPT in section III of the Convention, only 23 remain applicable. Nine articles would cease to apply, including the duty to ensure the delivery of food and medical supplies to the population (Article 55) and the obligation to ensure the proper working of all institutions focused on the care and education of children (Article 50). This raises the question of if the Convention drafters intended for the occupied population to be deprived of food and medical supplies during long-term occupation. Or if it was their will that children should be deprived of proper education institutions. A similar stretch of credulity is required to conclude that it was intended that the obligations of the occupying power should be limited during prolonged occupation. In order to answer these questions, it is necessary to return to the *travaux préparatoires* and the Commentary for the Fourth Geneva Convention.

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<sup>53</sup> T Ferraro, Occupation and other forms of administration of foreign territory: expert meeting (ICRC: Geneva: 2012), 77.

<sup>54</sup> Y Dinstein, The international law of belligerent occupation (Cambridge UP: Cambridge: 2009), 238.

<sup>55</sup> A Imseis, Critical reflections on the international humanitarian law aspects of the ICJ Wall advisory opinion, 99 American Journal of International Law 102 (2005)106;

In the Final Record of the 1949 Diplomatic Conference of Geneva and Pictet's commentary, the working assumption – as evidenced in their treatment of Article 6 – is that occupation is **always** short. Moreover, they suggest that the responsibilities excluded in article 6 would be transferred to local authorities after one year as part of a process leading to the end of occupation,<sup>56</sup> ultimately producing a situation where “the occupied state will almost always have regained [its] freedom of action...”<sup>57</sup>

However, it is clear that this exposition of the assumptions underpinning Article 6 diverges from the legal practice. Article 3(b) of the First Additional Protocol of 1977 therefore abolishes this ‘one year’ time limit. It states:

“The application of the Conventions and of this Protocol shall cease ..., in case of occupied territories, on the termination of occupation, except ... for those persons whose final release, repatriation or re-establishment takes place thereafter.”<sup>58</sup>

This Article requests that the Fourth Geneva Convention applies entirely until the conduct of occupation is terminated. In order to understand the purpose of the article and its application to the issue under consideration, it is important to consider the *travaux preparatoires* of Article 3(b) and the opinion of public international law experts.

In the ICRC Expert Meeting in 2012 it has been asserted that the “majority of the experts took the view that all the provisions of occupation law applied until the termination of an occupation and, consequently, that the rationale behind Article 3 of Additional Protocol I replaced the principle underlying Article 6§3.”<sup>59</sup> The 172 states that have ratified the Protocol<sup>60</sup> recognize that its Article 3 abolishes Article 6 of the Convention for the reason that it clearly modifies and governs the same

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<sup>56</sup> Final Record of the Diplomatic Conference of Geneva 1949, para. 623-625; Pictet, *supra* note 4; Leslie Green, *The Contemporary Law of Armed Conflict* (2<sup>nd</sup> edition, Manchester University Press, Manchester, 2000) 258; Roberts, *supra* note 7, p. 68.

<sup>57</sup> Pictet, *supra* note 4, at 45.

<sup>58</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (AP I), UNTS, Vol. 1125, No. I-17512, 1979, p. 8, Art. 3(b).

<sup>59</sup> International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory, Expert Meeting*, 2012, 77-78.

<sup>60</sup> This is according to the ICRC's list of States Parties to the main international humanitarian law treaties, which was last updated on 4 June 2012. It is available at: [http://www.icrc.org/international\\_humanitarian\\_law.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/international\\_humanitarian\\_law\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/international_humanitarian_law.nsf/(SPF)/party_main_treaties/$File/international_humanitarian_law_and_other_related_Treaties.pdf) (last visited 5 July 2012).

provisions. For these states, international humanitarian law remains applicable until the conduct of the occupation is terminated.

However, it is important to note that the Additional Protocol in general is conventional and is not therefore customary.<sup>61</sup> Accordingly, one could argue that article (3) of the Protocol is no relevance to Israel because it is not clear whether it is customary international law and Israel is not a party. In response to this argument, a reading of the *travaux préparatoires* of article 3, paragraph (b), shows that none of the States non-parties to the Protocol who participated in the 1974–1977 Diplomatic Conference objected on abolishing article (6), paragraph 3 of the Convention, this analyses includes Israel.<sup>62</sup> Moreover, the Supreme Court of Israel has never invoked article (6), paragraph (3) to limit the Convention scope, and has referred to articles whose application does not extend beyond the ‘one-year’ time limit.<sup>63</sup> This practice lends supporting the suggestion that article (3), paragraph (b) of the Protocol has a customary nature.<sup>64</sup> This analysis leads to the conclusion that the Fourth Geneva Convention remains applicable in its entirety to occupied territories in case of a prolonged occupation.

Taking into account the preceding analysis, we conclude that the application of international humanitarian law to the conduct of prolonged occupation should not cease. To put it differently, international humanitarian law remains, in its entirety, applicable to prolonged occupation. Now that the main issue of ‘prolonged occupation’ has been engaged in more detail, the discussion will now proceed to consider the dangers associated with the claim that long-term occupation is a special category.

### **C. The Dangers of Prolonged Occupation.**

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<sup>61</sup> Koutroulis, above note, page 9.

<sup>62</sup> Draft API, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977) (hereafter Official Records of the 1974–1977 Diplomatic Conference), Bern, Federal Political Department, (Vol. I, Part Three, 1978) p. 4.

<sup>63</sup> The Supreme Court of Israel, *Ajuri v. IDF Commander*, 7019/2002, 3 September 2002, citing article (78).

<sup>64</sup> On the customary status of most of Protocol I provisions, see Christopher Greenwood, “Customary law status of the 1977 Additional Protocols”, in *Humanitarian law of armed conflict* (Leiden, 1991). 93-144.

In the International Committee of the Red Cross (ICRC) expert meeting on occupation and other forms of administration of foreign territory, international humanitarian law scholars asserted that prolonged occupation raises legal issues because the principles of international humanitarian law instruments are made to reconcile with short-term occupations. Hence, it is difficult to harmonize between prolonged occupation with the principles of this body of law and they reached the conclusion that prolonged occupation requires the reinterpretation of international humanitarian law instruments.<sup>65</sup> This reinterpretation was addressed through the analysis of the Supreme Court of Israel decisions, because it is after all, the only court that handed down decisions related to the population of a prolonged occupation territory.<sup>66</sup>

The Supreme Court of Israel, in many of its decision, created conditions which are at odds with its obligation under international humanitarian law, to refrain from making legal and physical permanent changes to the territory, known as the conservationist principle or the duty to maintain the *status quo* in an occupied territory. The conservationist principle is considered '*the heart of occupation law*' used to prevent any transformations and changes in the occupied territory.<sup>67</sup>

However according to international humanitarian law experts, applying this principle in case of a prolonged occupation, would restrain the occupying power from making any changes related to social, economic and sometimes political realms, which would freeze the development of the occupied population and would only slide them backwards.<sup>68</sup> Therefore, the provisions of this field of law should be interpreted flexibly in case of a prolonged occupation. This issue has been raised in the Yesh Din case,<sup>69</sup> in which the Supreme Court of Israel used the prolonged occupation regime to reinterpret article (55) of The Hague Convention in order to justify its activities in relation to the

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<sup>65</sup> International Committee of the Red Cross (2012), *supra* note 56, at 80.

<sup>66</sup> Vincent Brenard, Editorial: occupation (2012), International Review of the Red Cross, Volume 94, Number 885, Spring 2012, p. 9.

<sup>67</sup> International Committee of the Red Cross (2012), *supra* note 56, at 76, *citation* 34.

<sup>68</sup> *Ibid*, p.74.

<sup>69</sup> Supreme Court of Israel, 'Yesh Din'- Volunteers for Human Rights v. The Commander of IDF Forces in the West Bank and others, HCJ 2164/09, 26 December 2011.



exploitation of quarries in the occupied Palestinian territory.<sup>70</sup> According to article (55), the occupying power shall be only regarded as administrator and usufructuary<sup>71</sup> of public buildings, real estate, forests, and agricultural estates belonging to the occupied population.<sup>72</sup>

However, the court considered the Israeli occupation to be different from the traditional occupation regime to which the rules of occupation are based on and that the length of the occupation places a burden and obligation on the occupying authorities in their administration of the occupied territories, which necessarily requires the adjustment of the traditional laws of occupation in order to reconcile with the current prolonged situation.<sup>73</sup> Therefore, the court **extended** the administration powers of the occupant provided in article (55), in order to carry out any measures necessary for the maintenance of development, “all of which are required to secure the changing needs of the **region’s population** by the occupied State”.

The issue with this decision is that the Court expanded the interpretation of article (55) by granting more powers for administering the occupied territories and adopted a dynamic changing perspective of the obligation and responsibilities that the occupying power has as an administrator.<sup>74</sup> Allowing the exploitation of quarries in Palestinian lands will drain their natural sources by time, moreover, the court intended to use the words “region’s population”, an unclear term that does not define if the court meant the Palestinians or the settlers?

This analysis leads to the conclusion that using the decisions of the Supreme Court of Israel to reinterpret the provisions of international humanitarian law is not the solution because Israel as an occupying power is trying to develop a new legal regime in which prolonged occupation used as a legal justification for not complying with international humanitarian law. Accordingly, occupation

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<sup>70</sup> The Hague Convention, *supra* note 24, article (55).

<sup>71</sup> Usufruct is defined as the 'right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time' *ibid.*, p. 11, para. 7.

<sup>72</sup> *Ibid.*, p. 17.

<sup>73</sup> *Ibid.*, p. 16, para. 10.

<sup>74</sup> Valentina Azarov, Exploiting a Dynamic Law of Prolonged Occupation, Adalah’s Newsletter, Volume 90, February 2012, published online on website of The Legal Center for Arab Minority Rights in Israel "Adalah", on the following link: <http://www.adalah.org/uploads/oldfiles/newsletter/eng/feb12/docs/Quarries%20case%20English%20Final.pdf> accessed P.3.

law should be accepted as it is with the conservationist principle. Meaning, the conservationist principle will remain the cornerstone of occupation law in case of a prolonged occupation. However, it may be adjusted under one condition: this adjustment is carried out to benefit the population of the occupied territory

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## Conclusion

When it comes to prolonged occupation it is very difficult to reach an unequivocal conclusion. This is mainly due to the fact that there is only one state practice when it comes to prolonged occupation, specifically the Israeli occupation of the Palestinian territories. Prolonged occupation is therefore a recent international phenomenon that presents a clear challenge to the determination of the applicability of international humanitarian law rules.

This paper demonstrated that it should not be considered as a new category under international law, which could lead to the exclusion of the application of international humanitarian law – this applies because the main objective of the Fourth Geneva Convention is to protect civilians from the occupying power during a temporary occupation. It is therefore inconceivable that it should not be applied at a time when civilians require protection more than before. But strictly implementing the international humanitarian law provisions may be dangerous during a prolonged occupation because it may freeze the life of the occupied population.

It should be remembered that temporariness is one of the main elements of the occupation regime and that, in the words of The Supreme Court of Israel, occupation is “inherently temporary”.<sup>75</sup> Roberts has previously observed how international humanitarian law has been “abused” by the prolonged occupation regime, with this body of law being used as a cloak to conceal unjustified acts and intentions that would otherwise be obvious. This is the logical outcome of an arrangement in which the interpretation of international humanitarian law has been conducted in accordance with the interests and priorities of powerful states. It should be recognized that prolonged occupation is a hazardous justification for colonialism. On this basis, it appears appropriate to conclude by supporting Imseis’s suggestion that it is now appropriate for the ICJ to issue a second advisory opinion that addresses the legality of Israel’s prolonged occupation of the Palestinian Territories.<sup>76</sup>

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<sup>75</sup> Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel et al.*, Case No. HCJ 2056/04, Judgment, 30 June 2004, para. 27; Supreme Court of Israel, *Zaharan Yunis Myhammad Mara’abe et al. v. The Prime Minister of Israel et al.*, Case No. HCJ 7957/04, Judgment, 15 September 2005, para. 22

<sup>76</sup> Ardi Imseis, “Prolonged Occupation of Palestine: The Case for a Second Advisory Opinion of the International Court of Justice”; Lecture, 7 October 2015 (unpublished)