

# The application of international humanitarian law and international human rights law in situation of prolonged occupation: only a matter of time?

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## **Abstract**

*The article deals with the effect of the time factor in the application of international humanitarian law (IHL) and international human rights law (IHRL) in 'prolonged belligerent occupations'. It demonstrates that IHL applies in its entirety to such situations and that the adjustments necessary can be made through the interpretation of existing IHL norms. As for IHRL, the protracted character of an occupation reinforces the importance of respecting and applying human rights. It cannot, however, be invoked in order to influence the interpretation of the notion of a state of emergency leading to the adoption of derogations from IHRL rules.*

\* All the internet references were accessed on 28 June 2012, unless otherwise stated. Documents by UN organs can be accessed through: <http://www.un.org/en/documents/index.shtml>. Similarly, unless otherwise stated, references to written and oral proceedings before the ICJ can be accessed at: <http://www.icj-cij.org>.

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Article 42 of the 1907 Regulations concerning the Laws and Customs of War on Land (the Hague Regulations) defines occupation as follows: ‘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’.<sup>1</sup> For its part, the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that: ‘Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of hostilities’.<sup>2</sup> The determination of the situations that come under this definition lies beyond the scope of this article.<sup>3</sup> We will focus instead on the time element of an occupation and, more precisely, on what legal scholarship has called ‘prolonged’ occupations.<sup>4</sup>

None of the definitions listed above indicate any time-frame for belligerent occupation. However, occupation is considered as being a temporary state of affairs,<sup>5</sup> or, in the words of the Supreme Court of Israel, as ‘inherently temporary’.<sup>6</sup>

- 1 Regulations concerning the Laws and Customs of War on Land, annex to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, available at: <http://www.icrc.org/ihl.nsf/WebART/195-200053?OpenDocument>. The authentic text of the Convention and the Regulations is the French one.
- 2 ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 214. Eyal Benvenisti defines occupation as ‘a situation where the forces of one or more States exercise effective control over a territory of another State without the latter State’s volition’: Eyal Benvenisti, ‘Occupation, belligerent’, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2012, p. 920, para. 1.
- 3 For more information on this topic, see the contribution to this volume by Tristan Ferraro, as well as Adam Roberts, ‘What is a military occupation?’, in *British Year Book of International Law*, Vol. 55, 1985, pp. 249–305; Robert Kolb and Sylvain Vité, *Le droit de l’occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009, pp. 61–114; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden and Boston, 2009, pp. 3–54; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 31–49; Vaïos Koutroulis, *Le début et la fin de l’application du droit de l’occupation*, Pedone, Paris, 2010, pp. 19–94.
- 4 See, mainly, Adam Roberts, ‘Prolonged military occupation: the Israeli-occupied territories since 1967’, in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103; Y. Dinstein, above note 3, pp. 116–120; Richard Falk, ‘Some legal reflections on prolonged Israeli occupation of Gaza and the West Bank’, in *Journal of Refugee Studies*, Vol. 2, No. 1, 1989, pp. 40–51.
- 5 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 275 (hereafter *Commentary GC IV*); Adam Roberts, ‘Transformative military occupation: applying the laws of war and human rights’, in *American Journal of International Law*, Vol. 100, No. 3, 2006, p. 582; Michael J. Kelly, ‘Critical analysis of the International Court of Justice ruling on Israel’s security barrier’, in *Fordham International Law Journal*, Vol. 29, 2005–2006, p. 223; Eyal Benvenisti, ‘Origins of the concept of belligerent occupation’, in *Law and History Review*, Vol. 26, No. 3, 2008, pp. 621 and 623.
- 6 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 (with further references to Israeli case law); the judgments are available at: [http://elyon1.court.gov.il/Files\\_ENG/](http://elyon1.court.gov.il/Files_ENG/)

Prolonged occupations appear to be fundamentally at odds with precisely this temporary character. It should be noted that the word ‘temporary’ can be somewhat misleading in this context. It can mean both ‘not permanent; provisional’ and ‘lasting only a short time; transitory’. In situations of belligerent occupation, ‘temporary’ means first of all ‘not permanent; provisional’. It reflects the idea that a belligerent occupation does not change the status of the occupied territory but merely suspends the exercise of the ousted sovereign’s rights over the said territory.<sup>7</sup> One major consequence of this provisional character is the rule according to which the Occupying Power should, as far as possible, preserve the status quo in the territory that it occupies, and refrain from introducing permanent changes – a rule referred to by some scholars as the ‘conservationist’ principle.<sup>8</sup> The notion of prolonged occupation, on the other hand, relates to the duration of a belligerent occupation and therefore refers to the second meaning of the word ‘temporary’. The Supreme Court of Israel has recognized that an occupation’s ‘temporariness can be long-lived’.<sup>9</sup> The issue concerning situations of prolonged occupation is whether their duration affects the rules applicable in belligerent occupations.

What *are* these rules? Aside from international humanitarian law (IHL) and international human rights law (IHRL), occupation can also be examined from the perspective of the right to self-determination or from the perspective of the rules regulating the use of force in international relations (*jus ad bellum* or *jus contra bellum*). In this respect, the duration of a belligerent occupation may affect the exercise of these rights. It has been suggested, for example, that a protracted occupation is illegal *per se*, as amounting to *de facto* annexation.<sup>10</sup> Along the same

[04/560/020/A28/04020560.A28.pdf](#) and [http://elyon1.court.gov.il/Files\\_ENG/04/570/079/A14/04079570.A14.pdf](http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf) (last visited 30 August 2012).

- 7 See Article 47 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *U.N.T.S.*, No. 973, 1950, p. 318 (hereafter GC IV), as well as Article 43 of the Hague Regulations, stating that, in situations of occupation, ‘[t]he authority of the legitimate power ha[s] in fact passed into the hands of the occupant . . .’. See also, UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, p. 278, para. 11.9 (hereafter UK, *Military Manual*); Federal Republic of Germany, Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, VR II 3, August 1992, paras. 529–530 (hereafter Germany, *Military Manual*); Canada, *Law of Armed Conflict at the Operational and Tactical Levels*, National Defence, Chief of Defence Staff, Office of the Judge Advocate General, 13 August 2001, B-GJ-005-104/FP-021, p. 12–2, paras. 1205–1206 (hereafter Canada, *Military Manual*); United States, *The Law of Land Warfare*, Department of the Army Field Manual, FM 27-10, 1956, pp. 138, 140, paras. 353 and 358 (hereafter US, *Law of Land Warfare*); *Commentary GC IV*, above note 5, p. 275; Hans-Peter Gasser, ‘Protection of the civilian population’, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, pp. 277–278; Eric David, *Principes de droit des conflits armés*, 4th edition, Bruylant, Brussels, 2008, pp. 562–565; E. Benvenisti, above note 5, p. 623.
- 8 See, e.g., Gregory H. Fox, *Humanitarian Occupation*, Cambridge University Press, Cambridge, 2008, pp. 233–237; A. Roberts, above note 5, p. 580; Kristen E. Boon, ‘Obligations of the new occupier: the contours of a *jus post bellum*’, in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 31, No. 1, 2009, p. 60.
- 9 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 – the Superior Planning Council for the Judea and Samaria region*, Case No. HCJ 393/82, Judgment, 12 December 1983, p. 13, para. 12 (on file with the author) (hereafter *Askan case*).
- 10 Palestine: International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory proceedings (hereafter *Wall advisory proceedings*),

lines, if an occupation is established in exercise of a state's right to self-defence, the duration of the occupation will be taken into account in the evaluation of the necessary and proportionate character of the self-defence in question. It is evident that the longer the duration of the occupation, the harder it will be for a state to prove that the conditions of self-defence relating to necessity and proportionality are satisfied.<sup>11</sup> As interesting as these issues may be, they are beyond the scope of this contribution, which will be limited to the influence exercised by the duration of the occupation over IHL and IHRL. However, before making our analysis, it is important to identify what kinds of situations qualify as 'prolonged occupations'.

## Prolonged occupation: in search of a definition

In exploring what is meant by 'prolonged occupation', it should be underlined from the outset that neither conventional nor customary IHL distinguishes between 'short-term' occupations and 'prolonged' ones. In the absence of a formal definition of prolonged occupation in conventional or customary humanitarian law, any attempt to define these terms will essentially be arbitrary or, as Adam Roberts has admitted in his seminal article on the subject of prolonged occupation, 'a pointless quest'.<sup>12</sup> This arbitrariness is applicable both to the temporal element and to other particular characteristics that may be attributed to a prolonged occupation. For example, the UN Security Council used the term 'prolonged occupation' with reference to the Israeli occupation of Palestinian territories in 1980, that is, thirteen years after the beginning of the occupation in question.<sup>13</sup> According to Roberts, a prolonged occupation 'is taken to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced – i.e., a period at least approximating peacetime'.<sup>14</sup> Thus, for Roberts, prolonged occupation has two characteristics: a temporal one (five years) and a substantial one relating to the *quasi*-absence of hostilities. Yoram Dinstein seems to define prolonged occupations only with reference to their

Oral Statement by counsel Georges Abi-Saab, 23 February 2004, CR 2004/1, p. 46; also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, 9 July 2004, ICJ Reports 2004 (hereafter ICJ, *Wall* advisory opinion), Separate Opinion of Judge Al-Khasawneh, p. 237, para. 9.

- 11 South Africa: ICJ, *Wall* advisory proceedings, Written Statement Submitted by the Government of the Republic of South Africa, 30 January 2004, p. 15, para. 37; Democratic Republic of the Congo (DRC): ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Merits, Written Proceedings, Reply of the Democratic Republic of the Congo, 29 May 2002, pp. 240–242, paras. 3.173–3.176. Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995, p. 99; Christine Gray, *International Law and the Use of Force*, 3rd edition, Oxford University Press, Oxford, 2008, pp. 154–155.
- 12 A. Roberts, above note 4, p. 47. Cf. International Committee of the Red Cross (ICRC), First meeting of experts in *Occupation and Other Forms of Administration of Foreign Territory*, Report prepared and edited by T. Ferraro, ICRC, Geneva, April 2012, pp. 72–78 (a chapter referring to prolonged occupations, which has no discussion of the definition of this notion).
- 13 UNSC Res. 471, 5 June 1980, p. 2, para. 6; UNSC Res. 476, 30 June 1980, p. 1, para. 1.
- 14 A. Roberts, above note 4, p. 47.

duration.<sup>15</sup> He introduces a further distinction, however, pleading for the existence of ‘semi-prolonged’ occupations, whose duration extends to ‘a number of years (rather than decades)’.<sup>16</sup> In this regard, he points, among others, to occupations that lasted for a little more than three years.<sup>17</sup>

The reference to ‘semi-prolonged’ occupations and the fact that the ‘prolonged occupation’ argument has been raised in some cases as early as three or four years after the beginning of an occupation call for some comments.<sup>18</sup> It is submitted that, despite the inherent difficulty in determining a precise time-frame in the issue under consideration, three or four years are in any case too few to allow the broadening of the occupier’s powers on the basis of the duration of the occupation. This is confirmed by the International Court of Justice (ICJ) in the *Armed Activities on the Territory of the Congo* case (*Democratic Republic of the Congo v. Uganda*), where, among other issues, the Court dealt with the application of IHL to the occupation of part of the DRC’s territory by Uganda. Although the temporal limits of the occupation in question are not explicitly determined by the ICJ, a reading of the judgment indicates that the occupation had lasted almost five – or, at the very least, four – years.<sup>19</sup> Yet at no point does the ICJ suggest that the occupation might be one of a prolonged or semi-prolonged character or that its duration might influence the applicable rules.<sup>20</sup> Uganda itself did not rely on a broader application of occupation law rules on the basis of the time element.<sup>21</sup> The same goes for the judges who issued declarations or separate or dissenting opinions: no one invokes time as a factor influencing the application of relevant occupation law rules.<sup>22</sup> In view of the above, we conclude against the existence of a ‘semi-prolonged’ occupation category.

15 Y. Dinstein, above note 3, p. 116.

16 *Ibid.*

17 *Ibid.*, pp. 116–117.

18 Supreme Court of Israel, *The Christian Society for the Sacred Places v. Minister of Defence*, cited by Eyal Benvenisti, *The International Law of Occupation*, Cambridge University Press, Cambridge, 2004, p. 146. In the same vein, Dinstein cites Singapore, *Original Civil Jurisdiction, Public Trustee v. Chartered Bank of India, Australia and China*, 1956, in *International Law Reports*, Vol. 23, pp. 693–694 (Y. Dinstein, above note 3, p. 117).

19 The duration of the occupation was five years starting from the date of the withdrawal of the DRC’s consent concerning the presence of Ugandan forces inside Congolese territory (August 1998) and ending with the withdrawal of the Ugandan forces (June 2003); see ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports 2005*, pp. 254–255, para. 254 (hereafter *DRC v. Uganda*, Judgment). In any case, the relevant territory was considered occupied at least since the creation of a new province in Congolese territory and its administration by Uganda in June 1999; see *ibid.*, p. 230, para. 175.

20 The ICJ found that Uganda violated, among others, Articles 43, 46, and 47 of the Hague Regulations and Article 53 of GC IV; *ibid.*, p. 244, para. 219.

21 Uganda rejected the DRC claim that its forces occupied DRC territory, and did not elaborate on the application of occupation law: ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Written Proceedings, Counter-Memorial submitted by the Republic of Uganda, Vol. 1, 21 April 2001, mainly pp. 180 ff., paras. 329 ff.; *ibid.*, Rejoinder Submitted by the Republic of Uganda, Vol. 1, 6 December 2002, pp. 75–78, 86–91, 181–182, paras. 170–174, 198–210, 407.

22 ICJ, *DRC v. Uganda*, Judgment, above note 19, pp. 284 ff. Judge Parra-Aranguren was the only judge to refer to an adjustment of the interpretation of Article 43 of the Hague Regulations. However, his critique against the majority was that it did not take into consideration geographical – not temporal – characteristics in the appreciation of the conformity of Ugandan actions with Article 43 of the Hague Regulations; see *ibid.*, separate Opinion of Judge Parra-Aranguren, p. 305, para. 48.

Leaving this issue aside, the real question is whether there is a need to define ‘prolonged occupations’ at all. In this author’s view, no distinct legal category of prolonged occupation exists in IHL. This means that, as will be further demonstrated below,<sup>23</sup> there is no distinct legal regime regulating prolonged occupations. In other words, the starting point of this analysis is that the same IHL rules apply to all occupations, independently of their duration. The adjective ‘prolonged’ is descriptive. It is therefore submitted that embarking on a protracted quest for the definition of prolonged occupation is misleading, in that it suggests that they constitute a separate category of occupations, which in turn implies precisely that a distinct legal regime governing prolonged occupations exists. Roberts correctly (although somewhat indecisively) warned against the danger of suggesting that prolonged occupations constitute a special category.<sup>24</sup>

Of course, the fact that prolonged occupations do not constitute a distinct category of belligerent occupations in the sense that they are not regulated by different rules does not necessarily mean that the duration of an occupation leaves the applicable IHL and IHRL completely unaffected. Thus, the thread that will guide our analysis is whether and to what extent the duration of an occupation affects the interpretation and application of these rules. It is in this sense that we will be talking of ‘prolonged’ occupations.

The absence of a precise definition of prolonged occupations entails an uncertainty in choosing relevant precedents to examine.<sup>25</sup> However, the prime example of prolonged occupation is the occupation of Palestinian territories (including Gaza) (hereafter OPT)<sup>26</sup> by Israel. Indeed, it is with reference to OPT that the notion of prolonged occupation has principally been used in the United Nations

23 See the analysis under the heading ‘International humanitarian law applies in its entirety to prolonged occupations’ (below pp. 172–176).

24 A. Roberts, above note 4, p. 51. Despite this warning, Dinstei reads Roberts as ‘com[ing] up with the notion that prolonged occupation should be regarded as a distinct and special category within the law of belligerent occupation’: see Y. Dinstei, above note 3, p. 120.

25 See the precedents cited by A. Roberts, above note 4, pp. 48–51; Y. Dinstei, above note 324, p. 117.

26 The present author believes that Gaza continues to be under belligerent occupation, despite the 2005 Israeli disengagement. Without entering into a detailed presentation of relevant arguments, it is submitted, first, that the presence of enemy troops inside the occupied territory is not a *conditio sine qua non* for the existence of a belligerent occupation; second, that Article 42 of the Hague Regulations does not require the Occupying Power to be the sole authority in the occupied territory or to fully administrate it; and, third, that Israel exercises the necessary control over the Gaza Strip for it to be considered occupied. For more details, see V. Koutroulis, above note 3, pp. 181–189; Vaïos Koutroulis, ‘Of occupation, *ius ad bellum* and *ius in bello*: a reply to Solon Solomon’s “The great oxymoron: *ius in bello* violations as legitimate non-forcible measures of self-defense: the post-disengagement Israeli measures towards Gaza as a case study”’, in *Chinese Journal of International Law*, Vol. 10, No. 4, 2011, pp. 900–906 and the references cited therein. The qualification of Gaza as occupied territory has been accepted by the vast majority of states: see UN GA Res. 64/94, 10 December 2009, paras. 4 and 10 (adopted by 162 votes in favour, 9 against and 5 abstentions); UN GA Res. 65/105, 10 December 2010, paras. 5 and 10 (165 votes in favour, 9 against, 2 abstentions); UN GA Res. 66/79, 9 December 2011, paras. 5 and 10 (159 votes in favour, 9 against, 4 abstentions). All these resolutions explicitly recognize Israel as the occupying power of the Gaza Strip. For the view that Gaza is not occupied, see R. Kolb and S. Vité, above note 3, pp. 177–182; Yuval Shany, ‘Faraway, so close: the legal status of Gaza after Israel’s disengagement’, in *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 369–383.

(UN) context,<sup>27</sup> in case law,<sup>28</sup> and in legal scholarship.<sup>29</sup> Thus an inextricable link has been established between the notion of prolonged occupation and Israeli occupation of Palestinian territories.

In this regard, one last remark should be made. Unlike other situations that can be considered as prolonged occupations (such as Turkey's occupation of the northern part of Cyprus<sup>30</sup> or Morocco's occupation of Western Sahara<sup>31</sup>), that of the OPT has been the only instance of a long-time Occupying Power openly recognizing that status.<sup>32</sup> This recognition has resulted in a significant number of decisions by the Supreme Court of Israel on the interpretation and application of various IHL and IHRL rules relating to belligerent occupation, some of which also deal with the influence exercised by the prolonged nature of the Israeli occupation on these rules. In the absence of any other significant case law, the decisions handed down by the Supreme Court of Israel constitute the primary material for evaluating the application of the aforementioned sets of legal rules to prolonged occupations. Thus, the already close ties linking the precedent of the OPT and prolonged occupation become almost incestuous. Valuable as this material may be, the fact that

- 27 See the UN Security Council resolutions cited above note 13. See also statements by: Azerbaijan, UN Security Council, 6706th meeting, 24 January 2012, UN Doc. S/PV.6706, p. 25; Cuba, UN GA, Special Political and Decolonization Committee (Fourth Committee), Summary Record of 8 November 2011, UN Doc. A/C.4/66/SR.22, p. 2; Iran, UN GA, Third Committee, Summary Record of the 37th meeting, 2 November 2009, UN Doc. A/C.3/64/SR.37, p. 5; Bahrain, UN GA, Special Political and Decolonization Committee (Fourth Committee), Summary Record of the 23rd meeting, 14 November 2007, UN Doc. A/C.4/62/SR.23, p. 3; Indonesia, UN GA, 2nd Committee, Summary Record of the 12th meeting, 22 October 2007, UN Doc. A/C.2/62/SR.12, p. 5 and Summary Record of 20 October 2006, UN Doc. A/C.2/61/SR.17, p. 6; Saudi Arabia, UN GA, 66th plenary meeting, 2 December 2003, UN Doc. A/58/PV.66, p. 1; Cyprus, UN GA, 66th plenary meeting, 3 December 2002, UN Doc. A/57/PV.66, p. 8; Jamaica, UN GA, 65th plenary meeting, 2 December 2002, UN Doc. A/57/PV.65, p. 13; Sri Lanka, UN GA, Fourth Committee, Summary Record of the 17th meeting, 6 November 2000, UN Doc. A/C.4/55/SR.17, p. 3; Bangladesh, UN GA, Fourth Committee, Summary Record of the 18th meeting, 7 November 2000, UN Doc. A/C.4/55/SR.18, p. 7 and 13 October 1999, UN Doc. A/C.4/54/SR.9, p. 4. Finally, see Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, annex to Situation of human rights in the Palestinian territories occupied since 1967, Note by the Secretary-General, 13 September 2011, UN Doc. A/66/358.
- 28 Separate Opinions of Judge Al-Khasawneh and Judge Elaraby, ICJ, *Wall* advisory opinion, above note 10, p. 237, para. 9, and pp. 255 ff. respectively, as well as the judgments by the Supreme Court of Israel cited or referred to below in notes 73–75 and 95.
- 29 See, among many, the authors cited above notes 3 and 4.
- 30 For the qualification of the presence of Turkish forces in Cyprus as an occupation, see UN GA Res. 33/15, 9 November 1978, preambular para. 6 (110 in favour, 4 against, 22 abstentions); UN GA Res. 34/30, 20 November 1979, preambular para. 9 (99 in favour, 5 against, 35 abstentions); UN GA Res. 37/253, 13 May 1983, preambular para. 8 and para. 8 (103 in favour, 5 against, 20 abstentions). See also European Court of Human Rights (ECHR), *Loizidou v. Turkey (Preliminary Objections)*, Judgment, 23 March 1995, Appl. no. 15318/89, paras. 62–64; ECHR, *Loizidou v. Turkey*, Judgment, Merits, 18 December 1996, Appl. no. 15318/89, paras. 42–44, 56–57; ECHR, *Cyprus v. Turkey*, Judgment, 10 May 2001, Appl. no. 25781/94, paras. 75–76; all available at <http://www.echr.coe.int> (last visited 5 July 2012).
- 31 See UN GA Res. 34/37, 21 November 1979, preambular para. 9 and paras. 5 and 6 (85 in favour, 6 against, 41 abstentions); UN GA Res. 35/19, 11 November 1980, preambular para. 7 and para. 3 (88 in favour, 8 against, 43 abstentions).
- 32 E. Benvenisti, above note 18, pp. 189–190, and the state practice cited therein. This is in line with the general 'disinclination of states to consider occupation law relevant even when the conditions for its applicability are met': Tristan Ferraro, 'Enforcement of occupation law in domestic courts: issues and opportunities', in *Israel Law Review*, Vol. 41, Nos 1–2, 2008, p. 338.

it is linked to a single precedent and that it comes from the domestic courts of one state imposes prudence in its analysis.<sup>33</sup>

With these considerations in mind, we will now turn to the impact exercised by time on the application of IHL rules to situations of belligerent occupation.

## Prolonged occupations and international humanitarian law

It will first be shown that the protracted duration of an occupation cannot be invoked as a legal basis for excluding altogether the application of any IHL rule. It can, however, influence the way in which some IHL rules apply to such occupations.

### International humanitarian law applies in its entirety to prolonged occupations

As was indicated in the previous part, our position is that all IHL rules pertaining to situations of belligerent occupation remain applicable until the end of the occupation.<sup>34</sup> The rules pertaining to occupation laid down in the Hague Regulations do not contain any article determining their end of application.<sup>35</sup> The *travaux préparatoires* of the Hague Regulations confirm that the scope of application *ratione temporis* of these rules is aligned to their scope of application *ratione materiae*. In other words, the rules continue to apply as long as a belligerent occupation in the sense of Article 42 of the Hague Regulations exists.<sup>36</sup> This has been confirmed by the ICJ in its *DRC v. Uganda* judgment.<sup>37</sup> Things are more complex with the application of the Fourth Geneva Convention, whose Article 6, paragraph 3 reads as follows:

In 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,

33 See, e.g., Eyal Benvenisti, 'Judicial misgivings regarding the application of international law: an analysis of attitudes of national courts', in *European Journal of International Law*, Vol. 4, No. 1, 1993, pp. 160 ff. Along the same lines, Tristan Ferraro argues that: 'enforcement of occupation law by domestic courts . . . does not seem to actually provide for an adequate system of implementing control and review of occupants' measures': T. Ferraro, above note 32, p. 337. Finally, according to Guy Harpaz and Yuval Shany, 'The jurisprudence of the Supreme Court during all these years may be seen as an exercise in judicial acrobatics, simultaneously regulating and legitimizing the occupation': Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the incremental expansion of the scope of discretion under belligerent occupation law', in *Israel Law Review*, Vol. 43, 2010, p. 515.

34 See also ICJ, *Wall* advisory opinion, above note 10, Separate Opinion Judge Elaraby, p. 255; V. Koutroulis, above note 3, pp. 274–276; Christopher Greenwood, 'The administration of occupied territory in international law', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories*, Clarendon Press, Oxford, 1992, p. 263.

35 Hague Regulations, articles 42–56.

36 V. Koutroulis, above note 3, pp. 156–157.

37 ICJ, *DRC v. Uganda*, Judgment, above note 19, pp. 228, 231, and 254–255, paras. 167, 178–179, and 254. The Court considered that Uganda was responsible for violations of IHL (including the Hague Regulations) until 2 June 2003, the date of the final withdrawal of the Ugandan forces from DRC 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>38</sup>

The ‘one year’ time limit laid down by this provision has been widely viewed by legal scholars as having fallen into desuetude.<sup>39</sup> It has, however, been given the ‘kiss of life’ by the ICJ advisory opinion relating to the *Wall* advisory opinion.<sup>40</sup> We have extensively addressed this provision elsewhere.<sup>41</sup> For the purposes of this article, it will briefly be shown, first, that Article 6, paragraph 3 of the Fourth Geneva Convention has been replaced by Article 3(b) of the First Additional Protocol of 1977, which abolishes the ‘one-year’ time limit and calls for the application of all IHL rules until the end of occupation; and, second, that, even if one clings to Article 6, paragraph 3 of the Convention, this provision does not impose a purely temporal criterion for the end of application of IHL rules relating to occupation.

### *Article 3(b) of the First Additional Protocol as the only relevant provision for the end of application of IHL rules regulating belligerent occupations*

Article 3(b) of the First Additional Protocol reads as follows:

‘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>42</sup>

For the 172 states<sup>43</sup> that have ratified the Protocol, the temporal limit of ‘one year after the general close of military operations’ stipulated by Article 6, paragraph 3 of the Fourth Geneva Convention has been abolished, and IHL rules pertaining to occupation remain applicable until the ‘termination of occupation’. Twenty-four states have not ratified the Protocol and therefore are not conventionally bound by

38 GC IV, p. 292.

39 E. David, above note 7, p. 263; Michael Bothe, Karl J. Partsch, and Waldemar A. Solf, ‘Article 3’, in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, p. 59; Robert Kolb, ‘Deux questions ponctuelles relatives au droit de l’occupation de guerre’, in *Revue Hellénique de Droit International*, Vol. 61, 2008, pp. 358–360; Orna 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’, in *Israel Law Review*, Vol. 38, 2005, p. 217; David Alonzo-Maizlish, ‘When does it end? Problems in the law of occupation’, in Roberta Arnold and Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century’s Conflicts, Changes and Challenges*, Editions interuniversitaires suisses – Edis, Lausanne, 2005, p. 106 (with some doubts).

40 ICJ, *Wall* advisory opinion, above note 10, p. 185, para. 125.

41 V. Koutroulis, above note 3, pp. 163–179. For a critical assessment of the application of GC IV, Art. 6, para. 3 by the ICJ, see Ardi Imseis, ‘Critical reflections on the international humanitarian law aspects of the ICJ *Wall* advisory opinion’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 105–109; O. Ben-Naftali, above note 39, pp. 214–220.

42 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).

43 According to the ICRC’s list of States Parties to the main IHL treaties, last updated 4 June 2012, available at: [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited 5 July 2012).

Article 3(b).<sup>44</sup> However, there is more than sufficient proof of these states' support for the rule of Article 3(b).

First of all, this support is confirmed by the *travaux préparatoires* of Article 3(b), which reveal the will of the negotiators to abolish Article 6, paragraph 3 of the Fourth Geneva Convention.<sup>45</sup> It is also significant that Article 3 was adopted by consensus successively before the relevant Working Group and the First Committee as well as at the Plenary session.<sup>46</sup> This consensus includes States non-parties to Additional Protocol I that participated in the 1974–1977 Diplomatic Conference, namely India, Indonesia, Iran, Israel, Pakistan, Somalia, Sri Lanka, Thailand, Turkey, and the US.<sup>47</sup> The fact that these states have not ratified the Protocol because they disagreed with other contentious provisions within the document does not mean that their adherence to the rule laid down in Article 3(b) can be put to question. All the more so since this adherence has been confirmed by later practice.<sup>48</sup> Finally, a series

44 These states are: Andorra, Azerbaijan, Bhutan, Eritrea, India, Indonesia, Iran, Israel, Kiribati, Malaysia, Marshall Islands, Myanmar, Nepal, Niue, Pakistan, Papua New Guinea, Singapore, Somalia, South Sudan, Sri Lanka, Thailand, Turkey, Tuvalu, and the United States.

45 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, 1978, Vol. I, Part Three, p. 4. See also *ibid.*, Vol. VIII, CDDH/I/SR.8, 8th meeting, 18 March 1974, p. 60, para. 9; *ibid.*, Vol. III, pp. 16 and 17. Pakistan and the US were among the states that proposed relevant amendments. For the opinions expressed by delegations see, e.g., *ibid.*, Vol. VIII, CDDH/I/SR.10, 10th meeting, 19 March 1974, p. 73, paras. 21 and 25, and p. 74, para. 35; *ibid.*, Vol. VIII, CDDH/I/SR.21, 21st meeting, 13 February 1975, p. 196, para. 33. An overview of the amendments concerning Article 3 shows that the abolition of the time limit imposed by Article 6, para. 3 of GC IV was not called into question: see *ibid.*, Vol. III, pp. 15–18.

46 *ibid.*, vol. VIII, CDDH/I/SR.26, 26th meeting, 13 March 1975, pp. 247–248, para. 4; *ibid.*, Vol. VI, CDDH/I/SR.36, 36th plenary meeting, 23 May 1977, p. 57.

47 For a list of participants see *ibid.*, Vol. II, pp. 29 ff.

48 The 2005 US *Law of War Handbook* cites AP I, Art. 3, among the rules regulating the end of the application of the Geneva Conventions; Maj. K. E. Puls (ed.), *Law of War Handbook (2005)*, JA 423, International and Operational Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, VA, 2005, p. 149, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/law-war-handbook-2005.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf) (last visited 5 July 2012). The Supreme Court of Israel has not invoked Article 6, para. 3 of GC IV, and has referred to articles whose application does not extend beyond the 'one-year' time limit: Supreme Court of Israel, *Ajuri v. IDF Commander*, 3 September 2002, HCJ 7015, 7019/02 (citing Article 78); *Marab v. IDF Commander*, 5 February 2003, HCJ 3239/02, pp. 11–12, 16, 24–25, paras. 21–22, 28, 42 (citing Articles 78 and 113); *Yassin v. Commander of Kziot Military Camp*, 18 December 2002, HCJ 5591/02, pp. 17–18, para. 17 (citing Article 85); all available at: <http://elyon1.court.gov.il/eng/home/index.html> (last visited 5 July 2012). See also David Kretzmer, 'The Advisory Opinion: the light treatment of international humanitarian law', in *American Journal of International Law*, Vol. 99, No. 1, 2005, p. 91, note 23; G. Harpaz and Y. Shany, above note 33, p. 539 (noting that Israel has never openly objected to Article 3 of AP I). The High Contracting Parties to GC IV called upon Israel to 'fully and effectively respect' that convention: the declaration 'reflects the common understanding reached by the participating High Contracting Parties' to the conference. The text of the declaration is reproduced in Pierre-Yves Fux and Mirko Zambelli, 'Mise en oeuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997–2001)', Annex 1: Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, in *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 683–686. Aside from Israel, the US, and Australia, all the other States Parties to GC IV subscribed to the declaration (see Communiqué de presse, Swiss Federal Department of Foreign Affairs, 5 December 2001). Moreover, in the context of the *Wall* advisory procedure before the ICJ, no state invoked Article 6, para. 3 of GC IV as limiting the application of occupation law. Malaysia and the League of Arab States invoked GC IV articles not listed among those applicable beyond the 'one-year' time limit: Malaysia, ICJ, *Wall* advisory proceedings, Written Statement

of UN General Assembly Resolutions adopted after the ICJ *Wall* Advisory Opinion, while recalling the advisory opinion in its preamble, demand, in the relevant operative paragraph, that Israel ‘comply *fully* with the provisions of the Fourth Geneva Convention’.<sup>49</sup> Nineteen out of the twenty-four states that have not yet ratified Additional Protocol I voted in favour of these resolutions.<sup>50</sup> The aforementioned elements illustrate that, with the exception of states such as Niue or Kiribati, the overwhelming majority of the States non-parties to the Protocol have expressed their intention of seeing all IHL rules applied until the end of an occupation. In this respect, the limitation laid down by Article 6, paragraph 3 of the Fourth Geneva Convention has been rejected.

### *The exercise of governmental functions as a fundamental criterion for the application of article 6 para. 3 of the Fourth Geneva Convention*

Aside from the relationship between Article 6, paragraph 3 of the Fourth Geneva Convention and Article 3(b) of Additional Protocol I, it is also submitted that Article 6, paragraph 3 does not impose a purely temporal criterion for the termination of the application of the law of occupation. Indeed, the *travaux préparatoires* of this provision indicate that Article 6, paragraph 3 refers in substance to occupations in which there has been a transfer of governmental functions by the Occupying Power to authorities of the occupied territory.<sup>51</sup> The ‘one-year’ period was suggested as a time limit because it was optimistically considered, that, after this time, the Occupying Power would have already transferred some responsibilities to local authorities of the occupied territory. Even during negotiations, this time limit was viewed as arbitrary by some delegations.<sup>52</sup> The inclusion of the second line of Article 6, paragraph 3 formalizes this link between the transfer of responsibilities and the application of the Convention.<sup>53</sup> Italy expressed this point clearly:

of Malaysia, 30 January 2004, pp. 48 and 49, paras. 134 and 137; League of Arab States, *ibid.*, Written Statement of the League of Arab States, 28 January 2004, paras. 9.7 and 9.10.

- 49 Emphasis added. The relevant resolutions are: UN GA Res. 60/107, 8 December 2005, pp. 1, 3; UN GA Res. 61/119, 14 December 2006, pp. 1, 3; UN GA Res. 62/109, 17 December 2007, pp. 1, 3; UN GA Res. 63/98, 5 December 2008, pp. 2, 4; UN GA Res. 64/94, 10 December 2009, pp. 2, 4; UN GA Res. 65/105, 10 December 2010, pp. 2, 4; UN GA Res. 66/79, 9 December 2011, pp. 2, 4.
- 50 The states that did not vote in favour of either of the aforementioned resolutions were the US, Israel, and the Marshall Islands; Niue and Kiribati did not take part in the vote. See UN GA, A/60/PV.62, 8 December 2005, p. 16; UN GA, A/61/PV.79, 14 December 2006, p. 10; UN GA, A/62/PV.75, 17 December 2007, pp. 10–11; UN GA, A/63/PV.64, 5 December 2008, pp. 10–11; UN GA, A/64/PV.62, 10 December 2009, p. 12; UN GA, A/65/PV.62, 10 December 2010, p. 11; UN GA, A/66/PV.81, 9 December 2011.
- 51 The first draft of GC IV stipulated that the Convention would remain applicable until the end of an occupation: Draft Convention for the Protection of Civilian Persons in Time of War, in *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne (n.d.), Vol. I, p. 114 (Art. 4). It was the United States that proposed an amendment introducing the ‘one-year’ time limit to the application of the Convention, justified by the fact that occupation leads to a progressive return of governmental responsibilities to local authorities and that, following such a return, the Occupying Power should not be subject to the relevant obligations of the Convention: *ibid.*, Vol. II-A, p. 623.
- 52 For example, the delegates of Bulgaria (*ibid.*, Vol. II-A, p. 624) and Norway (*ibid.*).
- 53 See the comments on Article 6 by Committee III to the Plenary Assembly of the 1949 Diplomatic Conference: *ibid.*, p. 815.

‘An occupation which lasted beyond the date of cessation of hostilities only entailed obligations which were to be lifted progressively, as and when the local authority took over administrative powers’.<sup>54</sup> Therefore, what seems at a first glance to be a simple temporal criterion for the non-application of some of the articles of the Fourth Geneva Convention is in fact a condition of substance, relating to the transfer of governmental authority.<sup>55</sup> This is nothing more than an expression of the fundamental link between the application of IHL and the facts on the ground.<sup>56</sup> Thus Article 6, paragraph 3 was clearly not designed for protracted occupations where no transfer of powers has taken place. In other words, if one defines ‘prolonged occupations’ solely by a temporal criterion, Article 6, paragraph 3 of the Fourth Geneva Convention is of little use as a legal basis for rejecting the full application of IHL. This is all the more so since the provision of that paragraph would certainly not prevent all relevant IHL customary rules from applying beyond the ‘one-year’ limit.<sup>57</sup>

Having established that all IHL rules remain applicable to situations of prolonged occupation, we will now turn to the possibility of adapting the application of these rules to the specific circumstances of such occupations.<sup>58</sup>

## Adapting international humanitarian law to prolonged occupations

The influence exercised by the duration of the occupation on the application of IHL is not entirely clear. The central question seems to be whether the Occupying Power should be accorded more leeway or not. In this regard, the ‘inherent dilemma’<sup>59</sup> in long-term occupations is that their prolonged character can be invoked in support of both options.<sup>60</sup> Scholars have expressed opinions both in favour of according more leeway<sup>61</sup> and against it.<sup>62</sup>

54 *Ibid.*, p. 625.

55 The relevance of the distinction between the articles listed in Art., 6 para. 3 of GC IV and the ones excluded from the provision has also been challenged. Roberts notes that the great majority of the GC IV articles pertaining to occupation remain applicable even after the ‘one-year’ time limit: see A. Roberts, above note 4, pp. 55–56. Comparing Articles 49 and 53, which remain applicable even after the ‘one-year’ limit, with Article 50, whose application is excluded, Kolb correctly notes that the reasons for the distinction between the two categories of rules are not always clear: see R. Kolb, above note 39, pp. 355–356.

56 V. Koutroulis, above note 3, pp. 168–169.

57 R. Kolb, above note 39, p. 359.

58 This contribution will not deal with the possibility of adapting IHL occupation law through the adoption of binding Security Council resolutions.

59 The expression is used in Christine Chinkin, ‘Laws of occupation’, in Neville Botha, Michele Olivier, and Delarey Van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study*, Unisa Press, Pretoria, 2010, p. 178.

60 A. Roberts, above note 4, pp. 52–53. See also C. Chinkin, above note 59, p. 178: ‘In a prolonged occupation there may be strong reasons for recognizing the powers of an occupant in certain specific respects – for example, because there is a need to make drastic and permanent changes in the economy or the system of government. At the same time, there may be strong reasons for limiting the occupant’s powers in other respects’.

61 Y. Dinstein, above note 3, p. 120.

62 O. Ben-Naftali, above note 39, pp. 218–219.

However, the realities in long-lasting occupations are too complex to be limited to a binary approach, according to which either the occupant's powers are more extensive in prolonged occupations or they are curtailed. For example, recognizing that the Occupying Power enjoys greater liberty in its law-making power in situations of prolonged occupation does not automatically imply that the same liberty should be accorded in relation to the application of all IHL rules relating to occupation. Starting from this premise, we will first focus on IHL rules whose application appears prone to become more liberal due to the long duration of an occupation. We will then identify IHL rules whose application seems to be influenced in the opposite direction: the more an occupation lasts, the stricter their application becomes. The existence of these two categories of rules indicates that IHL application in prolonged occupations admits no straitjacket solutions and that whether a specific IHL rule will be applied in a more or less strict manner owing to the particularities of a prolonged occupation will depend mainly on the nature of the rule itself.

### *Time as an element allowing for a permissive application of the law of occupation*

A prolonged occupation is considered as granting the Occupying Power the possibility to introduce changes of a more permanent nature to the occupied territory. For example, Yoram Dinstein 'takes it as almost axiomatic that the military government must be given more leeway in the application of its lawmaking power if the occupation endures for many years'.<sup>63</sup> The main IHL rules whose application is affected in such a way are those related to the 'conservationist principle': Article 43 of the Hague Regulations<sup>64</sup> and Article 64 of the Fourth Geneva Convention.<sup>65</sup>

The obligation to respect the status quo of the occupied territory stipulated by these articles is not overly cumbersome. On the contrary, it has been interpreted rather flexibly.<sup>66</sup> The main obligation imposed by Article 43 of the Hague

63 Y. Dinstein, above note 3, p. 120.

64 Hague Regulations, Art. 43: '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'.

65 GC IV, Art. 64, p. 328: '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 fulfil 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.' See, in this respect, the discussion in T. Ferraro, above note 12, pp. 72–74.

66 See also, Marco Sassòli, 'Legislation and maintenance of public order and civil life by Occupying Powers', in *European Journal of International Law*, Vol. 16, no. 4, 2005, pp. 663–680; Yoram Dinstein, 'Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding', Program on Humanitarian Policy and Conflict Research (HPCR), Harvard University, Occasional Paper Series, Fall 2004, p. 8, available at: <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf> (last visited 5 July 2012); Edmund H. Schwenk, 'Legislative power of the military occupant under Article 43, Hague Regulations', in *Yale Law Journal*, Vol. 54, 1944–1945, pp. 395 ff.

Regulations is the one to restore and ensure ‘public order and safety’ or – more accurately in light of the formulation of the authentic French version (*l’ordre et la vie publics*) – ‘public order and (civil) life’.<sup>67</sup> ‘Public order and civil life’ have been interpreted as referring to ‘the whole social, commercial and economic life of the community’.<sup>68</sup> In doing so, the Occupying Power must respect the laws of the occupied territory ‘unless absolutely prevented’. These terms have been further specified by Article 64, paragraph 2 of the Fourth Geneva Convention.<sup>69</sup> The Occupying Power is not absolutely prevented from introducing legislative changes in order to, first, fulfil its obligations under the Fourth Geneva Convention; second, maintain the orderly government of the occupied territory; and third, ensure the security of the Occupying Power and of the members and property of the occupying forces or the administration.<sup>70</sup> In reality the limitations imposed by the ‘unless absolutely prevented’ exception are far less rigid than its negative formulation suggests.<sup>71</sup> This is confirmed by the interplay between Article 43 of the Hague Regulations and Article 64, paragraph 2 of the Fourth Geneva Convention. As we just explained, according to the first of these two articles, the Occupying Power should preserve public order and civil life while respecting the legislation of the occupied territory. Only in exceptional cases can this respect be circumvented. Among these exceptional cases, Article 64, paragraph 2 of the Convention includes the need to maintain the orderly government of the occupied territory. However, the preservation of public order and civil life itself forms an essential part of the occupier’s obligation to maintain the orderly government of the occupied territory. Thus, the two parts of the rule laid down in Article 43 of the Hague Regulations become tautological to a large extent: the occupier should preserve public order and civil life without interfering with local legislation unless such interference is necessary for the orderly government of the territory, orderly government that certainly includes the preservation of public order and civil life. In view of the above,

67 M. Sassòli, above note 66, pp. 663–664; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, Albany, NY, 2002, pp. 58–59; E. H. Schwenk, above note 66, p. 393.

68 Court of Criminal Appeal established at the British Zone of Control in Germany, *Grahame v. The Director of Prosecutions*, British Zone of Control, Control Commission, 26 July 1947, *Annual Digest and Reports of Public International Law Cases*, Vol. 14, 1947, p. 232. The Supreme Court of Israel, *Askani* case, above note 9, p. 19, para. 18, states that Article 43 ‘extends to the public order and life in all their aspects . . . such as economic, social, educational, hygienic [*sic*], medical, traffic and similar matters that are connected with life in a modern society’.

69 *Commentary GC IV*, above note 5, p. 335; M. Sassòli, above note 66, pp. 669–671; Y. Dinstein, above note 66, pp. 4–6. Schwenk’s analysis confirms that the exceptions introduced by Article 64 of GC IV were in conformity with the interpretation of the phrase ‘unless absolutely prevented’ before the adoption of GC IV, Art. 64: see E. H. Schwenk, above note 66, pp. 399–402.

70 See GC IV, Art. 64, para. 2, above note 65. For an analysis of the scope of this provision see M. Sassòli, above note 66, pp. 674–675 and 678–679. Penal legislation is specifically regulated by GC IV, Art. 64, para. 1.

71 It has, for example, been considered that an Occupying Power would be absolutely prevented from applying local legislation contrary to international law in general, with particular reference to human rights norms. See UK, *Military Manual*, above note 7, pp. 278–279, para. 11.11; M. Sassòli, above note 66, pp. 676–678; Robert Y. Jennings, ‘Government in commission’, in *British Year Book of International Law*, Vol. 23, 1946, p. 132, n. 1; F. A. Mann, ‘The present legal status of Germany’, in *International Law Quarterly*, Vol. 1, No. 3, 1947, p. 321.

there is no reason not to allow for the long duration of an occupation to influence the meaning and scope of what is needed to ‘maintain the orderly government’ of the occupied territory.

The obligation to ensure ‘public order and civil life’ set out in Article 43 of the Hague Regulations has been applied by national courts permissively, several changes in the status quo of the occupied territory having been considered as valid by case law.<sup>72</sup> This notwithstanding, the duration of the occupation has been invoked as an element allowing for an even more permissive application of Article 43, as well as other IHL rules linked to the preservation of the status quo of the occupied territory. Thus, the Supreme Court of Israel has invoked the long-lasting character of the Israeli occupation over Palestinian territories in order to justify the adoption of new tax legislation,<sup>73</sup> or the implementation of infrastructure projects with permanent effect on the occupied territories, such as the construction of high-speed motorways<sup>74</sup> or high-voltage lines.<sup>75</sup> The essence of the argument here is to avoid freezing life and to allow for the normal development of the occupied territory.<sup>76</sup> The judgment handed down in the *Askan* case on the construction of high-speed motorways provides a résumé of the Court’s case law until 1983 and deserves a more detailed presentation here.

The central issue before the Court was whether the Occupying Power can go through with a project ‘that has permanent implications’, reaching ‘beyond the time limits of the military government itself’.<sup>77</sup> The Supreme Court of Israel turned first to Article 43 of the Hague Regulations and asserted that the distinction between a short-term and a long-term occupation affects the content given to ‘the public order and life’.<sup>78</sup> And the Court went on to explain that

military and security needs predominate in a short-term military occupation. Conversely, the needs of the local population gain weight in a long-term

72 See E. David, above note 7, pp. 567–568 and 571–572; D. Kretzmer, above note 67, pp. 62 ff.; Yoram Dinstein, ‘The Israel Supreme Court and the law of belligerent occupation: Article 43 of the Hague Regulations’, in *Israel Yearbook on Human Rights*, Vol. 25, 1995, pp. 12–16. For an extensive analysis of the scope of Article 43, including reference to the *travaux préparatoires* of the provision, see E. H. Schwenk, above note 66, pp. 395 ff.

73 Supreme Court of Israel, *Bassil Abu Aita et al. v. The Regional Commander of Judea and Samaria and Staff Officer in Charge of Matters of Custom and Excise – Omar Abdu Kadar Kanzil et al. v. Officer in Charge of Customs, Gaza Strip Region and the Regional Commander of the Gaza Strip*, HC 69/81 – HC 493/81, 5 April 1983, pp. 133–134, para. 50, available at: [http://elyon1.court.gov.il/files\\_eng/81/690/000/z01/81000690.z01.pdf](http://elyon1.court.gov.il/files_eng/81/690/000/z01/81000690.z01.pdf) (last visited 5 July 2012). We are not commenting here on the subordination of Articles 48 and 49 of the Hague Regulations to Article 43, since the duration of the occupation has not been invoked as an argument in favour of this subordination. For a comment, see Y. Dinstein, above note 72, pp. 16–20.

74 Supreme Court of Israel, *Askan* case, above note 9, p. 39, para. 36.

75 See the case law cited in Y. Dinstein, above note 3, pp. 118–119.

76 See ‘Statement by the International Committee of the Red Cross, Geneva, 5 December 2001’, Conference of High Contracting Parties to the Fourth Geneva Convention, para. 3, available at <http://www.icrc.org/eng/resources/documents/misc/57jrgw.htm> (last visited 5 July 2012): ‘the Occupying Power... must ensure the protection, security and welfare of the population living under occupation. This also implies allowing the normal development of the territory, if the occupation lasts for a prolonged period of time’. See also Cuba, *Wall* advisory proceedings, Written Statement of the Republic of Cuba, 30 January 2004, p. 12.

77 Supreme Court of Israel, *Askan* case, above note 9, p. 17, para. 16.

78 *Ibid.*, pp. 23–24, para. 22.

military occupation... Therefore legislative measures (such as new taxation or a new rate of taxation for an existing tax) that might be improper for a short-term military government could be proper for a long-term military government.<sup>79</sup>

Despite insisting on the fact that the Hague Regulations had not foreseen such distinction, the Supreme Court of Israel did not reject the Regulations as irrelevant. It accepted that it was bound to apply them but asserted that ‘the time dimension can be taken into account when considering proper policy in cases in which there is room for policymaking within the Regulations themselves’.<sup>80</sup> Article 43 is considered as sufficiently flexible to accommodate such interpretations by incorporating the time element in the analysis of both the term ‘public order and life’ and the term ‘unless absolutely prevented’.<sup>81</sup> The Court stated unequivocally:

The life of a population, like the life of an individual, is not static but is in a perpetual movement that contains development, growth and change. A military government cannot ignore this. It may not freeze life. . . .

The Military Government’s authority therefore extends to taking measures necessary for growth, change and progress. The conclusion is that a military government may develop industry, trade, agriculture, education, health and welfare services and similar matters of proper administration that are necessary for securing the changing needs of a population in an area subject to belligerent occupation.<sup>82</sup>

These actions are subject to the limits imposed by the temporary character of the military government, by the fact that the occupier is not the sovereign ruler of the occupied territory.<sup>83</sup> The Court affirmed that investments favouring growth and development of the occupied territory but leading at the same time to permanent changes in the occupied territory ‘are permitted if they are reasonably required for the needs of the local population’.<sup>84</sup> As for prohibited measures for the Occupying Power, the Court cited ‘institutional changes’ or measures that ‘bring about a substantial change in the fundamental institutions’ of the occupied territory.<sup>85</sup> The military government was under no obligation to adopt far-reaching measures for the development of the occupied territory. According to the Court, this margin of appreciation was reflected in the wording of Article 43 (the occupier must take ‘*all measures in its power*’ in order to ensure ‘*as far as possible*’ public order and life).<sup>86</sup> There exists for the Occupying Power

a minimal standard with regard to securing the public order and life of the local population below which the military government functioning as a proper

79 *Ibid.*, p. 24, para. 22.

80 *Ibid.*, p. 25, para. 22.

81 *Ibid.*

82 *Ibid.*, pp. 28–29, para. 26.

83 *Ibid.*, p. 27, para. 23.

84 *Ibid.*, pp. 30–31, para. 27.

85 *Ibid.*, p. 31, para. 27.

86 *Ibid.*, p. 33, para. 29 (emphasis added).



government may not descend, and that there certainly exists a maximal standard with regard to securing the public order and life of the population above which the military government functioning as a temporary government may not ascend, and that between these two there exists a field of authority within which there is permission and not duty to choose between various options...<sup>87</sup>

Thus, the occupier may or may not choose to act in order to make fundamental investments and this choice will depend on factors such as the occupier's 'physical capacity, the manpower (military and civilian) at its disposal and its monetary resources'.<sup>88</sup> In the end, the Supreme Court of Israel established a link between Article 46 of the Hague Regulations, concerning expropriation of private property, and Article 43, and found that both the high-speed motorway construction plan and the expropriations necessary for its realization were in conformity with the Hague Regulations.<sup>89</sup>

This judgment raises several interesting issues. First, the Court affirmed that the Hague Regulations rules remain applicable to situations of prolonged occupation. Second, it admitted that the duration of the occupation would be taken into account 'in cases in which there is room for policymaking within the Regulations themselves',<sup>90</sup> not with respect to every rule of the Hague Regulations. This is also confirmed by the fact that the Court did not invoke the duration of the occupation in order to modify the scope of Article 46 of the Hague Regulations directly. Indeed, Article 46 is a straightforward provision with no caveats.<sup>91</sup> The Court could have viewed the duration as an element 'external' to the Hague Regulations, capable of directly modifying the application of the rules of those Regulations, independently of their wording. It chose not to do so. Instead, it linked Article 46 to Article 43, whose wording offers room for integrating considerations relating to the time element of the occupation. Third, turning to Article 43 itself, the Supreme Court of Israel asserted that the duration of the occupation affects the scope of the terms 'public order and life' and 'unless absolutely prevented'. In a prolonged occupation, the needs of the local population gain in importance. This allows the occupier to take measures that would be excluded in a short-term occupation, in view of securing these needs. The Court did not offer detailed explanation concerning the influence of time on the 'unless absolutely prevented' part of Article 43. It seemed to consider self-evident that, in prolonged occupations, an Occupying Power would be absolutely prevented from respecting local laws. As we have already explained, this view finds a sounder legal basis in the interplay between Article 43 of the Hague Regulations and Article 64, paragraph 2 of the Fourth Geneva Convention. Fourth, the Court identified the limits to the extension

87 *Ibid.*, p. 33–34, para. 29.

88 *Ibid.*

89 *Ibid.*, pp. 34–37, para. 31 and pp. 39–41, paras. 35–37.

90 *Ibid.*, p. 25, para. 22.

91 Hague Regulations, Art. 46: 'Private property cannot be confiscated'.

of the authority of the Occupying Power. These limits rest upon the temporary (read: 'non-sovereign') character of the occupier's administration. The Court affirmed in rather general terms that measures adopted by the Occupying Power should not 'blur the distinction between a military and ordinary government', and referred mainly to the occupier's obligation to act as usufructuary of immovable public property and not to introduce substantial institutional changes in the occupied territory.<sup>92</sup> Unfortunately, the Court did not envisage the influence of the prolonged character of an occupation over these limits. However, the longer an occupation lasts and the wider the authority exercised by the Occupying Power over the local population, the more the distinction between a military and an ordinary government becomes strained and difficult to perceive. According too much authority to the Occupying Power may result in what some refer to as 'creeping annexation'.<sup>93</sup> Consequently, the duration of an occupation can be seen as imposing on the Occupying Power the need to offer further assurances about the non-permanent or the reversible character of the measures it adopts. Fifth, and finally, the Supreme Court of Israel insisted that the Occupying Power is under no obligation to adopt measures in order to promote growth or development of the occupied territory. Here again, the Court stopped short of analysing the impact of the prolonged character of the occupation on the 'minimal standard with regard to securing the public order and life of the local population below which the military government functioning as a proper government may not descend'.<sup>94</sup> Since the time element broadens the scope of 'public order and life', this broadened scope also influences the obligations imposed on the Occupying Power by Article 43 of the Hague Regulations. Thus, since the occupier has to 'take all the measures in his power to restore, and ensure, as far as possible, public order and [life]', it is submitted that the interpretation of the terms 'as far as possible' and 'all the

92 See above note 85. The Court allowed for one exception to this rule, in cases where the local institutions are opposed 'in their substance to fundamental notions of justice and morality' (*Askani* case, above note 9, p. 27, para. 23). Although this exception is formulated in broad and vague terms, it is submitted that it should be read as referring to the cases covered by Hague Regulations, Art. 43, read together with GC IV, Art. 64, para. 2 (i.e. legislation contrary to fundamental IHRL rules).

93 Palestine, *Wall* advisory proceedings, Written Statement Submitted by Palestine, 30 January 2004, p. 274, para. 596; UN Economic and Social Council, Commission on Human Rights, 'Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission established pursuant to Commission resolution S-5/1 of 19 October 2000', UN Doc. E/CN.4/2001/121, 16 March 2001, p. 20, para. 68; R. Falk, above note 4, p. 46; Gamal Abouali, 'Natural resources under occupation: the status of Palestinian water under international law', in *Pace International Law Review*, Vol. 10, No. 2, 1998, p. 508; Editor's Note accompanying the *Basic Abu Ita* judgment of the Supreme Court of Israel, in *Palestinian Yearbook of International Law*, Vol. 4, 1987–1988, p. 186; Theodor Meron, 'Applicability of multilateral conventions to occupied territories', in *American Journal of International Law*, Vol. 72, No. 3, 1978, p. 550; G. H. Fox, above note 8, p. 235. At the time of Israel's occupation of parts of southern Lebanon, Lebanon had also denounced the link by Israel of 'the economic and administrative infrastructure of southern Lebanon to its own' as 'creeping annexation': see letter dated 16 July 1990 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General, UN Doc. S/21396, 16 July 1990, p. 1. See also Jordan, *Wall* advisory proceedings, Written Statement Submitted by the Hashemite Kingdom of Jordan, 30 January 2004, pp. 79–80, para. 5.106 (referring to *de facto* annexation).

94 See above note 87 and accompanying text.

measures in his power' are equally influenced by the long duration of the occupation. The longer the occupation, the more difficult it will be for the Occupying Power to suggest that it has absolutely no measure in its power to ensure the development and growth of the occupied territory or that it has been impossible to do so. Therefore, in situations of prolonged occupation, the minimal standard identified by the Court should be interpreted as imposing on the Occupying Power at least some positive obligations to take action in favour of growth and development in the occupied territory. This may prove particularly useful in situations where the Occupying Power rejects the application of human rights instruments in the occupied territory.

The question of the prolonged character of the occupation has been raised before the Supreme Court of Israel in a recent judgment concerning activities in relation to the exploitation of quarries in the occupied Palestinian territory (the *Yesh Din* case).<sup>95</sup> On the basis of Articles 43 and 55 of the Hague Regulations the petitioner, a voluntary human rights association, requested an order to cease quarrying activities inside the occupied territories of Judea and Samaria and to stop the establishment of new quarries or the expansion of already existing quarries in these territories.<sup>96</sup> Usufruct is defined by the Court 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'.<sup>97</sup> The Court explained that this meant that the Occupying State 'shall not be entitled to sell the asset or to use it in a way that shall result in its depletion or exhaustion'.<sup>98</sup> Without invoking the prolonged character of the occupation, the Court affirmed that the mere mining of minerals was not considered as damaging to the capital and therefore is not excluded by Article 55.<sup>99</sup> The Court then turned to the question whether the mining was allowed only with regard to mines and quarries that already existed before the occupation, as the petitioners suggested, or whether the Occupying Power could establish new ones, as the respondents proposed, invoking 'the unique circumstances of a prolonged belligerent occupation'.<sup>100</sup> The Court acceded to this line of reasoning. It admitted that

the duration of the occupation period . . . requires the adjustment of the law to the reality on the ground, which imposes a duty upon Israel to ensure normal

95 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, available at: <http://www.yesh-din.org/userfiles/file/תורערכה%20דין/psak.pdf> (last visited 5 July 2012).

96 *Ibid.*, pp. 4–5, paras. 2–3. Article 55 of the Hague Regulations reads as follows: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'.

97 Supreme Court of Israel, *Yesh Din* Judgment, above note 95, p. 11, para. 7.

98 *Ibid.*

99 *Ibid.*, pp. 12–14, para. 8. For a persuasive critical analysis of this issue, see Guy Harpaz, Yuval Shany, Eyal Benvenisti, Amichai Cohen, Yael Ronen, Barak Medina, and Orna Ben-Naftali, Expert Legal Opinion, opinion with regard to the issues arising from the *Yesh Din* judgment in support of the petitioners' motion for a review of the judgment (En Banc review), January 2012, pp. 38 ff.

100 Supreme Court of Israel, *Yesh Din* Judgment, above note 95, pp. 14–16 paras. 7 and 9.

life for a period, which even if deemed temporary from a legal perspective, is certainly long-term. Therefore, the traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of economic relations between the two authorities – the occupier and the occupied.<sup>101</sup>

On the basis of this finding, the Court held that the current, limited and reasonable, usage of minerals of the occupied territory did not contradict Article 55, as adjusted to the particularities of prolonged occupation. The Court appeared to exclude the establishment of new quarries.<sup>102</sup> As for mining activities in quarries established during the occupation, referring to ‘the unique aspects’ of the occupation in question, the Court stated that

adopting the Petitioner’s strict view might result in the failure of the military commander to perform his duties pursuant to international law. For instance, adopting the stance, according to which under the current circumstances the military commander must cease the operations of the Quarries, might cause harm to existing infrastructures and a shut-down of the industry, which might consequently harm, of all things, the wellbeing of the local population.<sup>103</sup>

The Court went on to cite aspects of the quarrying activities that are beneficial to the local population (such as employment in the quarries and training of Palestinian residents, marketing of quarrying products to Palestinians and Israeli settlers in the occupied territories, payment of royalties by the quarries’ operators) and concluded that

it is therefore difficult to accept the Petitioner’s decisive assertion, according to which the quarrying operations are in no way promoting the best interests of the Area, especially in light of the common economic interests of both the Israeli and Palestinian parties and the prolonged period of occupation.<sup>104</sup>

The following remarks deal solely with the use of the occupation’s prolonged character in the Court’s legal reasoning.<sup>105</sup> First, contrary to the approach adopted in the *Askaniya* case, it seems that, in this case, the Court considered the duration of the occupation as imposing the adjustment of all the rules of occupation law, regardless of whether the wording of a particular rule allows for such an adjustment or not. The Court’s stance on this matter was not unambiguous: it is not clear whether the Court did indeed consider that the time element directly alters the scope of application of Article 55 or whether this adjustment is due to the link established between this Article and Article 43. In any case, to the extent that the judgment could be interpreted in favour of a direct influence of the time element on the application of Article 55, such an interpretation is flawed. The wording of

101 *Ibid.*, p. 16, para. 10.

102 *Ibid.*, p. 17, paras. 10–12.

103 *Ibid.*, p. 18, para. 13.

104 *Ibid.*, p. 19, para. 13.

105 For a general critical analysis of the judgment, see G. Harpaz *et al.*, above note 99.

Article 55 itself does not allow for a change in its scope depending on the duration of the occupation<sup>106</sup> and the Court offered no alternative legal basis for such a change.<sup>107</sup> It should be noted that Israel advanced a similar position in 1978, in respect of the exploitation of new oil fields in Sinai and the Gulf of Suez. In that case, Israel invoked, among other arguments, the duration of its occupation of these two territories, arguing that preventing exploitation of oil fields would amount to a delay in the development of these territories and economic paralysis.<sup>108</sup> However, Israel's memorandum contradicted one issued by the United States on the same theme, which rejected Israel's right to exploit new oil fields under occupation law, without mentioning any relaxation of this prohibition owing to the duration of the occupation.<sup>109</sup> The US memorandum pointed out that allowing for such a right might be an incentive against withdrawal and in favour of prolonging the occupation.<sup>110</sup>

Second, turning back to the *Yesh Din* judgment, it is important to underline that the Israeli governmental authorities admit that the duration of the occupation creates positive obligations for the occupier.<sup>111</sup> The Court agreed with this view.<sup>112</sup> This would imply that the operation of the quarries is not a decision that the Occupying Power is free to take or not, but rather an obligation stemming from the general duty of the occupier to ensure public order and life. This confirms the view expressed above that the duration of the occupation enhances the obligations imposed on the Occupying Power by Article 43 of the Hague Regulations.

Third, as seven Israeli legal experts have outlined in a legal opinion on the *Yesh Din* judgment,

the protraction of the occupation does indeed broadly impact the appropriate interpretation of Article 43 and consequently the powers of the Military Commander... but this broad impact is subject to two strict and basic

106 For example, the meaning of 'usufruct' is unlikely to vary according to the duration of the occupation.

107 See, along the same lines, G. Harpaz *et al.*, above note 99, pp. 45–48, who insist that the character of the prohibition to use the capital of the natural resources is an absolute one that admits no exceptions or adjustments of degree.

108 Ministry of Foreign Affairs of Israel, 'Israel: Ministry of Foreign Affairs memorandum of law on the right to develop new oil fields in Sinai and the Gulf of Suez', 1 August 1977, in *International Legal Materials*, Vol. 17, No. 2, 1978, pp. 434–435, paras. 5 and 10.

109 US Department of State, 'United States: Department of State memorandum of law on Israel's right to develop new oil fields in Sinai and the Gulf of Suez', 1 October 1976, in *International Legal Materials*, Vol. 16, No. 3, 1977, pp. 733–753. The occupation in question dated from 1967.

110 *Ibid.*, p. 746: 'A rule holding out the prospect of acquiring unrestricted access to and use of resources and raw materials, would constitute an incentive to territorial occupation by a country needing raw materials, and a disincentive to withdrawal'. For a defence of this policy consideration, see Brice M. Clagett and O. Thomas Johnson Jr., 'May Israel as a belligerent occupant lawfully exploit previously unexploited oil resources of the Gulf of Suez?', in *American Journal of International Law*, Vol. 72, No. 3, 1978, pp. 577–578.

111 Israel, Ministry of Justice, HCJ 2164/09 *Yesh Din*, Response on Behalf of Respondents 1–2, 20 May 2010, para. 52, available at: <http://yesh-din.org/userfiles/file/Petitions/Quarries/Quarries%20State%20Response%20May%202010%20ENG.pdf> (last visited 5 July 2012): 'in a state of prolonged belligerent occupation, the prevailing belief is that the military administration acquires additional positive duties in relation to the area it is administering'.

112 Supreme Court of Israel, *Yesh Din* Judgment, above note 95, p. 18, para. 12.

limitations: the first is that such expansion does not allow the Military Commander to factor in considerations that are prohibited under Article 43 or to act outside of the other provisions that apply to his powers, and the second is that the expansion must be exercised for the benefit of the local population and not against it.<sup>113</sup>

The present writer agrees with the experts that the *Yesh Din* judgment uses the time element to promote an expanding interpretation of Articles 43 and 55 that circumvents these two limitations articulated by its own case law.<sup>114</sup> Taking this last remark one step further, and along the same lines as our comments on the *Askan* judgment, the long duration of the occupation can be interpreted as establishing new limits to the freedom of the action of the Occupying Power. These limits will be explored below.

### *Time as an element allowing for a restrictive application of the law of occupation*

Aside from being a tool for the expansion of the powers of the occupier, the prolonged character of the occupation may also constitute an argument in favour of limiting the freedom of these powers. We have already referred to one example in this regard in relation to the application of Article 43 of the Hague Regulations. The starting point in defining the limits of the occupier's freedom is the recognition that the prolonged character of an occupation implies certain positive obligations to the Occupying Power. As it has just been shown, both the Israeli authorities and the Supreme Court of Israel have recognized the existence of such obligations in the *Yesh Din* case.<sup>115</sup> In this respect, two things should be kept in mind. The first is the fact that the expansion of the occupier's powers should be exercised for the benefit of the local population.<sup>116</sup> The second is that this expansion should not blur the distinction between a military government and a national one.<sup>117</sup> As we have already stated, prolonged occupations put this last consideration to the test. In short-term occupations, in order to maintain the aforementioned distinction, it may suffice to abstain from introducing fundamental institutional changes in the occupied territory.<sup>118</sup> However, in long-term occupations, where the degree of dependence of the occupied territory upon the Occupying Power is enhanced over the years, this simple abstention may not be enough, and supplementary action may be needed in

113 G. Harpaz *et al.*, above note 99, p. 30, para. 84. The experts cite several judgments of the Supreme Court of Israel confirming this position.

114 *Ibid.*, p. 33, para. 92. As the experts correctly underline: 'the decision adjusts the provisions [i.e. Articles 43 and 55] to accommodate the reality on the ground instead of subjecting that reality to the rule of law and limiting the authorities of the military Commander so as to accord with the provisions of the laws of occupation'.

115 See above notes 111–112.

116 Supreme Court of Israel, *Askan* case, above note 9, p. 24, para. 22 and pp. 28–29, para. 26; G. Harpaz *et al.*, above note 99, p. 30, para. 84.

117 Supreme Court of Israel, *Askan* case, above note 9, p. 29, para. 26.

118 As the Supreme Court of Israel suggests: see Supreme Court of Israel, *Askan* Judgment, above note 9, p. 27, para. 23 and p. 31, para. 27.

order to ensure the potential (depending on the final decision of the sovereign) reversibility of the occupier's measures. In such a context, the simple affirmation that the measures are temporary may not be deemed sufficient. This is demonstrated by the ICJ *Wall* advisory opinion. Despite Israel's repeated statements that the wall was a temporary measure and that Israel was 'ready and able . . . to adjust or dismantle',<sup>119</sup> the ICJ remained reluctant and considered that

the construction of the wall and its associated régime create 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.<sup>120</sup>

Although the ICJ did not explicitly mention the long duration of the occupation, the finding in itself suggests that the spectre of annexation on the occupied territory by the Occupying Power may not be chased away merely by reaffirming the temporary character of the measures adopted or the occupier's will to reverse them. The difficulty in reversing the 'temporary' measures adopted by the Occupying Power is shown by the situation in the Gaza strip following the 2005 disengagement of the Israeli forces. The Supreme Court of Israel has determined that, following the 2005 disengagement, Gaza is no longer a territory under belligerent occupation.<sup>121</sup> It has, however, conceded that the State of Israel continues to have obligations towards the residents of the Gaza strip that derive, among others,

from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.<sup>122</sup>

This finding reveals the extent of interdependence between the occupier and the occupied territory that develops during long-term occupations.<sup>123</sup> First, it should be noted that the Supreme Court did not explain the legal basis of this statement. If one follows the Court's underlying reasoning, the finding cited above could be read to

119 ICJ, *Wall* advisory opinion, above note 10, p. 182, para. 116.

120 *Ibid.*, p. 184, para. 121 (emphasis in the original).

121 Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed et al. v. Prime Minister and Minister of Defence*, HCJ 9132/07, Judgment, 30 January 2008, para. 12; Supreme Court of Israel, *A and B v. State of Israel*, CrimA 6659/06 and others, Judgment, 11 June 2008, para. 11. Both judgments are available at: <http://elyon1.court.gov.il/eng/home/index.html> (last visited 5 July 2012). See also Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), *Report*, Part One, January 2011, pp. 50–53, paras. 45–47, available at: [http://www.turkel-committee.gov.il/files/worddocs/870720021\\_english.pdf](http://www.turkel-committee.gov.il/files/worddocs/870720021_english.pdf) (last visited 5 July 2012).

122 Supreme Court of Israel, *Al-Bassiouni* Judgment, above note 121, para. 12. See also Supreme Court of Israel, *Physicians for Human Rights et al. v. Prime Minister of Israel et al.* and *Gisha Legal Centre for Freedom of Movement et al. v. Minister of Defence*, HCJ 201/09 and 248/09, Judgment, 19 January 2009, p. 13, para. 14. Both judgments are available at: <http://elyon1.court.gov.il/eng/home/index.html> (last visited 5 July 2012).

123 The supply of electricity was one of the first issues that the Supreme Court of Israel decided taking into account the 'prolonged occupation' argument. See Supreme Court of Israel, *The Jerusalem District Electric Company Ltd. v. The Minister of Energy and Infrastructure*, HCJ 351/80, Judgment, cited in Supreme Court of Israel, *Askan* Judgment, above note 9, p. 31, para. 27.

mean that the prolonged character of a belligerent occupation leads to the extension of obligations of the Occupying Power even after the end of the occupation as such. However, this does not seem to be the position of the Supreme Court of Israel, since no IHL rule pertaining specifically to occupation law is mentioned in its judgment.<sup>124</sup> More simply, one could view this statement as confirming that Israel still exercises over Gaza the degree of control necessary for the occupation to continue.<sup>125</sup> In this respect, Dapo Akande suggests that

the criteria for the establishment of occupation may not be the same as the criteria for the maintenance of occupation. . . . [E]ven in cases where a former occupying power no longer exercises the level of control that would justify the establishment of occupation, if it exercises such control as to prevent another power from exercising full control, the occupying power remains in occupation.<sup>126</sup>

There is no indication that states qualify Gaza as occupied territory based on such a differentiated conception between the control necessary for the establishment of the occupation and the one required for its maintenance. The fact that a very large majority of states consider that Gaza is still occupied<sup>127</sup> indicates that, in reality, the degree of control necessary for a state to be an Occupying Power does not require *full and exclusive* control over the occupying territory. However, Akande's argument may become relevant if one adheres to a restrictive conception of the criterion of control for the purpose of establishing a belligerent occupation.<sup>128</sup> In this case, the positions adopted by states in relation to the status of Gaza as occupied territory suggest that, in situations of prolonged occupation, the interdependence between the occupier and the occupied territory may lower the degree of control necessary for the continuation of the occupation.

Furthermore, a long-term Occupying Power has the obligation to take positive measures for the welfare and development of the local population. We subscribe to the position that the benefit to the local population should be significant. Thus, 'any beneficial outcome at all, as small, indirect and speculative as it may be' will not absolve the Occupying Power of its obligations under IHL.<sup>129</sup> The importance of the 'welfare of the local population' element was also expressed during the expert meetings on occupation and other forms of administration of foreign territory organized by the ICRC.<sup>130</sup> The experts participating in these

124 Supreme Court of Israel, *Al-Bassiouni* Judgment, above note 121, paras. 13 ff.

125 Dinstein affirms that the real source of such obligation is that Gaza still remains under belligerent occupation: Y. Dinstein, above note 3, pp. 276–279. As has already been noted, this is also the point of view of the present author: see above note 26.

126 Dapo Akande, 'Classification of armed conflicts: relevant legal concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 48.

127 See the references cited above at note 26.

128 Along the lines of the view held by the ICJ in its *DRC v. Uganda* Judgment, above note 19, pp. 229–231, paras. 172–178. See also Turkel Commission, above note 121, pp. 51–53, paras. 46–47. For a critical appraisal of this interpretation, see V. Koutroulis, above note 3, pp. 47–58.

129 G. Harpaz *et al.*, above note 99, p. 18, paras. 45–46.

130 The experts 'were unanimously of the view that the welfare of the local population played a key role' in situations of prolonged occupation: see T. Ferraro, above note 12, p. 72.



meetings discussed ways to ensure that the measures adopted by the Occupying Power do indeed preserve the welfare of the local population and, *inter alia*, 'took the view that long-term occupation required the occupying power to take into consideration the will of the local population by including it in its decision making process', although they were unable to agree on the most suitable means for such an involvement.<sup>131</sup>

The long duration of a belligerent occupation may also influence the application of military necessity, which is, along with humanitarian considerations, one of the two pillars on which the entire edifice of IHL is built. IHL rules are the fruit of the balance struck between these two elements.<sup>132</sup> Military necessity is not defined in IHL conventions. However, several military manuals propose definitions of the concept.<sup>133</sup> According to the UK military manual,

Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.<sup>134</sup>

The fundamental rule concerning military necessity is that, since it has already been taken into consideration during the elaboration of all IHL rules, it can be invoked only where the specific IHL rules provide for a relevant exception; it cannot be invoked to justify actions contrary to IHL.<sup>135</sup> Exceptions founded on

131 *Ibid.*, pp. 75–76.

132 Michael N. Schmitt, 'Military necessity and humanity in international humanitarian law: preserving the delicate balance', in *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, p. 798. The preamble of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land (above note 1) notes that the wording of the Convention's provisions 'has been inspired by the desire to diminish the evils of war, as far as military requirements permit'. See also the preamble of the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868, available at: <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (last visited 5 July 2012).

133 UK *Military Manual*, above note 7, pp. 21–22, para. 2.2. See, along the same lines, Canada, *Military Manual*, above note 7, p. 2–1, para. 202; US, *Law of Land Warfare*, above note 7, p. 4; France, Ministère de la Défense, *Manuel de droit des conflits armés*, Secrétariat général pour l'administration, Direction des Affaires juridiques, Sous-direction du droit international et du droit européen, Bureau du droit des conflits armés, (undated), p. 48. These definitions can be traced back to the 1863 Lieber Code. Military necessity was defined there as 'the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war' (Article 14), with the additional precision that 'in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult' (Article 16): Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at: <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (last visited 5 July 2012).

134 UK *Military Manual*, above note 7, pp. 21–22, para. 2.2.

135 See the military manuals cited above, as well as Australia, Royal Australian Air Force, *Operations Law for RAAF Commanders*, AAP 1003, Royal Australian Air Force, 2nd edition, 2004, p. 50, para. 6.7 (hereafter Royal Australian Air Force, *Military Manual*), available at: <http://airpower.airforce.gov.au/Publications/Details/156/AAP1003-Operations-Law-for-RAAF-Commanders-2nd-Edition.aspx> (last visited 5 July 2012); Germany, *Military Manual*, above note 7, paras. 131–132. See also, ICJ, *Wall* advisory proceedings, Egypt, Legal Memorandum Submitted by the Arab Republic of Egypt, 28 January 2004, p. 39; League of Arab States, Written Statement of the League of Arab States, 28 January 2004, p. 52, para. 9.5. This has been confirmed by legal doctrine: see International Law Commission, *Report of the International Law*

military necessity can be found in various IHL rules and can have different scopes.<sup>136</sup>

It is particularly interesting for the issue under discussion that the definition cited above establishes a link between the appreciation of military necessity and time. Indeed, the 'legitimate purpose of the conflict' is defined as the submission of the enemy 'at the earliest possible moment'.<sup>137</sup> This could be interpreted to mean that the longer a conflict (including a belligerent occupation) lasts, the more pressing the necessity to submit the enemy at the earliest possible moment becomes. Such an interpretation would lead to a broader application of the principle of military necessity in long-lasting conflict situations. However, to our knowledge, no such broad application of military necessity has been invoked by states, international jurisprudence, or legal doctrine.<sup>138</sup> Indeed, time appears to be left out from the scope of the 'legitimate purpose of the conflict' – the 'ends of war', in the 1863 Lieber Code terminology.<sup>139</sup> This is confirmed by the fact that the Lieber Code itself, as well as some military manuals, does not include a reference to time in its definition of military necessity.<sup>140</sup> In any case, the duration of a conflict or occupation may not overturn the fundamental rule according to which military necessity may not be invoked as a general justification of actions contrary to IHL.<sup>141</sup> In the same vein, the prolonged character of an occupation may not be invoked in order to integrate political, demographic, or economic considerations of the Occupying Power into the notion of military necessity.<sup>142</sup>

*Commission*, Fifty-third session (23 April–1 June and 2 July–10 August 2001), UN Doc. A/56/10, 2001, p. 219, para. 19 and pp. 220–221, para. 21; Nobuo Hayashi, 'Requirements of military necessity in international humanitarian law and international criminal law', in *Boston University International Law Journal*, Vol. 28, 2010, p. 52; M. N. Schmitt, above note 132, pp. 796 ff.; William Gerald Downey Jr., 'The law of war and military necessity', in *American Journal of International Law*, Vol. 47, 1953, pp. 253–254; Burrus M. Carnahan, 'Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity', in *American Journal of International Law*, Vol. 92, No. 2, 1998, p. 218; Gerald I. A. D. Draper, 'Military necessity and humanitarian imperatives', in *Revue du droit pénal militaire et du droit de la guerre*, Vol. 12, 1973, No. 2, pp. 133–134; Hilary McCoubrey, 'The nature of the modern doctrine of military necessity', in *Revue du droit pénal militaire et du droit de la guerre*, Vol. 30, 1991, p. 221.

136 For a detailed list of the relevant provisions, see Robert Kolb, 'La nécessité militaire dans le droit des conflits armés: essai de clarification conceptuelle', in *Colloque de Grenoble de la Société française pour le droit international, La nécessité en droit international*, Pedone, Paris, 2007, pp. 176–178.

137 Some scholars distinguish between the 'restrictive' and the 'permissive' function of military necessity: see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 286–291. Along the same lines but with different terminology, see also R. Kolb, above note 136, pp. 164–173.

138 We found no trace of such an interpretation in states' military manuals. Equally revealing is the fact that none of the states intervening during the written and oral phase of the *Wall* proceedings before the ICJ referred to the possibility of applying military necessity in a broader manner owing to the long-lasting character of the occupation in question. States interventions are available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a&p3=0> (last visited 5 July 2012). Moreover, no such interpretation has been advanced by either Israel or the ICJ in the *Wall* advisory opinion.

139 See the text of Article 14 of the Lieber Code, cited above at note 128.

140 *Ibid.* See also, Royal Australian Air Force, *Military Manual*, above note 135, p. 49, para. 6.6; Norway, *Norwegian Armed Forces Joint Operational Doctrine*, Organisation and Instruction Authority, Defence Staff, p. 34, para. 0247; Germany, *Military Manual*, above note 7, para. 130.

141 See above note 135 and the accompanying text.

142 Such considerations are excluded from the scope of military necessity. See N. Hayashi, above note 135, pp. 64 ff. with analysis of the *Elon Moreh* decision of the Supreme Court of Israel. The case concerned an

Having established that the long duration of an occupation does not lead to a broader application of military necessity, we will now consider whether it leads to a stricter one. As was underlined above, the scope of the exceptions relating to military necessity differs from one rule to the other. For example, Article 52 of the Hague Regulations allows for requisitions in kind and services from municipalities or inhabitants of the occupied territory ‘for the needs of the army of occupation’.<sup>143</sup> Article 53 of the Fourth Geneva Convention prohibits the destruction of public or private property inside the occupied territory by the Occupying Power, ‘except where such destruction is rendered absolutely necessary by military operations’.<sup>144</sup> Finally, Article 48 of the Convention provides for the possibility of protected persons who are not nationals of the power whose territory is occupied to leave the occupied territory, unless their departure is contrary to the national interests of the Occupying Power.<sup>145</sup> It is obvious that the exception provided for by Article 52 of the Hague Regulations is more limited in scope than military necessity, since it relates only to the needs of the occupying army.<sup>146</sup> At the other end of the spectrum, the exception relating to national interests of the Occupying Power is sufficiently broad to include interests going beyond the concept of military necessity as such.<sup>147</sup>

There are few indications in state practice, military manuals, and international or national case law that the duration of the occupation alone may influence the interpretation of these exceptions. For example, with the exception of Switzerland noted below, none of the states that intervened before the ICJ in the *Wall* advisory proceedings suggested that exceptions relating to military necessity were either excluded or should be interpreted narrowly because of the duration of the occupation. Interpretations as to the scope of the military necessity exceptions cited by the states may differ. However, none of them used the prolonged character of the occupation as a factor influencing the interpretation advanced.<sup>148</sup> The *Jamayat Askan* judgment of the Supreme Court of Israel points towards conceiving

order to requisition privately owned Palestinian land in order to establish a settlement. The Court held that the order was null and void because it was founded on a predominantly political decision and thus was outside the scope of the military necessity exception provided for by Article 52 of the Hague Regulations (‘Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation’): Supreme Court of Israel, *Duweikat et al. v. Government of Israel et al.*, HCJ 390/79, 22 October 1979, reproduced in *International Legal Materials*, Vol. 19, 1980, pp. 171–175. The Supreme Court of Israel has stated generally that ‘[t]he Military Commander may not consider the national, economic and social interests of his own state, so long as they do not affect his security interest in the Region or the interest of the local population’: Supreme Court of Israel, *Askan* Judgment, above note 9, p. 13, para. 13. This was reaffirmed, in relation to Article 43 of the Hague Regulations, in the *Yesh Din* judgment: Supreme Court of Israel, *Yesh Din* Judgment, above note 95, p. 15, para. 8. See also H. McCoubrey, above note 135, p. 227; B. M. Carnahan, above note 135, pp. 219 ff.

143 Hague Regulations, Article 52.

144 GC IV, Art. 53 (emphasis added): ‘Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operations*’.

145 GC IV, Arts. 48 and 35.

146 For an interpretation of the scope of this exception, see Y. Arai-Takahashi, above note 3, pp. 223–225.

147 For example, economic interests: see *Commentary GC IV*, above note 5, p. 236.

148 See ICJ, *Wall* advisory proceedings, Written Statement of the League of Arab States, pp. 86–87, para. 9.13; Egypt, Legal Memorandum, p. 39; Palestine, Written Statement, 30 January 2004, pp. 199–202,

the military necessity requirement of Article 43 of the Hague Regulations narrowly, in cases of prolonged occupation: ‘military and security needs predominate in a short-term military occupation. Conversely, the needs of the local population gain weight in a long-term military occupation ...’.<sup>149</sup> If Article 43 is conceived as establishing a balance of interests and, in prolonged occupations, the needs of the local population do indeed gain weight in this balance, then more compelling military and security considerations will be needed in order to outweigh them. In that sense, time does affect the influence of the military element in the application of Article 43. This reasoning may be applied to all IHL rules containing military necessity exceptions. However, the Court’s subsequent case law has not fleshed out this suggested limitation. We conclude therefore that the time factor does not in and of itself impose a narrow interpretation of military necessity in the application of IHL rules relating to occupation.

Is the suggestion in favour of limiting the long-term occupier’s powers wrong?<sup>150</sup> Not necessarily. In reality, if we look closely at the examples referred to in relation to these suggestions, we realize that the decisive element lies not with time but with the (*quasi*) absence of hostilities. As was noted earlier, the absence of hostilities is one of the two components of the definition employed by Adam Roberts.<sup>151</sup> Relevant situations in this respect are the occupation of the northern part of Cyprus by Turkey<sup>152</sup> and Western Sahara, to the extent that the territory is considered as being occupied by Morocco.<sup>153</sup> In cases such as these, ‘[w]hen military operations have ceased, military necessities must inevitably be less demanding’.<sup>154</sup> The absence of military operations will have different impacts on military necessity exceptions depending on relevant IHL rules. For example, given the absence of military operations, the absolute necessity of military operations in order to justify destruction of private or public property under Article 53 of the Fourth Geneva Convention will be extremely difficult to invoke. It may be excluded altogether, if one interprets the terms military operations strictly, as covering only ‘movements

paras. 442–449; Syria, Memorandum presented by the Syrian Arab Republic, 30 January 2004, p. 17; Morocco, Written Statement of the Kingdom of Morocco, 30 January 2004, p. 11; Organisation of the Islamic Conference, Written Statement of the Organisation of the Islamic Conference, January 2004, p. 10, para. 35; France, Written Statement of the French Republic, 30 January 2004, p. 10, paras. 42–43; Ireland, Statement of the Government of Ireland, January 2004, pp. 7–8, paras. 2.8–2.9; Sweden, Note Verbale dated 30 January 2004 from the Embassy of the Kingdom of Sweden to the Netherlands, together with the Statement of the Kingdom of Sweden, 30 January 2004, para. 7.

149 Supreme Court of Israel, *Askani* case, above note 9, p. 24, para. 22.

150 See A. Roberts, above note 4, pp. 52–53; C. Chinkin, above note 59, p. 178; O. Ben-Naftali, above note 39, pp. 218–219.

151 A. Roberts, above note 4, p. 47.

152 See above note 30.

153 See above note 31, as well as C. Chinkin, above note 59, pp. 174–178; Stephanie Koury, ‘The European Community and Member States’ duty of non-recognition under the EC–Morocco Association Agreement: state responsibility and customary international law’, in Karin Arts and Pedro Pinto Leite (eds), *International Law and the Question of Western Sahara*, International Platform of Jurists for East Timor, Oporto, 2007, pp. 172–174; Vincent Chapaux, ‘The question of the European Community–Morocco Fisheries Agreement’, in K. Arts and P. Pinto Leite, this note, pp. 224–226.

154 ICJ, *Wall* advisory proceedings, Jordan, Written Statement of the Hashemite Kingdom of Jordan, 30 January 2004, p. 143, para. 5.279.

and activities carried out by armed forces related to hostilities'.<sup>155</sup> On the other hand, according to Article 51, paragraph 2 of the same Convention<sup>156</sup> the needs of the army of occupation may justify forced labour of local people over eighteen. These needs have been interpreted as being limited to maintenance needs of the army.<sup>157</sup> It is obvious that, even though the absence of military operations may result in fewer maintenance needs, the mere presence of the occupying army inside the occupied territory will generate at least some needs covered by Article 51, paragraph 2.

Despite variations resulting from the formulation of the military necessity exceptions, it can be suggested that, in prolonged occupation combined with absence of hostilities, these exceptions will indeed be construed narrowly. Along the same lines, in the *Wall* advisory proceedings, Switzerland underlined that the prolonged character of an occupation implies a more rigorous examination of necessity and proportionality:

The law of armed conflict strikes a balance between humanitarian demands and military needs. . . . Hence, every step taken in the context of hostilities, of a military, security or administrative character, must respect the principle of necessity, proportionality and humanity . . . Any examination of necessity and proportionality in circumstances of *prolonged occupation when hostilities have ceased* must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons.<sup>158</sup>

It is not entirely clear whether Switzerland was referring here to both IHL and IHRL or only to one of these two sets of rules. The formulation of the statement indicates that it covers both.

Two remarks should be made concerning the Swiss statement. The first confirms that, in order for a restrictive interpretation of military necessity to be applied, the prolonged character of the occupation should be combined with the absence of hostilities. Thus, the time element is not the only criterion to be taken into consideration in this respect. The second concerns the reference by Switzerland to human rights. Such reference is not surprising, given that, in cases of (relatively) peaceful prolonged belligerent occupation, the administration of the occupied populations by the Occupying Power will bear some resemblance to that of an

155 See the definition given in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, 'Article 51', p. 617, para. 1936. For scholars in favour of a narrow interpretation, see among others Iain Scobbie, 'The Wall and international humanitarian law', in *Yearbook of Islamic and Middle Eastern Law*, Vol. 9, 2002–2003, p. 504; Martin B. Carroll, 'Israeli demolition of Palestinian houses in the Occupied Territories: an analysis of its legality in international law', in *Michigan Journal of International Law*, Vol. 11, 1989–1990, pp. 1210–1213.

156 GC IV, Art. 51, para. 2, p. 320: 'The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary . . . for the needs of the army of occupation'.

157 *Commentary GC IV*, above note 5, p. 294; Y. Arai-Takahashi, above note 3, p. 351.

158 Switzerland, *Wall* advisory proceedings, Written Statement of the Swiss Confederation, 30 January 2004, p. 6, para. 26 (emphasis added).

ordinary government. This brings us to the fundamental role that the application of human rights law acquires in situations of prolonged occupation.

## Prolonged occupation and international human rights law

The starting point of this analysis is that IHRL remains applicable in a situation of belligerent occupation.<sup>159</sup> It is therefore important to determine whether the prolonged character of an occupation has an impact on the application of IHRL. The importance of human rights in situations of prolonged occupation has been repeatedly affirmed in the context of the Israeli occupation of Palestinian territories.<sup>160</sup> This has also been stressed by legal scholarship.<sup>161</sup> It is interesting to note here that several fields have been identified where IHL rules are usefully complemented by IHRL. For example, economic, social, and cultural rights of the occupied population, such as the right to adequate food,<sup>162</sup> the right to health,<sup>163</sup> or the right to education,<sup>164</sup> appear to be of particular relevance in situations of prolonged occupation.<sup>165</sup> The limits of this article do not allow an in-depth examination of the application of each relevant human right in long-term occupations. We will rather focus on two general questions: first, the question of the interaction between IHL and IHRL in situations of prolonged occupation, and

159 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, p. 240, para. 25 (hereafter *Nuclear Weapons* advisory opinion); ICJ, *Wall* advisory opinion, above note 10, pp. 178–181, para. 106–113; ICJ, *DRC v. Uganda* Judgment, above note 19, pp. 242–243, para. 216; ECHR, *Loizidou v. Turkey (Preliminary Objections)*, above note 30, paras. 62–64; ECHR, *Loizidou v. Turkey*, Judgment, above note 30, paras. 54, 57; ECHR, *Al-Skeini and others v. The United Kingdom*, Case No. 55721/07, Judgment, 7 July 2011, paras. 138–142 (the ECHR judgments are available at: <http://cmiskp.echr.coe.int> (last visited 5 July 2012)).

160 Switzerland, *Wall* advisory proceedings, above note 158, p. 6, para. 27; UN General Assembly, Note by the Secretary General, Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, 4 October 2001, UN Doc. A/56/440, p. 4, para. 5; UN Economic and Social Council, Commission on Human Rights, above note 93, p. 12, para. 37: 'A prolonged occupation, lasting for more than 30 years, was not envisaged by the drafters of the Fourth Geneva Convention (see art. 6). Commentators have therefore suggested that in the case of the prolonged occupation, the Occupying Power is subject to the restraints imposed by international human rights law, as well as the rules of international humanitarian law.'

161 See among many, A. Roberts, above note 4, pp. 70–74; R. Falk, above note 4, p. 46; Noam Lubell, 'Challenges in applying human rights law to armed conflict', in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 752–753; Kenneth Watkin, 'Controlling the use of force: a role for human rights norms in contemporary armed conflict', in *American Journal of International Law*, Vol. 98, No. 1, 2004, p. 28; Orna Ben-Naftali and Yuval Shany, 'Living in denial: the application of human rights in the Occupied Territories', in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, p. 40.

162 Sylvain Vité, 'The interrelation of the law of occupation and economic, social, and cultural rights: the examples of food, health, and property', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 636–642.

163 *Ibid.*

164 Jonathan Thompson Horowitz, 'The right to education in occupied territories: making more room for human rights in occupation law', in *Yearbook of International Humanitarian Law*, Vol. 7, 2004, pp. 243–275.

165 Esther Rosalind Cohen, *Human Rights in the Israeli-Occupied Territories, 1967–1982*, Manchester University Press, Manchester, 1985, pp. 244–250.

second, the impact of the duration of the occupation on the possibility of invoking a state of emergency under IHRL.

## Prolonged occupation and the relations between international humanitarian law and human rights law

Before going into the possible influence of the prolonged character of an occupation on the relations between IHL and IHRL, some brief comments should be made on these relations as such. This issue has been dominated by debate over the *lex specialis* character of IHL in relation to IHRL,<sup>166</sup> a debate that has been fuelled by the well-known pronouncements of the ICJ in the *Nuclear Weapons* and *Wall* advisory opinions.<sup>167</sup> Critics of the *lex specialis* approach raise, among others, three points about the *lex specialis* rule: first, it applies to relations between two concrete rules rather than between two normative orders *in abstracto*, especially since these two orders are different in their purposes, areas of applicability, principles, and so forth;<sup>168</sup> second, it has been applied, even by the ICJ itself, not as a rule for the

166 See e.g., Anna Guellali, 'Lex specialis, droit international humanitaire et droits de l'homme: leur interaction dans les nouveaux conflits armés', in *Revue générale de droit international public*, Vol. 111, No. 3 2007, pp. 539–573; Dagmar Richter, 'Humanitarian law and human rights: intersecting circles or separate spheres?', in Thomas Giegerich (ed.), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference*, Duncker & Humblot, Berlin, 2009, pp. 257–322; Cordula Droege, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; Cordula Droege, 'Elective affinities? Human rights and humanitarian law', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 501–548; Marco Sassòli, 'The role of human rights and international humanitarian law in new types of armed conflicts', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de deux*, Oxford University Press, Oxford, 2011, pp. 34–94; Marco Milanović, 'Norm conflicts, international humanitarian law, and human rights law', in *ibid.*, pp. 95–125; Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 881–904; Anja Lindroos, 'Addressing norm conflicts in a fragmented legal system: the doctrine of *lex specialis*', in *Nordic Journal of International Law*, Vol. 74, No. 1, 2005, pp. 27–66; Theodor Meron, 'The humanization of humanitarian law', in *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 239–278; Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?', in *Israel Law Review*, Vol. 40, 2007, pp. 356–395; Louise Doswald-Beck and Sylvain Vité, 'Le droit international humanitaire et le droit des droits de l'homme', in *International Review of the Red Cross*, Vol. 75, No. 800, 1993, pp. 99–128; Dietrich Schindler, 'Human rights and humanitarian law: interrelationship of the laws', in *American University Law Review*, Vol. 31, 1981–1982, pp. 935–978; Constantine Antonopoulos, 'The relationship between international humanitarian law and human rights', in *Revue hellénique de droit international*, Vol. 63, No. 2, 2010, pp. 599–634; Iain Scobbie, 'Principle or pragmatics? The relationship between human rights law and the law of armed conflict', in *Journal of Conflict & Security Law*, Vol. 14, No. 3, 2009, pp. 449–457; Vera Gowlland-Debbas, 'The right to life and the relationship between human rights and humanitarian law', in Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter (eds), *The Right to Life*, Martinus Nijhoff, Leiden and Boston, 2010, pp. 123–150; Heike Krieger, 'A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study', in *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, pp. 265–291.

167 ICJ, *Nuclear Weapons* advisory opinion, above note 159, p. 240, para. 25; ICJ, *Wall* advisory opinion, above note 10, p. 178, para. 106.

168 A. Lindroos, above note 166, pp. 41–42; I. Scobbie, above note 166, p. 453, H. Krieger, above note 166, p. 269; D. Richter, above note 166, p. 319. It has rightly been pointed out that the ICJ itself, in the *Nuclear Weapons* advisory opinion, formulated the *lex specialis* rule in relation to the application of a specific norm, namely that of Article 6 of the International Covenant of Civil and Political Rights (ICCPR),

resolution of conflict norms (dictating which of these norms should prevail over the others)<sup>169</sup> but rather as an interpretative aid in order to avoid norm conflicts;<sup>170</sup> and, third, even if it can be applied in relation to some rules, it is overly simplistic to do justice to the complexity of the relations between the two sets of legal rules.<sup>171</sup>

It can be concluded from the above that the view that IHL entirely supersedes IHRL as *lex specialis* must be rejected. The starting point of the analysis of the relations between these two sets of legal rules is that they are ‘complementary, not mutually exclusive’.<sup>172</sup> This complementarity has been endorsed by the ICJ in the 2004 *Wall* advisory opinion, the 2005 *DRC v. Uganda* judgment, and the order on provisional measures issued by the ICJ on the case concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* in 2008.<sup>173</sup> A complementary application of IHL and IHRL, which suggests, in principle, a parallel application of the two sets of legal rules in situations of armed conflict and occupation, can imply a great deal of interaction between them – interaction that has led some scholars to develop what has been called a ‘theory of harmonization’.<sup>174</sup> Thus, for example, IHRL rules may inform the scope of IHL rules, as is the case with the definition of torture for the purpose of applying the relevant IHL prohibition. The opposite is also true: IHL norms may be used to define the scope of IHRL norms. Determining

19 December 1966, *UNTS*, vol. 999, p. 175: see V. Gowlland-Debbas, above note 166, pp. 138–139; M. Milanović, above note 166, p. 99.

169 The UN International Law Commission Study Group on Fragmentation indicates that, while the maxim *lex specialis derogat legi generali* may sometimes appear as a ‘conflict-resolution technique’, this may not always be the case: International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, p. 35, para. 57. For the notion of ‘conflict of norms’, see *ibid.*, pp. 17–20, paras. 21–26.

170 V. Gowlland-Debbas, above note 166, pp. 138–139. This is the case even for the ICJ *Nuclear Weapons* advisory opinion. In that case, what the Court essentially did was to interpret the adjective ‘arbitrary’ in Article 6 of the ICCPR according to IHL, therefore operating a ‘harmonizing interpretation’ rather than excluding the application of one rule over another: see D. Richter, above note 166, pp. 290–291.

171 A. Guellali, above note 166, p. 557; M. Milanović, above note 166, p. 116.

172 UN Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

173 ICJ, *Wall* advisory opinion, above note 10, p. 178, para. 106; ICJ, *Armed Activities* Judgment, above note 19, pp. 242–243, para. 216; ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, *ICJ Reports* 2008, p. 387, para. 112 (adopted by eight votes to seven, with a highly critical joint dissenting opinion of the seven dissenting judges: *ibid.*, p. 402, para. 10).

174 See C. Droege, above note 166, p. 339 and pp. 340–344 (on the various facets of complementarity); V. Gowlland-Debbas, above note 166, p. 141; N. Prud’homme, above note 166, pp. 386–393. The ECHR also seems to adhere to this view. In an application launched before the Court by Georgia against the Russian Federation following the 2008 hostilities between them, Russia invoked the *lex specialis* rule and argued that, since the alleged violations took place in the context of an international armed conflict, ‘the conduct of the Stat Party’s forces was governed exclusively by international humanitarian law’ and thus lay outside the *ratione materiae* scope of the European Convention on Human Rights: ECHR, *Georgia v. Russia*, Appl. No. 38263/08, Decision, 13 December 2011, pp. 23–24, para. 69. The Court reserved the assessment of the question to the merits stage of the procedures, but not without confirming the applicability of the Convention in cases of armed conflict. It also stated that: ‘Article 2 must be interpreted in so far as possible in the light of the general principles of international law, including the rules of international humanitarian law . . . . Generally speaking, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part’ (*ibid.*, p. 25, para. 72).



when a deprivation of life is arbitrary under Article 6, paragraph 1 of the International Covenant of Civil and Political Rights (ICCPR) is a case in point.

This does not mean that there are not situations where IHL rules displace IHRL ones. The detention of prisoners of war is a good example. Such detention will be regulated by the detailed provisions of the Third Geneva Convention and detained prisoners of war will not benefit from the rights provided for under Article 9 of the ICCPR or Article 5 of the European Convention on Human Rights.<sup>175</sup>

How is the duration of a belligerent occupation incorporated into this highly complex picture and does it really affect the relationship between IHL and IHRL? As was mentioned before, legal scholarship suggests that:

Situations involving lengthy periods of occupation... further complicate attempts to resolve the interface between human rights law and international humanitarian law. Long-term governance might inevitably create the expectation that international human rights norms associated with peaceful governance will apply.<sup>176</sup>

Indeed, the need to apply human rights 'can be even more acute when dealing with prolonged occupation spanning decades'.<sup>177</sup>

If one follows the complementarity approach, once it is established that situations of occupation trigger the application of human rights instruments,<sup>178</sup> the Occupying Power will be bound by the obligations laid down by the relevant treaties. The ICJ *Wall* advisory opinion has confirmed that an Occupying Power has obligations stemming from the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention on the Rights of the Child.<sup>179</sup> However, the Court's analysis shows no influence of the prolonged nature of the occupation on the interpretation of IHRL norms or on their interplay with IHL. The same goes for the ECHR case law relating to the occupied territory of northern Cyprus.<sup>180</sup> The ECHR has up to now systematically avoided confronting the question of the interplay between IHL and the European Convention on Human Rights.<sup>181</sup> Therefore, this case law does not offer any guidance on the influence exercised by the duration of an occupation on this interplay.

175 See M. Sassòli, above note 166, p. 73. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, UNTS, Vol. 213, p. 221 (hereafter EConvHR).

176 K. Watkin, above note 161, p. 28. See also, Grant T. Harris, 'Human rights, Israel, and the political realities of occupation', in *Israel Law Review*, Vol. 41, Nos 1–2, 2008, p. 104.

177 N. Lubell, above note 161, p. 752.

178 This relates to the question of the extraterritorial application of human rights treaties, a question that goes beyond the scope of this article. The present writer considers, along with the majority of legal scholars, that situations of occupation bring the local population under the jurisdiction of the Occupying Power, rendering IHRL treaties applicable. See, among many, G. T. Harris, above note 176, pp. 112–115, and the references cited therein.

179 ICJ, *Wall* advisory opinion, above note 10, pp. 187–189, paras. 127–131 and pp. 191–192, para. 134.

180 See, among many decisions, the case law cited above note 159.

181 D. Richter, above note 166, pp. 303–306.

The Inter-American Commission for Human Rights offers some indication that the prolonged character of an occupation strengthens the role of IHRL. In a report on terrorism and human rights, the Commission held that

the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum human rights standards of detainees. . . . in the Commission's view the paramount consideration must at all times remain the effective protection pursuant to the rule of law of the fundamental rights of detainees, including the right to liberty and the right to humane treatment. Accordingly, *where detainees find themselves in uncertain or protracted situations of armed conflict or occupation*, the Commission considers that *the supervisory mechanisms as well as judicial guarantees under international human rights law and domestic law . . . may necessarily supersede international humanitarian law* where it is necessary to safeguard the fundamental rights of those detainees.<sup>182</sup>

This passage suggests that, in situations of prolonged occupation, IHRL may become the special norm prevailing over IHL. Even if one does not subscribe to this inversion of the *lex specialis* approach, the position of the Inter-American Commission confirms the importance attributed to IHRL in situations of prolonged occupation.

Outside the context of detention, this importance can be illustrated if we turn to the example of forced labour. As was previously mentioned, Article 51, paragraph 2 of the Fourth Geneva Convention allows the Occupying Power to compel protected persons who are over eighteen to work 'on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country'.<sup>183</sup> Article 8, paragraph 3 of the ICCPR prohibits forced or compulsory labour, with a series of exceptions.<sup>184</sup> Using the complementary approach and the parallel application of IHL and IHRL as a starting point, one concludes that both sets of legal rules are applicable to a belligerent occupation from the outset of that occupation. Therefore, if the Occupying Power compels protected persons to work for the needs of the occupying army or for the feeding and sheltering of the local population, these actions should be in conformity

182 Inter-American Commission for Human Rights, 'Report on Terrorism and Human Rights', 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev.1 corr, para. 146, available at: <http://www.cidh.org/Terrorism/Eng/toc.htm> (last visited 5 July 2012) (emphasis added).

183 GC IV, Art. 51, p. 320.

184 ICCPR, Art. 8, para. 3: '(a) No one shall be required to perform forced or compulsory labour. (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court. (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations'.

with both sets of rules. Article 51, paragraph 2 of the Fourth Geneva Convention is clearly not violated. However, given that the situation under consideration does not seem to fall under any of the exceptions provided for by Article 8, paragraph 3 of the ICCPR, the actions in question violate the Covenant.<sup>185</sup> This is a case where the application of the principle of *lex specialis* could be of use. Indeed, unless we consider that Article 51, paragraph 2 of the Fourth Geneva Convention has been abolished by the IHRL prohibition of forced labour,<sup>186</sup> the content of the two rules is contradictory. Therefore, Article 51, paragraph 2 of the Convention will supersede Article 8, paragraph 3 of the ICCPR as *lex specialis*.

Consider now that the occupation has lasted for many years or decades and the Occupying Power continues to compel protected persons to work for the needs of the occupying army or the local population. As was explained above, the formulation of the reasons for compelling protected persons to work is such that it can remain valid throughout a long-term occupation.<sup>187</sup> In other words, even if an occupation lasts for forty years, the occupying army will still have maintenance needs and the local population will still need feeding and sheltering. Does this mean that the Occupying Power will be able to continue this practice without violating either Article 51 of the Fourth Geneva Convention or Article 8, paragraph 3 of the ICCPR, thanks to the *lex specialis* rule? Such an interpretation would lead to the absurd result of allowing an Occupying Power to support its army, at least in part, by exploiting the local population for long periods of time. It is submitted that, in this case, the prolonged character of the occupation breaks the *lex specialis* bond between the two relevant provisions, restoring their parallel application. Thus, the Occupying Power's actions may still be in conformity with IHL, but they will constitute a violation of the ICCPR. This example illustrates the reinforcing influence that the duration of an occupation has on the weight attributed to IHRL rules.

That being said, one final remark is in order. One cannot generally affirm the reinforcement of IHRL in prolonged occupation without taking into account the peaceful character or not of the occupation in question. The long duration of the occupation will raise the impact of human rights rules only in situations not related to the existence of hostilities inside the occupied territory. For example, in the case of inhabitants of the occupied territory taking part in a protest against austerity measures adopted by the Occupying Power in the context of its exercise of administrative functions of the territory, the Occupying Power may not invoke imperative reasons of security for taking safety measures or requiring those inhabitants to live in assigned residence.<sup>188</sup> It can, however, adopt such measures

185 This presupposes that the Occupying Power in question has not invoked Article 4 of the ICCPR in order to derogate from GV IV, Art. 8, para. 3: see ICCPR, Art. 4, para. 2.

186 Which does not seem to be the case, since states continue to acknowledge the power of the occupier to compel members of the occupied population to work: see the military manuals referred to in relation to Rule 95 of the ICRC study on customary IHL, available at: [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule95](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule95) (last visited 5 July 2012).

187 See above note 157 and accompanying text.

188 GC IV, Art. 78.

with regard to protected persons participating in resistance actions against the occupying army. In short, in cases where hostilities between the Occupying Power and resistance forces continue during the occupation,<sup>189</sup> and in relation to these hostilities, the role of IHL cannot be downplayed, whatever the duration of the occupation. Therefore, as was the case with the interpretation of military necessity, much will depend on the conflictual character – or absence thereof – of the prolonged occupation.

Having explored the impact of the prolonged character of the occupation on the general application of IHRL in situations of occupation, we will now turn to its impact in the case of the Occupying Power derogating from the application of human rights by invoking a state of emergency.

### Prolonged occupation and the invocation of a state of emergency

Several human rights instruments provide for the possibility to derogate from most human rights norms in case of emergency. Among these norms, we find rights that are of particular importance in situations of prolonged occupation, such as the freedom of movement or the right to privacy.<sup>190</sup> According to Article 4 of the ICCPR:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>191</sup>

Article 15 of the European Convention on Human Rights is drafted in a similar way.<sup>192</sup> The question on which we will focus is whether the Occupying Power may

189 Of course, the existence of large-scale and long-lasting hostilities against the Occupying Power might give rise to the question whether the occupant is in a position to exercise the control necessary for the existence of a belligerent occupation. However, it is accepted that occasional successes of resistance fighters in an occupied territory do not put an end to belligerent occupation. See UK, *Military Manual*, above note 7, p. 277, para. 11.7.1; Canada, *Military Manual*, above note 7, p. 12–2, para. 1203; US, *Law of Land Warfare*, above note 7, p. 139, para. 360; V. Koutroulis, above note 3, p. 54.

190 The freedom of movement is set out in Article 12 of the ICCPR and in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocols, 16 September 1963, *UNTS*, vol. 1496, p. 263. The right to privacy is set out in Article 17 of the ICCPR and in Article 8 of the EConvHR. The articles with respect to which no derogations are permitted are listed in the following two notes.

191 ICCPR, Art. 4, para. 1. Paragraph 2 of the article lists the non-derogable articles of the ICCPR: ‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision’.

192 EConvHR, Art. 15: ‘(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision’.

rely on the prolonged character of the occupation as a factor substantiating such a state of emergency.

It is submitted that it cannot. First of all, we need to determine whether the existence of an armed conflict (and of an occupation<sup>193</sup>) is *ipso facto* considered to constitute a state of emergency permitting the invocation of Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights. As far as Article 4 of the ICCPR is concerned, this seems not to be the case. According to the Human Rights Committee: ‘The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.’<sup>194</sup> The Committee has insisted that ‘measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature and be limited to the extent strictly required’.<sup>195</sup> In this respect, the need for derogations must be justified, the provisions of the Covenant that are subject to derogations must be specified, and sufficient limits must be placed on derogations.<sup>196</sup> In relation to the state of emergency proclaimed by Syria in 1963, the Committee noted that derogations from several articles are provided for by the relevant decree ‘without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict’.<sup>197</sup>

Aside from these considerations, the Human Rights Committee – while allowing a wide margin of appreciation to the states for determining an ‘emergency which threatens the life of the nation’<sup>198</sup> – does express an opinion on this determination. On the one hand, confronted with a Russian counter-terrorist legislation introducing derogations from the Covenants rights, the Committee held that the measures adopted by the Russian Federation could be justifiable only under the state of emergency regime, and invited the Russian government to adapt the

193 The mere existence of a belligerent occupation, even if it meets with no armed resistance, is constitutive of an international armed conflict: see Article 2 common to the Geneva Conventions, para. 2.

194 Human Rights Committee (HRC), General Comment No. 29: States of Emergency (Article 4), 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, p. 2, para. 3.

195 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Israel’, 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para. 7.

196 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Thailand’, 8 July 2005, UN Doc. CCPR/CO/84/THA, para. 13; HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Algeria’, 12 December 2007, UN Doc. CCPR/C/DZA/CO/3, para. 14; HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Israel’, 21 August 2003, UN Doc. CCPR/CO/78/ISR, p. 3, para. 12.

197 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic’, 9 August 2005, UN Doc. CCPR/CO/84/SYR, para. 6.

198 For example, Mongolia proclaimed a state of emergency for four days in 2008, in order to stop a demonstration that led to mass disorder and unrest and to prevent the broadening of its scope. The HRC did not question this determination: HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Mongolia’, 2 May 2011, UN Doc. CCPR/C/MNG/CO/5, para. 12.

legislation in conformity to Article 4 of the ICCPR.<sup>199</sup> On the other hand, the Committee has been critical of situations where the state of emergency has been maintained for a long period. We will come back to this element below.

The interpretation of Article 15 of the European Convention on Human Rights is more difficult in the sense that the state of war is explicitly mentioned in the text of the article itself.<sup>200</sup> To our knowledge, the ECHR has so far treated cases only under the ‘public emergency’ part of Article 15.<sup>201</sup> The Court has constantly recognized that states enjoy a wide margin of appreciation in determining what constitutes an emergency situation justifying the invocation of Article 15.<sup>202</sup> However, while the Court emphasizes its control over whether states have gone beyond what ‘is strictly required by the exigencies’ of the emergency, it does in fact also pronounce on the question of the existence of such a state of emergency in the first place.<sup>203</sup> Thus, it evaluates whether the factual situation inside a state corresponds to a crisis threatening the life of the nation. Up to the time of writing it has accepted the qualifications offered by the respondent state. However, it is possible that the Court may overturn the state’s qualification if need be.

That being said, it seems difficult to argue that every armed conflict will automatically be sufficient to justify derogating from human rights rules.<sup>204</sup> This is particularly the case for situations of international armed conflict, where the threshold of intensity required in order for IHL norms to be applicable is considered to be a low one.<sup>205</sup> The same reasoning can also be applied to situations of belligerent occupation. There, too, the state wishing to derogate from relevant IHRL provisions will be required to justify the need for the specific derogations established in view of the exigencies of the situation. Such justification will prove more demanding in situations of prolonged occupation where hostilities have ceased or radically diminished. It would, for example, be difficult for Turkey or Morocco (had they recognized themselves as Occupying Powers) to invoke the existence of a state

199 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Russian Federation’, 24 November 2009, UN Doc. CCPR/C/RUS/CO/6, para. 7.

200 See above note 192.

201 The Court has dealt mainly with what were qualified as ‘terrorist activities’ by the respondent states in relation to Article 15. See, e.g., ECHR, *Lawless v. Ireland*, Appl. No. 332/57, Judgment, 1 July 1961, paras. 23–30; ECHR, *Ireland v. The United Kingdom*, Appl. No. 5310/71, Judgment, 18 January 1978, para. 205; ECHR, *Brannigan and McBride v. The United Kingdom*, Appl. No. 14553/89 and 14554/1989, Judgment, 25 May 1993, paras. 43–47; ECHR, *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment, 18 December 1996, paras. 68–70; ECHR, *Demir and others v. Turkey*, Appl. No. 71/1997/855/1062–1064, Judgment, 23 September 1998, paras. 43–45; ECHR, *Bilen v. Turkey*, Appl. No. 34482/97, Judgment, 21 February 2006, paras. 46–47.

202 See the cases mentioned in the previous note.

203 Again, see the cases mentioned in note 201.

204 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 196.

205 See *Commentary GC IV*, above note 5, pp. 20–21; E. David, above note 7, p. 123; René Kosirnik, ‘Droit international humanitaire et protection des camps de réfugiés’, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, p. 389; Jean-François Quéguiner, ‘Dix ans après la création du Tribunal pénal international pour l’ex-Yougoslavie: évaluation de l’apport de sa jurisprudence au droit international humanitaire’, in *International Review of the Red Cross*, Vol. 85, No. 850, 2003, p. 275.

of emergency based on the situation in relation to northern Cyprus or Western Sahara respectively.

The practice of states and the Human Rights Committee indicates that the duration of an occupation cannot be invoked to justify a state of necessity in and of itself. Syria is a case in point. The Syrian state of necessity dates back to 1963. Syria contends that the state of emergency consists 'in a real threat of war, the continued occupation of part of the territory of the Syrian Arab Republic and the existence of a real threat of seizure and ongoing occupation of further land' by Israel.<sup>206</sup> Furthermore, it has also invoked the general situation in the Middle East – namely the occupation by Israel of part of southern Lebanon – as well as hostile acts committed by Israel in the region against Syria, Lebanon, and the Palestinians. According to the Syrian argument, these actions 'create an atmosphere conducive to maintenance of the existing state of war'.<sup>207</sup> Thus, while the continuing occupation of Syrian territory is mentioned among the elements on which the existence of a state of emergency is founded, it is hardly the crucial one. The accent is placed rather on the existence of a real threat of attack by Israel. The Human Rights Committee has been unreceptive to this broad construction of the state of emergency:

The Committee is concerned at the fact that Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency has remained in force ever since that date, placing the territory of the Syrian Arab Republic under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4 of the Covenant. It also regrets that the delegation did not provide details of the application of the state of emergency in actual situations and cases.

While noting the information given by the State party's delegation that the state of emergency is rarely put into effect, the Committee recommends that it be formally lifted as soon as possible.<sup>208</sup>

In general, the Committee has adopted a critical stance in regard to long-lasting states of emergency.<sup>209</sup> This has been equally valid for Israel, which has been in a

206 HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Second periodic report of States Parties due in 1984: Syrian Arab Republic', 25 August 2000, UN Doc. CCPR/C/SYR/2000/2, p. 10, para. 50.

207 Syrian Arab Republic, 'Comments by the Government of the Syrian Arab Republic on the Concluding Observations of the Human Rights Committee: Syrian Arab Republic', 28 May 2002, UN Doc. CCPR/CO/71/SYR/Add.1, para. 4.

208 HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic', 24 April 2001, UN Doc. CCPR/CO/71/SYR, para. 6. See also HRC, UN Doc. CCPR/CO/84/SYR, above note 197, para. 6 (on the concern over the continuing state of emergency).

209 HRC, 'Consideration of report submitted by Algeria', above note 196, para. 14 (state of emergency proclaimed in 1992); HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Egypt', 28 November 2002, UN Doc. CCPR/CO/76/EGY, para. 6. The state of emergency proclaimed by Egypt dates back to 1981: HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Egypt, Addendum: Comments by the Government of Egypt on the Concluding Observations of the Human Rights Committee', 4 November 2003, UN Doc. CCPR/CO/76/EGY/Add.1, para. 7 (the state of emergency was founded on the need to deal with terrorism and to protect the security and stability of society).

proclaimed state of emergency since 1948<sup>210</sup> and which also made a declaration upon ratification of the ICCPR derogating from Article 9 of the Covenant on the basis of Article 4.<sup>211</sup> The state of emergency was founded on threats of war, armed attacks, and campaigns of terrorism<sup>212</sup> – in other words, not at all in the prolonged character of the occupation.<sup>213</sup> The Committee has indicated its preference for a review of the need to maintain the declared state of emergency.<sup>214</sup>

In view of the above, it can be affirmed that the prolonged character of the occupation cannot be invoked as a factor justifying the existence of a state of emergency. The idea of such a state lasting several decades runs counter to the text of both Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights, according to which the derogative measures adopted should be temporary and ‘strictly required by the exigencies of the situation’.<sup>215</sup> The Human Rights Committee has consistently expressed concern over the existence of ‘a semi-permanent state of emergency’ and has urged states to review the need to maintain it.

Inserting considerations relating to the duration of an occupation among the ‘exigencies of the situation’ actually distorts the application of Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights. As we have seen, derogations are justified by the exigencies of the situation. If the duration of an occupation is incorporated into these exigencies, then the longer an occupation lasts, the easier it will be to invoke these articles and to justify broader derogations. We would therefore end up constantly undermining the human rights protection of the occupied population. Furthermore, experience has shown that the longer an occupation lasts, the more consolidated it becomes. This leads to the following paradox: the longer the occupation is, the easier it will be to invoke a state of emergency, justifying more derogations on behalf of the Occupying Power. The application of these derogations will consolidate the position of the Occupying Power and its control over the occupied territory. This will probably lead to an extension of the duration of the occupation, which can be integrated once again into the ‘exigencies of the situation’, triggering the adoption of more derogations on the basis of the state of emergency. It is obvious that this vicious circle completely distorts application of Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights. Taking the duration of an occupation into consideration for the evaluation of a state of emergency runs counter to the

210 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Second Periodic Report, Addendum: Israel’, 4 December 2001, UN Doc. CCPR/C/ISR/2001/2, p. 19, para. 71.

211 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Initial report of States Parties due in 1993, Addendum: Israel’, 9 June 1998, UN Doc. CCPR/C/81/Add.13, para. 106.

212 *Ibid.* See also HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Third periodic report of States Parties due in 2007: Israel’, 21 November 2008, UN Doc. CCPR/C/ISR/3, pp. 41–42, para. 161.

213 Invoking the existence of an occupation in order to justify the state of emergency is highly unlikely in the case of Israel, since it does not accept that the ICCPR applies to the Occupied Palestinian Territories.

214 HRC, UN Doc. CCPR/CO/78/ISR, above note 196, p. 3, para. 12. The HRC has also indicated that the sweeping nature of measures adopted during this state of emergency goes beyond what is permissible under the ICCPR. See also HRC, UN Doc. CCPR/C/ISR/CO/3, above note 195, para. 7.

215 See above note 192.



exceptional character of the articles in question and is fundamentally inconsistent with the notion of emergency itself.

## Conclusion

This article has shown that the influence of the prolonged character of an occupation over the application of IHL and IHRL should not, as such, be overestimated. More than the time factor, it is other characteristics of prolonged occupations that have an impact on the rules of IHL and IHRL, namely the existence or not of hostilities in the occupied territory.

However, hostilities or not, a prolonged belligerent occupation does raise the challenge of how to co-ordinate the application of IHL and IHRL. The main danger in such occupations is that IHL rules applicable to occupations may be applied in an overly rigid manner, resulting in the 'freezing' of the life of the occupied population and impeding evolution. On the other hand, according too much leeway to the Occupying Power entails the risk of consolidating the occupation and resulting in 'creeping annexation'. Adding human rights norms into the equation is intended to help the occupied population move towards regaining a normal way of life while simultaneously subjecting the Occupying Power to the restraints of an actual government, and thereby limiting the danger of abusive application of IHL.

Despite the possibility of abuse of the various rules applicable in situations of prolonged occupation, it should be kept in mind that it is difficult to draw definite conclusions as to the eventual adjustments of applicable law in prolonged occupations, owing to the fact that the overwhelming majority of state practice and case law relates to a single case: the Israeli occupation of Palestinian territories. The application of IHL in other situations that could be qualified as prolonged occupations has not been recognized by the respective Occupying Powers. One should therefore be prudent when generalizing legal conclusions drawn from a situation as particular as the occupied Palestinian territories. This consideration, combined with the impossibility of defining – and thereby determining the scope of – prolonged occupations, imposes further restraint in identifying and suggesting adaptations of IHL and IHRL for general use.