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International Law and the prolonged occupation of Palestine

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The question of prolonged occupation

The fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory.[1] The principal rules of international law regulating the conduct of occupation are contained in the *Regulations respecting the laws and customs of war on land* which are annexed to the 1907 Fourth Hague Convention (the Hague Regulations), and the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). It is universally accepted that the provisions of the Hague Regulations are not simply conventional but also form part of the corpus of customary international law.[2] Accordingly, although Israel is not a party to the Fourth Hague

1. See *Ottoman debt* arbitration (1925), 3 Annual Digest of Public International Law Cases 472 (1925-26); and also E Benvenisti, *The international law of occupation* (Princeton UP: Princeton: 1993) 3-6; GH Hackworth, *I Digest of international law* (Department of State: Washington DC: 1940) 145-146; A McNair and AD Watts, *The legal effects of war* (Cambridge UP: Cambridge: 1966, 4th edn) 363-369; L Oppenheim, *International law: a treatise. Vol.II: Disputes, war and neutrality* (Longmans: London: 1952, 7th edn by H Lauterpacht) 436-438; G Schwarzenberger, *International law as applied by international courts and tribunals. Vol.II: The law of armed conflict* (Stevens: London: 1968) 166-173; and UK Ministry of Defence, *The manual of the law of armed conflict* (Oxford UP: Oxford: 2004) 278-279, paras.11.9-11.11.

2. The customary nature of the Hague Regulations was declared by the International Criminal Tribunal at Nuremberg in the *Trial of German major war criminals*, Cmd. 6964 (1946) 65. The customary status of the Regulations has since been affirmed by various other courts, see, eg, *In re Krupp* (US Military Tribunal at Nuremberg), 15 Annual Digest 620, 622; *R v Finta* (Canadian High Court of Justice), 82 International Law Reports 425, 439; *Affo v IDF Commander in the West Bank* (Israel High Court), 83 International Law Reports 122, 163; *Polyukhovich v Commonwealth of Australia* (Australian High Court), 91 International Law Reports 1, 123. An overview of the consolidation of the Hague Regulations into customary international law was given by Acting President Shamgar of the Israel High Court in *Bassil Abu Aita et al v The Regional Commander of Judea and Samaria and Staff Officer in charge of matters of customs and excise*, HC 69/81 (5 April 1983), 37(2)

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Convention, to which Palestine acceded on 2 April 2014 and which entered into force for it on 1 June 2014,[3] the Regulations annexed to that Convention regulate activities in the occupied Palestinian territories by virtue of their customary status. Both Israel and Palestine are parties to the Fourth Geneva Convention. Israel ratified the Fourth Geneva Convention on 6 July 1951. Palestine deposited a letter of accession to all four Geneva Conventions and the associated 1977 Additional Protocol I on 2 April 2014: by a letter addressed to all parties of the Geneva Conventions dated 10 April 2014, the Swiss Federal Council, in its capacity as the depository of the Geneva Conventions and Protocols, announced that Palestine had become a party to the four Conventions and Additional Protocol I as of 2 April 2014.[4]

In the law of armed conflict, the question of "prolonged occupation" is absent from the governing international instruments, and the notion has been little discussed in commentaries,[5] however Israel's High Court has employed it in a number of

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Piskei Din 197 at 251-252, para.19b (original Hebrew text), 7 Selected Judgments of the Supreme Court of Israel 1 (1983-87) 46-47, para.19b (English translation) and at <http://elyon1.court.gov.il/files_eng/81/690/000/z01/81000690.z01.pdf> (English translation in pdf format) 63-64, para.19b. Hereinafter, this case will be cited as *Abu Aita*, with reference being made only to the relevant paragraph number(s). Extracts from Shamgar's opinion in *Abu Aita* are also provided at 13 Israel Yearbook on Human Rights 348 (1983). See also T Meron, *Human rights and humanitarian norms as customary law* (Clarendon Press: Oxford: 1989) 38-40; and J Pictet (Ed), *Commentary to Geneva Convention IV relative to the Protection of Civilian Persons in Time of War* (ICRC: Geneva: 1958) 614.

3. Ministry of Foreign Affairs of the Kingdom of the Netherlands, Notification, Conventions 1907 No.1/2014 (17 April 2014).

4. See the link to notifications by the depository to States parties made on 10 April 2014 at <https://www.eda.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/traites-internationaux/depositaire/protection-des-victimes-de-la-guerre/notifications-du-depositaire-communes-aux-conventions-de-gen%C3%A8ve-et-aux-protocoles-additionnels.html>.

5. See Benvenisti, above n.* (Occupation), 144-148; A Cassese, *Powers and duties of an occupant in relation to land and natural resources*, in E Playfair (Ed), *International law and the administration of occupied territories* (Clarendon Press: Oxford: 1992) 419 at 426-427; Y Dinstein, *The international law of occupation and human rights*, 8 Israel Yearbook on Human Rights 104 (1978) 112-114, and his *The international law of belligerent occupation* (Cambridge UP: Cambridge: 2009) 116 *et seq*; R Falk, *Some legal reflections on prolonged Israeli occupation of Gaza and the West Bank*, 2 Journal of Refugee Studies 40 (1989); T Ferraro, *Occupation and other forms of administration of foreign territory: expert meeting* (ICRC: Geneva: 2012) 72 *et seq*; G von Glahn, *Taxation under belligerent occupation*, in Playfair, *op cit*, 341 at 349; C Greenwood, *The administration of occupied territory in international law*, in Playfair, *op cit*, 241 at 263; D Kretzmer, *The law of belligerent occupation in the Supreme Court of Israel*, 94 International Review of the Red Cross 207 (2012) 219-222; A Roberts, *Prolonged military occupation: the Israeli-occupied territories since 1967*, 84 American Journal of International Law 44 (1990); E Schwenk, *Legislative power of the military occupant under Article 43, Hague Regulations*, 54 Yale Law Journal 393 (1944-45), 401; and M Sassoli, *Legislation and maintenance of public order and civil life by occupying powers*, 16 European Journal of International Law 661 (2005) 679-680.

decisions.[6] While Roberts cautions that attempting to define the notion of prolonged occupations "is likely to be a pointless quest",[7] it raises two legal issues in particular—the effect of Article 6 of the Fourth Geneva Convention; and, more importantly, the exercise of the occupant's legislative competence over the occupied territory under Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention.

A recurring theme in commentaries on the law of belligerent occupation is that both the Hague Regulations and Fourth Geneva Convention envisaged that an occupation would only be of short duration.[8] The authors of these instruments did not conceive that an occupation could last for decades and, as a result, it has been claimed

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6. Israel's Supreme Court fulfils two broad functions. As the Supreme Court it serves as a court of appeal from the decisions of lower courts, and as the High Court of Justice it acts as a court of first and last instance in petitions for the review of governmental actions, including actions taken in the Occupied Territories: see, for example, Benvenisti, above n.* (Occupation), 118-123; Y Dotan, *Judicial rhetoric, government lawyers, and human rights: the case of the Israeli High Court of Justice during the intifada*, 33 Law and Society Review 319 (1999), 322-324; and D Kretzmer, *The occupation of justice: the Supreme Court of Israel and the Occupied Territories* (SUNY Press: Albany: 2002) 10-11, and his *Law of belligerent occupation*, above n.*, 208-209.

The principal judgments of the High Court relevant to prolonged occupation include *Christian Society for the Holy Places v Minister of Defence et al*, HC 337/71, 2 Israel Yearbook on Human Rights 354 (1972), and 52 International Law Reports 512; *Electric Corporation for Jerusalem District Ltd v Minister of Defence et al*, HC 256/72, 5 Israel Yearbook on Human Rights 381 (1975) [hereinafter *Electricity Company No.1*]; *Jerusalem District Electricity Co Ltd v Minister of Energy and Infrastructure and Commander of the Judea and Samaria Region*, HC 351/80, 11 Israel Yearbook on Human Rights 354 (1981) [hereinafter *Electricity Company No.2*]; *Ja'amait Ascan v IDF Commander in Judea and Samaria*, (1982) 37(4) Piskei Din 785, discussed *in extenso* in Kretzmer (*Occupation of justice*) 69-71 and partially reported in translation as *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v Commander of IDF Forces in the Judea and Samaria Region et al*, HC 393/82, 14 Israel Yearbook on Human Rights 301 (1984); *Abu Aita*, above n.*; *Dwadin et al v Commander of the IDF Forces in the West Bank*, HC 4154/91, 25 Israel Yearbook on Human Rights 333 (1985); *Economic Corporation for Jerusalem Ltd v Commander of IDF Forces in the Judea and Samaria Region et al*, HC 5808/93, 30 Israel Yearbook on Human Rights 322 (2000); *Na-ale—an Association for the Settlement of Employees of the Israeli Aircraft Industry in Samaria v the Supreme Planning Committee of the Judea and Samaria Area, the Sub-Committee for Mining and Quarrying et al*, HC 9717/03, *International Law in Domestic Courts* database, ILDC 70 (IL 2004), also summarised as *Na'ale v Planning Council for the Judea and Samaria Region et al*, 37 Israel Yearbook on Human Rights 332 (2007); and *Yesh Din v Commander of IDF Forces in Judea and Samaria* (26 December 2011), an English translation of, and *amicus curiae* brief criticising the judgment, are available at <http://yesh-din.org/infoitem.asp?infocatid=15>, and the case is discussed at Kretzmer, *Law of belligerent occupation*, 220-222

7. Roberts, above n.* (Prolonged occupation), 47.

8. See, eg, O Ben-Naftali, *"A la recherche du temps perdu": rethinking Article 6 of the Fourth Geneva Convention in the light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion*, 38 Israel Law Review 211 (2005) 215 and 218; O Ben-Naftali, AM Gross and K Michaeli, *Illegal occupation: framing the occupied Palestinian territory*, 23 Berkeley Journal of International Law 551 (2005) 596; Benvenisti, above n.* (Occupation), 144; Ferraro, above n.* (Occupation); DA Graber, *The development of the law of belligerent occupation 1863-1914: a historical survey* (Columbia UP: New York: 1949) 290-291; and Roberts, above n.* (Prolonged occupation) 47.

that their provisions are inadequate to regulate a prolonged occupation:

> Considering the complexity of modern occupations, such as those during World War I and II in which large areas were occupied for long periods of time, raising a multitude of legal questions about the rights and duties of occupants in particular situations and the legal effects of the occupant's actions after the war, the rules laid down in the landmark codes of the 1863-1914 period and expounded in the literature and in military manuals seem fragmentary indeed and inadequate to guide occupation practices. But it must be considered that they were developed in a relatively peaceful period in which no major wars occurred and in which belligerent occupations were generally of short duration so that occupants were not forced to assume the full governmental burdens which had rested on the displaced sovereign. Consequently, while general principles were evolved, few specific rules developed because of a lack of factual situations requiring application of specific rules often enough to permit their growth into law.[9]

a. Article 6 of the Fourth Geneva Convention

The Hague Regulations are silent on the methods by which an occupation maybe terminated. This has given rise to controversy regarding the status of Gaza following the implementation of Israel's disengagement plan in September 2005. Discussion of this point is beyond the bounds of this paper, but it is submitted that Gaza remains occupied territory.[10]

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9. Graber, above n.* (Historical survey), 290-291.

10. For a range of views on whether Israel remains the occupant of Gaza, see, for example, G Aronson, *Issues arising from the implementation of Israel's disengagement from the Gaza Strip*, 34 Journal of Palestine Studies 49 (2005); E Benvenisti, *The law on the unilateral termination of occupation*, in T Giegerich and U Heinz (eds), *A wiser century? Judicial dispute settlement, disarmament and the laws of war 100 years after the Second Hague Peace Conference* (Walther Schücking Institute, Kiel: 2009); A Bockel, *Le retrait israelien de Gaza et ses consequences sur le droit international*, 51 Annuaire francais de droit international 16 (2005); S Darcy and J Reynolds, *"Otherwise occupied": the status of the Gaza Strip from the perspective of international humanitarian law*, 15 Journal of Conflict and Security Law 211 (2010); Dinstein, above n.* (Occupation), 276-280; H-P Gasser, *Notes on the law of belligerent occupation*, 45 Military Law and Law of War Review 229 (2006) 233-234; Gisha–Legal Center for Freedom of Movement, *Disengaged occupiers: the legal status of Gaza*

Article 6 of the Fourth Geneva Convention provides:

> The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
>
> In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
>
> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.
>
> Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

For present purposes, only the third paragraph of Article 6 is of any concern.[11] In the *Legal consequences of the construction of a wall* advisory opinion, the International Court of Justice ruled that as "the military operations leading to the occupation of the

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(2007), available at <http://gisha.org/publication/1649>; C James, *Mere words: the "enemy entity" designation of the Gaza Strip*, 32 Hastings International and Comparative Law Review 643 (2009); MS Kaliser, *A modern day exodus: international human rights law and international humanitarian law implications of Israel's withdrawal from the Gaza Strip*, 17 Indiana International and Comparative Law Review 187 (2007); M Mari, *The Israeli disengagement from the Gaza Strip: an end of the occupation?*, 8 Yearbook of International Humanitarian Law 356 (2005); E Samson, *Is Gaza occupied? Redefining the legal status of Gaza* (Begin-Sadat Center for Strategic Studies, Bar-Ilan University, Mideast Security and Policy Studies No.83: 2010); I Scobbie, *An intimate disengagement: Israel's withdrawal from Gaza, the law of occupation and of self-determination*, 11 Yearbook of Islamic and Middle Eastern Law 3 (2004-2005), reprinted in V Kattan (ed), *The Palestine question in international law* (British Institute of International and Comparative Law: London: 2008) 637, and also *Gaza*, in E Wilmshurst (ed), *International law and the classification of conflicts* (Oxford UP: Oxford: 2012) 280 at 295-301; and Y Shany, *Faraway, so close: the legal status of Gaza after Israel's disengagement*, 8 Yearbook of International Humanitarian Law 369 (2006) and his *Binary law meets complex reality: the occupation of Gaza debate*, 41 Israel Law Review 68 (2008).

11. For commentaries on Article 6(3), see Ben-Naftali, above n.* (Temps perdu); Ben-Naftali, Gross and Michaeli, above n.* (Illegal occupation), 594-597; Y Dinstein, *The international legal status of the West Bank and the Gaza Strip—1998*, 28 Israel Yearbook on Human Rights 28 (1998) 42-44; Ferraro, above n.* (Occupation) 77-78; A Imseis, *Critical reflections on the international humanitarian law aspects of the ICJ* Wall *advisory opinion*, 99 American Journal of International Law 102 (2005)105-109; Pictet, above n.* (Commentary GCIV), 62-63; and Roberts, above n.* (Prolonged occupation), 53-57.

West Bank in 1967 ended a long time ago" only those Articles specified in Article 6(3) remained applicable.[12] By extension, the Court presumably would reach the same conclusion in relation to Gaza and East Jerusalem. This ruling has been widely criticised as erroneous,[13] with the report of the ICRC Expert Meeting on occupation stating that "the experts agreed that the ICJ's statement on this Article was incorrect for the purposes of IHL".[14] The claim that Article 6(3) has restricted Israel's responsibilities under the Fourth Geneva Convention has never been invoked before Israeli courts, and its High Court has applied provisions which the operation of Article 6(3) would have rendered inapplicable.[15] As Imseis notes:

> The problem with the Court's interpretation of Article 6 is its misguided focus on 'military operations leading to occupation'. Article 6 in fact provides that insofar as occupied territories are concerned, application of the Convention 'shall cease one year after the general close of military operations', not on the 'general close of military operations *leading to the occupation*', as asserted by the Court.[16]

Ben-Naftali makes a similar point, arguing that even a literal reading of the text of Article 6 "should have deduced its inapplicability from its own terms",[17] while Dinstein states that this ruling "poses a danger to the civilian population, inasmuch as it reduces the scope of protection that the population enjoys under the Convention".[18]

The substance of this ruling does not correspond well to official Israeli policy. For example, in its *First Statement to the Sharm el-Sheikh Fact-finding Committee* (the

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12. *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, ICJ Rep, 2004, 136 at 185, para.125.

13. See, eg, Ben-Naftali, above n.* (Temps perdu); Ben-Naftali, Gross and Michaeli, above n.* (Illegal occupation), 594-597; Dinstein, above n.* (Occupation), 282-283; and Imseis, above n.* (Critical reflections) 105-109).

14. Ferraro, above n.* (Occupation), 77.

15. See Ben-Naftali, above n.* (Temps perdu), 217; and Roberts, above n.* (Prolonged occupation), 55.

16. Imseis, above n'* (Critical reflections), 106: emphasis in original.

17. Ben-Naftali, above n.* (Temps perdu), 214.

18. Dinstein, above n.* (Occupation), 283.

Mitchell Commission), the Government of Israel stated that since the start of the second *intifada*:

> Israel is engaged in an armed conflict short of war. This is not a civilian disturbance or a demonstration or a riot. It is characterised by live-fire attacks on a significant scale, both quantitatively and geographically—around 2,700 such attacks over the entire area of the West Bank and the Gaza Strip. The attacks are carried out by a well-armed and organised militia, under the command of the Palestinian political establishment, operating from areas outside Israeli control.[19]

The notion of an "armed conflict short of war" was devised by the Israel Defense Forces (IDF) Military Advocate General's Corps to categorise the violence experienced during the second *intifada*. It was presumably intended not to correspond to either an international or a non-international armed conflict, and thus is a purported novel classification which introduces ambiguity regarding the applicable law. In 2003, Finkelstein, then the IDF Military Advocate General, explained that this notion was adopted because:

> the scale and intensity of the events justifies the classification as an armed conflict. On the other had, war is classically defined as being a conflict between the military organizations of two or more states, a condition not met in our scenario.[20]

Further, in the *Targeted killings* case,[21] the premise of President Emeritus Barak's

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19. *Sharm el-Sheikh Fact-finding Committee, First Statement of the Government of Israel* (28 December 2000), para.282, available at <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/12/Sharm%20el-Sheikh%20Fact-Finding%20Committee%20-%20First%20Sta-open>.

20. M Finkelstein, *Legal perspective in the fight against terror—the Israeli experience*, 1 IDF Law Review 341 (2003) 343-344: note omitted.

21. *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v (i) the Government of Israel, (ii) the Prime Minister of Israel, (iii) the Minister of Defence, (iv) the Israel Defense Forces, (iv) the Chief of the General Staff of the Israel Defense Forces, (v)*

opinion was that "between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip...a continuous situation of armed conflict has existed since the first *intifada*".[22] Relying on the views of Professor Antonio Cassese, he held that the situation amounted to an international armed conflict[23]—"the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict".[24]

It has also been argued that Article 6(3) of the Fourth Geneva Convention did not survive the adoption of Article 3(b) of 1977 Additional Protocol I which provides, in part, that the application of the Geneva Conventions and Additional Protocol I in occupied territory only ceases "on the termination of the occupation". The opinion of the ICRC Expert Meeting on occupation was that:

> This was clearly the case for States party to Additional Protocol I, and arguably for all other States if the paragraph was considered to be customary in nature. In this regard, a majority of the experts took the view that all the provisions of occupation law applied until the termination of an occupation and, consequently, that the rationale behind Article 3 of Additional Protocol I replaced the principle underlying Article 6§3.[25]

It is difficult to ascertain why the International Court made this ruling on the operation of Article 6(3) as it was only mentioned twice during the extensive proceedings. Documentary annex 2 to the Palestinian written submission was Professor John Dugard's 2002 *Report on the violation of human rights in the occupied Arab territories, including Palestine* which he submitted to the Human Rights

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Shurat HaDin—Israel Law Center and twentyfour others, decided 13 December 2006. An official English translation of this judgment is available on the Israel Supreme Court's website at <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf>.

22. *Targeted killings* case, opinion of President Emeritus Barak, para.16.

23. *Targeted killings* case, opinion of President Emeritus Barak, para.18.

24. *Targeted killings* case, opinion of President Emeritus Barak, para.21.

25. Ferraro, above n.* (Occupation), 77-78.

Commission in his capacity as Special Rapporteur. This dealt with the interpretation of his mandate to investigate violations of international humanitarian and human rights law in occupied territory, which the Government of Israel had challenged. Relying on the ICRC commentary to Article 6(3), Israel had argued that during a prolonged occupation, such as that of Palestine, the law of occupation envisages that "the Occupying Power will not become more bound, but less bound by the legal regime". Professor Dugard rejected this argument:

> Unfortunately the time has not come in the Occupied Palestinian Territory when the application of the Convention is no longer or less justified. The transfer of governmental and administrative powers to the Palestinian Authority in A areas has not diminished the need for the protection of the people of the territories from the Occupying Power for the reasons set out in the present report. This was made clear in the Declaration adopted on 5 December 200 1 by the High Contracting Parties to the Fourth Geneva Convention, which reaffirms the applicability of the Convention to the Occupied Palestinian Territory and reiterates "the need for the full respect for the provision of the said Convention in that Territory" (para. 3).[26]

The only other reference to Article 6(3) was made in the Jordanian written statement in its discussion of the occupant's obligation not to dispose of or annex occupied territory. Jordan noted that Article 49 of the Fourth Geneva Convention, which prohibits deportations, population transfers, and settlements in occupied territory, is an article "which is expressly stated by Article 6, paragraph 3, to continue in operation 'for the duration of the occupation'".[27] This was a passing reference. There was no discussion of whether Article 6(3) had been, or should be given, effect in Palestine.

The substantive issue of the application of Article 6(3) was simply not discussed during the proceedings. Perhaps the lesson to be learned from this episode is that of the

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26. Dugard, *Question of the violation of human rights in the occupied Arab territories, including Palestine*, E/CN.4/2002/32 (6 March 2002), 7, para.9.

27. Written Statement of the Hashemite Kingdom of Jordan, 86, para.5.126.

dangers which may arise when the International Court decides upon an unargued point. This issue was an unnecessary item given the architecture of the Court's opinion, and it has only attracted criticism from scholars, and legal condemnation from experts. It is not at all clear why the Court thought it should address this issue, far less address it wrongly.

b. prolonged occupation and the occupant's legislative competence

While recognising that prolonged occupations occur frequently, Roberts cautions against treating them as a special category. To do so might suggest that the law of occupation ceases to apply with its full vigour through the passage of time,[28] as Israel did when challenging Dugard's interpretation of his mandate as Special Rapporteur, and thus reward the occupant for prolonging the occupation rather than encourage its termination. It has also been noted that there are few meaningful guidelines to determine what may constitute a legitimate deviation from the "normal" rules of occupation during a prolonged occupation.[29] Commentators, however, recognise that circumstances may require that changes be made in the administration of occupied territory during a prolonged occupation in the interests of its population[30] although, as Dinstein observes, this makes it "imperative to guard the inhabitants from the bear's hug of the occupant".[31] A further complicating factor is that the need for change may partly arise as a result of the occupant's own policies.[32]

i. the legislative competence of the occupant

Under general international law, the legitimacy of legislative changes introduced by an

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28. Roberts, above n.* (Prolonged occupation), 51.

29. Benvenisti, above n.* (Occupation), 144-145.

30. See, for example, Benvenisti, above n.* (Occupation), 147-148; Dinstein, above n.* (Occupation and human rights), 112 and above n.* (Occupation) 120; Ferraro, above n.* (Occupation), 72-74; Roberts, above n.* (Prolonged occupation), 52; Sassoli, above n.* (Legislation), 679; and Schwenk, above n.* (Article 43), 401.

31. Dinstein, above n.* (Occupation and human rights), 113.

32. Benvenisti, ,above n.* (Occupation), 147.

occupant falls to be determined by reference to Article 43 of the Hague Regulations, as this has been augmented by Article 64 of the Fourth Geneva Convention.[33] Article 43 of the Hague Regulations provides:

> The authority of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the territory.[34]

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33. As the Hague Regulations form part of customary international law and the Geneva Conventions have been ratified by all States, it can be claimed that their provisions represent general international law and not simply treaty commitments between the parties thereto. On the universal ratification of the Geneva Conventions, see J. A. Lavoyer, *A Milestone for International Humanitarian Law* (22 August 2006), <www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-220906?opendocument>.
This does not, however, mean that the provisions of the Geneva Conventions have customary status: on the relationship between customary and conventional sources in international humanitarian law in the context of the ICRC's customary international humanitarian law study and assessments of the methodology employed, see, eg, G Aldrich, *Customary international humanitarian law–an interpretation on behalf of the International Committee of the Red Cross*, 76 British Yearbook of International Law 503 (2005); JB Bellinger and WJ Haynes, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 866 International Review of the Red Cross 443 (2007); Y Dinstein, *The ICRC customary international humanitarian law study*, in AM Helm (Ed), *The law of war in the 21st century: weaponry and the use of force* (Naval War College: Newport, RI: 2006) 99; TLH MacCormack, *An Australian perspective on the ICRC customary international humanitarian law study*, in Helm, *Law of war in the 21st century*, 81; M Maclaren and F Schwendimann, *An exercise in the development of international law: the new ICRC study on customary international humanitarian law*, 6 German Law Journal 1217 (2005); WH Parks, *The ICRC customary law study: a preliminary assessment*, 99 Proc. American Society of International Law 208 (2005); and I Scobbie, *The approach to customary international law in the Study*, in E Wilmshurst and S Breau, *Perspectives on the ICRC study on customary international humanitarian law* (Cambridge UP: Cambridge: 2007) 15. For the ICRC response to assessments of the study, see J-M Henckaerts, *Customary international humanitarian law—a response to Judge Aldrich*, 76 British Yearbook of International Law 525 (2005); *Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict*, in Helm, *Law of war in the 21st century,* 37; *Customary international humanitarian law: a response to US comments*, 89 International Review of the Red Cross 474 (2007); and his *Customary international humanitarian law: taking stock of the ICRC study*, 78 Nordic Journal of International Law 435 (2010).

34. On the interpretation of Article 43, see Dinstein, above n.* (Occupation) 89-94 and 108-109; G von Glahn, *The occupation of enemy territory: a commentary on the law and practice of belligerent occupation* (University of Minnesota Press: Minneapolis: 1957) 94 *et seq* and also his *Taxation* (above n.*), 347 *et seq*; Greenwood, above n.* (Administration); E Playfair, *Playing on principle? Israel's justification for its administrative acts in the occupied West Bank*, in Playfair, above n.* (Administration of occupied territories) 205 at 207 *et seq*; Kretzmer, above n.* (Occupation of justice), Chapter Four; Qupty M, *The application of international law in the Occupied Territories as reflected in the judgments of the High Court of Justice in Israel*, in Playfair, *op cit*, 87 at 92 *et seq*; Schwarzenberger, above n.* (Armed conflict) 191 *et seq*; Schwenk above n.* (Article 43); Sassoli, above n.* (Legislation); and J Stone, *Legal controls of international conflict* (Maitland: Sydney: 1959, rev.edn) 698-699.

This is the standard English translation of the authoritative French text.[35] It is, however, accepted that to render the key phrase “l'ordre et la vie publics” as "public order and safety" is unsatisfactory.[36] Following Schwenk, this phrase is better translated as "public order and civil life" to import the idea that “la vie publique” should be conceived broadly to refer to "the whole social, commercial and economic life of the country".[37]

Article 64 of the Fourth Geneva Convention, which is seen as "a more precise and detailed [expression of] the terms of Article 43 of the Hague Regulations",[38] provides:

> 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.
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> 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,

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35. The French text reads:

> L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigeur dans le pays.

36. See Benvenisti, above n.* (Occupation), 7; Dinstein, above n.* (Occupation), 89; von Glahn, above n.* (Taxation), 348; Greenwood, above n.* (Administration), 246; Playfair, above n.* (Principle), 207; Sassoli, above n.* (Legislation), 663-664; Schwarzenberger, above n.* (Armed conflict), 180; and Schwenk, above n.* (Article 43). 393 n.1 and 398. This misinterpretation was noted in the pivotal first case dealing with the implications of prolonged occupation decided by Israel’s High Court, *Christian Society for the Holy Places v Minister of Defence and others*: see 52 International Law Reports 512, opinion of Deputy President Sussman at 513-514. This passage does not appear in the summary of the case provided at 2 Israel Yearbook on Human Rights 354 (1972).

37. See Schwenk, above n.* (Article 43), 393 n.1 and 398; and also Greenwood, above n.* (Administration) 246; and Sassoli, above n.* (Legislation), 663-664.

38. Pictet, above n.* (Commentary GCIV), 335.

and likewise of the establishments and lines of communication used by them.

Although the first paragraph of Article 64 refers expressly to criminal law, it is accepted that the legislative power conferred on the occupant by virtue of the second paragraph 64(2) is a general competence. This competence is, nevertheless, circumscribed. The occupant may only adopt new measures which are "essential" in relation to the issues enumerated in paragraph 2—namely, in order that the occupant may fulfil its obligations under the Fourth Convention; for the orderly government of the territory; and to ensure its own security interests principally within the occupied territory.[39]

Schwarzenberger claims that by adopting this enumeration "the Conference of 1949 took it for granted that it had not extended the traditional scope of occupation legislation",[40] however others argue that Article 64(2) attenuates the restrictions on the occupant's legislative competence imposed by Article 43 of the Hague Regulations.[41] The determination of which is the better view need not detain us. Israel has consistently denied that the Fourth Geneva Convention applies, as a matter of law, to the occupied Palestinian territories while admitting the application of the Hague Regulations.[42] Because of this attitude, despite the unanimous ruling of the

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39. For commentaries on Article 64, see Ben-Naftali, Gross and Michaeli, above n.* (Illegal occupation), 594; Benvenisti, above n.* (Occupation), 100-105; Dinstein, above n.* (Occupation), 110-112; Pictet, above n.* (Commentary GCIV), 334-336; Sassoli, above n.* (Legislation), 669-670; and Schwarzenberger, above n.* (Armed conflict), 193-195. There is a presumption against measures adopted by the occupant having extra-territorial effect. In 1970, an Israeli military court sitting in Ramallah ruled that Article 64 only conferred extra-territorial legislative competence on the occupant in relation to "classical" security offences, namely, those offences whose prevention was "necessary in order to preserve the physical security of the Occupying Power and its forces"—see *Military Prosecutor v Akrash Nazimi Bakir*, 48 International Law Reports 478 at 483-484.

40. Schwarzenberger, above n.* (Armed conflict), 194.

41. For example, Ben-Naftali, Gross and Michaeli, above n.* (Illegal occupation), 594; Benvenisti, above n.* (Occupation), 100-105; and Sassoli, above n.* (Legislation), 670.

42. For overviews of Israel's attitude to the Hague Regulations and the Fourth Geneva Convention, see Benvenisti, above n.* (Occupation), 108-115; Kretzmer, above n.* (Occupation of justice), 32-35 and 40-42; and Roberts, above n.* (Prolonged occupation), 62-66. The reasoning underlying Israel's rejection of the Fourth Geneva Convention is expressed in YZ Blum, *The missing reversioner: reflections on the status of Judea and Samaria*, 3 Israel LR 279 (1968); and M Shamgar, *The observance of international law in the administered territories*, 1 Israel Yearbook on Human Rights 262 (1971): see also A Gerson, *Israel, the West Bank and international law* (Cass: London: 1978) 76-82. For the view of Israeli courts towards the Fourth Geneva Convention, see, for example, *Military Prosecutor v Zuhadi Salah Zuhad* (Israeli Military Court sitting in Ramallah, 11 August 1968), 47 International Law Reports 490 at 490-491; *Christian Society for the Holy Places v Minister of Defence and others* (Israel High Court, 14 March 1972), 52 International Law Reports 512 at 513; and *Ajuri and others v Israel Defence Force Commander in the West Bank, Israel Defence Force Commander in*

International Court of Justice that the Fourth Geneva Convention applies as a matter of law to the territories,[43] Israel is precluded from taking any benefit Article 64 might afford in the easing of the restrictions upon its legislative competence imposed by virtue of Article 43 of the Hague Regulations. Israeli courts have rarely referred to Article 64,[44] and the most authoritative ruling on its import was delivered by the High Court in *Abu Aita*. In rejecting a plea that Article 64 prohibited the creation of new criminal offences by the occupant, Acting President Shamgar ruled that the Fourth Geneva Convention could not be impleaded before the Court, but even if this had been possible, the plea would not have succeeded. Article 64 permitted new criminal legislation aimed at maintaining the orderly government of the territory:

> In view of the recognized interpretation, this concept is parallel to the provisions regarding the permitted purposes of legislation arising under Article 43 [of the Hague Regulations].[45]

Accordingly, for present purposes, we may conclude that Article 64 of the Fourth Geneva Convention does not alter the basic rule regarding Israel's legislative competence as occupant, although it provides further specification regarding the legitimate aims of that legislation.

ii. limitations upon the legislative competence of the occupant

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the Gaza Strip and others (HC 7015/02 and 709/02, Israel High Court, 3 September 2002), 125 International Law Reports 537, opinion of President Barak, 539 at 546-547. Both Benvenisti (110-112) and Roberts (65) note the contradiction inherent in the view that the Hague Regulations are applicable but that the Fourth Geneva Convention is not.

43. See *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 136 at 173-177, paras.90-101, and the declaration of Judge Buergenthal, 240 at 240, para.2.

44. There is a handful of cases decided in the early days of the occupation in which military courts relied upon Article 64, principally to provide the basis for their jurisdiction, see *Military Prosecutor v Halil Muhamad Mahmud Halil Bakhis and others* (Israeli military court sitting in Ramallah, 10 June 1968), 47 International Law Reports 484 at 485-486; *Military Prosecutor v Zuhadi Salah Hassin Zuhad* (Israeli Military Court sitting in Bethlehem, 11 August 1968), 47 International Law Reports 490 at 490-491 and 498; *Military Prosecutor v Akrash Nazimi Bakir* (Israeli Military Court sitting in Ramallah, 5 March 1970), 48 International Law Reports 478 at 481-484; and *Military Prosecutor v Mohammad Samikh Amin Ibrahim Al Nassar* (Israeli Military Court sitting in Schechm, 26 August 1969), 48 International Law Reports 486 at 489.

45. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.54.

By virtue of Article 43 of the Hague Regulations, as occupant, Israel's legislative competence is restricted to the adoption of measures "in his power" which are aimed at restoring and ensuring public order and civil life, but it must respect "unless absolutely prevented" the law which was in force in the occupied Palestinian territories at the time the occupation was established. The gloss placed on this provision by Article 64 of the Fourth Geneva Convention is that any new measures must only be those "necessary" to enable the occupant to fulfil its obligations under the Convention, "to maintain the orderly government of the territory", and to ensure the occupant's security. Nevertheless, these new measures "must not in any circumstances serve as a means of oppressing the population".[46]

Article 43 places the occupant under duties which must be balanced: the duty to "restore and ensure...public order and civil life" has to be weighed against the duty to respect "unless absolutely prevented, the laws in force in the country". The latter recognises that the occupant possesses legislative power over the territory. The parameters of this power are flexible and open to interpretation, particularly because "this provision sets more of a guideline than a clear rule".[47] Further, the duty to ensure public order and civil life "is not a definite and certain concept, but a notion depending on the circumstances of the particular case".[48] It is clear, however, that:

> international law does not recognize a general legislative competence in the belligerent occupant. Changes in the law of the territory will be contrary to international law unless they are required for the legitimate needs of the occupation.[49]

There is doctrinal consensus that private law is generally "immune from interference on the part of the occupant". Laws that concern "family life, inheritance, property, debts

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46. Pictet, above n.* (Commentary GCIV), 337.

47. Playfair, above n.* (Principle) 207: see also Sassoli, above n.* (Legislation), 673-674; and Schwenk, above n.* (Article 43), 399-400.

48. Schwenk, above n.* (Article 43), 399.

49. Greenwood, above n.* (Administration) 247.

and contracts, commercial and business activities, and so forth" are normally not suspended or altered by an occupant.[50]

A further limitation inherent in the occupant's legislative competence arises from the temporary—if at times prolonged—nature of occupation as a legal institution. The occupant's powers are limited to the period of occupation as it does not possess sovereign rights over the territory. The changes that it may legitimately introduce must be commensurate with the transitional and temporary nature of occupation.[51] Further, as Schwenk emphasises, there are two distinct vectors to this legislative competence:

> While the occupant can *restore* public order and civil life only when they have been disrupted, he may legislate to *ensure* them in the absence of any disturbance. Hence the terms "restoration" and "ensurance" are used alternatively rather than jointly...
>
> Thus it follows that, when public order and civil life have remained undisturbed, the validity of legislation under Article 43 depends on whether or not the legislating occupant was motivated by a desire to ensure them.[52]

The duty to respect existing laws "unless absolutely prevented" has never been interpreted literally, as some flexibility must be accorded to the occupant in the exercise of its administrative functions.[53] This phrase has been interpreted to import a criterion of necessity as a justification for an exercise of the occupant's legislative competence,[54] but it is accepted that this is wider than military necessity:[55]

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50. von Glahn, above n.* (Occupation) 99.

51. Sassoli, above n.* (Legislation), 673.

52. Schwenk, above n.* (Article 43), 398-399: emphasis in original.

53. See, for example, Dinstein, above n.* (Occupation), 109 and above n.* (Occupation and human rights), 112; Feilchenfeld EH, *The international economic law of belligerent occupation* (Carnegie Endowment for International Peace: Washington: 1942) 89; Kretzmer, above n.* (Occupation of justice) 63; and Schwarzenberger, above n.* (Armed conflict), 193.

54. For example, see Dinstein, above n.* (Article 43), 4-5; HP Gasser, *Protection of the civilian population*, in D Fleck (Ed), *The handbook of humanitarian law in armed conflicts* (Oxford UP: Oxford: 2008, second edition) 237 at 278; Sassoli, above n.* (Legislation), 670; and Schwenk, above n.* (Article 43), 401.

55. For instance, von Glahn, above n.* (Occupation) 96-97; and Schwenk, above n.* (Article 43), 399-402.

> The restoration of public order and civil life aims primarily, if not exclusively, at the interest of the population. Hence, a construction which confines the term "empêchement absolu" to the military interest of the occupant seems too narrow, if not actually incorrect.[56]

Accordingly, a balance must be drawn in observing this limitation. While the occupant is entitled to take its security interests into account, commentators recognise that legislative changes may be needed to protect or promote the interests of the population, particularly during prolonged occupations. Dinstein cautions, however, that an occupant's interests for the welfare of the population is not above suspicion as a "professed humanitarian concern may camouflage a hidden agenda". Accordingly, whether there is a real necessity for each new enactment must be examined,[57] and the occupant is not entitled to assume a general duty to update the law lest this "effectively grant the occupant almost all the powers a modern sovereign government would wield".[58]

During an occupation, the entity which decides whether legislation is necessary to restore or ensure civil life is the occupant.[59] Dinstein suggests that an appropriate test—the "litmus test"—to decide whether an occupant's concern for the welfare of the inhabitants of occupied territory is lawful in the terms of Article 43 hinges on whether it has the same concern for its own population. If the occupant enacts legislation in the occupied territory which is parallel (although not necessarily identical) to legislation adopted in its home territory, then Dinstein claims that this has a presumptive

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56. Schwenk, above n.* (Article 43), 400: see also Sassoli, above n.* (Legislation), 673.

57. Dinstein, above n.* (Occupation), 120-121.

58. Benvenisti, above n.* (Occupation), 147: see also Dinstein, above n.* (Occupation), 120-123; and also *In re Krupp and others* (United States Military Tribunal at Nuremberg, 30 June 1948), 15 International Law Reports 620 at 623—"The occupying power is forbidden from imposing any new concept of law upon the occupied territory unless such provision is justified by the requirements of public order and safety".

59. See *Muhammad Amin Al-Ja'bari v Ahmad Ya'qub 'Abd Al-Karim Al-Awini* (Jordan, Court of Appeal of Ramallah, 17 June 1968), 42 International Law Reports 484 at 486: compare Benvenisti's plea for more inclusive decision-making, above n.* (Occupation), 147-148, and see also Dinstein, above n.* (Occupation and human rights), 113.

legitimacy.[60] Should this not be the case, then the occupant's professed concern for the welfare of the occupied territory "loses credibility".[61]

This test, expressly adopted by Israel's High Court in the *Abu Aita* case,[62] is inadequate: an occupant may not amend the law of occupied territory "merely to make it accord with [its] own legal conceptions".[63] Simply because the occupant has adopted a measure in its home territory does not mean that it is necessary to do so in territory it occupies. This has obvious dangers:

> In practice the standard implicit in the test may be abused by an occupant interested in a gradual extension of its laws to the occupied territory under a strategy of creeping annexation...It may not introduce changes simply on the ground that it is "upgrading" the local institutions to the level obtaining in the occupant's own country and that it is in the interest of the local population.[64]

The ICRC Expert Meeting on occupation discussed the "litmus test", with some experts challenging its utility, noting that what was good for the occupant's population was not necessarily good for the occupied population, and that it could not be a substitute for the norms of occupation law:

> even if a measure taken for the occupied territory had its equivalent in the occupying power's own territory, it would not be lawful under IHL if it was not deemed essential to enable the occupying forces to fulfil their obligations under

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60. See Dinstein, above n.* (Occupation), 120-123.

61. Dinstein, above n.* (Occupation), 122: see also Dinstein, above n.* (Occupation and human rights), 112; and *Christian Society for the Holy Places, Minister of Defence and others*, 52 International Law Reports 512, dissenting opinion of Cohn J, 518 at 520; and T Meron, *Applicability of multilateral conventions to occupied territories*, 72 American Journal of International Law 542 (1978) 548-550.

62. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.50.c: see also 13 Israel Yearbook on Human Rights 348 (1983) 357: but compare *Economic Corporation for Jerusalem Ltd v Commander of IDF Forces in the Judea and Samaria Region et al*, 30 Israel Yearbook on Human Rights 322 (2000) 324.

63. Pictet, above n.* (Commentary GCIV), 336; see also Roberts, above n.* (Prolonged occupation), 94; and Sassoli, above n.* (Legislation), 677.

64. Meron, above n.* (Multilateral conventions), 550.

IHL or to maintain orderly government in the territory.[65]

Finally, an occupant is incompetent to adopt any measure which is in breach of international law. To an extent this is apparent on the face of Article 64(2) of the Fourth Geneva Convention which permits the occupant to adopt provisions "which are essential to enable the Occupying Power to fulfil its obligations under the present Convention". Dinstein claims that, by extension, this must allow the occupant to implement other obligations derived from customary and conventional international law.[66] The converse must be, as Kretzmer contends expressly relying on the terms of Article 43 of the Hague Regulations, that "[a]ny measure prohibited by international law is not in the occupant's power".[67] It is self-evident that an occupant may not purport to use its legitimate powers conferred by the regime of occupation to pursue an end that is unlawful.

c. prolonged occupation and Israel's High Court

Israel's assertion[68] that a long term occupation *per se* modifies the obligations imposed on an occupant by Article 43 of the Hague Regulations has been rejected by some commentators.[69] Undertaking an analysis of the High Court's approach to prolonged occupation is important because the Court exercises judicial review of measures taken by Israel within the occupied Palestinian territories. If inappropriate standards are used in this process, the Court might not only wrongfully legitimise unlawful action but, in doing so, it will also provide authoritative, yet erroneous, guidelines for the future conduct of the occupation. The High Court's interpretation of Article 43 has been criticised on the ground that it attenuates unduly the restrictions placed on legislative

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65. Ferraro, above n.* (Occupation), 75: see 74-75.

66. Dinstein, above n.* (Occupation), 113.

67. Kretzmer, above n.* (Occupation of justice), 60: see also Sassoli, above n.* (Legislation), 674, and also 676-677.

68. See von Glahn, above n.* (Taxation), 345-346.

69. For instance, Cassese, above n.* (Powers and duties), 419-420; von Glahn, above n.* (Taxation), 345-347, 373; and Greenwood, above n.* (Administration) 263.

competence, substituting administrative convenience for the criterion of necessity.[70] Thus, for example, in *Tabib*, the High Court ruled:

> The question [whether an absolute prevention exists] is one of the preferable and convenient means for achieving the purpose as stated at the beginning of Article 43, namely, ensuring "public order"—a term that I propose to interpret as meaning the existence of an administration safeguarding civil rights and concerned about the maximal welfare of the population.
>
> If the achievement of this purpose requires a deviation from the existing laws, there is not only a right but, indeed, a duty to deviate from them.[71]

The High Court has repeatedly relied on the claim that where an occupation is prolonged, the occupant is empowered to employ measures of a nature which would not be permissible during a short-term occupation.[72] This view was expounded in detail by Acting President Shamgar in *Abu Aita*. The premise of this claim is that:

> The needs of any area, whether under military government or otherwise, will naturally change over the course of time, along with attendant economic developments...The length of time that a military government continues may affect the nature of the needs involved, and the urgency to effect adjustment and reorganization may increase as more and more time elapses. The

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70. See, for example, Kretzmer, above n.* (Occupation of justice), 57-72; Playfair, above n.* (Principle) 211 *et seq*; Qupty, above n.* (Judgments), 91 *et seq*; and Sassoli, above n.* (Legislation), 674—"The practice of Israeli courts concerning legislation in the Israeli occupied territories is...very permissive". On the other hand, Cassese sees some merit in the approach adopted by the High Court (above n.* (Powers and duties), 423 *et seq*): see also J Singer, *Aspects of foreign relations under the Israeli-Palestinian Agreements on interim self-government arrangements for the West Bank and Gaza,* 26 Israel Law Review 268 (1994) 275-277. Singer's exegesis of Article 43 ignores the point that only factual authority, but not sovereignty, passes to the occupant.

71. *Tabib et al v (a) Minister of Defence, (b) Military Governor of Tulkarem*, 13 Israel Yearbook on Human Rights 364 (1983), opinion of Justice Shilo at 366.

72. See, for example, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v Commander of IDF Forces in the Judea and Samaria Region et al*, 14 Israel Yearbook on Human Rights 301 (1984) 307-308, and as *Ja'amait Ascan*, Kretzmer, above n.* (Occupation of justice), 70; *Dwadin et al v Commander of IDF Forces in the West Bank*, 25 Israel Yearbook on Human Rights 333 (1985) 334; *Economic Corporation for Jerusalem Ltd v Commander of IDF Forces in the Judea and Samaria Region et al*, 30 Israel Yearbook on Human Rights 322 (2000) 324; and *Na'ale v The Supreme Planning Committee of the Judea and Samaria Area et al*, ILDC 70 (IL 2004) para.6 and 37 Israel Yearbook on Human Rights 332 (2007) 333.

> argument...that there is no foundation for the idea that the duration of military government affects the character of the duties and the extent of the powers of military government [is] irreconcilable with the character of the duties and powers vested in it by Article 43. It is true that this article contains no rules as to adjustment or reclassification bound up with, or conditional upon the time element, but the effect of the time dimension is implicit in the wording, according to which there is a duty to ensure, as far as possible, order and public life, which patently means order and life at all times, and not only on a single occasion. The element of time is also decisively involved in the question of whether it is absolutely impossible to continue acting in accordance with existing law, or whether it is essential to adapt that law to new realities...It follows that the time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the needs of the territory, or maintain equilibrium between them.[73]

Relying on Graber,[74] Acting President Shamgar claimed that the Hague Regulations were too inadequate and fragmentary to guide the occupant in a manner which implied that, during a prolonged occupation, the occupant assumes sovereign powers of legislation:

> a lengthy military occupation, which would be required to find solutions for a wide range of day-to-day problems, similar to those an ordinary government would encounter, is likely not to find answers to its questions in the provisions of the Regulations.[75]

Further, in his interpretation of the phrase "as far as possible" employed in Article 48 of

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73. *Abu Aita*, above note *, opinion of Acting President Shamgar, para.50e: see also para.50c.

74. Graber, above n.* (Historical survey), 290-291: see quotation in text to n.*.

75. *Abu Aita*, above note *, opinion of Acting President Shamgar, para.25g.

the Regulations,[76] and the presumption must be that it bears the same meaning in Article 43, Shamgar flatly asserted that "there is no logic in applying the same criterion to a newly established military government and to a military government that has administered a territory with all the problems of civil administration, for ten years or more".[77]

To depart from the terms of Article 43 in a manner which effectively effaces the limitations it places upon the occupant's legislative competence conflicts with the view expressed by the US Military Tribunal in the *Krauch* case. Although the Tribunal recognised that there were uncertainties in the law of armed conflict, it held that these did not arise in relation to the basic principles of the law of occupation contained in the Hague Regulations—"We cannot read obliterating uncertainty into these provisions and phrases of international law having to do with the conduct of the military occupant towards inhabitants of occupied territory."[78]

Yet the High Court has done precisely this. It has employed the doctrine of prolonged occupation to buttress an interpretation of the Hague Regulations which obliterated the restraints placed upon the occupant by Article 55. In *Na'ale*, two settlements in the West Bank, somewhat paradoxically, lodged an objection to a permit allowing the opening of a quarry. The petitioners argued that this would breach Article 55 of the Hague Regulations, which provides that an occupant is only the "administrator and usufructuary" of publicly owned buildings and estates located in occupied territory. This places on the occupant the duty to "safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".[79] The

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76. Article 48 of the Hague Regulations deals with the occupant's principal powers regarding taxation, and provides:

> If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

77. *Abu Aita*, above note *, opinion of Acting President Shamgar, para.24c.

78. *In re Krauch and others (IG Farben trial)*, (US Military Tribunal at Nuremberg, 29 July 1948), 15 International Law Reports 668 at 677.

79. For commentary on Article 55, see I Scobbie, *Natural resources and belligerent occupation: mutation through permanent sovereignty*, in S Bowen (Ed), *Human rights, self-determination and political change in the occupied Palestinian territories* (Kluwer: The Hague: 1997) 221 at 232-234, and at 238-242 for an account of

petitioners argued that quarrying consumed the property and thus breached the duty of usufruct. The High Court rejected this plea, ruling:

> even if quarrying cannot be considered as usufructing, no prohibition of such a kind of use applies in cases where an activity is done for the benefit of the local population or local needs.[80]

This ruling is manifestly incorrect: its effacement of Article 55 also entails a clear breach of Article 43 because this ruling validates a measure which violates international law.

The High Court's doctrine of prolonged occupation has its roots in the *Christian Society for the Holy Places* judgment. In his opinion, Deputy President Sussman ruled that the occupant has a duty to adapt the law to respond to changing needs in economic and social matters, but:

> In inquiring whether the legislative measures of an Occupying Power are at one with the provisions of Article 43, considerable importance attaches to the question of the motives of the legislator. Has he legislated in order to advance his own interests or out of a desire to care for the well-being of the civil population, "la vie publique" of which Article 43 speaks? All agree that any legislative measure not concerned with the welfare of the inhabitants is invalid and goes beyond the authority of the Occupant.[81]

Kretzmer terms this, the claim that the occupant has the duty to legislate for the welfare

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Israel's exploitation of hydrocarbon resources in occupied Sinai and the Gulf of Suez.

80. *Na'ale v The Supreme Planning Committee of the Judea and Samaria Area et al*, ILDC 70 (IL 2004) and 37 Israel Yearbook on Human Rights 332 (2007), quotation at 333.

81. *Christian Society for the Holy Places v Minister of Defence and others*, 52 International Law Reports 512, opinion of Deputy President Sussman at 515: see also *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v Commander of the IDF Forces in the Judea and Samaria Region et al*, 14 Israel Yearbook on Human Rights 301 (1984), opinion of Justice Barak at 304, and as *Ja'amait Ascan*, Kretzmer, above n.* (Occupation of justice), 69—"The military commander may not consider the national, economic or social interests of his own country, unless they have implications for his security interest or the interests of the local population".

of the local population, the "benevolent occupant" approach.[82]

The dichotomy Sussman drew between the occupant's interests and those of the local population reflects the fundamental principle of the law of occupation that the occupant is only in temporary administrative control of the territory, which rests on factual control and not sovereignty. This entails that the territories involved—the occupied territory and the occupant's home territory—are to be treated as separate entities. While this is implicit in the prohibition of the annexation of occupied territory, it is also been expressed in the rules governing the regulation of the economy of occupied territory. For example, Feilchenfeld rejects the claim that an occupant may create a customs union between its territory and occupied territory because "this almost invariably would be an intrinsic measure of complete annexation which a mere occupant has no right to effect".[83] In essence, the economy of occupied territory must be kept separate from that of the occupant as "the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort":

> The economy of the belligerently occupied territory is to be kept intact, except for carefully defined permissions given to the occupying authority—permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their country's allies, so must the economic assets of the occupied territory not be used in such a manner.[84]

Benvenisti identifies another reason the economies should be kept separate: economic integration may simply act as an incentive for the occupation to continue.[85]

It seems likely that the post-World War II tribunals were influenced to some

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82. See Kretzmer, above n.* (Occupation of justice), 58-59.

83. Feilchenfeld, above n.* (Economic law), 83.

84. *In re Krupp*, (US Military Tribunal at Nuremberg, 30 June 1948), 15 International Law Reports 620 at 622-623: compare *In re Krauch and others (IG Farben trial)*, (US Military Tribunal at Nuremberg, 29 July 1948), 15 International Law Reports 668 at 674.

85. Benvenisti, above n.* (Occupation), 144.

degree in their strictures against economic convergence by the *Austro-German customs union* advisory opinion.[86] In this opinion, the Permanent Court of International Justice ruled that Austria's independence would be compromised if it lost its "sole right of decision in all matters economic, political, financial or other".[87] The "classical" definition of independence was, however, expounded by Judge Anzilotti in his concurring opinion:

> The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it [with] the exceptional and, to some extent, abnormal class of States known as "dependent States". These are States subject to the authority of one or more States. The idea of dependence therefore necessarily implies a relation between a superior State...and an inferior or subject State; the relationship between the State which can legally impose its will and the State which is legally compelled to submit to that will.[88]

Axiomatically, if an occupant were to converge the economy of occupied territory with its own, then the latter would lose its independence. It would no longer be sovereign but effectively be annexed, contrary to the fundamental purpose of the law of occupation.

In judgments hinging on the application of its doctrine of prolonged occupation, Israel's High Court has upheld measures which systematically efface the principle of the separateness of the occupied Palestinian territories. By including settlers within the category of inhabitants whose welfare the occupant must promote, the High Court has endorsed an obliteration of the distinction between lawful and unlawful inhabitants. In *Electricity Company No.1*, the Court simply asserted that "the residents of Kiryat Arba must be regarded as having been added to the local population and they are also

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86. *Customs regime between Germany and Austria (Protocol of March 19th, 1931)* advisory opinion, PCIJ, Ser.A/B, No.41 (1931).

87. *Austro-German customs union* advisory opinion, PCIJ, Ser.A/B, No.41 (1931) 45.

88. *Austro-German customs union* advisory opinion, PCIJ, Ser.A/B, No.41 (1931), opinion of Judge Anzilotti, 55 at 57.

entitled to a regular supply of electricity".[89] Similarly, in *Economic Corporation for Jerusalem*, the Court held that in assessing changes during a prolonged occupation for the purpose of applying Article 43, a relevant "new reality" was the existence of settlements.[90] In doing so, the Court thus conferred apparent legitimacy upon a situation unlawful in itself.

The Court has also disregarded the temporary nature of occupation by upholding changes made within the occupied Palestinian territories which will subsist after the end of occupation, such as the construction of road systems linking the West Bank, and settlements, to metropolitan Israel,[91] and the integration of Palestinian electricity infrastructure within that of Israel.[92] Water supplies have also been made dependent

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89. *Electricity Corporation for Jerusalem District Ltd v Minister of Defence et al*, as reported in Kretzmer, above n. (Occupation of justice), 65: this aspect of the judgment is not noted in the summary contained in 5 Israel Yearbook on Human Rights 381 (1975). Settlers are not protected persons for the purposes of Geneva Convention IV: Article 4(1) provides "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party tot he conflict or Occupying Power *of which they are not nationals*" (emphasis added).

90. *Economic Corporation for Jerusalem Ltd v Commander of the IDF Forces in the Judea and Samaria Region et al*, 30 Israel Yearbook on Human Rights 322 (2000) 324.

This is an even more marked feature in proceedings which pit the interests of the indigenous population against those of settlers, such as cases involving the confiscation of privately owned land in order to ensure the security of Jewish worshippers within the West Bank—see, for example, *Hass v IDF Commander in the West Bank (the Machpela Cave case)*, HCJ 10356/02 (4 March 2004), [2004] Israel Law Reports 53 (this case was joined with HCJ 10497/02, *Hebron Municipality v IDF Commander in Judaea and Samaria*); *Bethlehem Municipality v the State of Israel (Rachel's Tomb case)*, HCJ 1890/03 (3 February 2005): <http://elyon1.court.gov.il/files_eng/03/900/018/n24/03018900.n24.pdf>—and those dealing with the route of the barrier wall in the West Bank, for example, *Beit Sourik Village Council v Government of Israel and Commander of the IDF Forces in the West Bank* (HCJ 2056/04, 30 June 2004, 43 ILM 1099 (2004)) and *Mara'abe and others v The Prime Minister of Israel and others* (HCJ 7857/04, 15 September 2005, 45 ILM 202 (2006)). These judgments are also available in English on the website of the Israeli Supreme Court, <http://elyon1.court.gov.il/eng/home/index.html>. On this, see Gross A, *Human proportions: are human rights the emperor's new clothes of the international law of occupation?*, 18 European Journal of International Law 35 (2007).

91. See *A Cooperative Society Lawfully Registered in the Judea and Samaria region v Commander of the IDF Forces in the Judea and Samaria Region et al*, 14 Israel Yearbook on Human Rights 301 (1984), and as *Ja'amait Ascan*, Kretzmer, above n.* (Occupation of justice), 69-70; and compare *Tabib et al v (a) Minister of Defence and (b) Military Governor of Tulkarem*, 13 Israel Yearbook on Human Rights 364 (1983).

92. See *Electricity Corporation for Jerusalem District, Ltd v Minister of Defence et al*, 5 Israel Yearbook on Human Rights 381 (1975); and compare *Jerusalem District Electricity Co Ltd v Minister of Energy and Infrastructure and Commander of the Judea and Samaria Region*, 11 Israel Yearbook on Human Rights 354 (1981). See also *Jaber al Bassiouni Ahmed et al v The Prime Minister and Minister of Defence* (HC 9132/07, 30 January 2008), unofficial English translation at <www.gisha.org/UserFiles/File/Legal%20Documents%20/fuel%20and%20electricity_oct_07/english_docs/HCJ%209132%2007%20English%20Verdict%20final.pdf>

upon Mekerot, Israel's national water carrier. Although in the *Elon Moreh* case, Justice Landau ruled that an occupant could not create facts (in that case a settlement) for its military purposes that were intended from the outset to last beyond the termination of military rule,[93] this test was soon reformulated by Justice Cahan in *Electricity Company No.2* to provide:

> generally, in the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications which, even if they do not alter the existing law, would have a far-reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.[94]

While in that case Justice Cahan held that there was insufficient reason to divest the company of its concession to supply electricity within the West Bank in favour of the Israel Electricity Corporation, this had already occurred in relation to the supply of electricity to Hebron by virtue of the *Electricity Company No.1* case.

In *Cooperative Society*, Justice Barak affirmed Sussman's views regarding the changing needs of the population of occupied territory expressed in *Christian Society for the Holy Places*, but found that the occupant's authority extended "to taking all measures necessary to ensure growth, change and development".[95]

This case dealt with objections to a plan to build highways connecting towns in the West Bank with Jerusalem. During the proceedings the respondents had conceded that the roads would benefit residents of Israel and ease travel between Israel and the West Bank, but also argued that many West Bank residents travelled to work in Israel.[96] Affirming the Court's rulings in the *Electricity Company* cases on the legitimacy of the

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93. *Dweikat v Government of Israel*, 9 Israel Yearbook on Human Rights 345 (1979).

94. *Jerusalem District Electricity Co Ltd v Minister of Energy and Infrastructure and Commander of the Judea and Samaria Region*, 11 Israel Yearbook on Human Rights 354 (1981) 357.

95. *A Cooperative Society Lawfully Registered in the Judea and Samaria region v Commander of the IDF Forces in the Judea and Samaria Region et al*, 14 Israel Yearbook on Human Rights 301 (1984) 308-309.

96. Kretzmer, above n.* (Occupation of justice), 68.

creation of permanent changes in occupied territory, Barak formulated the governing rule as:

> Long-term fundamental investments in an occupied area bringing about permanent changes that may last beyond the period of the military administration are permitted if required for the benefit of the local population—provided there is nothing in these investments that might introduce an essential modification in the basic institutions of the area.[97]

Further, in order to carry out "fundamental investments and long-range projects for the benefit of the local population...the military administration is entitled to cooperate with the Occupying State".[98] Kretzmer commented on this manifestation of the benevolent occupant approach thus:

> The notion of "public benefit" is intimately connected to political objectives and interests. The model applied by Justice Barak is reminiscent of a colonial model of governors who know what is best for the natives. Development is assumed beneficial and large highways must be for the public good, as must improved connections between the Occupied Territories and Israel itself. There is, however, nothing inherently good about development the adverse consequences of which my override benefits. It is quite true that people may opt for development despite its adverse consequences, but should a temporary regime make this irrevocable decision? Moreover, is improving connections between the West Bank and Israel necessarily for the good of the West Bank residents, on the not unreasonable assumption that many of these residents would prefer to break those connections?[99]

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97. *A Cooperative Society Lawfully Registered in the Judea and Samaria region v Commander of the IDF Forces in the Judea and Samaria Region et al*, 14 Israel Yearbook on Human Rights 301 (1984) 310.

98. *A Cooperative Society Lawfully Registered in the Judea and Samaria region v Commander of the IDF Forces in the Judea and Samaria Region et al*, 14 Israel Yearbook on Human Rights 301 (1984)313.

99. Kretzmer, above n.* (Occupation of justice), 70: note omitted.

As Kretzmer notes, there is generally a strong connection between steps taken by the military authorities in the occupied territories and the political agenda of the Israeli government.[100] This perhaps reached its apotheosis in the measures which gave rise to the proceedings in *Abu Aita*. The immediate cause was the introduction of value added tax into the occupied Palestinian territories, but this was only the culmination of the conscious integration of Israeli and Palestinian economies. In his opinion, Shamgar started from the proposition that the removal or continued maintenance of customs barriers between an occupant's territory and the territories it occupies was a matter to be decided by the military government of the occupied territories. Its decision could not be contested provided its action caused no significant damage to the economy of the occupied territories.[101] It had been decided at the start of the occupation that "the two economies would not be separated" because the economy of the occupied territories was "umbilically tied to the economy of Israel".[102] This was effected by the removal of the customs barriers between the occupied territories and Israel and the introduction of uniform rates of indirect taxes.[103]

Invoking the prolonged occupation argument, that changing circumstances in occupied territory justify the introduction of new measures by the occupant in order that it may fulfil its obligation under Article 43 of the Hague Regulations to ensure civil life, Shamgar asserted that freezing the tax regime as it existed at the start of the occupation could, through time, be detrimental to the economy of occupied territory by preventing its development and adjustment to changes in the world and regional economy, as well as to changes in the economy of the occupant.[104] He ruled that the legislative change proposed met the balance to be drawn between the welfare of the population of the occupied territories and Israel's security:

> military government has a clear and direct interest in avoiding any disruptions in

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100. Kretzmer, above n.* (Occupation of justice), 64.

101. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.7.

102. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.52c.

103. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.7.

104. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.25e.

> the regional economy and *inter alia* it will do all it possibly can to prevent as far as possible reduction in trade or increase in unemployment. To cut off existing markets, especially those created during the period of military government, has a direct effect on incomes and therefore upon the standard of living; unemployment is a fermenting and unsettling factor from the standpoint of security and both these phenomena are among those the military government tries to avoid in so far as possible; at least a military government that aspires to the good of the public in the territory, and the good of the security interests of the occupier in so far as possible and practicable.[105]

In addition to these security considerations, Shamgar employed the parallel application argument, that VAT had been introduced in Israel as well as in the occupied territories, to claim that this was a reasonable use of the powers granted to Israel by Article 43.[106]

Israel's association agreement with the European Economic Communites had made its adoption of VAT vital as a consequence of the removal of customs barriers between Israel and EEC member States, and this "had direct repercussions in the territories":

> Economic integration—as a compelling motive for introducing the tax—was obviously a dominant factor in all decisions having implications on the economic relations between Israel and the territories.[107]

The alternative was to separate the economies of the occupied territories and Israel, but this would breach Israel's duties under Article 43 as this "would impede the possibility of a return to orderly life and prevent the effective observance of the duty regarding the assurance of 'law vie publique'"—"Having seen that a value added tax must be introduced in Israel, the wheel could not have been turned back without affecting the proper fulfilment of the duties deriving from Article 43". Shamgar concluded that the

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105. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.50e.

106. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para,50e.

107. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.51.

integration of the economies required that strict attention be paid to parallel fiscal and economic developments:

> The method of tackling economic problems in Israel cannot, it seems, stop at the old pre-1967 borders which today are open for passage of people and trade.[108]

Although Shamgar paid lip service to the autonomy of the military authorities in economic matters, this is difficult to reconcile with the fact that the introduction of VAT was driven by Israel's own economic policy. The military authorities simply "served as proxies for the implementation of economic policies decided upon by the Israeli body-politic".[109] It seems impossible to justify this by reference to the test that innovation within occupied territory should be determined by its own interests and not those of the occupant, all the more so when the rationale for its necessity was the earlier unlawful act of the integration of the economies. This was simply a case of compounding illegality under the guise of benevolence which Gasser argues "cannot be reconciled with the law of belligerent occupation, which is based on the assumption that foreign control will last only for a limited period of time".[110]

When one also takes into account the creation of water and electricity dependence—the consequences of which were clearly illustrated in the events giving rise to the proceedings in *Jaber al Bassiouni Ahmed et al v The Prime Minister and Minister of Defence*—and the weight given to the interests of settlers unconnected with the administration of the occupied territories in determining policy, it seems apparent that the interests of the indigenous population of occupied Palestinian territories have been made completely subservient to Israel's domestic concerns. This is not simply an effacement of the separation of the territories and the distinctiveness of their interests. It amounts to a rejection of the rationale of the law of occupation as it amounts to a *de facto* annexation which denies Palestinian interests weight in the formulation of policy, far less their active participation. It has occurred, nevertheless, under the cloak of

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108. *Abu Aita*, above n.*, opinion of Acting President Shamgar, para.52c.

109. Benvenisti, above n.* (Occupation), 143.

110. Gasser, above n.* (Protection of the civilian population), 291.

observing the law of occupation, and this perception has been cemented by the intervention of the Supreme Court. In 1990 Roberts observed that the law of occupation had provided the basis for denying the inhabitants of the occupied Palestinian territories normal political activity and thus had effectively kept them permanently under Israeli control as second class citizens or worse:

> From this perspective, the longer the occupation lasts, the more akin to colonialism it seems.[111]

111. Roberts, above n.* (Prolonged occupation), 98.