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Does International Humanitarian Law have an expiration date? The temporal dimension of prolonged belligerent occupations: a case study of Palestine

Abstract

The purpose of this paper is to examine the suitability of International Humanitarian Law as a legal framework for protracted belligerent occupations. Through a case study focusing on the occupation of Palestine, we will attempt to shed light on the extent to which the provisions of International Humanitarian Law are legally applicable to belligerent occupations that are significantly protracted in time and, if so, whether the temporal element requires adjustments in the application of this body of law. The results of our study suggest that, while the law of belligerent occupation may permit differential legal treatment between nationals of the occupying state and those of the occupied territory, this does not mean that the occupier can establish a system of discrimination and oppression in the long term, under the legal cover of the temporary nature of the occupation

Keywords

Prolonged military occupation, Legal loopholes, International Humanitarian Law, Human rights, Palestinian-Israeli conflict.

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1. Introduction

Two thousand twenty-two saw the highest number of Palestinian deaths by Israeli security forces in the past 17 years and the highest number of Israeli deaths since 2016[1].

Israel's presence in the Occupied Palestinian Territories (OPT) dates back more than half a century to the Six-Day War of June 1967, in which Egypt was stripped of the Sinai Peninsula and the Gaza Strip, Jordan of the West Bank and East Jerusalem, and Syria of the Golan Heights. Although the 1979 Camp David Accords ended decades of conflict between Israel and Egypt, they left the question of Palestinian self-determination unanswered[2].

The Palestinian right to self-determination[3] has been systematically ignored by Israeli leaders, as is evident from the following words of former Prime Minister Golda Meir: "It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist"[4].

This denial of the existence of the Palestinian people[5] has been echoed by authors such as Karsh: "In 1948, no Palestinian state was 'occupied' or destroyed to make way for the establishment of Israel [...] Palestine had never existed as a distinct political entity" (2019: 45-51). However, this has been rejected by another group of jurists who have soundly defended the Palestinian people's right to self-determination[6].

1 UN (2023). Occupation 'eating away' at Israeli, Palestinian societies: Türk. UN. 3 March [accessed: April 2023]. Available at: https://news.un.org/en/story/2023/03/1134142

2 Notwithstanding this, the Palestinian-Israeli conflict dates back at least to the United Nations (UN) Partition Plan of 1947, which divided the British mandate into an Arab and a Jewish state, leading to the creation of Israel in 1948. The subsequent Arab-Israeli war ended in 1949 with Israel's victory and the division of the disputed territory into: Israel, the West Bank and Gaza.

3 This right has been recognised as an *erga omnes* principle by the ICJ-*cf.* ICJ, *East Timor (Portugal v. Australia),* Judgement, 30 June 1995, *ICJ Reports 1995,* p. 90, par. 29; ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July, 2004, *ICJ Reports 2004,* pp. 136-203, https://www.icj-cij.org/en/case/131 (Wall Advisory Opinion). p. 136, par. 155 –and a fundamental right– *cfr.* ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, *ICJ Reports 2019*, par. 144. It has been enshrined in: the UN Charter (26 June 1945) under article 1.2; UN GA, article 1.1 of the *International Covenant on Civil and Political Rights*, 16 December 1966, *UNTS*, vol. 999, no. 171; UN GA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN,* 24 October 1970, A/RES/2625 (XXV).

4 Giles, F. (1969). Golda Meir: Who can blame Israel. *Sunday Times*. 15 June.

5 Rejecting the existence of a Palestinian people is the first step towards denying their right to self-determination: "A special problem arises in relation to the right to self-determination of peoples. First, while this is a human right, it applies only to peoples. Not every population of an occupied territory is a people" (Sassòli, 2005: p. 677).

6 Falk states: "Sovereignty with respect to the Occupied Territories continues to reside with the Palestinian people" (1989, p. 44); Roberts notes: "There was also, even before 1967, some evidence of a tendency to view the inhabitants of Palestine as a people, and as candidates for self-determination [...] the international community has come to accept [...] there is a Palestinian people; that it has a right of self-determination" (1990, 44-103).

Moreover, after some timid advances in the recognition of Palestinian statehood in the aftermath of World War I,[7] there is no longer any doubt that it is a firm position of the international community: Palestine has been an observer state at the United Nations (UN) since 2012 and a member of the International Criminal Court (ICC) since 2015.

Focusing our attention on the case of the Palestinian question, the purpose of this article is to examine the adequacy of International Humanitarian Law (IHL) as a legal framework for *prolonged* belligerent occupations. Against the backdrop of the Russian invasion of Ukraine, which is expected to lead to a protracted occupation,[8] we need now more than ever an analytical framework for the impact of extended occupations on the application of IHL. Thus, we will try to shed light on whether all IHL provisions are legally applicable to belligerent occupations that, like Israel's in Palestine, have extended considerably over time and, if so, whether the temporal factor requires adjustments in the application of this body of law.

For this paper, we take as a starting point an outline of how the notion of military occupation and its regime fits in the general legal framework. Subsequently, we will explore the temporal dimension of belligerent occupation, focusing on the conservationist principle[9] —enshrined in Art. 43 of the Hague Regulations and Art. 64 of Geneva Convention IV (GC IV)— and the prohibition on annexation, as well as the academic debate concerning prolonged occupation as a distinct legal category. We will then examine the question of whether the temporal factor precludes the application of certain rules of IHL, through a detailed analysis of Art. 6(3) of GC IV of 1949 and Art. 3(b) of Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977 (AP I). We will also analyse the extent to which the protracted nature of an occupation extends the occupier's legislative power and the notion of military necessity, using the Israeli occupation in Palestine as a case study.

2. Legal outline of belligerent occupation

The scope of military occupation has been delimited by convention and case law, but its verification in reality is no easy task. To do so, we need to understand the systematic position of the law of belligerent occupation, as a branch of *jus in bello,* and its scope of application.

7 Professor Vacas points out that "Article 9 of Protocol XII of the Lausanne Peace Treaty, [...] between the Allies and Turkey, as heir to the defeated Ottoman Empire, refers to the states carved out of Turkey which, according to the Treaty itself, were Iraq, Syria and Palestine". Moreover, "two years later, the Permanent Court of International Justice had occasion to interpret this question in the Mavrommatis case, stating clearly: "Palestine is subrogated as regards the rights and obligations of Turkey" (2015: 1-43).

8 Washington sources now suggest that Russia's occupation of Ukraine could last up to 20 years. See Basset, M., Mars S. and González, M. (2022). Ofensiva de Rusia en Ucrania [Russia's offensive in Ukraine], *El País*, 6 March 2022, [accessed: April 2023]. Available at: https://elpais.com/internacional/2022-03-06/tres-escenarios-para-una-guerra-larga-y-sangrienta.html

9 In this article we will use this translation of the English term "conservationist principle".

2.1. *The concept of belligerent occupation under IHL*

The notion of occupation is defined in Art. 42 of the Hague Regulation:[10] "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself."

In addition, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined occupation as: "a transitional period following invasion and preceding the agreement on the cessation of hostilities"[11]. It is thus an eminently provisional situation, it ends with the ratification of a peace treaty between the parties or the *debellatio* of the defeated front (Benvenisti, 2008): 622). As such, it does not alter the sovereign prerogatives of the occupied state (Fiore, 1865: 177).

It could therefore be argued that the notion of military occupation rests on two pillars: on the one hand, the *de facto* and not *de jure* control of territory by a foreign state, without any legal legitimacy, and, on the other hand, a conflict of interests between the occupying forces and the local population (Roberts, 1990): 44) which is "obedient by submission" rather than "by loyalty" (Arai-Takahashi, 2009: 43).

In this sense, for a territory to be considered occupied, it must be under the effective control of foreign military forces (Dinstein, 2009): 31). Specifically, according to the ICTY's *Naletilic* judgement, the occupying power needs to have replaced the authority of the overthrown government, i.e. it must have a sufficient presence in the territory or the capacity to deploy its troops rapidly. Indeed, as the Nuremberg Tribunal pointed out, unlike an invasion —which is a mere military operation— occupation amounts to an effective, coercive and non-consensual substitution (Dinstein, 2009): 38) of the government overthrown by the occupier, regardless of its duration (Ferraro, 2012: 885).

2.2. *The contours and scope of the law of belligerent occupation*

If these criteria are met, the IHL of belligerent occupation, a constantly evolving body of law, is applicable; it comprises Art. 42-56 of the Hague Regulations, Arts. 27-34, 47-78 of GC IV and AP I (Milanovic, 2014: 164). In the Israeli-Palestinian conflict, although neither Israel, Egypt, Jordan nor Syria have ratified the 1907 Hague Regulations (Roberts, 1990: 62), they are subject to them, as well as to GC IV, due to

10 The definition has been extended by Common Art. 2.2, GC I-IV, to include cases of occupation without armed resistance.

11 *Cfr.* ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case no. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003 (*Naletilic* judgement), p. 72, par. 214.

their customary nature, as confirmed by the International Court of Justice (ICJ)[12]. As for AP I, only Jordan and Syria have ratified it, but its customary character is defended in legal theory[13].

These are crucial legal instruments for the protection of the civilian population falling into the hands of the occupier. The Hague Regulations safeguard the personal integrity and private property of the occupied population and the national sovereignty of the overthrown government (Benvenisti, 2008): 622), with GC IV being the equivalent of a bill of rights for the occupied population (Fox, 2012: 240).

The law of belligerent occupation, also known as *jus in bello, has developed within IHL.* It applies from the beginning of the armed conflict, according to Art. 2 GC IV, regardless of whether the war was justified under *jus ad bellum* or not, as they are two independent legal systems (Ferraro, 2012: 133-142; Sassòli, 2005: 661). As the Nuremberg Tribunal emphasised, the lawful or unlawful character of the occupation has no bearing on the regulation by IHL of the obligations of the occupier and the occupied population[14]. As will be seen below, Art. 47 GC IV enshrines the principle of prohibition of annexation, namely a prohibition on recognising the effects of the unlawful use of force, including any occupation. Nevertheless, since the prohibition of annexation is a matter of *jus ad bellum*, it does not exclude the application of the law of belligerent occupation as a branch of *jus in bello*, according to Art. 47 GC IV (Arai-Takahashi, 2009): 44; Milanovic, 2014: 178).

While occupations are often linked to war, they can occur without, or even after, hostilities[15](Dinstein, 2009): 31; Kolb, 2002: 291; Schwarzenberger, 1968: 317) because the occupier's powers are *de facto,* not *de jure* (Arai-Takahashi, 2009: 42; Imseis, 2005: 103; Oppenheim, 1917: 363-364). When the occupier's authority is only temporarily or locally weakened and he is fully capable of re-establishing it, the occupation cannot be considered concluded (Milanovic, 2014: 177)[16].

3. The temporal dimension of belligerent occupation

Although the legal definition of military occupation does not refer to time, it is inherently presumed to be temporary (Arai-Takahashi, 2009: 42; Benvenisti,

12 See, ICJ. (2004), *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, *ICJ Reports 2004*, (Wall Advisory Opinion), par 89.

13 *See infra*, section 3.2. on the customary character of Art. 3(b) AP I.

14 See, List *judgement, op. cit.,* par. 5.

15 *E.g.*, Uganda's occupation of the Democratic Republic of Congo (DRC) began when the DRC withdrew its support for the presence of foreign troops, *see* ICJ. (1995). *Democratic Republic of the Congo v. Uganda, Judgement on the Armed Activities on the Territory of the Congo*, 19 December 2005, *ICJ Reports 2005*, pp. 254-255 (*Armed Activities* judgement).

16 In support of this assertion, the Nuremberg tribunal held, in its *List* judgement, that the German occupation of Yugoslavia was without pause because "Germans could at any time they desired assume physical control of any part of Yugoslavia".

2008: 621; Fiore, 1865: 444; Imseis, 2005: 103)[17]. Its regulation is therefore based on the conservationist principle[18] or the minimalist principle[19] and the prohibition of annexation, without the protracted nature of an occupation giving rise to a separate legal category precluding the application of the aforementioned principles.

3.1. The prohibition on annexation

The prohibition of annexation, enshrined in Art. 47 of GC IV, prohibits the occupying power from extending its sovereignty over all or parts of the occupied territory (Arai-Takahashi, 2009). The origins of this customary principle can be traced back to several arbitral decisions in the inter-war period, whereby a mere armistice, unlike a peace agreement did not allow for the legitimate annexation of occupied territory[20]. In the same vein, the UN General Assembly has reaffirmed that:[21] "The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force."

It follows that the prohibition on annexation is closely linked to the prohibition of the use of armed force and the obligation to respect the territorial integrity of a sovereign state, enshrined in Art. 2.4 of the UN Charter.

3.2. The conservationist principle

The conservationist principle, provided for in Art. 43 of the Hague Regulations and Art. 64 of GC IV, obliges the occupying power to respect the *status quo ex ante* of the occupied territory. It can therefore be seen as a division of powers between the occupying power and the deposed government (Fox, 2008: 236). Moreover, this

17 Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel et al.* Case No. HCJ 2056/04, Judgement, 30 June 2004, par. 27; Supreme Court of Israel, *Zaharan Yunis Myhammad Mara'abe et al. v. Prime Minister of Israel et al.* Case No HCJ 7957/04, Judgement, 15 September 2005, par. 22.

18 In this article we will use this translation of the English term "conservationist principle". It is the antonym of the transformative tendency of prolonged occupations, *see* section 5.

19 In this article we will use this translation of the English term "minimalist principle".

20 *See* Ottoman Public Debt Arbitration, Award, April 18, 1925, *Annual Digest and Reports of Public International Law Cases,* vol. III, pp. 78-79; British-American Arbitral Tribunal, *Iloilo Claims*, November 19, 1925. Available at: https://jusmundi.com/en/document/decision/en-iloilo-claims-several-british-subjects-great-britain-v-united-states-award-thursday-19th-november-1925; Hungaro-Yugoslav Mixed Arbitral Tribunal, *Alexandre Kemeny v. Serbo-Croate-Slovenia,* September 13, 1928.

21 UN GA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter, 24 October 1970. A/RES/2625 (XXV). Annex, par. 10, first principle.

customary principle is embodied in the Fauchille Doctrine (1921), which prohibits the transformation of the institutional architecture of the occupied territory[22].

Conceptualised early on by Fiore (1865), this principle developed from the premise that the validity of reforms introduced by the occupier expired at the end of the occupation unless they were supported by the local population[23]. Thus, Art. 43 of the Hague Regulations was originally conceived as a limit to the legislative power of the belligerent occupier (Schwenk, 1945: 393-416) as stated by the Liège Court of Appeal[24]. The international customary nature of this principle was recognised in the *List* judgement from the Nuremberg Trials and in the *Wall Advisory Opinion* of the ICJ (Arai-Takahashi, 2009: 63; Sassòli, 2005: 662)[25]. It is also codified in the precepts analysed in the following lines.

3.2.1. Respect for local law by the Occupier, in accordance with Art. 43 of the Hague Regulations.

Article 43 of the Hague Regulations provides: "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country[26]".

The term "public order" was interpreted at the 1874 Brussels Conference[27] as security or general safety (Arai-Takahashi, 2009: 92-107; Power, 2014: 350; Schwenk, 1945: 398). The French version used *vie publique* which was interpreted as including "the social functions, ordinary transactions that make up everyday life" but it was erroneously translated into English as "safety" instead of "public life" (Dinstein, 2004; Sassòli, 2005): 663). Furthermore, the term "laws in force" should not be interpreted literally, as it includes "the constitution, decrees,

22 "La situation de l'occupant est éminemment provisoire, il ne doit pas bouleverser les institutions du pays" [The occupier's position is entirely provisional, it must not disrupt the country's institutions], (Fauchille, 1921).

23 "[S]econdo I nostri principii essendo le nazioni tutte eguali ed autonome, ed avendo l'egual d[i]ritto di sovranità nel loro territorio, non possono soggiacere al dritto della forza, nè le loro terre possono passare nel domino del vincitore si questo arbitrariamente e violentemente le avesse occupate" (Fiore, 1865: 177)

24 *See* Court of Appeals of Liège, *Mathot v. Longué,* 19 February 1921, *Annual Digest of Public International Law Cases*, vol. 1, 1932, pp. 463-465. The appeal against the German Ordinance of 8 August 1918 was dismissed on the grounds that a recognition of the occupier's legislative power would imply "an insoluble conflict between the decrees of the legal authority and those issued by the de facto power [against] the absolute character of sovereignty".

25 List Judgement, *op. cit* . p. 65; Wall Advisory Opinion, *op. cit.* par. 89.

26 This concept was contained in arts. 2-3 of the Brussels Declaration of 1874, but it was merged into one to avoid, as stated at the 1899 Hague Conference, the legislative competence conferred in Art. 3 being interpreted too broadly.

27 *See* Ministry of Foreign Affairs, *Actes de la conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre : protocoles des séances plénières [Minutes of the 1874 Brussels Conference on the draft for an international treaty on war: protocols of plenary meetings],* Paris: Librairie des Publications Législatives, 1874.

ordinances, court precedents [...] administrative regulations and executive orders" (Sassòli, 2005: 669; Schwenk, 1945: 398) but excludes war measures,[28] so that the conservationist spirit protects the legal and institutional order of the occupied state in its entirety (Fauchille, 1921).

3.2.2. The occupier's limited legislative function according to Art. 64 GC IV

Art. 64 of GC IV establishes the threshold of military necessity that authorises the occupier to legislate and substitute existing local regulations (Dinstein, 2004: 5):

> "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. [...]
>
> 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".

The first paragraph refers to local criminal laws and two situations in which they may be modified, as an exception to the conservationist principle, namely: in cases where (i) they constitute a threat to the security of the occupier and (ii) where they may hinder the implementation of GC IV itself. The second section, on the other hand, refers to legislation in general and mentions other situations in which the *status quo* may be altered, such as (iii) the need for orderly governance of the territory (Sassòli, 2005: 670)[29].

3.3. The two exceptions to the conservationist principle

It follows from the above that the expression "unless absolutely prevented" in Art. 43 of the Hague Regulation, qualified by Art. 64 of GC IV, refers not only to situations of material necessity, but also to situations of legal necessity, which allows the occupier to legislate both out of (i) military necessity and (ii) the requirement to comply with GC IV (Sassòli, 2005: 670).

28 *Cfr.* District Court Rotterdam, *Cillekens v. DeHaas case*, 14 May 1919.

29 However, according to some legal scholars, both the first and second paragraphs refer to legislation in general, not only to criminal law (Gasser, 2014: 501-591).

3.3.1. Military necessity

The concept of military necessity (Imseis, 2005: 109)[30] has been paired with the notion of "as far as possible" in Art. 43 of the Hague Regulation (Dinstein, 2004), as an exception to the conservationist principle (Garner, 1920: 86). Indeed, legal doctrine points out that the aforementioned art. 43, as well as art. 64.2 of GC IV, allow the occupier to modify the laws in force, if it is sufficiently justified on military grounds, that is, when it is necessary for the safety, effectiveness and probability of success of his troops (Hyde, 1922: 368; Fenwick, 1934: 486), whether imperative for the war effort, public safety or social welfare (Stauffenberg, 1931: 86-119), to preserve its security (Oppenheim, 1917: 349-350; Sassòli, 2005), to avoid harmful contingencies (Wilson,1939: 315) or any other insurmountable obstacles (Meurer, 1907: 338). It thus refers o the military interests of the troops as a whole, without extending to the security of the occupier himself outside the occupied territory[31].

Given that military necessity was already taken into account in the drafting of IHL rules, which rest precisely on a balance between the principles of humanity and military necessity (Imseis, 2005: 110; Koutroulis, 2012: 189), military considerations cannot be used as a reason for not applying these rules (Pellet, 1992: 169), unless the provision in question specifically provides for this (Kretzmer, 2012: 207-236). However, some authors have blurred the contours of the notion of military necessity in order to increase the legislative powers of the occupiers in prolonged occupations. From this perspective, some legal scholars (Dinstein, 2004; Schwenk, 1945) and the Israeli Supreme Court itself, as we will see in section 5 of this article, expand the concept of military necessity to include not only the security *of troops*, but also the general political and economic interests *of the State* in replacing local regulations or institutions.

In contrast, other jurists oppose the use of military necessity as a reason to alter the institutional and legal order of the place (McCoubrey *et al,* 1992; McNair *et al,* 1966). Indeed, according to the literal wording of the aforementioned art. 43, the occupier may rely on military considerations to legislate not for its own strategic convenience but only when it is essential for the security of its troops. As the *Milaire* decision underlined, the purpose of Article 43 is "not to place the occupant in the benefit of a privilege or a right, but, on the contrary, to impose an obligation on him"[32]. We must therefore insist that this precept was adopted to guarantee that the occupier would maintain public order and public life in the occupied territory and in the absence of

30 See US War Manual: "Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied", *see* US Department of the Navy, US Marine Corps and US Coast Guard. *The Commander's Handbook on The Law of Naval Operations* (Naval Warfare Publications, 1995).

31 The Israeli Supreme Court itself noted that "military needs are his [the commander's] military needs in the [occupied] area, and not national security interests in the wide sense", *see* Supreme Court of Israel, *Jamayat Askan v. Commander of IDF Forces in the Judea and Samaria region*, Case no HCJ 393/82, Judgement, 12 December 1983 (*Askan* judgement).

32 *Cfr.* German-Belgian Mixed Arbitral Tribunal, *Milaire v. German State* (1923).

insurmountable obstacles. However, it has been exploited to extend the occupier's discretion indefinitely by turning the proviso "unless absolutely prevented" into a catch-all for any geopolitical interest of the occupier.

3.3.2. The occupier's obligations under GC IV

The occupier's obligations under GC IV, and by extension international law, are the other exception to the conservationist principle. Specifically, the occupying power may undertake legislative and institutional reforms to eliminate "any adverse distinction [in local laws] based [...] on race, religion or political opinion" in violation of Art. 27.3 GC IV (Dinstein, 2004): 6; Sassòli, 2005: 65). Indeed, Article 27 of the 1969 Vienna Convention on the Law of Treaties (VCLT) states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", so that it must be interpreted *a fortiori* as referring both to the internal law of the occupying power and to the law in force in the territory it occupies (Dinstein, 2009: 116-117)[33].

While the occupier's protection obligations are commendable, the question arises as to who are the "protected persons" under the law of belligerent occupation. While the Hague Regulations do not specify whether nationals of the occupier are included among the protected persons, Art. 4 of GCIV explicitly states that: "Persons protected by the Convention are those who [...] find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

Thus, while the Hague Regulations are three-dimensional, seeking a balance between the interests of the displaced sovereign, the local population and the occupying power, GC IV is two-dimensional, seeking a balance between the interests of the occupying army and those of the local population (Harpaz *et al.*, 2010: 525).

3.4. The legal paradox of prolonged occupations and the legal debate over the classification of occupations

The notion of *protacted* belligerent occupation is difficult to reconcile with the traditional definition of military occupation as an inherently brief situation (Bernard, 2012: 5-11). This premise has been contradicted by the protracted occupations of the last century,[34] which seem to suggest that nothing lasts as long as the temporary

33 *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *UNTS*, vol. 1155, No. 18232, pp: 332-512.

34 *E.g.,* Allied forces occupied Japan and Germany after World War II for 6 and 10 years respectively; South Africa became an occupier of Namibia for at least 23 years when its international mandate ended in 1966 until free elections in 1989; Türkiye occupied Cyprus in 1974 [Res. 33/15 of the UN GA (9 November 1978); Res. 34/30 (20 November 1979); Res. 37/253 (13 May 1983)]; Morocco in Western Sahara since 1975 [Res. 34/37 (21 November 1979); Res. 35/19 (11 November 1980); Res. 43/33 (22 November 1988)]; Vietnam in Cambodia in 1978 [Res. UN GA 37/6 (28 October 1982); Res. UN GA 40/7 (5 November 1985); Res. UN GA 43/19 (3 November 1988)] and Russia in Afghanistan between 1979 and 1989.

(Roberts, 1990: 47). Notwithstanding this, there is no distinction between *short* and *protacted occupations* in current treaty-based or customary IHL (Koutroulis, 2012)[35].

There is debate in law whether *protracted* belligerent occupations should be classified as a separate legal category based on their temporal dimension. According to Dinstein (2009: 116-117), we should distinguish between *protacted* belligerent occupations, which last several decades, and *semi-protracted* ones, which on the contrary last only a few years, since the longer the occupation, the more reforms are required to prevent the needs of the local population from remaining in legal limbo[36].

Similarly, Roberts (1990) defines protracted military occupations as those lasting more than five years, with a sharp decline in hostilities, where the problems that arise require more than mere temporary and conservative solutions to the *status quo*. However, unlike Dinstein, he warns against the risks of an independent classification of such occupations, as it could invite their exclusion from the scope of IHL. Along these lines, Koutroulis (2012:169) questions the definition of separate legal categories, rightly pointing out that IHL applies to all situations of belligerent occupation, regardless of their duration.

In this sense, the creation of an independent and separate legal category for protracted occupations offers no added value compared to the existing IHL regime for occupations. Indeed, the principles of protection and the prohibition of annexation, on which the IHL of occupations is based, serve the ultimate purpose of protecting the occupied population and its legitimate government. If we accept the need to make the conservation principle more flexible in the case of prolonged occupations, thereby allowing the occupier to introduce more reforms, we risk legitimising de facto power of the occupier and ultimately the annexation of the occupied territories, as Dinstein (2009: 116-117) and Roberts (1990) admit. The *de facto* but non-*de jure* nature of the occupier's power in the territory acts as the insurmountable obstacle to extending its legislative power. In the ICJ's *Armed Activities* judgement, although the occupation of the Democratic Republic of Congo (DRC) by Uganda had lasted more than five years, neither the ICJ, nor Uganda, nor the DRC attempted to qualify it as a prolonged or semi-prolonged occupation for the purpose of altering the applicable legal regime[37]. Indeed, to consider that, by the mere passage of time, what was makes a factual situation of occupation, regulated by IHL, becomes subject to a different legal regime, would be tantamount to legitimising the results of the unlawful use of force.

35 Military rule over occupied territory is not temporally defined, "it is co-extensive in time and space to the effective rule of the military" (Shamgar, 1982).

36 *E.g.*, in Japan's semi-prolonged occupation of Singapore, it was argued that the Japanese had the legal power and duty, according to Art. 43 [of the Hague Regulations], to introduce monetary and banking regulations to govern the territory in an orderly manner, *see* Singapore, Original Civil Jurisdiction, *Public Trustee v. Chartered Bank of India, Australia and China*, 1956.

37 Armed Activities Judgement, *op. cit.* pp. 254-255.

4. The prolonged nature of an occupation: a carte blanche for negating IHL?

As we have seen, there is no doubt that *prolonged* occupations lack an independent legal regime. However, we must now consider whether the time factor precludes the application of certain rules of IHL and, if so, which branch of law should fill these legal gaps.

4.1. The one-year time limit imposed by Art. 6.3 GC IV

As is well known, IHL is applicable to belligerent occupations, irrespective of their duration, according to Art. 42 of the Hague Regulations and the above-mentioned ICJ *Armed Activities* Judgement[38]. However, Art. 6.3 GC IV states:

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

In its *Wall Advisory Opinion*, the ICJ confirmed the validity of the one-year period,[39] after which a number of obligations on the occupier, which are crucial for the protected population, cease to apply, such as the obligation to provide food and medical supplies (art. 55), medical and hospital services (art. 56), protection from grave breaches such as intentional homicide, torture or inhuman treatment (arts. 146-147)[40]. This recognition of the validity of the one-year time limit has been criticised by several authors (Imseis, 2005; Ben-Naftali, 2005).

The textual interpretation of Art. 6.3 led the ICJ to conclude that when an occupation does not cease "one year after the general cessation of military operations", only 23 of the 32 provisions applicable to the occupied territories would remain binding. The ICJ thus concluded, paradoxically, that a protracted occupation relieves the occupier of most of its obligations vis-à-vis towards the occupied population. The ICJ thus seemed to identify a gap in the application of IHL caused by the mere lapse of the one-year time limit.

38 Armed Activities Judgement, *op. cit.*, par. 220.

39 Wall Advisory Opinion, *op. cit.* par. 125.

40 However, they are customarily binding (Imseis, 2005: 106).

While the ICJ created this lacuna in the *lex specialis* of belligerent occupation, it sought to fill it with the *lex generalis*, namely international treaties relating to the protection of human rights. In particular, Art. 50 GC IV, which guarantees children's rights to education, was replaced by Arts. 10, 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), while the occupier's duties to ensure food and medical supplies for the population (art. 55) and medical and hospital services (art. 56) were replaced by less precise obligations under arts. 2 and 12 of the ICESCR (the right to an adequate standard of living and the right to health, respectively) and the similar articles 24 and 27 in the Convention on the Rights of the Child (Ben-Naftali, 2005: 218).

Although the recognition of the applicability of human rights law is in itself a guarantee, its application as *lex generalis* instead of the *lex specialis* of armed conflict represents a step backwards in the protection of the occupied population, not only because the duties of the occupier under IHL are more specific and stringent, but also because the occupied population is expressly recognised as a beneficiary of protection in Art. 47 GC IV. In contrast, international human rights refer to *all* individuals and can thus potentially be used by the occupier to promote the interests of its nationals to the detriment of the rights of the occupied civilian population.

4.2. The repeal of the one-year deadline

Art. 6.3 of GC IV was repealed by Art. 3(b) of AP I of 1977 (ratified by 174 states) which eliminates this one-year time limit (Koutroulis, 2012: 173). Moreover, even states that have not ratified AP I are bound by it, as its content has been incorporated into customary international law (Harpaz *et al.*, 2010): 539; Ben-Naftali, 2005: 217; Roberts, 1990: 54). Indeed, the *travaux préparatoires* of AP I show that this provision was adopted by consensus, so that even non-signatory states accepted it without prejudice to their disagreement with other provisions of the treaty (Koutroulis, 2012: 174; Ben-Naftali, 2005: 217). The customary nature of this provision is apparent from the fact that most non-signatory states voted in favour of UN GA resolutions[41] that have stated the application of GC IV in OPT without any such time limit. Moreover, the State of Israel itself has never invoked Art. 6.3 of GC IV as an argument for disregarding its obligations as an occupier under IHL (Roberts, 1990: 55).

It should be noted, however, that the time limit of "one year after the general cessation of military operations" does not refer to the armed conflict that triggered the occupation, as understood by the ICJ, but to any military operation even after the beginning of the occupation (Ben-Naftali, 2005: 214; Imseis, 2005: 106). Indeed, even

41 *See* 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.

if we were to consider that the time limit is still applicable, despite its repeal under customary law and treaties, it should not be interpreted as a mere temporal limit but also as a material one, relating to whether or not hostilities exist in the occupied territory (Arai-Takahashi, 2009: 16-19; Koutroulis, 2012; Ben-Naftali, 2005).

To understand this issue, we must recall that, under Art. 31 of the VCLT, the provisions of a treaty are to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Since the ICJ's textual interpretation led to a conclusion that was inconsistent with the humanitarian "object and purpose" of the treaty, we must examine "the preparatory work of the treaty" and "the circumstances of its conclusion"[42] in order to properly interpret the provision.

It is clear from the *travaux préparatoires* that this one-year limit on the occupier's obligations was adopted on the assumption that after this period the occupier would cede its powers to the local institutions of the occupied territory, thus implying the end of the occupation (Koutroulis, 2012: 175). On this premise, which in our view is dubious, it did not seem reasonable to the Geneva Diplomatic Conference of 1949 to subject the occupier to the obligations deriving from that status if he had transferred power over a year ago (Koutroulis, 2012: 175; Roberts, 1990: 56). The problem arises, then, when we are faced with occupations, such as that of Palestine, in which, after this year-long period, there has been no such return of power, but rather the opposite[43].

It could be concluded that what determines the cessation of the occupier's obligations in a prolonged occupation is not the time threshold per se but the substantive criterion of the actual transfer of power (Bothe, *et al.* 1982: 59). There are two possible long-term scenarios in such occupations. On the one hand, if the occupied power defeats the occupier, hostilities will cease and with them the occupier's obligations. On the other hand, if the occupying power is victorious, its occupation can be prolonged (but without hostilities), which prevents the state from invoking Article 6.3 of GC IV to weaken the rights of the occupied population (Pictet, 1958).

Thus, we can affirm that, although the aforementioned Art. 6.3 GC IV was not designed to diminish the rights of the local civilian population (Arai-Takahashi, 2009: 92-107), but to restrict the occupier's exorbitant powers, it led to the opposite effect of allowing the occupier to evade its obligations, by the mere passage of time. This rule is therefore a "legal anomaly" because, in identifying the problem of the applicability of IHL in protracted occupations, it proposes a counterproductive solution (Roberts, 1990: 57).

42 *See* Art. 32: "when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable" "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion".

43 This time limit was intended for specific historical cases, such as the occupation of Germany and Japan after World War II. By the 1970s, it had become meaningless, given the proliferation of prolonged occupations without the return of power to the sovereign state.

5. The prolonged nature of an occupation: a catalyst or inhibitor of an occupier's powers?

From what we have observed, the prolonged nature of an occupation does not preclude the application of the rules of IHL. However, it can certainly influence its implementation (Koutroulis, 2012: 169), as the law of belligerent occupations allows for a wide margin of variation (Roberts, 1990: 51; Sassòli, 2005: 668) in the administration of the territory[44]. To this end, the question arises as to whether the temporal factor of an occupation extends the occupier's legislative powers or whether, on the contrary, it restricts them.

5.1. Time as a catalyst for the occupier's legislative power and the notion of military necessity

Some legal jurists see the prolongation of military control as an amplifying factor of the occupying power's normative powers, so that the conservationist principle on respecting the *status quo ex ante* would be inversely proportional to the temporary duration of the occupation (Cassese, 1992; Dinstein, 2009: 116-117; Fox, 2012: 240). Already in the 19th century, military manuals suggested a broad interpretation of the legislative competence ot the occupiers[45]. In similar terms, at the beginning of the First World War, Leurquin noted (1916: 54-55) that "if the occupation is extended, where, after the war, the economic and social situation of the occupied country changes, new legislative measures will obviously have to be adopted sooner or later ".

In this sense, Sassòli (2005: 679) suggests an extensive interpretation of the notion of military necessity in order to exclude the conservationist principle in prolonged occupations, fill an alleged legislative gap of the overthrown sovereign and not interrupt the development of the territory. Similarly, Schwenk (1945) stresses that such an interpretation of the legislative power of the occupier facilitates the re-establishment of public order and civilian life in the territory under occupation.

44 On how authority is exercised, *see* District Court of The Hague, Holland, *K.N.A.C. v. State of the Netherlands* (8 June 1949), *Annual Digest and Reports of Public International Law Cases,* vol. XVI, pp. 468-469, where it was stated: "though the regime envisaged by the Hague Regulations for occupied territory comprised a military administration with civil departments subordinate to it, the setting up by the occupant of a separate civil administration to control the existing civil administration left functioning, was not forbidden and must, on the contrary, be held to be a permissible complement of the maintenance of the latter administration in office"; Supreme Court of Israel, Ansar Prison, case no. HCJ 593/82, Judgement, 13 July 1983, where it was noted: "the application of the third chapter of the Hague Rules or of the parallel instructions in the Fourth [Geneva] Convention are not conditioned upon the establishment of a special organisational framework in the form of a Military Government".

45 For example, a French manual recommended the establishment of new courts in situations of prolonged occupation where local courts had ceased to function, *see* France, Ministry of War. (1884). *Manuel de droit international a l'usage des officers de l'armée de terre* [International law handbook for army officers]. Paris, L. Baudoin .

5.2. Time as a factor inhibiting the occupier's legislative power and the notion of military necessity

The opposing legal argument puts forward that the temporary extension of an occupation does not alter the concept of military necessity and, at most, restricts rather than expands it. Indeed, the extension of the occupier's legislative power in protracted occupations can lead to illegal annexations (Koutroulis, 2012: 182) or even lay the foundations for institutional discrimination constituting the crime of apartheid (Roberts, 1990: 52).

It should be noted that a permanent system of control and discrimination against Palestinians has been established by Israel through a biased interpretation of the law of belligerent occupation, as we shall see in more detail in section 5 of this article[46]. In particular, the expansion of the military authorities' discretionary power and the rejection of the customary conservationist principle have eroded Palestinians' protection under Article 4 of GC IV (Harpaz *et al.,* 2010). It is worth noting that the occupied population is better protected by IHL than by the discretionary decisions taken by the military commander, which is a delegation of authority from the legislature to the executive (Schlag, 1985): 386-87), which may include strategic considerations unrelated to the requirement maintaining public order and civilian life for the benefit of the local population.

Moreover, even if we were to ignore the risks of expanding military discretion in protracted occupations, from a factual perspective, the temporal factor restricts rather than increases the degree of military necessity, and even increases the occupier's duties of protection (Roberts, 1990). In fact, the longer the occupation lasts, the more consolidated the the power of the occupier becomes, and thus the more difficult it will be for him to invoke reasons of military necessity to adopt extraordinary measures or to argue that insurmountable obstacles prevent him from guaranteeing the welfare of the occupied population (Jones, 1923: 159).

Indeed, as we saw in the previous section,[47] the decisive factor in reducing the legislative powers of the occupying power does not lie in the duration of the occupation, but in the partial or total cessation of hostilities, since this implies the reduction of military needs[48]. As underlined by Switzerland, in the ICJ's *Wall Advisory Opinion*: "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"[49].

46 *See infra* par. 5.

47 *See,* section 3.

48 *E.g.,* it will be more difficult to justify the destruction of property under the military necessity exception of Art. 53 GC IV, once military operations are concluded (Koutroulis, 2012: 192; Roberts, 1990).

49 *Wall Advisory Proceedings* (2004), *Written Statement*. 30 January 2004, p. 6.

In this sense, protracted occupations resemble *peaceful* occupations, in which the powers of the occupier are much more limited than in a belligerent occupation (Roberts, 1990: 52), as the occupier's prerogatives to protect his troops from the enemy's domestic population lose their rationale.

6. Palestine as a case study

As noted in the introduction to this article, the Israeli occupation of Palestine is a model case of prolonged occupation, characterised by profound legal and institutional reforms in violation of the conservationist and minimalism principles (Dinstein, 2004: 8)[50]. This case study is particularly interest because unlike other occupations[51], it is the only one so far in which the occupant has acknowledged its status. It is therefore appropriate to examine, on the one hand, the change in the Israeli Supreme Court's case law in order to legitimise the occupation over time and, on the other hand, the response of the primary international courts and bodies of the UN system.

6.1. The Israeli Supreme Court's interpretation of the law of military occupations

The regime of oppression and discrimination against Palestinians is supported by the jurisprudence of the Israeli Supreme Court, which Harpaz describes as "legal acrobatics" (2010: 515), that simultaneously regulate and legitimise occupation (Ferraro, 2008: 338). The Israel executive gradually instrumentalised the court, and two jurisprudential phases can be distinguished: (i) a first phase of *moderate transformative occupation and (ii) a second phase of benevolent occupation*.

The first phase of *moderate transformative occupation* involved a discreet respect for the conservationist principle. Thus, for example, in the *Elon Moreh* judgement, concerning the expropriation of Palestinians to create Jewish settlements, the court opposed the implementation of reforms by the military government that were to last: "after the termination of the military rule in that area, when the fate of the territory after termination of the military rule is unknown"[52].

50 This also occurred with a prior British occupation during the First World War: although the UK kept the Ottoman laws in force, it implemented profound reforms under the pretext of safeguarding the interests of the occupied people (Dinstein, 2004: 8).

51 "China's occupation and annexation of Tibet, the Indonesian invasion and annexation of East Timor, the Moroccan annexation of Western Sahara in the mid-1970s, South Africa's occupation of Namibia [...], the Vietnamese occupation of Cambodia in 1978, the Soviet intervention in Afghanistan in 1979, the US interventions in Grenada in 1983 and Panama in 1989, the Iraqi invasion and annexation of Kuwait in 1990, and Turkey's occupation of Northern Cyprus" (Arai-Takahashi, 2009: 4).

52 *See* Supreme Court of Israel, *Dweikat et al. v. Government of Israel et al.* Case no. HCJ 390/79, Judgement, 1979 (*Elon Moreh* judgement).

In contrast, the second jurisprudential phase of *benevolent occupation* constituted a pure legitimisation of the occupier (Kretzmer, 2012: 227). In particular, the court adjusted the application of IHL to extend the occupier's powers given the protracted nature of the occupation (Kretzmer, 2012: 227). In the *Quarries* judgement,[53] *for example, the court found that Israeli quarrying activities in the OPT did not violate Article 55 of the Hague Regulations, which limits the use of public property in the occupied territory to mere usufruct.* The Court authorised the quarrying complained of, noting that "traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the area", despite the fact that the article in question did not provide for any possible legislative competence of the occupier in this matter[54].

It should also be underlined that, in its initial *moderate occupation* jurisprudence, the court recognised that the notion of military necessity refers exclusively to that of troops in the occupied territory. Thus, in the *Beth El* judgement, the Court ruled that private Palestinian land could be expropriated to build an Israeli civilian settlement in a strategic location only if it contributed to the military defence of that occupied territory[55].

In contrast, in its later *benevolent occupation* jurisprudence, the Court expanded this notion of military necessity to include the security of the State of Israel itself. In particular, in the *Mar'abe* judgement, the court departed from its initial position that military necessity was limited to that of military forces located in the OPT and ruled that the military authorities could adopt security decrees to protect the State of Israel, within the 1967 borders, from terrorist attacks launched from outside[56].

Finally, it should be noted that, in the first jurisprudential phase, the court restricted the *ratione personae* application of GC IV guarantees to the occupied population. For example for illustrative purposes, in the *Value Added Tax* ruling, the Court recognised that the status of protected population was exclusive to the Palestinians, so that in order to validate the introduction of a new tax in OPT, it used the pretext of benefiting the Palestinians[57].

53 *Cfr.* Supreme Court of Israel, "*Yesh Din" - Volunteers for Human Rights v. The Commander of IDF Forces in the West Bank and others*, case no. HCJ 2164/09, Judgement, 26 December 2011 (*Quarries* judgement).

54 Article 55: "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".

55 *See* Supreme Court of Israel, *Ayyub v. Minister of Defence,* case no. HCJ 606/78, Judgement, 1988 (*Beth El* judgement) which stated "as regards the pure security aspect, it cannot be doubted that the presence in occupied territory of settlements –even 'civilian' settlements– of citizens of the occupying power contributes appreciably to security in that territory and makes it easier for the army to carry out its task".

56 *See* Supreme Court of Israel, *Zaharan Yunis Myhammad Mara'abe et al. v. The Prime Minister of Israel et al.* Case No. HCJ 7957/04, Judgement, 15 September 2005, (*Mar'abe* judgement).

57 *See* Supreme Court of Israel, *Abu Itta et al. v. IDF Commander in Judea and Samaria et al.* Case no. HCJ 69/81, Judgement, 1983 (*VAT* judgement).

On the other hand, in the second *benevolent occupation* phase, the Court included not only the occupied population but also the residents of the illegal Jewish settlements in the OPT, and even the residents of the State of Israel itself within the scope of the application of occupation law. In particular, the court noted in the *Bethlehem* judgement that the military commander had the power, under the Hague Regulations and GC IV, to issue orders offering protection to Jewish worshippers, on the basis that "Jewish worshippers have a basic right of freedom of worship at Rachel's Tomb" and the military authorities should ensure "the exercise of freedom of worship while ensuring the safety of the worshippers"[58]. Similarly, in the *Abu Safiya* judgement , the Court ruled that the military authorities must ensure the safety of all travellers on a particular route, including Israeli travellers who live in the State of Israel but decide to take that route for whatever reasons (Harpaz *et al*, 2010: 535).

In our view, this blatant extension of the *ratione personae* application of the law of belligerent occupation distorted its raison d'être (Gross, 2007: 1-35), i.e. to protect those who fall into the hands of "a Party to the conflict or Occupying Power of which they are not nationals". (Art. 4 GC IV) and put different categories of civilians in competition to have their interests protected and safeguarded by the occupier.

It follows from the above that the interpretation of the law of military occupations by the Israeli Supreme Court has allowed for the expansion of the occupier's discretionary and legislative powers, thus legitimising the gradual establishment of a regime of systematic and discriminatory control of the Palestinian population, under the legal cover of interpreting IHL, in our view, in a biased manner. This instrumentalisation of the judiciary to legitimise the current occupation is likely to grow in the future, as the proposed reform of the judiciary on 6 January 2023 could further limit the independence of the judiciary in Israel. Indeed, if approved, the reform would weaken the separation of powers, change the system for electing judges and allow the Parliament to re-adopt rules previously overturned by the Supreme Court[59].

6.2. The interpretation of the law of occupation by international courts and UN bodies

The UN has been watching the Palestinian issue for more than half a century, when the 1947 Partition Plan divided the British mandate into an Arab and a Jewish state, leading to the creation of Israel in 1948. The Israeli-Palestinian conflict has thus been the subject of numerous resolutions by UN bodies.

58 *See* Supreme Court of Israel, (2005). *Bethlehem Municipality v. The Minister of Defense*, case no. HCJ 1890/03, Judgement.

59 Pita, A. (2023). The keys to explaining the protests and the serious institutional crisis in Israel. *El País*, 27 March. [Accessed: April 2023]. Available at: https://elpais.com/internacional/2023-03-27/las-claves-que-explican-las-protestas-y-la-grave-crisis-institucional-en-israel.html

The Security Council enshrined the principle of "land for peace" in its resolutions 242 of 22 November 1967 and 338 of 22 October 1973, reaffirmed the notion of coexistence between the two states in its resolution 1397 of 12 March 2002 and banned Israeli settlements in the OPT in its famous resolution 2334 of 23 December 2016.

Since 1997, the General Assembly has held its tenth Emergency Special Session (Vacas Fernández, 2015: 11). It also established the Committee on the Exercise of the Inalienable Rights of the Palestinian People under resolution 3376 of 10 November 1975. On 30 December 2022, the UN General Assembly adopted resolution 77/247 requesting the ICJ to give an advisory opinion on the following question:

> "What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?"

Since 2006, the Human Rights Council has taken over from the Commission on Human Rights within ECOSOC (Vacas Fernández, 2015: 11). Most recently, on 27 May 2021, the Human Rights Council adopted resolution S-30/1, by which it

> "Decides to urgently establish an ongoing independent, international commission of inquiry [...] to investigate in the Occupied Palestinian Territory, including East Jerusalem, and in Israel all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since 13 April 2021."

To date, the new international commission of inquiry has issued two reports. In its report of 14 September 2022 , the Commission of Inquiry concluded that the *protracted* nature of the Israeli occupation is "contrary to international law because of its *permanent* nature" concealed by a "fiction of temporariness" that implies irreversible transformations in the occupied territory, as well as territorial annexations by force. In the report of 7 June 2022, the Commission reiterated the existence of evidence pointing to the permanent nature of the Israeli occupation of Palestine, as well as to the State's intention to permanently annex the occupied territory.

The ICJ is currently studying the advisory opinion submitted to it by the General Assembly on 30 December 2022. In its latest advisory opinion, the *Wall Advisory Opinion*, already mentioned throughout this article, the ICJ concluded that Israel's construction of a wall and Israeli settlement measures in the OPT contravened IHL and the safeguarding of human rights. Furthermore, the ICJ has already warned that the prolonged occupation in the OPT risks becoming permanent and thus a *de facto* annexation, contrary to the principle of respect for the national sovereignty and self-determination of the Palestinian people.

With regard to the question of whether the temporal factor of the occupation excluded the application of certain IHL norms (as we have pointed out in section 3 of this article), the ICJ ratified the validity of the one-year period, set out in Article 6.3 GC IV, after which a set of obligations of the occupier, fundamental for the protection of the occupied population, would cease to apply. Specifically, the ICJ considered that "one year after the general cessation of military operations" (Art. 6.3 GC IV), nine guarantees to the benefit the occupied population ceased to apply and that this legal gap had to be filled by human rights protection instruments. This article has argued that giving primacy to the *lex generalis* of human rights treaties over the *lex specialis* of armed conflict is counter-productive in terms of the object and purpose of the treaty. Indeed, the occupier's obligations under IHL are more specific and stringent, and the population under occupation is expressly recognised as a beneficiary of protection in Art. 47 GC IV. On the contrary, human rights protection instruments cover all persons, so that they can be used by the occupier to promote the interests of its national citizens *vis-à-vis* the occupied population.

Finally, we must stree that the Palestinian issue is also the subject of an international criminal investigation. The ICC opened a Preliminary Examination on the situation in Palestine on 16 January 2015. Following the positive outcome of that review, in February 2021, the ICC declared itself competent to prosecute the international crimes perpetrated in the OPT[60] and the following month the Office of the Prosecutor opened a formal investigation[61]. In addition, several human rights NGOs have denounced Israel's systematic oppression and discrimination against Palestinians as constituting apartheid and persecution under both the Apartheid Convention and the Rome Statute[62].

7. Conclusion

From what has been considered above, we can conclude that the creation of an autonomous legal regime for prolonged occupations, from a legal rationale, does not present a comparative advantage to the already existing IHL for occupations. Indeed, the conservationist principle and the prohibition on annexation, which are the pillars

60 ICC, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*, Case no. ICC-01/18 (Pre-Trial Chamber I), 5 February 2021. Available at: https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF.

61 Bensouda, F. (2021). Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine. ICC. 3 March. [Accessed: April 2023]. Available at: https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine.

62 Amnesty International (2022). Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity. 1st ed. London: Peter Benenson House. [Accessed: April 2023]. Available at: https://www.amnesty.org/en/wp-content/uploads/2022/02/MDE1551412022ENGLISH.pdf; Human Rights Watch, (2021). A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution. New York: Human Rights Watch. [Accessed: April 2023]. Available at: https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf

on which the IHL of occupations rests, are intended to protect the occupied population and its legitimate institutions. If we were to agree to grant broader legislative powers and greater discretion to the occupier in the case of prolonged occupations, dismissing the above principles, this would open the door to the legitimisation of his de facto power and, eventually, the annexation of the occupied territories.

As noted in this text, there are two exceptional situations in which the occupier is authorised to legislate by altering the existing legal and institutional order: when it is indispensable for reasons of military necessity or to fulfil its obligations as a state party to GC IV. Some long-term occupying powers, such as Israel, have so broadly interpreted such exceptional situations as to make the exception the rule. Hence, we have considered in this article whether time can negate the application of IHL or, if not, whether it ends up modifying to some degree the scope of the occupying power's legislative power in the territories under its control.

It follows from our analysis that the time limit for the expiry of certain IHL rules in belligerent occupations —set by Art. 6.3 GC IV at one year— has been abrogated by Art. 3(b) AP I 1977, as well as by international custom. However, even assuming that the aforementioned Art. 6.3 of GC IV continues to apply —as the ICJ does in its *Wall Advisory Opinion*— our analysis suggests that it should not be interpreted as a merely temporal limit but of a substantive nature, according to which IHL ceases to apply to belligerent occupations when it loses its raison d'être, that is, when governmental functions are restored to the legitimate institutions of the occupied state.

In this sense, it does not seem necessary to close any loopholes in the IHL of belligerent occupations, but rather to interpret it in accordance with the protective and humanitarian purpose of GC IV. In this article, we have argued that the application of the *lex generalis* of human rights protection instruments, rather than the *lex specialis* of armed conflict, in situations of prolonged occupation undermines the protections of the occupied population. This is because the occupier's obligations under IHL are more concrete and stringent, and also because the occupied population is explicitly recognised as the beneficiary of the occupier's protection in Art. 47 GC IV, which avoids placing their interests in competition with those of the nationals of the occupying state.

While the protracted nature of the occupation does not preclude the application of IHL, our study suggests that it may influence its application. Some legal experts conceive of the temporal factor as a catalyst for the legislative power of the occupying power, due to an expansive interpretation of the notion of military necessity when the occupation extends over a long enough period. Instead, our analysis suggests that the prolongation of an occupation does not change the concept of military necessity, and at most limits rather than amplifies it. Indeed, the longer the occupation lasts, the stronger the occupier's presence in the territory will be, and therefore the more difficult it will be to justify extraordinary measures on the grounds of alleged military exigencies or to argue that insurmountable obstacles prevent it from safeguarding the interests of the occupied people.

Therefore, while the law of belligerent occupation may authorise the occupier to stray from the conservationist principle on extraordinary occasions and thus to grant differential legal treatment for nationals of the occupying state and those of the occupied territory, this does not mean that it may do so in order to establish a system of discrimination and oppression in the long term, as has occurred in the OPT. In other words, the problem is not the adequacy of IHL to govern protracted occupations, but its exploitation as a cover for *de facto* annexation. The issue is not the existence of legal gaps in IHL, which ought to be filled by other legal systems, but the need to interpret it in accordance with its purpose of protecting the occupied population from the occupier.

From our study of the jurisprudence of the Israeli Supreme Court, it is clear from a domestic law perspective of the occupier, this body has legitimised the gradual construction of a discriminatory and oppressive regime against the Palestinian population. Furthermore, from an international law perspective, our study of resolutions and decisions of the main UN bodies, as well as the jurisprudence of the ICJ and the ICC, suggests that there is a broad consensus in the international community on the illegality of the prolonged occupation in the OPT.

In the years to come it will be seen whether the ICC prosecutor's investigation will finally respond to the growing demands of civil society and the international community to end the impunity of the Israeli state. Only the future will tell whether the Palestinian people will achieve the protection of their right to self-determination, and liberation from the Israeli oppression to which they have been subjected for more than half a century.

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