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Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding

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SUMMARY

Article 43 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (II) of 1899 and (IV) of 1907, is the linchpin of the international law of belligerent occupation.

Two diverse obligations are imposed on the Occupying Power by Hague Article 43: (a) to restore and ensure, as far as possible, public order and life in the occupied territory; (b) to respect the laws in force in the occupied territory unless an "empêchement absolu" exists. The first obligation has to be implemented by the executive (and the judicial) branch of the Military Government of the Occupying Power, whereas the second obligation devolves to the legislative branch. The first obligation requires acts of commission, and the second duty postulates primarily acts of omission. Neither obligation is absolute.

Although in principle the Occupying Power has to maintain the laws in force in the occupied territory, it is generally understood that the preexisting legal system can be modified through new legislation when a necessity arises. In principle, any legislation enacted by the Occupying Power in the name of necessity applies in the occupied territory during the occupation and not beyond that stretch of time.

Article 64 of the 1949 Fourth Geneva Convention expresses in a more precise and detailed form the terms of Article 43 of the Hague Regulations. Without exhausting the concept Article 64 allows for suspension or repeal of existing laws and the enactment of new legislation in three exceptional situations: (i) the need of the Occupying Power to remove any direct threat to its security and to maintain safe lines of communication, (ii) the duty of the Occupying Power to discharge its duties under the Geneva Convention, and (iii) the necessity to ensure the "orderly government" of the occupied territory. Obviously, the orderly government exception becomes more prominent under conditions of prolonged occupation. It is, therefore, required to establish a litmus test for resolving disputes concerning the validity of legislation enacted by the Occupying Power in the name of orderly government.

How far can the Occupying Power go in tampering, in the name of necessity, with the institutions of government of the occupied territory? Under Article 47 of the Fourth Geneva Convention, should institutional changes be introduced by the Occupying Power, they must not deprive the civilian occupation in the occupied territory of any benefits conferred by international humanitarian law. But the paramount question is whether the Occupying Power can transform radically the political institutions of government in the occupied territory when its action does not affect adversely those benefits. While the practice of States is somewhat ambiguous, it is believed that such changes ought to be undertaken only by the territorial sovereign. The Occupying Power should not be allowed to interfere with fundamental institutions of government in the occupied territory, inasmuch as there is a disquieting possibility that the structural innovations (albeit temporary in theory) may take root and have enduring consequences.

Under the Hague Regulations and the Fourth Geneva Convention, the rules stated above relate only to belligerent occupation. However, there is possibly room for their application by analogy also in circumstances of peacebuilding, subject to any binding resolution adopted by the United Nations Security Council.

Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding

By Professor Yoram Dinstein

Article 43 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (II) of 1899 and (IV) of 1907, is the linchpin of the international law of belligerent occupation. In its common English translation (1907 version), Article 43 reads:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[1]

The authentic (and binding) French text of Article 43 lays down:

> 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 vigueur dans le pays.[2]

The juxtaposition of the two versions of Article 43 shows discrepancies between them. The most blatant mistranslation relates to the first part of the provision where the phrase "*l'ordre et la vie publics*" (i.e., public order and life) is rendered in English as "public order and safety". Safety, which is not mentioned at all in French, thus comes to the fore in English. This peculiar slip in the translation — left uncorrected so many years — is most unfortunate since the French text, and only the French text, is authentic.

Article 43 and peacebuilding

Article 43, which relates to belligerent occupation, applies to peacebuilding only by analogy. This analogy — like all analogies — is imperfect, since the circumstances of peacebuilding and belligerent occupation are completely different. In particular, the underpinning of peacebuilding is a Security Council resolution, whereas belligerent occupation is predicated upon general international law.

It follows that, in Kosovo and East Timor (leading examples of peace-building), Article 43 is not really applicable (except, possibly, by analogy). Even in Iraq in 2003-2004 (a clear-cut case of belligerent occupation), it was necessary to consult relevant Security Council resolutions. When acting in a binding fashion (pursuant to Chapter VII of the UN Charter), the Security Council can validly override general international law (unless *jus cogens* is involved).

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[1] Regulations Respecting the Laws and Customs of war on Land annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *The Laws of Armed Conflicts*: *A Collection of Conventions, Resolutions and Other Documents* 55, 66, 78 (D. Schindler and J. Toman eds., fourth edition, 2004).

[2] Convention Concernant les Lois et Coutumes de la Guerre sur Terre, 1907, 205 *Consolidated Treaty Series* 277, 295 (C. Parry ed., 1980).

Structure and scope of Article 43

When one consults the *travaux préparatoires* of Article 43, it becomes apparent that, as initially drafted (in Articles 2 and 3 of the 1874 Brussels Draft International Declaration on the Laws and Customs of War), the provision consisted of two separate clauses:

> II. L'autorité du pouvoir légal étant suspendue et ayant passée 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 publique.
>
> III. À cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ne les remplacera que s'il y a nécessité.[3]

A similar structure of two consecutive stipulations characterized also the counterpart Articles 43-44 of the influential Oxford Manual, adopted by the Institute of International Law in 1880.[4]

The contraction of the two separate Brussels (and Oxford) provisions into a single text in Hague Article 43 was brought about in response to an apprehension, voiced in the course of the Hague Conference of 1899, that Brussels Article 3 — when standing alone — might be construed as conceding to the Occupying Power far-reaching legislative powers.[5] Still, the ensuing syntactic amalgamation of Brussels Articles 2 and 3 into a single Hague Article 43 does not impinge upon the substantive duality of the concepts involved therein.

Two diverse obligations are imposed on the Occupying Power by Hague Article 43: (a) to restore and ensure, as far as possible, public order and life in the occupied territory; (b) to respect the laws in force in the occupied territory unless an "*empêchement absolu*" exists. The two obligations have to be read independently of each other in the following three significant respects.

- The first obligation has to be implemented by the executive (and the judicial) branch of the Military Government of the Occupying Power, whereas the second obligation devolves on the legislative branch.

- In the final analysis, the first obligation requires acts of commission: the Occupying Power must take the necessary and proper measures in order to restore and ensure public order and life. Conversely, the second duty postulates primarily acts of omission: avoiding the repeal or suspension of existing laws, except in cases of "*empêchement absolu*".

- Neither obligation is absolute, but each is subject to a different qualifying phrase, which fine-tunes the general rule and allows deviation from it. The first obligation applies "*autant qu'il est possible*" (as far as possible). The second obligation is subject to the saving proviso of "empêchement absolu".

This paper is not concerned with the first part of Article 43.[6] It confines itself to the meaning and scope of the second part concerning legislation.

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[3] Projet d'une Déclaration Internationale concernant les Lois et Coutumes de la Guerre, 1874, 65 *British and Foreign State Papers* 1059, 1059-1060.

[4] Oxford Manual Adopted by the Institute of International Law, 1880, *The Laws of Armed Conflicts, supra* note 1, at 29, 35-36.

[5] See E.H. Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," 54 *Yale Law Journal* 393, 396-397 (1944-1945).

[6] On this subject, see Yoram Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague

The meaning of the phrase "*les lois en vigueur*"

In accordance with the second part of Article 43, the Occupying Power must respect "les *lois en vigueur*" (the laws in force) in the occupied territory, except in cases of "*empêchement absolu*". Respect means that — as spelled out in the Brussels Declaration — the Occupying Power has to maintain the laws in force and not modify, suspend or replace them with its own legislation. The term "*les lois*" appears to encompass only promulgated laws (whether basic or trivial; national or municipal; civil or criminal; substantive or procedural). Yet, there is no indication that the framers of the Hague regulations intended to exclude from the ambit of Article 43 'common law', tribal law (especially of indigenous and nomadic people) or other forms of domestic customary law.

As for the phrase "*en vigueur*", once more the Brussels Declaration is more precise in adverting to "*les lois qui étaient en vigueur dans le pays en temps de paix*". Surely, Article 43 "refers only to those laws which were 'in force' in the occupied territory at the time of the commencement of the occupation".[7] What this denotes is that the Occupying Power is not bound to respect any laws enacted by the absent territorial sovereign subsequent to the commencement of the occupation.[8]

Nevertheless, for reasons of expediency, the Occupying Power may freely choose — "whenever military and political conditions permit" — to give effect in the occupied territory to specific legislation (which meets with the occupant's approval) enacted by the absent territorial sovereign subsequent to the commencement of the occupation.[9] It must also be taken into account that Article 43 does not purport to have any impact on the relations between the absent territorial sovereign and its own nationals living in the occupied territory. The allegiance of these nationals is not diminished by the occupation. As held by the Supreme Court of Norway, in the *Haaland* case of 1945, notwithstanding its absence from the occupied territory, the territorial sovereign may enact criminal legislative measures pertaining to the conduct of its nationals during the occupation (especially where treason is concerned); naturally, such legislative measures will be carried into effect only after the end of the occupation.[10]

The meaning of the phrase "*empêchement absolu*"

Since, in accordance with the second part of Article 43, the duty of the Occupying Power to respect the laws in force in the occupied territory (predating the occupation) is subject to the exception of "*empêchement absolu*", the crucial question is when does an "*empêchement absolu*" exist? Although the phrase sounds exceedingly restrictive, there is virtually a consensus in the legal literature that "*empêchement absolu*" is not as categorical as it seems. Indeed, "[t]he term 'absolutely prevented' has never been interpreted literally".[11] The common interpretation of Article 43 is that "*empêchement absolu*" is the equivalent of "*nécessité*" (the original language of Brussels Article 3). When a necessity arises, the Occupying Power is allowed to enact new legislation, repealing, suspending, or modifying the preexisting legal system.

Regulations," 25 *Israel Yearbook on Human Rights* 1, 12-16 (1995).

[7] E. Stein, "Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre," 46 *Michigan Law Review* 341, 349 (1947-1948).

[8] See C.C. Hyde, 3 *International Law* 1886 (second edition, 1945).

[9] See Stein, supra note 7, at 362.

[10] *Public Prosecutor v. Reidar Haaland* (Norway, Supreme Court [Appellate Division], 1945), 12 *Annual Digest and Reports of Public International Law Cases* 444, 445 (1943-1945).

[11] E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* 89 (1942).

It must be borne in mind that, in principle, any legislation enacted by the Occupying Power in the name of necessity applies in the occupied territory during the occupation and not beyond that stretch of time. The occupant's legislation ceases to be valid as soon as the occupation has ended, unless the returning territorial sovereign opts to keep that legislation intact.[12] For various practical reasons, the returning territorial sovereign would often elect to maintain in force — if only for a transition period — at least segments of the legislation enacted by the Occupying Power.[13] Indeed, irrespective of any transition period, it may prove difficult (if not impossible) to turn the clock back should certain legislation introduced by the Occupying Power gain general acceptance and support. Realistically, "any lengthy military occupation brings about certain changes in legal and other spheres which cannot be completely wiped out after the return of the legitimate sovereign".[14]

Article 64 of the Fourth Geneva Convention

What, then, amounts to a necessity for the Occupying Power to replace the laws in force in the occupied territory with legislation of its own? The answer to that question is authoritatively enshrined in Article 64 of the Fourth Geneva Convention:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[15]

The structure of Article 64 is peculiar. The first paragraph speaks solely of penal laws, yet the second paragraph deals with legislation in more general terms. Then, the first paragraph is concerned with two categories of exceptional situations (threats to the security of the Occupying Power and obstacles to the application of the Geneva Convention), whereas the second paragraph mentions three (the same two plus the need to maintain the orderly government of the territory). Then again the first paragraph speaks of not repealing or suspension existing legislation, while the second paragraph uses the phraseology of subjecting the population to (i.e., enacting) certain provisions.

The following observations are called for:

- The text of Article 64 is generally viewed as an 'amplification' of Hague Article 43.[16] "Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations".[17] The framers of Article 64 "took it for granted that it had not extended the traditional scope of occupation legislation".[18]

[12] See Lord McNair and A.D. Watts, *The Legal Effects of War* 388-389 (fourth edition, 1966).
[13] See J.H.W. Verzijl, 9 *International Law in Historical Perspective* 160 (1978).
[14] G. von Glahn, *The Occupation of Enemy Territory* 257 (1957).
[15] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *The Laws of Armed Conflicts*, supra note 1, at 575, 598-599.
[16] R.T. Yingling and R.W. Ginnane, "The Geneva Conventions of 1949," 46 *American Journal of International Law* 393, 422 (1952).
[17] *Commentary*, *IV Geneva Convention* 335 (ICRC, O.M. Uhler and H. Coursier eds., 1958).
[18] G. Schwarzenberger, *The Law of Armed Conflict* 194 (1968).

- The reference in the first paragraph of Article 64 to penal laws is somewhat baffling, yet "the entire legal system must be taken into consideration here".[19] In the words of the International Committee of the Red Cross (ICRC) Commentary, "there is no reason to infer *a contrario* that that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution".[20] The two paragraphs of Article 64 must be read together.

- Again, the two paragraphs of Article 64 must be read together in other respects as well. Notwithstanding their linguistic differences, what the joint provision allows for is suspension or repeal of existing laws and the enactment of new legislation in three exceptional situations.

The three specific dimensions of necessity

What can be learned from the more detailed wording Article 64 is that the concept of necessity has three specific dimensions. We shall address these three rubrics seriatim. However, it must be perceived at the outset that they do not exhaust the concept of necessity, and occasionally there are cases transcending the threefold classification. An irrefutable example is the necessity to revise the laws in force in an occupied territory when they grant a right of appeal from local courts to a higher tribunal functioning in an unoccupied portion of the country. It goes without saying that the Occupying Power does not have to submit to such dependence on enemy institutions, and (while the case does not come strictly within any of the three rubrics taken individually) the concept of necessity is sufficiently comprehensive to allow an amendment of the laws in force, with a view to disconnecting the nexus to that higher tribunal for the duration of the occupation.[21]

The three dimensions of necessity pursuant to Article 64 are discussed below.

- The first and foremost dimension of necessity is the fundamental — and unassailable — need of the Occupying Power to remove any direct threat to its security (including the security of members of its armed forces or administrative staff, as well as the property of the Occupying Power and those employed in its service) and to maintain safe lines of communication. Thus, clearly, the Occupying Power may impose by law a prohibition on the possession of firearms or a curfew; it may enact anti-riot legislation; and it may severely punish any act of terrorism directed at its personnel or facilities. It may also impose limitations on freedom of the press, freedom of association, freedom of movement, and so forth.[22]

- Secondly, necessity incorporates the duty of the Occupying Power to discharge its duties under the Geneva Convention (and, by extension of this principle, to implement any other obligations derived from international law whether customary or conventional). For instance, the Occupying Power may repeal by law, e.g., "any adverse distinction based, in particular, on race, religion or political opinion", such adverse distinction running counter to the third Paragraph of Article 27 of the Geneva Convention.[23]

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[19] H.P. Gasser, "Protection of the Civilian Population," *The Handbook of Humanitarian Law in Armed Conflicts* 209, 255 (D. Fleck ed., 1995).

[20] *Commentary*, *supra* note 17, at 335.

[21] See C. Fairman, "Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste," 45 *American Journal of International Law* 541, 548 (1951).

[22] See Christopher Greenwood, "The Administration of Occupied Territory in International Law," *International Law and the Administration of Occupied Territories* 241, 247-248 (Emma Playfair ed., 1992).

[23] Geneva Convention (IV), supra note 3, at 589.

This dimension of necessity calls for a comment. The second Paragraph of Article 64 is couched in language of entitlement ("may"), rather than obligation, when conferring on the Occupying Power the authority to alter the preexisting legislation.[24] However, like all other Contracting Parties of the Geneva Convention, the Occupying Power has unconditionally undertaken (in Article 1) "to respect and to ensure respect" for the Convention "in all circumstances".[25] The implementation of the Geneva Convention is not contingent on compatibility with domestic legislation. On the contrary, Contracting Parties have to enact any enabling domestic legislation required to give effect to the Geneva Convention (a matter expressly addressed in the first Paragraph of Article 146 with regard to effective penal sanctions against persons committing grave breaches of the Convention[26]). Article 27 of the 1969 of the Vienna Convention on the Law of Treaties confirms the general rule that a Contracting Party to a valid treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[27] If this is true of the Occupying Power's own legislation, it should *a fortiori* be true of the domestic laws in force in the occupied territory. The Geneva Convention must prevail over any conflicting local legislation in the occupied territory.[28] That means that the laws in force in the occupied territory must be adapted where necessary to the Geneva Convention (and, indeed, to any other binding instrument of international humanitarian law).

The distinction between what the Occupying Power may or must do in this field has significant practical repercussions when the Occupying Power is pleased with, and more than willing to strictly apply, some legislation — in force in the occupied territory at the commencement of the occupation — which is inconsistent with international humanitarian law. The leading illustration has been the Israeli reliance on Emergency Regulations, in force in the West Bank and the Gaza Strip on the eve of the occupation (and dating back to the British Mandate), permitting the authorities to destroy private property as a punitive measure, and not merely "where such destruction is rendered absolutely necessary by military operations" (as required by Article 53 of the Geneva Convention,[29] based on Article 23(g) of the Hague Regulations[30]). In a series of cases relating to the punitive demolitions of houses from which terrorist attacks have been launched, the Israel Supreme Court held that the demolitions were lawful inasmuch as they had been carried out in conformity with the local Emergency Regulations; but in the opinion of the present writer, the Occupying Power was bound to repeal or suspend these Regulations and certainly it could not legitimately rely on them.[31]

- Thirdly, there is a recognized necessity to ensure the "orderly government" of the occupied territory. This category of necessity is more open-ended than a cursory reading of Article 64 might suggest. Generally speaking, international humanitarian law is based on a delicate balance between two magnetic poles: military necessity, on the one hand, and humanitarian considerations, on the other.[32] The dichotomy of military necessity and humanitarian consideration exists also in the present context. The needs of the Occupying Power do not negate the requirements of the civilian population under occupation, and the

[24] The point is emphasized by J. Stone, *No Peace – No War in the Middle East* 15 (1969).
[25] Geneva Convention (IV), supra note 3, at 580.
[26] Ibid., 624.
[27] Vienna Convention on the Law of Treaties, 1969, [1969] *United Nations Juridical Yearbook* 140, 148.
[28] See *Commentary*, *IV Geneva Convention*, *supra* note 17, at 336.
[29] Geneva Convention (IV), supra note 3, at 596.
[30] Hague Regulations, supra note 1, at 73.
[31] See Yoram Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses," 29 *Israel Yearbook on Human Rights* 285-304 (1999).
[32] See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 16-20 (2004).

legislative power vested in the occupant is broad enough to take the latter into account.[33] Law is a living organism and conditions cannot be frozen: *tempora mutantur* and the Occupying Power must possess the right to modify the legislation in force, in order "to maintain the orderly government of the territory". Especially when an occupation goes on for years, its prolongation brings about the imperative need to open more widely the range of new legislation, which the Occupying Power is entitled to enact.[34]

Prolonged occupation

The most extreme case of a prolonged occupation in modern times is that of the Israeli occupation of Palestinian territories (which has been going on since 1967). Interestingly, if one is looking for a precedent of an earlier prolonged (albeit much less prolonged) occupation — and a relatively broad spectrum of legislation by the Occupying Power, which has never been challenged — it is not necessary to look for a different part of the world. When the Ottoman province of Palestine came under belligerent occupation by the British — during World War I and shortly thereafter (prior to the entry into force of the Mandate for Palestine) — the British military authorities arrived at the conclusion that the prolonged occupation called for special measures. Hence, while retaining in essence the (Ottoman) laws in force, they issued Orders concerning the carrying of firearms, communication with the enemy, currency, food prices, public health and sanitation, cruelty to animals, cutting down trees, rent control, as well as preservation of antiquities; and even introduced changes in court procedure, in order to shift it somewhat from European continental to Anglo-Saxon patterns.[35] Unmistakably, whereas the Orders pertaining to the carrying of firearms and communication with the enemy were geared to the needs of the Occupying Power, Orders concerning rent control and cruelty to animals were enacted to serve the interests of the "orderly government" of the occupied territory.

As the British legislation in Palestine almost a century ago shows, the Occupying Power — under conditions of a prolonged occupation — may regard it a necessity to alter the laws in force in the occupied territory, in order to ensure the continuation of normal life under an "orderly government". Necessity in this constellation is not circumscribed to the needs of the occupant itself, and the needs of the population under occupation may also be factored in. Naturally, any concern shown by the Occupying Power for the welfare of the population in the occupied territory is not above suspicion. Professed humanitarian motives of the Occupying Power may serve as a ruse for a hidden agenda.[36] For that reason, the question of whether or not there is a real necessity for each new piece of legislation by an Occupying Power deserves serious examination.

The litmus test

The issue can best be understood against the factual background of a judgment delivered by the Supreme Court of Israel in 1972 in *H.C. 337/71*.[37] That case arose from a labor dispute between the Christian Society for the Holy Places, which runs several welfare institutions in the city of Bethlehem (part of the occupied West Bank), and

[33] See Schwenk, supra note 5, at 400-401.

[34] See Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 84 *American Journal of International Law* 44, 94 (1990).

[35] See N. Bentwich, "The Legal Administration of Palestine under the British Military Occupation," 1 *British Year Book of International Law* 139, 145-146 (1920-1921).

[36] See A. Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System," 18 *Harvard International Law Journal* 525, 538 (1976-1977).

[37] *H.C. 337/71, The Christian Society for the Holy Places v. Minister of Defense* et al., 26(1) *Piskei Din* 574. The Judgment is excerpted in English in 2 *Israel Yearbook on Human Rights* 354 (1972).

hospital workers employed by it who had gone on strike. The Officer in Charge of Labor Affairs in the Israeli Military Government of the area initiated proceedings for settling the dispute, in accordance with a local Jordanian Labor Law predating the occupation. This statute decreed that at a certain stage of labor disputes — after other means for their settlement have failed — a procedure of compulsory arbitration could be set in motion. The trouble was that some of the arbitrators were supposed to have been appointed from among the employers' and employees' associations, whereas such associations did not in fact exist in Jordan. To overcome this difficulty, the Israeli Regional Commander issued an Order amending the Jordanian statute, whereby the arbitrators could be appointed by the employers and employees parties to the concrete dispute or by the Officer in Charge of Labor Affairs.

The principal bone of contention before the Israel Supreme Court was whether the amending Order was in compliance with Article 43 of the Hague Regulations. The majority opinion confirmed the validity of the Order, holding that the Occupying Power was obligated to look after the welfare of the civilian population, and — when the occupation lasts for a long time — the Occupying Power is entitled to revise the local laws consonant with the changing social needs.

Was the majority of the Court right in its approach? For my part, I believe (and have so stated elsewhere) that the litmus test for distinguishing between legitimate and illegitimate concern for the welfare of the civilian population — under Article 43 — should hinge on whether the Occupying Power shows similar concern for the welfare of its own population. Differently put, if the Occupying Power enacts a law – say, against cruelty to animals in the occupied territory — the crux of the issue is whether a parallel (not necessarily identical[38]) law exists back home. If the answer is negative, the ostensible concern for the welfare of the civilian population deserves being disbelieved.

Theodor Meron comments accurately that my yardstick for assessing the motives of the Occupying Power is conclusive only when the answer is negative.[39] If the answer is positive, that is not the end of the matter, given the general rule (embedded in Article 43) that the laws in force in an occupied territory ought to be left intact. However, as long as the answer is positive and absent a serious indication of ulterior motives, the Occupying Power may usually enjoy the benefit of doubt. Granted, as we are reminded by A. Pellet in this context, the occupant is not the territorial sovereign and it cannot legislate for the population within the occupied territory in the same way that it does within its own frontiers.[40] On the other hand, it must be recalled that (unlike legislation within its own boundaries) the legislation of the Occupying Power in the occupied territory is temporary in its effect and will normally expire at the end of the occupation.

Had my litmus test been resorted to resolve the dispute in *H.C. 337/71*, the Court ought to have ruled against the Military Government. The point is that compulsory arbitration in labor disputes has not yet been introduced in Israel itself, and the Jordanian Labor Law — although not perfected — was still more advanced than the Israeli legislation in the same field.[41] Occupied territories are not a laboratory for experiments in law reform. An Occupying Power must realize that any legislative step taken by it is looked upon with suspicion by the population in the occupied territory (and perhaps also by neutral observers).

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[38] Of course, "the social and economic conditions in the two areas could be different" (E. Benvenisti, *The International Law of Occupation* 15 (1992). Hence, variations in the details of the legislative measures taken are not of cardinal import. What counts is the legal concept underlying the legislation.

[39] Theodore Meron, "Applicability of Multilateral Conventions to Occupied Territories," 72 *American Journal of International Law* 542, 549-550 (1978).

[40] A. Pellet, "The Destruction of Troy Will Not Take Place," *International Law and the Administration of Occupied Territories*, *supra* note 24, at 169, 201.

[41] See the Dissenting Opinion of Justice Cohn, *H.C. 337/71*, supra note 37, at 588.

Admittedly, in the special circumstances of *H.C. 337/71*, the Regional Commander might have acted completely within his authority had he issued an Order prohibiting strikes and lock-outs in hospitals in the occupied territory. Such a hypothetical Order would manifestly have passed muster within the acceptable framework of necessity as defined in Geneva Article 64 (*vide* the first Paragraph of Article 56 of the Convention, whereby the Occupying Power is under a duty to ensure and maintain hospital services in an occupied territory[42]). In hoisting the banner of improving the mechanism for tackling labor disputes, and in attempting to provide the inhabitants of Bethlehem with a remedy unavailable in Tel Aviv, the actual Order transcended the bounds of necessity.

Institutional changes

When the Occupying Power is vested with the power to modify or suspend by dint of necessity preexisting legislation in the occupied territory, such power clearly encompasses legal provisions inherently incompatible with the occupation even if they are incorporated in the local constitution or basic laws. The question arises how far the Occupying Power can go in tampering in the name of necessity with the institutions of government of the occupied territory (of course, on a temporary basis, i.e., for the duration of the occupation).

There is no doubt that, should institutional changes be introduced by the Occupying Power, they must not deprive the protected persons in the occupied territory of any benefits conferred on them by international humanitarian law. This rule is enunciated expressly in Article 47 of Geneva Convention (IV).[43] Still, the issue goes deeper: Can the Occupying Power transform radically the political institutions of government in the occupied territory when such action does not affect adversely the benefits bestowed on the civilian population by international humanitarian law? The problem is that, as the ICRC Commentary on the Convention concedes, the only object of Article 47 is "to safeguard human beings and not to protect the political institutions and government machinery of the state as such".[44]

The structuring of political institutions is conspicuously a matter that should be undertaken solely by the territorial sovereign. As long as there is no head-on collision between the political institutions and the fact of the occupation, there is no real necessity for the Occupying Power to remold them. If the Occupying Power indulges in a redesign of political institutions — even if no outright benefits are denied to the population and notwithstanding the temporary status of any changes introduced (which will lapse once the occupation is over) — there is a disquieting possibility that the structural innovations (once people get used to them, especially after a prolonged occupation) may take root and have enduring consequences. In the opinion of this writer, therefore, the Occupying Power should not be allowed to interfere with fundamental institutions of government in the occupied territory. By way of illustration, the Occupying Power should not be able to transform validly a unitary system in the occupied territory into a federal one (or vice versa), even if the metamorphosis purports to affect exclusively the period of occupation.

Unfortunately, when the structural political changes are less drastic, the overall picture is somewhat murkier. Thus, when the Germans divided occupied Belgium into two separate administrative districts (one Flemish and one Walloon) during World War I, the move was met with a storm of protest as a breach of Article 43. Yet, when

[42] Geneva Convention (IV), supra note 3, at 596-597.
[43] Geneva Convention (IV), supra note 3, at 594.
[44] *Commentary, IV Geneva Convention*, supra note 17, at 274.

the British divided occupied Libya into two separate administrative districts (Cyrenaica in the east and Tripolitania in the west) during World War II, the measure did not encounter any objection.[45]

Taxation

Taxation in occupied territories is the subject of Articles 48-49 of the Hague Regulations,[46] whereby the Occupying Power has a choice: it may collect existing taxes (and even increase rates of assessment) or it may levy "money contributions" (but the latter can only be used to cover the needs of the army of occupation or of the administration of the occupied territory). It follows that the Occupying Power cannot create new taxes unless they come within the ambit of "money contributions" (with their narrowly defined purpose).

The Supreme Court of Israel, in *H.C. 69+483/81*,[47] held that the Occupying Power can introduce in the West Bank and the Gaza Strip a new tax — namely, a Value Added Tax (after a similar tax had been imposed in Israel) – despite the strictures of Articles 48-49. In the opinion of the Court, the specific provisions of Articles 48-49 apply in ordinary circumstances, but tax legislation is no different from other legislation in an exceptional situation of necessity: a new tax can be instituted by the Occupying Power through the opening of Article 43.[48] The Court's logic is based on the grafting of the exception clause as regards necessity (appearing in Article 43) onto the over-all prohibition of new taxes not constituting "money contributions" (as per Articles 48 and 49). The notion of subordinating Articles 48 and 49 to the necessity exception in Article 43 is far from self-evident but it is not incongruous.[49]

Limitations on legislation

Whatever legislation the Occupying Power enacts in conformity with Article 43 of the Hague Regulations and Article 64 of the Geneva Convention, that legislation must mesh with other provisions of the Regulations and the Convention. To take the most rudimentary example, Article 45 of the Regulations forbids compelling the inhabitants of the occupied territory to swear allegiance to the Occupying Power.[50] Manifestly, the Occupying Power cannot evade this specific limitation of its powers by enacting legislation transforming allegiance in the name of necessity. The salient question concerning taxation is whether Articles 48 and 49 should be excluded similarly from subordination to the necessity exception in Article 43.

If in the scheme of the Hague Regulations there are possible doubts concerning the inter-relationship between Article 43 and some other provisions (such as the ones regulating taxation), the Geneva Convention is more coherent. Article 65 of the Convention explicitly sets forth:

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[45] See G.T. Watts, "The British Military Occupation of Cyrenaica, 1942-1949," 37 *Transactions of the Grotius Society* 69, 72-73 (1951).

[46] Hague Regulations, supra note 1, at 78-79.

[47] *H.C. 69+493/81, Abu Aita* et al. *v. Commander of the Judea and Samaria Region* et al., 37(2) *Piskei Din* 197. The Judgment is excerpted in English in 13 *Israel Yearbook on Human Rights* 348 (1983).

[48] Ibid., 273-274.

[49] See Yoram Dinstein, "Taxation under Belligerent Occupation," *Des Menschen Recht zwischen Freiheit und Verantwortung* 115-123 (*Festschrift für J. Partsch*, 1989).

[50] Hague Regulations, supra note 1, at 78.

> The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.[51]

It is, thus, undeniable that the legislative power established in Article 64 is subject to the duty of publishing the Occupying Power's legislation in the local language as well as to the principle of non-retroactivity of penal laws. These requirements may be viewed as obvious, but experience has shown that they are not always observed.[52]

Article 67 of the Geneva Convention reverts to the issue of non-retroactivity and prescribes (in relation to military courts established by the Occupying Power):

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence.[53]

Of the general principles of law alluded to generically in Article 67 (apart from the specific reference to the norm that the penalty must be proportionate to the offence), the ICRC Commentary mentions in particular the rule that "nobody may be punished for an offence committed by someone else"[54] (as proclaimed in the first Paragraph of Article 33 of the Convention[55]).

Conclusion

Hague Article 43 by no means poses an insurmountable hurdle blocking the possibility of the enactment of new legislation in an occupied territory by the Occupying Power. On the contrary, the Occupying Power is given more than some latitude in the application of its legislative power, especially when the occupation is prolonged (inasmuch as the lapse of time increases the pressures of necessity for law reform).

There is, however, no valid legislation by an Occupying Power without necessity (as defined in Geneva Article 64). Moreover, any new legislation in the course of belligerent occupation should be subject to some qualifications (such as the non-retroactivity of penal laws), and — whatever the good intentions of the occupying Power — no fundamental institutional changes ought to be permitted even on a provisional basis.

These conclusions apply to peacebuilding as much as to belligerent occupation.

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[51] Geneva Convention (IV), supra note 3, at 599.
[52] See *Commentary, IV Geneva Convention*, supra note 17, at 338.
[53] Geneva Convention (IV), supra note 3, at 599.
[54] *Commentary, IV Geneva Convention*, supra note 17, at 342.
[55] Geneva Convention (IV), supra note 3, at 590.

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