

Expert Opinion
On International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding Area C of the West Bank

By Dr. Théo Boutruche, Consultant in International Human Rights and Humanitarian Law and Professor Marco Sassòli, Director of the Department of Public International Law and International Organization at the University of Geneva and Associate Professor at the Universities of Quebec in Montreal and Laval, Canada¹

This Opinion has been written at the request of the Petitioners in *Head of Dirat-Rfaiyya village and others vs. West Bank Military Commander and others*, before the Israeli High Court of Justice. The undersigned are experts in international law. They are not experts on how planning is actually made in the Occupied Palestinian Territory, nor on Israeli military orders, on Jordanian Law, on British mandate law or on Ottoman law. As far as this opinion refers to such matters, this is simply for the purpose of clarifying the factual assumptions based on which this legal opinion is given and on data and information given by the petitioners and by sources identified in the footnotes. This opinion is based upon the facts as they were known by the authors at the time the opinion was written. It cannot take into account hopes or announcements that the planning process will change. Difficulties of both the undersigned and the petitioners to identify the exact rules the occupying power applies in this field may however indicate a violation of the obligation of an occupying power to make any rules it subjects protected persons public² and foreseeable, in particular as building without a permit may have criminal consequences.³

The Petition requests to transfer back the planning authority in Area C of the West Bank from the Occupying Power to a formal representation of the protected persons, especially at the level of the local and district planning committees, primarily on the basis of

¹ The views expressed in this Expert Opinion are solely those of the authors and do not necessarily reflect those of the organizations and institutions the authors have worked for in the past or currently work for.

² Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge CUP, 2009, at 129.

³ Art. 65 of Geneva Convention IV.

Article 43 of the Hague Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (1907 Hague Regulations).

Among the multifaceted situation stemming from the occupation by Israel of the West Bank, the legal and practical issues arising from planning and building cannot be overlooked. The ramifications of such issues are significant and impact on the life of thousands of Palestinians. This is particularly true when considering the situation in Area C of the West Bank where the Israeli Civil Administration exercises an exclusive control in planning and building matters. While being characterized by very complex and technical issues, the question of planning and building in Area C not only raises central questions under international humanitarian law of belligerent occupation, but it lies at the heart of the needs of the Palestinian population. Consequently, the ruling of the Supreme Court, sitting as the High Court of Justice (hereinafter the High Court of Justice) in this case will be of paramount importance for the implementation of international humanitarian law (IHL) and for addressing the pressing needs of thousands of Palestinians. In this respect the undersigned concur with the view that far from being a minor issue, in the West Bank, planning and building is of a paramount importance for the social and economic development in this region.⁴ While the High Court of Justice may not be able or willing to address this further aspect, the undersigned note that if the planning process for Israeli settlements in the Occupied Territories differs from that applicable to Palestinians, e.g. in that **Israeli local inhabitants affected by the planning have a greater say** than Palestinians in the same situation, this would constitute an inadmissible discrimination, independently of the fact that Israeli settlements are unlawful as such.⁵ The widespread perception that changing existing plans and obtaining a building permit is much easier for Israeli settlers than for Palestinian residents may lead to the assumption that such discrimination exists.

I. RELEVANT APPLICABLE LAW

Due to the complex legal and geographic fragmentation in the West Bank, it is critical to clarify the scope and the related legal framework pertaining to this Expert Opinion. The current case relates to the planning and building situation in Area C of the West Bank. This

⁴ Anthony Coon, *Town Planning Under Military Occupation*, Dartmouth Publishing Company, London, 1992, p. 3.

⁵ Art. 49(6) of Geneva Convention IV.

area represents approximately 60% of the West Bank with, as of June 2008, some 150,000 Palestinians currently living in this Area, including 47,000 Palestinians who live in 149 communities⁶ whose entire built-up area is located within Area C, while the remainder live in villages where some of the homes are in Areas A and B and others in Area C.⁷ According to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, all civil powers and responsibilities, including planning and zoning, in Areas A and B, were transferred to the Palestinian Authority, whereas Area C is under exclusive Israeli control, including regarding planning and construction.⁸

Three main systems of law are applicable for Area C. First international law consisting of treaty law and customary law binds Israel policy and activities in such area. Among those international norms, the primary rules to consider are those of international law of belligerent occupation. Pursuant to Article 42 of the 1907 Hague Regulations and Article 2 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, and as recognized by the International Court of Justice⁹ and by the doctrine and as accepted by the Israeli Supreme Court, sitting as a High Court of Justice¹⁰, Israel has the status of Occupying Power in the West Bank. This is apparently also acknowledged by the Israeli State Attorney¹¹ Specific norms pertaining to situations of occupation set out in IHL treaties and which acquired a customary status as will be described below consequently apply. These consist *inter alia* of Section III of the 1907 Hague Regulations, including Article 43 restraining the legislative power of the occupant, and of Section III of Part III of the Geneva Convention IV. Furthermore, it is widely recognized by third States, United Nations practice and judicial decisions that international human rights law also binds an occupying power with respect to the population of an occupied territory save through the effect of provisions for derogation of

⁶ Based on the definition used in an Israeli census conducted by the Central Bureau of Statistics in 1967, the word “community” is defined “a community will be considered any permanently settled point lying outside the area of another community and in which at least 50 people were counted.” See Commander of IDF Forces, *Population Census-1967*, Jerusalem, Central Bureau of Statistics Publishers, IDF Forces Command, 1968, p. 29.

⁷ Bimkom – Planners for Planning Rights, *The Prohibited Zone - Israeli planning policy in the Palestinian villages in Area C*, June 2008, p. 7.

⁸ Article XI, para. 2 (b), Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, D.C. September 28, 1995, signed between the Government of the State of Israel and the Palestine Liberation Organization.

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, para. 78.

¹⁰ For example, H.C. 390/79, *Mustafa Dweikat et al. v. the Government of Israel et al.* (the *Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 *Israel YbkHR* 345.

¹¹ See section 12 of the Complementary Argument on Behalf of the State in HCJ 1526/07 Ahmad `Issa `Abdullah Yassin et al. v Head of the Civil Administration et al., 5 July 2007, cited by Bimkom, *supra* footnote 7, p. 8.

the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.¹² This must be particularly true in Area C, where Israel exercises exclusive jurisdiction in the matters relevant for the petition, and especially in light of the long-term occupation.

Second, the domestic law applicable in the territory before it was occupied also continues to apply, except if it has been revised by the Occupying Power, which is only lawful in certain circumstances discussed hereafter. Before 1967, the West Bank was under Jordanian rule and consequently Jordanian laws were in force in this territory. The Jordanian law is a complex amalgam of Ottoman codes, British Mandate amendments thereto and regulations adopted before 1947, and Jordanian law. All those laws remain in force if they were not abrogated before the occupation started and if they are not contrary to international law. This includes the 1966 *Towns, Villages, and Buildings Planning Law*.¹³

Finally, the Occupying Power exercises a limited legislative power with regard to the territory it occupies and may enact or abolish laws under certain conditions set out by the international law of belligerent occupation. In conformity with its legal obligations as an occupying power, when Israel started occupying the West Bank in 1967, the IDF military commander issued proclamations stating that the prevailing law would remain in force (i.e. Jordanian Law and British Mandate regulations), subject to changes made by military orders and proclamations.¹⁴ Israel revised through military orders the existing Jordanian laws. In particular, Military Order No. 418 adopted in 1971, and amended numerous times since then, revised the 1966 *Towns, Villages, and Buildings Planning Law*.¹⁵

It is paramount to stress that this case requires considering those three systems of law, but most importantly, that international law of belligerent occupation limits the extent to

¹² Ibid, paras. 107-112. See also references in W. Kalin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26, 16 Jan. 1992. at paras 5C-59; Concluding Observations of the Human Rights Committee: Israel. 18/08/98. UN Doc. CCPR/C/79/Add.93. at para. 10; *Loizidou v Turkey*, Merits. ECHR (1996), Series VI, 2216 at 2235-2236, para. 56 and *Cyprus v Turkey*, 10 May 2001. at paras. 69-77; General Comment No. 31 of the UN Human Rights Committee, (CCPR/C/74/CRP.4/Rev.6. of 21 Apr. 2004, at para. 10; and UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at para. 11.19.

¹³ *Towns, Villages, and Building Planning Law* (Temporary Law), Law No. 79 of 1966.

¹⁴ See for example, David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State of University New York Press, New York, 2002, p. 25, and Raja Shehadeh, "The Legislative Stages of the Israeli Military Occupation", in *International Law and the Administration of Occupied Territories*, E. Playfair (ed), Oxford University Press, Oxford, 1992, pp. 151-168.

¹⁵ *Order Concerning Towns, Villages, and Building Planning Law (Judea and Samaria)* (No. 418), 1971.

which an occupying power may change local legislation and institutions through the enactment of new laws.

II. INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

The question of planning and building in Area C of the West Bank raises several issues under the international law of belligerent occupation. The key provision founding the current Expert Opinion is Article 43 of the 1907 Hague Regulations that must be understood in connection with the underlying principles governing belligerent occupation under IHL.

A. Principles of belligerent occupation

The main principle underlying the law of belligerent occupation is that occupation does not transfer any title of sovereignty to the occupant on the occupied territory. In nature the occupation is to be considered transitional and temporary.¹⁶ As stated in the British Military Manual, “Occupation differs from annexation of territory by being only of a temporary nature” and “During occupation, the sovereignty of the occupied state does not pass to the occupying power. It is suspended.” Furthermore, “[t]he law of armed conflict does not confer power on an occupant. Rather it regulates the occupant’s use of power. The occupant’s powers arise from the actual control of the area.”¹⁷ This principle is entrenched in Article 43 of the 1907 Hague Regulation that imposes a duty on the occupant to respect, unless absolutely prevented, existing law, putting an emphasis on the *de facto* nature of the occupant’s authority.

Beyond the question whether prolonged occupation constitutes a distinct legal category of occupation, the factual situation of an occupation continuing over a long period of time must be taken into consideration when analyzing the duties and obligations of the occupying power. This is particularly significant with the obligation to restore and ensure public order, civil life and safety. Those latter notions evolve as time elapses, when moving away from combat-like situations, with the necessity to adapt to the needs of the population

¹⁶ See for example, L. Oppenheim, *International Law: A Treatise*, Vol. II: *Disputes, War and Neutrality*, (6th edition by H. Lauterpacht, 1944), pp. 432-434 and Christopher, Greenwood, “The Administration of Occupied Territory in International Law”, in Playfair, Emma (ed.), *International Law and the Administration of Occupied Territories*, Oxford University Press, Oxford, 1992, p. 244.

¹⁷ UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at para. 11.19.

under occupation. In this regard a prolonged occupation will impact on the interpretation of the scope of the adoption of legislative measures to let the occupied country evolve. As stressed by the Israeli High Court of Justice (IHCJ), “A prolonged military occupation brings in its wake social, economic and commercial changes which oblige [the occupant] to adapt the law to the changing needs of the population.”¹⁸ On the other hand, the powers of the occupant in general are constrained by specific duties and prohibitions under international law, and its legislative power in particular remains limited under international law of belligerent occupation.

Finally, it is important to stress that the principal concern of Geneva Convention IV, is the protection of “protected persons”, i.e. persons “who at any given moment and in any manner whatsoever, find themselves, in cases of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.¹⁹

B. Legislative power of the occupant under Article 43 of the 1907 Hague Regulations

Article 43 of the 1907 Hague Regulations reads in the most widely adopted English translation of the original authentic French texts:

“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.”

The International Military Tribunal at Nuremberg and the International Court of Justice have recognized that this provision is part of customary international law, and therefore binding upon all States.²⁰ The Israeli Supreme Court has also recognized the

¹⁸ *Christian Society for the Holy Places v. Minister of Defense*, No. H.C. 337/71, 26(1) Piskei Din 574 (1972), as summarized in 2 *IsR. Y.B. HuR. RTs.* 354, 355 (1972).

¹⁹ See Article 4 of Geneva Convention IV.

²⁰ *Trial of the Major War Criminals*, International Military Tribunal in Nuremberg, published in 41 *AJIL* (1947) 172, in particular at 248-249, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, paras. 89 and 124. See also E. Benvenisti, *The International Law of Occupation* (1993), at 8, G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation* (1957), at 95, D. Kretzmer (2002), *supra* footnote 14, at 57, and Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, 16 *EJIL* 661, at 663.

applicability and justiciability of the 1907 Hague Regulations based on the acceptance that they have a customary value.²¹

It is necessary to elaborate on the meaning and the scope of the obligations contained in this provision due to the fact that in the past occupying powers sometimes invoked its vagueness to justify broad legislative powers, and, at other times, have relied on the obligation to respect local laws ‘unless absolutely prevented’ in order to ignore their responsibility to ensure the welfare and normal life of the local population.²²

1) The construction of Article 43

Article 43 expresses the principle that the legislative power has, in fact, passed into the hands of the occupant.²³ A literal reading of the text of this provision could lead to conclude that the respect for local legislation by the occupant comes only into play when the occupying power is restoring and ensuring public order and safety and/or that it can only legislate within those fields. Such interpretation is however inconsistent with the introductory sentence of this provision and its drafting history. Articles 2 and 3 of the Brussels Declaration of 1874 suggested respectively a broad legislative authority of the occupant and a limitation of the possibility to change the existing laws pertaining to circumstances of necessity. However both provisions were merged in the Hague Regulations²⁴, confirming that Article 43 of the 1907 Hague Regulations provides for a general rule regarding the legislative powers of the occupying power.²⁵

However, the occupant not being sovereign over the occupied territory, it cannot act as a sovereign legislator, even less so in the field of planning which inevitably involves long-

²¹ Judgment in the *Beth-El* case (H.C. 606/78 and 610/78), in *Military Government in the Territories Administered by Israel: the Legal Aspects* (M. Shamgar ed. 1982). See also *A Teachers’ Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82, PO 37 [4], 785, 793.

²² E. Benvenisti, *supra* footnote 20, at 11.

²³ E. Schwenk, ‘Legislative Power of the Military Occupant Under Article 43, Hague Regulations’, 54 *Yale LJ* (1944–1945), p. 395.

²⁴ Article 43 of the 1899 Hague Regulations reads as follows: “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.”

²⁵ Y. Dinstein, *supra* footnote 2, at 90-91; E. Schwenk, *supra* footnote 23, p. 397. See also Marco Sassòli, *supra* footnote 20, at 663-664, and Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2009, at 94.

term consequences, going beyond the duration of the occupation. An occupying power may only introduce changes for the duration of the occupation.²⁶ The drafting history of the Brussels Declaration illustrates another key pillar enunciated in Article 43: the obligation to respect local laws is also a general principle that plays as a limitation to the legislative power of the occupant.²⁷ This demonstrates that Article 43 is articulated in such a way that the general rule on the legislative authority of the occupying power must be carried out in compliance with the other general principle of respect for local legislation.

Article 43 spells out two obligations for the occupant: the obligation to restore and ensure public order and civil life and the obligation to leave local legislation in force.

2) The obligation to restore and ensure public order and civil life

Regarding the definition of the field of application of this obligation, the expression ‘public order and safety’ does not only refer to security issues. The French version of Article 43, which is the only authentic text, uses the words ‘l’ordre et la vie publics’. The legislative history of this provision offers evidence of a broader interpretation of those terms, which cover ‘des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours’ (‘social functions, ordinary transactions which constitute daily life’).²⁸ Several courts endorsed this broad construction. A tribunal set up in the British occupied zone of Germany after the World War II interpreted the French phrase ‘l’ordre et la vie publics’ as relating to “the whole social, commercial and economic life of the community”.²⁹ The Israeli Supreme Court endorsed the same approach when stating that the obligation to restore and ensure public life and order encompasses “a variety of aspects of civil life, such as the economy, society, education, welfare, health, transport and all other aspects of life in a modern

²⁶ Oppenheim, *International Law – A Treatise*, 7th edition edited by Hersch Lauterpacht, Vol. II, Disputes, War and Neutrality, (1952) at 436 and 437.

²⁷ E. Schwenk, *supra* footnote 23, p. 397.

²⁸ This explanation has been proposed by Baron Lambermont, the Belgian representative at the negotiations for the Brussels Convention of 1874, which never entered into force, but is known as the ‘Brussels Declaration’, considered to codify many old rules of IHL. See Ministère des Affaires Etrangères de Belgique, *Actes de la Conférence de Bruxelles de 1874*, at 23, reproduced in Schwenk, *Ibid*, at 393. Similarly Y. Dinstein, *supra* footnote 2, at 94.

²⁹ Germany, British Zone of Control, Control Commission Court of Criminal Appeal, *Grahame v. Director of Prosecution*, 26 July 1947. 14 AD Case no. 103, 228, at 232.

society”.³⁰ The obligation to restore and ensure public order and civil life is therefore broader than just guaranteeing security.

This obligation is one of means and not of result, the public order and the civil life being only aims that the occupant must pursue with all available, lawful and proportionate³¹ means, as confirmed by the expressions ‘all the measures in his power’ and ‘as far as possible’ in Article 43. However, some measures the occupying power may take under this obligation are governed in detail by specific IHL rules.³² Furthermore, the measures the occupant can take are also limited by numerous prohibitions set out in Geneva Convention IV, such as the prohibition of the destruction of civilian constructions/objects.³³ Finally, while the obligation to enhance civil life is an obligation of means, changes of the existing legislation or institutions justified by this exception are only lawful if they actually enhance civil life compared with the situation under the previous legislation. It is up to the occupying power to prove that the situation under the legislation it has introduced is better than that under the previous legislation. If, in a situation of long-term occupation it turns out that such enhancement did not occur, the change introduced cannot be justified and must be repealed.

Although the standard of conduct required under the obligation to restore and ensure public order and civil life is not the same as that with which human rights instruments expect states to comply in fulfilling human rights, this obligation is actually twofold: an obligation to restore public order and one to ensure that public order and civil life are guaranteed. The Supreme Court of Israel specifically highlighted that the general obligation of Article 43 consist of those two requirements.³⁴ It seems reasonable to contend that the second duty is particularly important as the occupation is prolonged over time and when the occupant is moving away from combat-like situations to issues related to the changing needs and the normal life of the civilian population.³⁵

³⁰ *A Teachers’ Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82 (1983), 37 [4] *Piskei Din*, English summary in: (1984) Israel YbkHR 301, at 306.

³¹ This requirement includes proportionality between the interest of the population to have civil life restored and the adverse impact the means chosen by the occupying power to restore civil life may have for the population.

³² For the 1907 Hague regulations, see Art. 46 on family rights, property and religious practice, Arts. 48–52 on taxation, contributions and requisitions, and Arts. 53, 55, and 56 on public property.

³³ See article 53 of Geneva Convention IV.

³⁴ *A Teachers’ Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*. HC, 393/82 (1983), 37 [4] *Piskei Din*, English summary in: (1984) Israel YbkHR 301, at 306.

³⁵ See for example, Justice Shamgar of the Israeli Supreme Court qualified the second obligation as a “subsequent and continuous” duty which needs to be adjusted to changing social needs. See H.C. 69 +493/81, *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) *Piskei Din* 197; English excerpt in:

Finally, when fulfilling its duty to restore and ensure public order and civil life, the occupant must respect its obligations under international human rights law. This is particularly relevant because public order is restored **and ensured** through law enforcement operations that are governed by human rights norms. As recalled earlier, international human rights law continues to apply in times of armed conflict, including in situations of occupation, save cases of derogation or suspension for derogable rights under certain conditions. It is true that restoring or ensuring public order may constitute an emergency where the occupant is entitled to derogate from some of the rights. However it may be argued that in cases of prolonged occupation, the duty of the occupant to ensure civil life in the broad meaning of the term may be subject to more limitations under international human rights law in as much as lawful reasons for derogation may not be invoked. In the case of Israel, the International Court of Justice held that with regard to the ICCPR, due to the fact that Israel notified derogation concerned only Article 9 of the Covenant, “the other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory”.³⁶ As for the ICESCR, the Court, referring to the Concluding Observations of the Committee on Economic, Social and Cultural Rights on Israel, concluded: “In the exercise of the powers available to it [as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights”.³⁷

3) The principle concerning legislation: Occupying Powers must leave local legislation in force

In restoring and ensuring public order and civil life, but also as matter of principle vis-à-vis other activities as highlighted earlier; the occupant must respect the laws in force in the occupied territory at the beginning of the occupation. Consequently, Article 43 bars also an occupying power from extending its own legislation over the occupied territory. While the first obligation called for the adoption of positive measures, this obligation is a negative one, prohibiting the occupant from suspending or repealing local legislation.³⁸ Article 43 must be read in conjunction with Article 64 of the 1949 Fourth Geneva Convention, which states:

(1983) 13 Israel YbkHR 348, at 356-357, quoted by Yutaka Arai-Takahashi, supra footnote 25, p. 98, footnote 24.

³⁶ Para. 127.

³⁷ Ibid., para. 112.

³⁸ Yutaka Arai-Takahashi, supra footnote 25, p. 98.

“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.”

While the first paragraph explicitly refers to ‘penal laws’, the ‘provisions’ referred to in the second paragraph are not so qualified. It has been understood as allowing an occupying power to subject the local population to any (penal, civil, administrative etc.) laws essential for the purposes it exhaustively enumerates.³⁹ For the ICRC *Commentary*, the second paragraph expresses ‘in a more precise and detailed form’ the terms ‘unless absolutely prevented’ of Article 43.⁴⁰ The preparatory work of Article 64 shows that ‘it is not a mere coincidence that the adjective “penal” is missing in the second paragraph’.⁴¹ Drafting Committee No. 2 of Committee III (in charge of the draft convention on the protection of civilian persons in time of war) at the 1949 Diplomatic Conference had a long debate about future Art. 64 and in particular precisely about whether the adjective ‘penal’ should be added to the term “provisions” in the second paragraph.⁴² The draft submitted by the ICRC stated: ‘The *penal* laws of the Occupied Power shall remain in force ...’.⁴³ The UK, whose suggested amendment was closest to the finally adopted text, formulated it without specific reference to *penal* laws.⁴⁴ The USSR wanted to limit the provision to penal norms.⁴⁵ The Netherlands, a State having been subject to occupation, insisted, as a way of compromise, on the insertion of an article clarifying the complementary character of the Hague Regulations and the Geneva Conventions.⁴⁶ The Drafting Committee finally let Committee III choose between two versions, one referring to ‘penal provisions’, another one more generally to ‘provisions.’ The

³⁹ See Benvenisti, *supra* footnote 20, at 101; Y. Dinstein, *supra* footnote 2, at 111.

⁴⁰ See J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1958), at 335, and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, 1967, at 193.

⁴¹ Benvenisti, *supra* footnote 20, at 101-103.

⁴² See *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne, 1950) vol. III at 139.

⁴³ *Ibid.*, vol. I at 122 [emphasis added].

⁴⁴ *Ibid.*, vol. III at 139.

⁴⁵ *Ibid.*, vol. IIA at 670.

⁴⁶ *Ibid.*, vol. IIA at 672.

latter was adopted by 20 votes to 8.⁴⁷ In addition, Article 154 stating that the Convention was ‘supplementary’ to The Hague Regulations was added as part and parcel of the compromise reached about Article 64.

Both provisions show that international law does not recognize a general legislative competence where the occupant could legislate without limitations. There are however, as explained hereafter, exceptions to the prohibition of changes to the local laws provided for in Article 43.

Article 43 refers to “laws”. However it is widely recognized that the term must be understood in a broad manner, to include, not only the laws in the strict sense, but also the constitution⁴⁸, decrees, ordinances,⁴⁹ court precedents (especially in territories of common law tradition)⁵⁰, as well as administrative regulations and executive orders⁵¹, provided that the ‘norms’ in question are general and abstract. While the rule refers to the entire legal system, exceptions apply only to the individual provisions covered by the exceptions that allow an occupying power to legislate.

Article 43 also constitutes the legal parameter governing potential changes to institutions by the occupant, except in cases where *lex specialis* exists such as for changes affecting courts, judges and public officials.⁵² Considering the general principle set by Article 43 prohibiting changes to local legislation, this principle prevents the occupant from abolishing existing local administrative institutions because local institutions of the occupied country are established by and operate under the law. Institutions and the constitutional order are only one aspect of ‘the laws in force in the country’.

Article 47 of the Geneva Convention IV refers to institutional changes introduced by an occupying power. It states that protected persons “shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the . . .

⁴⁷ *Ibid.*, vol. III at 139.

⁴⁸ UK Manual, supra footnote 12, at para 11.11.

⁴⁹ Schwenk, supra footnote 23, at 397.

⁵⁰ Benvenisti, supra footnote 20, at 16.

⁵¹ G. Von Glahn, supra footnote 20, at 97 and 99; E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (2000) (reprint of the original 1942 edition), at 89.

⁵² Marco Sassòli, supra footnote 20, at 671.

territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory”. Article 47 must be read in conjunction with the principle spelled out in Article 7 para. 1 of the Geneva Convention IV that states: “No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them”. IHL norms continue to apply despite such institutional changes and such changes do not justify violations of its provisions – including those on the admissibility of legislative changes. Both provisions also apply to prescriptions of the Hague Regulations, because the Geneva Convention was supplementary to the Hague Regulations⁵³ and because the principle prohibiting legislative changes has been reaffirmed in Art. 64 of Geneva Convention IV.

4) Exceptions to the prohibition to legislate

Article 43 states that the occupant must respect local laws, “unless absolutely prevented”. However, state practice, judicial decisions and scholars show that there is a certain amount of flexibility on the part of occupant to exercise its legislative power.

As demonstrated earlier, the words ‘restore and ensure . . . public order and civil life’ in Article 43 do not mean that the occupying power is only allowed to take legislative measures in those fields. Similarly, this does not entail that it cannot legislate for other purposes such as promoting its own military interests.⁵⁴

The meaning of the exception ‘unless absolutely prevented’ (*sauf empêchement absolu*) is controversial. Some scholars suggest that it refers to ‘military necessity’.⁵⁵ The words ‘unless absolutely prevented’ were, however, a mere reformulation of the term ‘necessity’ contained in Article 3 of the 1874 Brussels Declaration, which, according to its preparatory works, was not meant as a synonym for ‘military necessity’.⁵⁶ At the other extreme, some authors simply require sufficient justification to deviate from local legislation.⁵⁷ Others consider that ‘absolute prevention means necessity’ and that the adverb

⁵³ See Art. 154 of Geneva Convention IV.

⁵⁴ See Schwenk, *supra* footnote 23, at 395–397.

⁵⁵ *Ibid.*, at 393; M. Greenspan, *The Modern Law of Land Warfare* (1959), at 224; Bothe, ‘Occupation, Belligerent’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), iii, at 765.

⁵⁶ Schwenk, *supra* footnote 23, at 401.

⁵⁷ Feilchenfeld, *supra* footnote 51, at 89.

‘absolutely’ is therefore of small consequence.⁵⁸ After the two world wars, courts have accepted a great variety of legislation by occupying powers (including by those that were finally vanquished) as valid.⁵⁹ The practice of Israeli courts concerning legislation in the Israeli occupied territories is also very permissive.⁶⁰ In the *VAT case* the Israeli Supreme Court noted that with regard to the possibility to impose new taxes the occupant cannot act freely, this question must be reviewed according to the principles set down in Article 43. It however held that the law introducing VAT was justified both in order to fulfill a military need and to ensure the welfare of the population.⁶¹ It may be argued that in this particular case, it is doubtful that the dominant motive behind the imposition of new taxes was the benefit of the local population.⁶²

Most authors have an intermediate position and mention that, as confirmed by Article 64 of Convention IV, not only the interests of the army of occupation, but also those of the local civilian population may prevent an occupying power from applying local legislation.⁶³ An extensive reading of what constitutes public order and civil life seems to also give rise to a broad interpretation of the exception contained in Article 43. It also has been suggested that the exception of Article 43 must be interpreted more extensively the longer an occupation lasts.⁶⁴ This broader interpretation also corresponds to the practice of allied occupying powers during World War II. The British Military Manual states that “The occupying power may amend the existing law of the occupied territory or promulgate new law if this is necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population.”⁶⁵

⁵⁸ Dinstein, ‘The International Law of Belligerent Occupation and Human Rights’ [1978] *Israel Yb Hum Rights*, at 112, citing G. Schwarzenberger, *supra* footnote 40, at 193. Dinstein adds that ‘[t]he necessity . . . may be derived either from the legitimate interests of the occupant or from concern for the civilian population’.

⁵⁹ For examples see reference to various court cases in E. David, *Principes de droit des conflits armés* (3rd ed., 2002), at 511.

⁶⁰ For the practice of the Israeli Supreme Court see Kretzmer, *supra* footnote 14, at 61–72.

⁶¹ In the *Christian Society for the Holy Places v. Minister of Defence case*, Justice Sussman, in upholding the legality of the order, observed that the occupant has a duty in respect of the population’s welfare: A prolonged military occupation brings in its wake social, economic and commercial changes which oblige him to adapt the law to the changing needs of the population. The words ‘absolutely prevented’ in Article 43 should, therefore, be interpreted with reference to the duty imposed upon him *vis-à-vis* the civilian population, including the duty to regulate economic and social affairs.

⁶² Kretzmer, *supra* footnote 14, at 72.

⁶³ Schwenk, *supra* footnote 23, at 400; J. Pictet, *supra* footnote 40, at 274; Debbasch, at 172; Von Glahn, *supra* footnote 20, at 97. A. D. McNair and A. D. Watts, *The Legal Effects of War* (1966), at 369 mention three grounds for being ‘absolutely prevented’ from respecting local laws, namely the maintenance of order, the safety of the occupier, and the realization of the legitimate purpose of the occupation.

⁶⁴ R. Kolb, *Ius in bello, Le droit international humanitaire des conflits armés* (2002), at 186.

⁶⁵ UK Military Manual, *supra* footnote 12, para. 11.25.

Under both Article 43 of the 1907 Hague Regulations and Article 64(2) of Convention IV, the most uncontroversial case of legislation an occupying power may introduce is that which is essential to ensure its security. Such legislation may not, however, prescribe any measure specifically prohibited by IHL (such as collective punishment, house demolitions or deportations)⁶⁶ or establish adverse distinctions prohibited by Art. 27 of Geneva Convention IV.

Beyond the protection of its own security, under the explicit wording of Article 43, the protection of the security of the local population is a legitimate aim for legislation by an occupying power. As it must restore and maintain public order, it may also legislate where absolutely necessary for that purpose.

The Occupying Power may also adopt legislation essential for the implementation of IHL. The reference in Article 64 to legislation essential for (or an obstacle to) the respect of ‘Convention [IV]’ must be extended to all applicable IHL, since IHL cannot possibly require specific conduct from an occupying power and also prohibit it to legislate for that purpose.

The most important contribution of an occupying power to civil life in an occupied territory is to maintain the orderly government of the territory. Article 64(2) of Convention IV explicitly allows it to legislate for that purpose. Beyond that, it must also ensure civil life among the inhabitants of the territory and may legislate for that purpose if the existing legislation or its absence absolutely prevents it from accomplishing that aim.

Sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve.⁶⁷ As the legislative function is a continuous, necessary function of every state on which the evolution of civil life depends, a **legislative vacuum** created by the disruption of the legitimate sovereign must at a certain point in time be filled by the occupying power.⁶⁸ The controversial extent, to which an occupying power may legislate, in particular in case of long-term occupation, to satisfy new

⁶⁶ Cf. Arts. 33(1), 53, and 49(1) of Geneva Convention IV.

⁶⁷ Lerquin, ‘The German Occupation in Belgium and Article 43 of The Hague Convention of the 18th October 1907’, 1 *International Law Notes* (1916) 55

⁶⁸ L. von Kohler, *The Administration of the Occupied Territories, Vol. I – Belgium* (1942), at 6, cited in McDougal and F. P. Feliciano, *Law and Minimum World Public Order* (1961), at 746, writes that ‘the life of the occupied country is not to cease or stand still, but is to find continued fulfillment even under the changed conditions resulting from occupation’.

needs of the local population,⁶⁹ should not impact upon the present case as far as the structural changes in the planning local and district system did not satisfy the needs of the local population better than the previous institutions and legislation. Under the obligation of means of Article 43 of the Hague Regulations, the changes of the Jordanian Law did not meet, but all on the contrary contradict, the requirement of “all steps in [one’s] power” to be taken by the Occupying Power to insure, as far as possible, public order and civil life. Furthermore the temporary nature of occupation should be taken into account when considering planning laws that control demography and land within the context of long-term occupation.

Because the risk of abuse of a broader interpretation of the exception set out in Article 43 should not be neglected, as it is the occupying power that decides whether a legislative act is necessary, and its interpretation is rarely subject to revision during the occupation⁷⁰, the expression ‘unless absolutely prevented’ must still be construed narrowly as an exception to the general principle prohibiting changes to local laws.⁷¹

III. PLANNING AND BUILDING REGIMES IN AREA C UNDER INTERNATIONAL LAW

The Planning and Building systems in place in Area C must be reviewed under the applicable international legal framework described above. From the outset, it is necessary to emphasize that the current Expert Opinion does not intend to analyze in details all legal issues arising from the planning and building systems in Area C. It will primarily demonstrate that under international law there is an obligation for Israel to transfer back the planning authority in Area C of the West Bank from the Civil Administration to a formal representation of the protected persons, especially in the level of the local and district planning committees. This stems from two conclusions.

First the amendments adopted by the Israeli authorities to the 1966 Jordanian Law through Military Order 418 and its successive revisions, especially pertaining to planning

⁶⁹ Y. Dinstein, *supra* footnote 2, at 115-123.

⁷⁰ Von Glahn, *supra* footnote 20, at 100. Exceptionally, the ICJ was able in *Legal Consequences of the Construction of a Wall*, at para. 137, to give an opinion on whether certain measures taken by an occupying power were necessary.

⁷¹ G. Schwarzenberger, *supra* footnote 40, at 182-183, cited by Yutaka Arai-Takahashi, *supra* footnote 25, p. 103, footnote 44. For judicial decisions recalling the restrictive understanding of the necessity exception, see also Yutaka Arai-Takahashi, *supra* footnote 25, p. 103, footnote 44.

authorities in the local and district level did not meet in 1971, nor does it now after the various amendments to this order, the requirements set under the obligation to respect local laws. This is particularly true given the nature of planning that inevitably involves long-term consequences, going beyond the duration of the occupation, while an occupying power may only introduce changes for the duration of the occupation. Situations of long-term occupation should not impact on the fact that related norms must be applied under the parameter of the temporariness of occupation.

Second Israel must respect its obligation to restore and maintain public order and civil life entrenched in Article 43 of the 1907 Hague Regulations. It is submitted that beyond the unlawfulness of the changes made to the local legislation, the current planning and building regime leads to a planning failure that fails to meet the needs of the Palestinian residents, which is contrary to the occupying power's obligations under international law. As stressed earlier, as far as this opinion refers to the planning and building regimes applicable in Area C, this is simply our understanding of such regimes, for the purpose of clarifying the factual assumptions based on which this legal opinion is given and on data and information given by the petitioners and by sources identified in the footnotes.

Ultimately, it is important to note that the occupied population does have the ability to administer and participate into planning institutions as demonstrated by the system in place in Areas controlled by the Palestinian Authority.

Before addressing the above aspects it is necessary to clarify the scope and implications of the Oslo Agreements for the international law on belligerent occupation with regard to planning and building authority. As noted earlier according to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip Area C, Israel retains exclusive control, including regarding planning and construction in Area C. However the combined reading of Article 7 and Article 47 of Geneva Convention IV limits the effects of "agreements" between the occupying power and enemy authorities or the authorities of the occupied territory. Pursuant to those provisions, such accord shall not "adversely affect the situation of protected persons", restrict their rights, or deprive them of the benefits of the Convention "by any change introduced, as the result of the occupation ..., into the institutions or government" of the occupied territory. The authority regarding planning and construction conferred to Israel in Area C under the Oslo agreements can therefore not justify legislative

powers of the occupying power which go beyond what International Humanitarian Law admits under Article 43 of the 1907 Hague Regulations, nor deprive the Palestinian residents of the benefit of the local legislation in place at the time the occupation started. This is confirmed by the 1995 Oslo Interim Agreement itself, which contains an explicit reference to the respect for international law. Article XVII states that “the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities in accordance, with international law”. Ultimately this means the following: first the Oslo Agreement could only transfer to Israel the authority in planning and construction in as much as this does not conflict with IHL norms protecting Palestinian residents in Area C, notably the obligation to respect the local legislation conferring some authority in planning to the representative of local communities. Second the Oslo Agreements could not confer legality to practices and policies that were already unlawful under IHL before their signature.

When Israel started occupying the West Bank in 1967, planning and building were governed by the *Towns, Villages, and Building Planning Law* (hereinafter the Jordanian Law), a Jordanian law enacted in 1966. Israel refrained from abolishing this Law but it revised it comprehensively through Military Orders on the grounds that the law required the inclusion of Jordanian government representatives in the planning process. However, beyond simply replacing Jordanian central government representatives, the *Military Order Concerning Towns, Villages, and Building Planning Law (Judea and Samaria)* (No. 418) of 1971 significantly amended the Jordanian Law. Hereafter we will briefly describe the Jordanian Law the way we understood it, before arguing that the changes made are unlawful for two independent reasons: first such changes go beyond the changes an occupying power may introduce to local legislation and institutions and second they fail to respect the occupying power’s duty to restore and ensure public welfare in the occupied territory. We will finally address the humanitarian consequences of the current planning and building regime in the Area C.

A. The Jordanian Law⁷²

According to our understanding, before it was revised the Jordanian Law established the following planning and building system. Pursuant to this law, a three-level hierarchical

⁷² This section relies greatly on the information contained in the Bimkom Report, *The Prohibited Zone*, supra footnote 7.

structure of planning institutions on the local, district, and national level was created, together with a hierarchy of plans based on this structure.

The most important planning body is the *High Planning Council* (HPC), which operates on the national level. The composition of the HPC as defined in the Jordanian Law reflects a diverse range of interests and perspectives.⁷³ Its principal functions are to present recommendations to the Interior Minister regarding the boundaries of planning areas⁷⁴; to approve regional and outline plans; and to approve regulations and various actions relating to building inspection. The HPC also hears appeals against the decisions of the District Committees.⁷⁵ Since the West Bank was subject to the legislative jurisdiction of the Kingdom of Jordan at the time the law was enacted, the HPC was responsible for planning throughout the Kingdom, and not only in the West Bank, compared to the local and district planning and district institutions that operate at the district and local levels and that are therefore different from the HPC.⁷⁶ *District Planning Committees* are the second planning institutions within the structure established by the Jordanian Law. They mediate between the national level (the HPC) and the local level (Local Committees). The Jordanian Law establishes that in every administrative district, a District Planning Committee of six members is to be established, representing a range of interests in the fields of planning, building, law, and health. A representative of the Local Committees active within the district also sits on the District Committee.⁷⁷ The functions of the District Committee include approving detailed plans; hearing objections to regional and outline plans and submitting opinions on these to the HPC; as well as various functions relating to building inspection. The District Committee also hears appeals against the decisions of the Local Committees in the district,⁷⁸ and holds all the powers granted to the Local Committee.⁷⁹ At the local level, the *Local Planning Committees* include several types, where a city or a village council can be appointed to serve as a Local Committee in a planning area or part of it, or six members instead of the city or village

⁷³ According to Article 5 of the Jordanian Law, the nine members of the HPC include the Interior Minister, a representative of the local authorities (the mayor of the capital), the director-general of the Ministry of Public Works, a representative of the Jordanian Building Council, the director of the Housing Authority, the director of the professional Planning Bureau in the Interior Ministry, a representative of the Justice Ministry (the prosecutor general), a representative of the Association of Engineers, and a representative of the health system.

⁷⁴ The term “planning area” refers to an area declared as a distinct planning unit. For example, many cities in the West Bank (as in Israel) have been declared separate planning areas, each of which has its own planning institution. See Bimkom, *supra* footnote 7, p. 35.

⁷⁵ Jordanian Law, Article 6.

⁷⁶ See Bimkom, *supra* footnote 7, p. 35.

⁷⁷ Article 8 of the Jordanian Law, *Ibid.*, p. 36.

⁷⁸ *Ibid.*, Article 8(3).

⁷⁹ *Ibid.*, Article 8(4).

council.⁸⁰ The functions of the Local Committee include the preparation of outline and detailed plans; hearing objections to detailed and outline plans and submitting opinions on these to the District Committee; approval of parcellation schemes; issuing building permits; and building inspection.⁸¹ In addition to these committees, the Interior Minister also plays an important role. Finally, the Planning Bureau, a professional body that operates within the Interior Ministry, plays an advisory expert role in *inter alia* the preparation of regional and outline plans. It is also tasked with undertaking a planning survey⁸² as a precondition for the depositing of any plan (regional, outline, or detailed).⁸³

While the Jordanian Law creates a hierarchy of plans based on the hierarchical structure of the planning institutions, the highest level of plan defined under the Jordanian Law is the regional Plan. The *regional plan* addresses the boundaries of cities and villages, the establishment of new communities, various building instructions, roads and infrastructures.⁸⁴ The *outline plan* applies to the entire area of a community (city, town, or village) and is intended to regulate the different land uses (residential, commercial, industrial, and so forth) on the community-wide level. However, as noted by the organization Bimkom, “the typical level of detail in these plans is usually inadequate for issuing a building permit on individual plots”.⁸⁵ Finally the *detailed plan* establishes the permitted uses and building restrictions on the level of the individual plot. Accordingly, building permits can be issued on the basis of detailed plans.⁸⁶ It is important to note that the Jordanian Law explicitly mandates the authorities to undertake planning, through the Local Committee or Planning Bureau.⁸⁷ The law establishes a deposit period of two months for all plans (regional, outline, or detailed) and allows anyone who has an interest in the plan to submit an objection during this period. The HPC has the authority to approve regional and outline plans, while the relevant District Committee has the authority to approve detailed plans. In addition to these plans, the

⁸⁰ Ibid., Articles 9(1)(A), 9(1)(B), Article 9(1)(C), and Article 9(1)(D).

⁸¹ Ibid., Article 9(2).

⁸² Ibid., Article 7.

⁸³ Ibid., Article 14.

⁸⁴ Ibid, Article 15, cited by Bimkom, *supra* footnote 7, p. 37.

⁸⁵ Ibid., p. 37.

⁸⁶ Ibid., 23(5). The Jordanian Law distinguishes between two types of detailed plans, according to the size of the community for which they are intended. In cities and large towns, the law requires the preparation of a separate outline plan; detailed plans for the different neighborhoods are then to be prepared according to the orders of the outline plan. Thus, in this case the detailed plan serves as a tool enabling the practical implementation of the orders in the outline plan. In villages and small towns, the law states that a single plan is sufficient – a detailed outline plan, which forms the basis for issuing building permits. For relevant articles of the Jordanian Law, see Bimkom, *supra* footnote 7, p. 37.

⁸⁷ Ibid., Articles 9(E)(2)(A), 19, 23.

Jordanian Law also establishes a procedure for the preparation and approval of *subdivision plans* (parcellation schemes) under the authority of the Local Committee. According to Bimkom, subdivision plans are important since many of the existing parcels in the West Bank are very large, sometimes covering dozens of hectares. Their subdivision into small lots (for example, lots of 1,000 square meters each) may enable construction on the basis of approved plans, without the need for an additional planning procedure.⁸⁸

The Jordanian Law requires construction works to be undertaken within a declared planning area only after receipt of a permit issued on the basis of an approved plan which includes sufficient detailed instructions. The law defines the term “construction” extremely broadly, to include for example the establishment, repair, or demolition of buildings; excavation works; and even the installation of airconditioning and heating systems.⁸⁹ Building permits are issued by the relevant Local Committee. An appeal against the decision of the Local Committee to refuse to issue a building permit may be submitted to the District Committee. In the regional planning areas,⁹⁰ the authority to issue a permit rests with the District Committee and appeals against its decisions may be submitted to the HPC.⁹¹ The main principle of the Jordanian Law is that construction works must be executed in accordance with approved plans. Regarding enforcement measures in case of non-compliance, the Jordanian Law establishes an orderly procedure for responding to building without a permit, or to construction undertaken contrary to a permit. The law instructs the planning institutions to issue an order to stop work in such a case.⁹² It is important to note that carrying out illegal construction *per se* is not considered a criminal offence under the Jordanian Law. The criminalization only occurs when the offender violates an order to stop work or a demolition order issued by the planning institutions.⁹³

The Jordanian Law established a planning system divided into three levels, with planning institutions that ensure local representation and participation in the planning and zoning process, at all stages, from the preparation of plans and the approval process to the issuance of building permits. Furthermore it provides for procedures to object to certain decisions affecting the individual requesting a building permit.

⁸⁸ Ibid., p. 37.

⁸⁹ Ibid., Article 34(4), p. 38.

⁹⁰ Ibid., Article 8(4).

⁹¹ Ibid., Article 36.

⁹² Ibid., Article 38(1).

⁹³ HCJ 4204/91 Yaacov Macmillan et al. v Local Planning and Building Committee.

B. The unlawfulness of the changes made to the Jordanian Law

The obligation for Israel to transfer back the authority in planning and building to a formal representation of the protected persons as per the model of the local and district planning committees in accordance with the Jordanian Law stems from the fact that the changes made to this law were unlawful *per se* under the obligation to respect local laws under Article 43 of the 1907 Hague Regulations. Not only such changes were not justified under this provision but the nature of planning under occupation in general and the centralization of powers into the hands of the Higher Planning Council as a result of the Order 418 render such changes unlawful. Finally the current regime of planning and building and its related policies have significant humanitarian consequences on the Palestinian population.

- 1) The changes made by the Military Order 418 and its subsequent revisions go beyond the legislative powers of the occupying power

The Israeli military commander published the Military Order *Concerning Towns, Villages, and Buildings Planning Law* (hereinafter, Order 418) in 1971. It is our understanding that officially this order was issued to address the need to amend the composition of the planning institutions under the Jordanian Law, since these included representatives of the Jordanian Government. Furthermore, the High Planning Council operated at the national level of the Kingdom of Jordan. However, it is understood that the changes made in 1971 through Order 418 and its numerous amendments since that date go far beyond the need to adjust the planning institutions to the new situation of occupation by the Israeli authorities and radically modify the Jordanian Law as well as the entire planning system in the West Bank. Such changes, including the revisions of the Order 418 after 1971, exceed the legislative powers of the occupant under international law.

As described above Article 43 of the 1907 Hague Regulations specifies that the occupant must leave the local laws in force, “unless absolutely prevented” to do so. This includes that the occupant shall not abolish existing local administrative institutions. The Jordanian Law was applicable to the West Bank in 1967 when Israel started occupying this area. While some changes of the law were needed to accommodate the new situation of the authorities having effective control over the West Bank, the amendments made to the Jordanian Law do not meet the exception of necessity as defined above.

Under Article 43, it is recognized that the occupying power may suspend, abolish or amend local legislation if it is necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population.

Even under a broad interpretation of the terms “unless absolutely prevented”, the amendments to the Jordanian Law operated through the Order 418 are not justified. The subsequent revisions of the Order 418 are similarly not lawful.

According to our knowledge, the most significant change introduced by the Order in 1971 is the abolition of the District Committees and the transfer of all their powers to the HPC.⁹⁴ Given the critical role played by the District Committees, their abolition in Order 418 constitutes a substantial revision of the Jordanian Law. As a replacement for the District Committees, the Order 418 provides for the appointment by the HPC of subcommittees, provided that at least half their members are members of the HPC.⁹⁵ However this technical amendment does not create separate planning institutions as envisaged in the hierarchical system of the Jordanian Law since the subcommittees form part of the HPC. Subcommittees are merely tasked with functions that the HPC cannot fulfill in its plenary format, as exemplified by the process regarding objections.⁹⁶ The highly centralized nature of the system, putting into the hands of the HPC all aspects of planning and development in the Palestinian communities, contradicts the principles of the Jordanian Law where the District Committees were playing an intermediate role. The undersigned fail to understand why this was necessary for security reasons, to ensure orderly government or to promote public welfare, given the powers conferred to the District Committees by the Jordanian Law.

The second radical change introduced by Order 418 in 1971 is the elimination of the possibility to appoint a village council as a Local Planning Committee. As noted by Bimkom, in place of the village councils, the order establishes “Village Planning Committees” that function within the framework of the Civil Administration; like the HPC, these committees were appointed by the military commander.⁹⁷ As a result, for rural planning area in the West Bank, currently can be identified as area C, Order 418 abolished both the Local Committee and the District Committee. The planning duties assigned to the Local Committees in

⁹⁴ Order 418, Article 2(2), cited by Bimkom, *supra* footnote 7, p. 39.

⁹⁵ *Ibid.*, Article 7A.

⁹⁶ *Ibid.*, p. 39.

⁹⁷ Order 418, Articles 2(4) and 4(A). See Bimkom, *supra* footnote 7, p. 40.

Palestinian villages by the Jordanian Law (the preparation of outline and detailed plans) were transferred to the HPC Local Planning and Licensing Sub-Committee. Like the HPC, this latter body is made up only of Israelis. Moreover, there was elimination by the Israeli authorities of the requirement under the Jordanian Law to have a representative of the public health system to sit on all the planning committees in the West Bank. The Local Planning sub-committee had a representative of the Health Officer in the Civil Administration but the position was cancelled in 1996 Military Order.⁹⁸

In light of the information provided by the Petitioners it is understood that since 1971, revisions of the Order 418 took place regarding Palestinian participation and representation in some of the planning and zoning institutions and process, and that various phases have to be identified. While until the early 1990's there was no representative of the Palestinian communities in the new planning institutions⁹⁹, in the early 1990's, prior to the Oslo Agreement, local representatives appear to have been included.¹⁰⁰ According to information provided by the Petitioners, following the Oslo Agreements, in the mid 1990's it seems that there were attempts to address problems in the functioning of the system and although on paper local representatives were to be part of the composition of the sub-committees, they were not active.¹⁰¹ Military Orders from 2000 and 2009 seem to show that there is no inclusion of local representatives anymore.¹⁰² The Civil Administration has allegedly conducted several meetings with prospective planning communities and requested them to provide the Civil Administration with information and figures relevant to the planning process to improve it. However, according to the information available at the time of writing this Expert Opinion, such improvement does not seem to have materialized yet. Even if it does so, any improvement where local Palestinians have not the same say in these Sub-Committees than they had in the former Local Committees or any mere improvement in terms of planning

⁹⁸ Nomination and Delegation of Authorities regarding Local Planning Sub-Committee from 6.9.1997.

⁹⁹ According to translation of parts of the Military Order provided by the Petitioners, the Military Order Nomination no. 457 from 1985, Delegation of Authorities no. 38, 1985 (amendment no. 3), pertaining to HPC meetings from 13.7.88 and 8.1.89, there were no local representative in the most important sub-committees, i.e. the Local Planning, the Supervision, and Objections sub-committees.

¹⁰⁰ See translation of parts of the Military Orders provided by the Petitioners: regarding the Licensing committee, see art. 1(3) of the Nomination no. 44/91 from 1991, Delegation of Authorities no. 84 from 5.9.1991 (Combined Version); regarding the Local Planning committee, see art. 1(6) of the Nomination no. 38/91 from 1991, Delegation of Authorities no. 78 from 5.9.1991 (Combined Version); and regarding the Objections committee, see art. 1(4) of the Nomination no. 39/91 from 1991, Delegation of Authorities no. 79 from 5.9.1991 (Combined Version).

¹⁰¹ See translation of parts of the HPC meeting protocol from 4.11.1999, provided by the Petitioners.

¹⁰² See translation of parts of Nomination and Delegation of Authorities of the High Planning Council - Objections Sub-Committee from 21.2.2000 and Nomination and Delegation of Authorities of the High Planning Council from 13.1.2009, provided by the Petitioners.

and impact would not change the assessment of the system under international law as it would still be in contradiction with the obligation to respect local legislation as will be explained below.

It is of paramount importance to stress that, on the other hand, the Order 418 created a separate planning framework for the settlements. The order establishes that the commander of the area is permitted to appoint a *Special Local Planning Committee* (SLPC), provided that the planning area in which it operates “does not include the area of a city or village council.”¹⁰³ As stressed by the UN Office for the Coordination of Humanitarian Affairs, with this “new Planning Area” not existing prior to 1967, “SLPCs can be appointed only for Israeli settlements”. Furthermore, as “[a]ll settlement Local and Regional council areas were subsequently proclaimed new planning areas, virtually all settlements now have SLPCs”.¹⁰⁴ In addition, the Israeli Civil Administration has established a separate sub-committee – the settlement sub-committee - responsible for planning in Israeli settlements, sitting as District Planning Committee.¹⁰⁵ Finally the Order 418 further establishes that the commander of the area may assign the powers of a District Committee to the SLPC (Article 2A(b) MO 418).

As stated earlier, the general principle of Article 43 prohibits changes to local legislation, including abolishing existing local administrative institutions because local institutions of the occupied country are established by and operate under the law. Consequently this rule prevents Israel from abolishing existing institutions under the Jordanian Law, except under certain circumstances. Although changes related to the composition of the planning institutions could have been allowed, these should only be limited to the provisions related to the representative/s of the Jordanian Government. It is clear that the amendments go far beyond this aspect and significantly affect the planning and building system established by this law. This cannot be qualified as justified in order to address the

¹⁰³ Ibid., Article 2A.

¹⁰⁴ UN OCHA oPt, *Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank*, *Special Focus*, December 2009, p. 11.

¹⁰⁵ Ibid. According to OCHA, “the Israeli military order announcing the limited settlement freeze temporarily annulled the authority of the Special Local Planning Committees (SLPC) to issue permits. Military legislation already in force allows the ICA to assume all the authorities and responsibilities of the SLPC, including inspection and enforcement. In short, the authority of the SLPC to issue permits and carry-out inspection activities have been temporarily suspended and transferred to the ICA.” Ibid., footnote 47. It is understood that this order is no longer in force due to the lifting of the settlement freeze. The Supervision sub-committee is joint to both settlers and Palestinians as well as other sub-committees on generic issues such as the Environment Sub-Committee.

military interests of the occupant as it relates to planning and building which are matters of the daily civil life.

Furthermore, the undersigned are of the view that the “need to maintain planning and construction actions in the seized territory”¹⁰⁶ or enabling the planning institutions established by the Jordanian Law to function and to complete the machinery set up under this law cannot serve as lawful justifications to explain the changes made. The elimination or the significant limitation to the local representation within the planning institutions, a representation which was prescribed by the local legislation, were not a condition for the planning regime to work properly. On the contrary, the full participation through representation of local representative appears to be a prerequisite for the system to adequately address the needs of the local population. This is even more so true when considering the nature of planning and its long term impact on the social and economic development, as well as the type of relationships between the occupying power and the occupied people. Moreover drastic changes such as the ones introduced by the Order 418 are not consistent with the principle that changes can only be made for the duration of the occupation as described above.¹⁰⁷

The question whether Palestinians could at certain stages attend these Sub-Committees, whether they actually did so, and if they did not, why they did not, is immaterial for this opinion, as long as local Palestinians had not the same say in these Sub-Committees than they had in the former Local Committees. Israel as an occupying power could only have ensured to be able to overturn decisions affecting the security of its occupying forces and take any measures indispensable to ensure that such local committees actually function. Public welfare, the further justification for changes by the occupying power could certainly not justify Order 418, as the new regime created did certainly not make planning and building easier compared with the situation under the previous regime.

Finally, the undersigned were informed that the Civil administration plans to ease the requirements for initiating detailed plans in built-up locations. It is however reported that the persons to be recruited to draw up such plans must be registered in the Israeli Engineers Register. This is not foreseen in the local legislation and the undersigned do not see how this requirement could be justified under the limited exceptions to the obligation to respect local

¹⁰⁶ HCJ 4151/91 Dodin vs. IDF commander in the West Bank.

¹⁰⁷ Oppenheim, *International Law – A Treatise*, supra footnote 26, at 436 and 437.

legislation. All on the contrary, if only Israelis may be involved as experts in the planning process, this corresponds to an implicit annexation in this respect.

To conclude on this point, the authors would like to reiterate that not only the occupant cannot make unjustified changes to the Jordanian Law, but it must respect the local laws.

- 2) The obligation to restore and maintain public order, civil life and safety and the question of the welfare of the population under the new planning regime

Independently of the aforementioned reason for retransferring planning to local authorities (because the legislative and institutional changes introduced by Israel in this respect go beyond what International Humanitarian Law allows an occupying power) such transfer may also be based upon International Humanitarian Law if the present planning process does not satisfy the planning needs of the local population. A proper planning system satisfying the needs of the local population to construct new buildings for demographic, health and economic reasons, in particular for housing purposes, is part of the public welfare, which Israel, as an occupying power has (under the authentic French text of Art. 43 of the Hague Regulations) to ensure. The possibility to construct housing on their lands is an important aspect of family rights (article 27 of Geneva Convention IV) and private property the occupying power has to respect under Article 46 of the Hague Regulations. If for whatever reason the planning needs of the population in the part of the West Bank under its exclusive control cannot be satisfied by the present system, it must be changed and such a change is possible while safeguarding the security interests of the occupying forces. It cannot possibly be claimed that the only way to protect this security interest and to maintain orderly government in areas C is for Israel to take for all practical purposes alone all decisions in matters of planning and building.

a) Planning and Building Policies and their implications

It is understood by the undersigned according to available data that under the current planning and building regime in Area C, Palestinians must meet a number of criteria in order to obtain a building permit. While not all the details are spelled out transparently, two criteria need to be mentioned for they result in restricting considerably the possibility to obtain such permit: 1) the person submitting the application must be able to prove that he/she owns or has

the right to use the land; and 2) the proposed construction must be in conformity with an approved planning scheme that is detailed enough to enable building permits to be issued.¹⁰⁸ As most of the land in the West Bank has not been registered, other documents than a Land Registrar extract are required, starting with property tax documents. Beyond the obstacles created by this first criterion, most of the building permit applications are rejected on the grounds that the proposed construction is inconsistent with existing plans. According to the petitioners, it is almost impossible to obtain an approval of the Civil Administration for subdivision plans to support the necessary change in the existing plans in light of the difficulty to fulfill the first criterion.

Two types of plans are used for Palestinian applicants in the West Bank. The first ones are the Special Partial Outline Plans prepared by the Israeli Civil Administration and not envisaged under the Jordanian Law. According to OCHA, they failed to meet the requirement of the detailed outline plans provided for in the Jordanian Law; they fail to address the needs of Palestinian communities, and can worsen the planning situation in a given village.¹⁰⁹ For example, as stressed by Bimkom as of June 2008 the Israeli Civil Administration has prepared special plans for only 16 of Palestinian villages that are now located completely in Area C, whereas almost all Israeli settlements located in the West Bank have detailed plans approved.¹¹⁰ Moreover, when plans are approved for Palestinian villages, they do not meet planning standards. Bimkom pointed out that density levels of special plans for Palestinian villages range from 24 to 70 housing units per gross hectare; for Israeli settlements, the typical range is 2.7 – 12.8. According to planning experts, high density levels (those higher than 40 to 60 housing units per gross hectare) “entail intolerable damage to the residents’ quality of life.”¹¹¹

The second type of plans is the Regional Outline Plan approved by the British Mandate government of Palestine in the 1940’s. These plans offer limited building possibilities and are considered inadequate to deal with current Palestinian planning needs.¹¹² According to Bimkom, while at the beginning of the occupation in the late 1960’s numerous

¹⁰⁸ UN OCHA oPt, *Restricting Space*, p. 8.

¹⁰⁹ *Ibid.*, p. 9.

¹¹⁰ *Idem.*

¹¹¹ Bimkom, *supra* footnote 7, p. 133, quoting from Quoting from Mike Turner, “Building Density, Open Areas and Quality of Life in Residential Neighborhoods,” in Yisrael Kimchi (ed.), *The Urban Environment*, Jerusalem Institute for Israel Studies – Environmental Policy Center, 2005, p. 101.

¹¹² UN OCHA oPt, *Restricting Space*, p. 10. See on the issue of the limitations of these plans, Anthony Coon, *supra* footnote 4, pp. 65-83.

building permits for construction in the West Bank Palestinian villages were issued based on those plans, at the end of the 1970's the Israeli authorities adopted a much more restrictive interpretation, which still continues to date, where most permits are rejected on the basis that they do not meet the conditions set in those Mandate Regional Plans.¹¹³ It must be noted that according to this organization such plans could meet the needs of many small-to-medium sized communities if the Israeli authorities would allow for the sub-division of plots.¹¹⁴ The undersigned fail to understand why the sub-division of plots is not made accessible to the local population even in unregistered and unsettled lands (if property rights are proven in other ways than by registration) as part of the occupying power's obligation to ensure public welfare and orderly government.

The insufficient and inadequate planning for Palestinian communities is also illustrated by the figures since the beginning of the occupation of the West bank by Israel in 1967. According to Bimkom, relying on official information from the Israeli authorities, while in the early 1970's over 95 per cent of building permit applications as a whole were approved, this rate dropped to less than six percent between 2000 and 2007 for Area C.¹¹⁵

The restrictions stemming from the planning and building regime and policies for Palestinian communities in Area C identified above must also be put within the broader context of additional obstacles to building in this Area. When considering the areas of the Area C which are off-limits for Palestinians, where Israel has effectively prohibited any Palestinian construction (falling within on the those categories: Land earmarked for Israeli settlements and "state land"; "Fire"/ Training zones and other military areas; Nature Reserves; and barrier "Buffer Zone"), this is practically only 30 percent of Area C for which the system of applying for a building permit is actually relevant.¹¹⁶

The very low percentage of approval for Palestinian building applications resulted in fewer and fewer Palestinians applying for permits and more and more illegal constructions in order to address immediate needs, mainly in the context of family expansion.¹¹⁷ Consequently, due to the failure of the current system to meet the needs of Palestinian

¹¹³ Bimkom, supra footnote 7, pp. 55 and ff.

¹¹⁴ Ibid., pp. 62-63.

¹¹⁵ Ibid, pp. 10-11.

¹¹⁶ UN OCHA oPt, *Restricting Space*, p. 6.

¹¹⁷ Bimkom, supra footnote 7, pp 8 and 10.

communities in Area C, illegal constructions increased, and with this the risk that the structures may be demolished by the Israeli authorities. According to OCHA, based on information released by the Israeli State Attorney's Office in early December 2009, a total of approximately 2,450 Palestinian-owned structures in Area C – or an average of 200 per year – have been demolished due to lack of permit over the course of the past 12 years.¹¹⁸ Demolition of houses (or the risk of it) results in the forced displacement of the affected inhabitants.¹¹⁹

b) Planning failure and the welfare of the population

The necessity to repeal the changes made to the Jordanian Law and to reinstate the local and district committees also derives from the obligation for Israel as an occupant to maintain public order and civil life. As highlighted above, in the context of the prolonged nature of the occupation of the West Bank, the needs of the civilian population become more valid and tangible. Conversely, the social, economic and commercial changes brought in the wake of this prolonged occupation do not justify the adaptation of the Jordanian Law as envisaged by the Order 418. The changes made seem to worsen the planning situation rather than improving it to respond to the natural growth of the population. This is particularly important given the long term effects of planning highlighted earlier.

In the light of the figures and above description of the current planning and building system, it is highly suspicious that the legislative changes were made to address concern for the welfare of the civilian population. Indeed, the existing regime not only abolished or limited significantly Palestinian participation and representation in the planning process, but it creates a system that does not meet the planning needs of Palestinian communities to address normal civil life needs such as building for family expansion. In addition, the elimination by the Israeli authorities of the requirement under the Jordanian Law to have a representative of the public health system to sit on all the planning committees in the West Bank, is not justified either. On the contrary, the current planning and building system affects the daily life of the civilian population as demonstrated by the issue of the density levels of special plans

¹¹⁸ UN OCHA oPt, *Restricting Space*, p. 13.

¹¹⁹ Ibid, p.15. See also UN OCHA oPt, "*Lack of Permit*" *Demolitions and Resultant Displacement in Area C, Special Focus*, May 2008, and "Statement on the increase in house demolitions in the West Bank and East Jerusalem", by Mr. Maxwell Gaylard, the United Nations Humanitarian Coordinator for the occupied Palestinian territory, 22 December 2010.

density. In this regard, it is a contradiction in terms under any planning standards to argue that the very high densities established by the special plans allow for meeting the needs of the Palestinian villages.

Indeed the welfare of the population in occupied territory encompasses the ownership and participation of the local population to the planning processes through formal representation as a condition to reflect the needs of the population but also the impact of policies and the related results for this population. Having in mind the long term social and economic effects of the planning regime and its current failure to address the needs of the protected persons, as well as the specific relationship between the occupant and the local population, it is necessary to go back to the original system under the Jordanian Law that actually better secured the participation through representation of the local population in the planning processes. Moreover, transferring back the authority in planning and building to a formal representation of the protected persons is also necessary in that a mere improvement of the current regime in terms of planning and impact or the establishment of a complete new system would still be in contradiction with the obligation to respect local legislation. Finally, as highlighted above, while the obligation to enhance civil life is an obligation of means, changes of the existing legislation or institutions justified by this exception are only lawful if they actually enhance civil life compared with the situation under the previous legislation. It is up to the occupying power to prove that the situation under the legislation it has introduced is better than that under the previous legislation. If, in a situation of long-term occupation it turns out that such enhancement did not occur, the change introduced cannot be justified and must be repealed.

3) Humanitarian consequences and discriminatory practices of the current planning and building system

While it is not the purpose of this Expert Opinion to review in an exhaustive manner the legal issues raised by the current planning and building regime in Area C for Palestinian communities, it is important to note that the current planning and building system has serious humanitarian consequences on the Palestinian population under both IHL and international human rights law. It is also against this backdrop that the obligation to reinstate the planning committees under the Jordanian Law must be considered.

- a) House demolitions, evictions and forced displacements resulting from the current planning and building regime

As stated earlier, the powers of the occupant must be exercised in respecting the specific prohibitions set out under IHL. Pursuant to Article 53 of Geneva Convention IV, “[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”. Among the categories of house demolitions carried out by the Israeli authorities are houses that may be demolished because building permit was not sought prior to their construction. Such demolitions are labeled “administrative demolitions”¹²⁰. As explained earlier, the current planning and building system is characterized by a very high rate of rejection of building permit applications by Palestinians, leading the latter to build without permit and exposing themselves to “stop work” orders and demolition orders.¹²¹ Demolitions of houses built without a permit may be considered to violate Article 53 if the lack of permit is due to a system which is contrary to the legislative powers of the occupant.

Furthermore, house demolitions and forced evictions resulting from the current planning and building system raise serious concerns of violations of the right of everyone to a home (Article 17 of the ICCPR) and the right to adequate housing stemming from the right to an adequate standard of living under Article 11 (1) of the ICESCR are violated.¹²²

The increase number of such demolitions in the recent years must also be considered with the impact it has in terms of forced displacements of affected inhabitants.¹²³

¹²⁰ See *The legality of house demolitions under International Humanitarian Law*, Harvard University, 31 May 2004.

¹²¹ See for example, Human Rights Watch, *Separate and Unequal Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*, 2010, p. 11.

¹²² Committee on Economic, Social and Cultural Rights, General comment no 4, *The right to adequate housing (Art.11 (1))*, 13/12/1991.

¹²³ UN OCHA oPt, *Restricting Space*, p. 15.

b) Discriminatory practices between settlers and the Palestinian population in terms of planning and building

As underlined above, the Order 418 created a separated regime for planning and building processes regarding settlers, where the latter are represented in the planning institutions and decision making processes, in addition to benefiting from more favorable conditions to obtain permits. The fact that on the contrary Palestinians do not enjoy in the same situation, the same regime may suggest that there is a discriminatory practice in this regard. This would constitute an inadmissible discrimination, independently of the fact that Israeli settlements are unlawful as such.¹²⁴ While IHL only addresses non discrimination between protected persons (settlers having the Israeli nationality, they do not fall under the category of protected persons), human rights law prohibits discrimination and applies to all persons under the jurisdiction of Israel, including residents of the Area C, as stressed earlier.

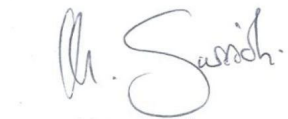
¹²⁴Art. 49(6) of Geneva Convention IV.

IV. CONCLUDING REMARKS

In the light of the above, it is submitted that:

- 1) Israeli authorities are under an obligation to transfer back planning authority to a formal representation of the protected population and especially reinstate the local and district planning committees under the Jordanian Law to ensure representation of the Palestinian communities in the planning process and to meet their needs. Under IHL there is an obligation for the occupant to respect local legislation which requires the occupying power to act under the Jordanian Law instead of creating a new system.
- 2) The relevant sections of Order 418 be repealed accordingly to allow the above.

Prof. Marco Sassoli
Signature



Dr. Theo Boutruche
Signature



Date: 1 February 2011