

The Duties of Occupying Powers in Relation to the Prevention and Control of Contagious Diseases through the Interplay between International Humanitarian Law and the Right to Health

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ABSTRACT

This Article explores the rules governing the prevention and control of contagious diseases in occupied territory under international law. Although the Article refers to the ongoing COVID-19 pandemic, its scope is broader and encompasses instances of state practice that have occurred over the last two centuries. After a careful analysis of the relevant treaties and episodes of state practice, the Article concludes that occupying powers have duties under international humanitarian law and international human rights law to prevent and control contagious diseases, through cooperating with the local authorities and bringing the necessary medical supplies in the occupied territory. The Article stresses that taking these measures, including facilitating the supply of vaccines, is a duty under international law rather than an arbitrary act of international solidarity.

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I. INTRODUCTION

This Article explores the legal framework applicable to the prevention and control of contagious diseases¹ in occupied territory, including the responsibility for vaccinations. The decision to write this Article originates from the current COVID-19 pandemic, which has been adversely affecting human lives in many occupied areas around the world, such as the Occupied Palestinian Territory (OPT)² and Northern Cyprus.³ Scholars⁴ and international nongovernmental organizations⁵ have started discussing this complex topic but, to the best knowledge of this author, no comprehensive study has been published. However, contagious diseases in armed conflict and occupied territory are far from a novelty in human history,⁶ and this Article explores issues beyond the current pandemic.

1. For the limited purposes of this research, the term contagious diseases should be interpreted broadly as a notion encompassing also epidemics and pandemics. These expressions are used interchangeably and in a nontechnical way.

2. See, e.g., *Occupied Palestinian Territory*, WORLD HEALTH ORG., <http://www.emro.who.int/countries/pse/index.html> (last visited Feb. 19, 2022) [<https://perma.cc/6MEJ-3J37>] (archived Feb. 19, 2022).

3. See generally Nazife Sultanoglu, Buket Baddal, Kaya Suer, & Tamer Sanlidag, *Current Situation of COVID-19 in Northern Cypress*, 26 E. MEDITERRANEAN HEALTH J. 641 (2020).

4. See, e.g., Marco Longobardo, *The Duties of Occupying Powers in Relation to the Fight against Covid-19*, EJIL:TALK! (Apr. 8, 2020), www.ejiltalk.org/the-duties-of-occupying-powers-in-relation-to-the-fight-against-covid-19/ [hereinafter Longobardo, *The Duties*] [<https://perma.cc/E5WF-HEVH>] (archived Feb. 19, 2022); Maha Abdallah & Vito Todeschini, *The Right to Health in the Occupied Palestinian Territory during the COVID-19 Pandemic*, OPINIOJURIS (May 19, 2020), <http://opiniojuris.org/2020/05/19/the-right-to-health-in-the-occupied-palestinian-territory-during-the-covid-19-pandemic/> [<https://perma.cc/QQF2-QRJJ>] (archived Feb. 19, 2022); Eyal Benvenisti, *Israel Is Legally Obligated to Ensure the Population in the West Bank and Gaza Strip Are Vaccinated*, JUST SEC. (Jan. 7, 2021), <https://www.justsecurity.org/74091/israel-is-legally-obligated-to-ensure-the-population-in-the-west-bank-and-gaza-strip-are-vaccinated/> [<https://perma.cc/3P85-PDNG>] (archived Feb. 19, 2022).

5. See, e.g., Diakonia International Humanitarian Law Centre, *Covid-19 in Occupied Gaza: What Are the Health-Related and Other Obligations of the Responsible Authorities?* (Dec. 2020), <https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/05/covid-19-health-ihl.pdf> [<https://perma.cc/A8S2-8435>] (archived Feb. 19, 2022); *Denying COVID-19 Vaccines to Palestinians Exposes Israel's Institutionalized Discrimination*, AMNESTY INT'L (Jan. 6, 2021), <https://www.amnesty.org/en/latest/news/2021/01/denying-covid19-vaccines-to-palestinians-exposes-israels-institutionalized-discrimination/> [<https://perma.cc/2AUH-SXTG>] (archived Feb. 19, 2022); *Israel: Provide Vaccines to Occupied Palestinians*, HUM. RTS. WATCH (Jan. 17, 2021, 12:00 AM), <https://www.hrw.org/news/2021/01/17/israel-provide-vaccines-occupied-palestinians> [<https://perma.cc/6RLQ-CNJX>] (archived Feb. 19, 2022); *Equal Access to COVID-19 Vaccines: Who is Responsible in the Occupied Palestinian Territory?*, MED. AID FOR PALESTINIANS (Feb. 2, 2021), <https://www.map.org.uk/news/archive/post/1191-equal-access-to-covid-19-vaccines-who-is-responsible-in-the-occupied-palestinian-territory> [<https://perma.cc/CT9B-3RWG>] (archived Feb. 19, 2022).

6. See generally MATTHEW R. SMALLMAN-RAYNOR & ANDREW CLIFF, *WAR EPIDEMICS: AN HISTORICAL GEOGRAPHY OF INFECTIOUS DISEASES IN MILITARY STRIFE, 1850–2000* (Gordan Clark, Andrew Goudie & Ceri Peach eds., 2004).

At the time of this writing, the tragedy of the COVID-19 pandemic continues to unfold around the world, ripe with grief for the widespread loss of human life and long-lasting impacts on physical and mental health. With different strategies and degrees of success, almost every government in the world engaged in the fight against the pandemic, which has acquired an unprecedented central stage in the public discourse. At no other time in human history have governments been so focused on the protection of the rights to life and health of the people living under their jurisdictions.

In relation to armed conflict, in 2020, the United Nations Security Council (UNSC) demanded “a general and immediate cessation of hostilities” and called upon all belligerents to “engage immediately in a durable humanitarian pause for at least 90 consecutive days, in order to enable the safe, unhindered and sustained delivery of humanitarian assistance, provisions of related services by impartial humanitarian actors, . . . and medical evacuations.”⁷ Long gone are the times when contagious diseases did not suspend armed conflicts, but rather fueled hostilities: in ancient epochs, the spread of a contagious disease was not only seen as the result of violating the religiously-dictated law of armed conflict, as reported paradigmatically in the *Iliad*—the Greeks refused to free the daughter of the high priest Chryses, who had been captured as a war prize, notwithstanding her father’s offer of an appropriate ransom⁸—but also a concrete opportunity to gain military advantage, as demonstrated by the plague in Athens during the Peloponnesian war.⁹ However, in contemporary times, the situation is entirely different: today, international humanitarian law¹⁰ embodies an array of rules that protects the sick as well as medical personnel during an armed conflict.¹¹ The international community’s aim to mitigate the negative effects of an armed conflict on individuals not taking direct part in the hostilities requires that the sick be spared and treated for their conditions. Not only is the purposeful spreading of infectious diseases no longer permitted,¹² but, as recently

7. S.C. Res. 2532, ¶¶ 1–2 (July 1, 2020).

8. See HOMER, THE FIRST BOOK OF THE ILIAD, l. 11–14 (Alexander Pope trans., 1715) (“Latona’s son a dire contagion spread, / And heaped the camp with mountains of the dead; / The king of men his reverend priest defied, / And, for the king’s offence, the people died.”); see also *id.* l. 15–126.

9. See THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR Book II, ch. VII, 194–95 (Richard Crawley trans., Floating Press 2005) (1874).

10. “International humanitarian law,” “law of armed conflict,” “law of war,” and “*jus in bello*” are employed here as synonyms.

11. See generally Jann K. Kleffner, *Protection of the Wounded, Sick, and Shipwrecked*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed., 4th ed. 2021).

12. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production and

demonstrated by the COVID-19 pandemic, the outbreak of a contagious disease is an appropriate reason to suspend hostilities.

The situation in occupied territories resonates with the overall evolution of the law in relation to contagious diseases in armed conflict but, at the same time, is different. An occupation is a portion of an ongoing armed conflict where, as a result of the use of armed force, a state has taken control of a territory without any legal title.¹³ International law strikes a delicate balance between the hostile character of the occupation and the need to protect the interests of the ousted sovereign and the local population. As a result, the occupying power is placed under the duty to administer the occupied territory temporarily without being the sovereign.¹⁴ However, the situation of occupied territories can be equated neither to a peacetime situation—when the vertical relationship between the government and the individual under its jurisdiction is governed mainly by human rights law—nor to a situation of hostilities—when international humanitarian law mainly requires belligerents to discriminate

Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

13. See Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations]. For more on this definition, see generally VAIOS KOUTROULIS, *LE DÉBUT ET LA FIN DE L'APPLICATION DU DROIT DE L'OCCUPATION* (2010); Marco Sassòli, *The Concept and the Beginning of the Occupation*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); NATIA KALANDARISHVILI-MUELLER, *OCCUPATION AND CONTROL IN INTERNATIONAL HUMANITARIAN LAW* (2020).

14. Hague Regulations, *supra* note 13, art. 43. On the responsibilities of the occupying powers under international law, see generally FRANCESCO CAPOTORTI, *L'OCCUPAZIONE NEL DIRITTO DI GUERRA* (1949); ALESSANDRO MIGLIAZZA, *L'OCCUPAZIONE BELLICA* (1949); HERSH LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW: A TREATISE*, II: *DISPUTES, WAR AND NEUTRALITY* 432–56 (7th ed. 1952); GIORGIO BALLADORE PALLIERI, *DIRITTO BELLICO* 300–41 (2nd ed. 1954); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 651–732 (1954); GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* (1957); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 731–832 (1961); II GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT* 163–358 (1968); *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP* (Emma Playfair ed., 1992); ROBERT KOLB & SYLVAIN VITÉ, *LE DROIT DE L'OCCUPATION MILITAIRE: PERSPECTIVES HISTORIQUES ET ENJEUX JURIDIQUES ACTUELS* (2009); ALESSANDRA ANNONI, *L'OCCUPAZIONE 'OSTILE' NEL DIRITTO INTERNAZIONALE CONTEMPORANEO* (2012); EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2d ed., 2012); INT'L COMM. RED CROSS, *EXPERT MEETING: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY* (Tristan Ferraro ed., 2012); Philip Spoerri, *The Law of Occupation*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* (Andrew Clapham & Paola Gaeta eds., 2014); Michael Bothe, *The Administration of Occupied Territory*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY*, *supra* note 13; HANNE CUYCKENS, *REVISITING THE LAW OF OCCUPATION* (2017); AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (2017); YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2d ed. 2019).

between civilians and persons *hors de combat* on the one hand, and combatants on the other, allowing the killing of the latter except if said killing is done in certain inhumane ways. During an occupation, the occupying power must take care of the enemy civilians, striking a subtle balance between hostile and peacetime features of the relationship between the occupying power and the local population.¹⁵

This delicate balance characterizes the actions to prevent and control contagious diseases, including the responsibility to provide vaccinations in occupied territory. A number of relevant international law rules govern the measures that an occupying power must take to prevent and control contagion in areas under its occupation. This Article analyzes the duty to prevent and control contagious diseases, taking into account international humanitarian law, international human rights law, and other applicable rules of international law. These rules are analyzed here in relation to contagious diseases that have plagued occupied territories in the past, as well as the spread of COVID-19 since December 2019; indeed, it is impossible to ignore the fact that recent events have raised difficult questions on the extent of the responsibilities upon occupying powers in relation to COVID-19.¹⁶ This Article mainly aims at describing the legal framework applicable to the prevention and control of contagious diseases in occupied territories in order to identify who is responsible for adopting the relevant measures, including vaccinations and prophylactics. Only limited analysis is devoted to the legality of the specific measures undertaken in some specific occupied territories, which are taken into account only as examples of relevant practice or to emphasize gaps in the law.

The analysis is structured as follows: Part II provides a general overview of the applicable international legal framework pertaining to dealing with contagious diseases in occupied territory. Part III analyzes Article 43 of the 1907 Hague Regulations, emphasizing how this provision applies to the prevention and control of contagious disease and, at the same time, describing its limitations. Part IV addresses the role of the rules embodied in the 1949 Fourth Geneva Convention, concluding that they complement in an effective way the responsibilities of occupying powers against contagious diseases by providing a complex partition of responsibilities with the local authorities. Part V summarizes the results reached through this research and offers some conclusions on the legal framework applicable to contagious diseases in occupied territories.

15. See generally MARCO LONGOBARDO, *THE USE OF ARMED FORCE IN OCCUPIED TERRITORY* 20–87 (2018) [hereinafter LONGOBARDO, *THE USE OF ARMED FORCE*].

16. For some of these questions, see Marko Milanovic, *Some Vaccination Questions, Ethical and Legal*, EJIL:TALK! (Feb. 3, 2021), <https://www.ejiltalk.org/some-vaccination-questions-ethical-and-legal/> [https://perma.cc/B48A-NAJZ] (archived Feb. 19, 2022).

II. THE INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO THE FIGHTS AGAINST CONTAGIOUS DISEASES: PRELIMINARY REMARKS

This Part discusses the role of international law in dealing with contagious diseases. Situations of occupation are mainly governed by international humanitarian law and, in particular, by three international treaties: the Fourth Hague Convention¹⁷ and the annexed Regulations of 1907 (Hague Regulations),¹⁸ which reproduces with marginal modifications the Second Hague Convention and Annexed Regulations of 1899,¹⁹ the 1949 Fourth Geneva Convention (GC IV),²⁰ and the 1977 First Additional Protocol (AP I).²¹ The Hague Regulations and the GC IV apply to every state in the world, since the former reflects customary international law, and the latter has been ratified by every state in the international community. Disagreement on whether the entirety of the AP I reflects customary international law suggests that this treaty should be applied only to states parties.²² However, some of the rules in the AP I correspond to customary international law and should be applied as such.²³

Over the last half century, it has become clear that international human rights law conventions ratified by the occupying power are applicable to its actions in the occupied territory. To summarize a complex debate, suffice it to say that in light of the case law of the International Court of Justice (ICJ)²⁴ and international human rights bodies, it is possible to conclude that international human rights law is applicable along with international humanitarian law during an

17. Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

18. Hague Regulations, *supra* note 13.

19. Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403.

20. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

22. On this debate, *see generally* Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PACIFIC BASIN L.J. 55 (1984); Dieter Fleck, *The Protocols Additional to the Geneva Conventions and Customary International Law*, 29 MIL. L. & L. WAR REV. 497 (1990); Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOR OF FRITS KALSHOVEN (Astrid J. M. Delissen & Gerald Jacob Tanja eds., 1991); Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 INT'L L. STUD. 337 (2002).

23. *See generally* I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005); II JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

24. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (July 9) [hereinafter Wall Opinion]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19).

occupation. Any normative conflict between the two bodies of international law should be resolved through interpretation in light of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),²⁵ which demands that international humanitarian law be applied taking into account other applicable rules of international law.²⁶ Accordingly, the analysis here includes references to the human right to health, as protected by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷ which the ICJ considers to be applicable in occupied territory.²⁸

Furthermore, this Article takes into account the role of treaties specifically dedicated to the prevention and control of contagious diseases, such as those adopted under the framework of the World Health Organization (WHO).²⁹ Specially with reference to the COVID-19 pandemic, the 2005 International Health Regulations (2005 IHR)³⁰ deserve some attention since they bind all the occupying powers that are parties to the WHO (such as Israel). This set of binding rules was

25. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

26. On the contextual application of international human rights law and international humanitarian law in occupied territory, see generally Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 *ISR. L. REV.* 24 (1992); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *ISR. L. REV.* 17 (2004); YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 401–607 (2009); Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 *INT'L REV. RED CROSS* 317 (2012); Victor Luis Gutiérrez Castillo, *La aplicación extraterritorial del Derecho internacional de los derechos humanos en casos de ocupación beligerante*, 36 *REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES* 1 (2018). For specific references to the right to health, see generally Sylvain Vité, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property*, 90 *INT'L REV. RED CROSS* 629 (2008); Gilles Giacca, *Economic, Social, and Cultural Rights in Occupied Territory*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY*, *supra* note 13; Gilles Giacca & Ellen Nohle, *Positive Obligations of the Occupying Power: Economic, Social and Cultural Rights in the Occupied Palestinian Territories*, 19 *HUM. RTS L. REV.* 491 (2019).

27. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICESCR].

28. See Wall Opinion, *supra* note 24, ¶¶ 130, 133.

29. The literature on international health law is constantly growing. For some fundamental references, see generally DAVID P. FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES* (1999); THE GOVERNANCE OF DISEASE OUTBREAKS: INTERNATIONAL HEALTH LAW: LESSONS FROM EBOLA CRISIS AND BEYOND (Leonie Vierck, Pedro A. Villarreal & A. Katarina Weilert eds., 2017); RESEARCH HANDBOOK ON GLOBAL HEALTH LAW (Gian Luca Burci & Brigit Toebes eds., 2018); STEFANIA NEGRI, *SALUTE PUBBLICA, SICUREZZA E DIRITTI UMANI NEL DIRITTO INTERNAZIONALE* (2018); *The International Legal Order and the Global Pandemic*, 114 *AM. J. INT'L L. (SPECIAL ISSUE)* 571 (2020).

30. WHO, Assembly Res. WHA58.3 (May 23, 2005), in *Fifty-Eighth World Health Assembly: Resolutions and Decisions*, at 14–15, WHO Doc. WHA58/2005/REC/1 (2005) [hereinafter 2005 IHR].

adopted on the basis of the WHO Constitution³¹ and creates a series of obligations pertaining to the detection, assessment, notification, and reporting of events in order to prevent the spread of disease or contamination.³² The possibility of applying these regulations in occupied territory is problematic since the 2005 IHR does not define the scope of its application. Even considering that the 2005 IHR is applicable in armed conflict,³³ it is unclear whether the regulations apply extraterritorially, such as in the occupied territory: although Article 4(1) of the 2005 IHR refers to the duty to create authorities responsible for the implementation of the regulations within the state's jurisdiction, Articles 6 and 8–10 refer to duties of the states parties in *relation to their own territory*.³⁴ A literal interpretation should exclude the applicability of these duties to occupied territory, even though the entire rationale of the law of occupation would suggest that, absent any limitation to the territorial scope of a treaty, occupying powers are bound in their activities in the occupied territory by every treaty that is not suspended by the hostilities, as long as this does not conflict with the law of occupation.³⁵ In any case, the duty of the occupying power not to alter the law in force in the occupied territory,³⁶ as described below, encompasses respect for the international obligations that were applicable in the occupied territory before the occupation.³⁷ Accordingly, it is possible to conclude that the 2005 IHR should be presumed to be applicable in occupied territory, especially if the ousted sovereign was a party to the WHO.

Finally, this Article does not explore the role that the rules embodied in the International Law Commission (ILC)'s Draft Articles

31. Constitution of the World Health Organization, art. 21, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 [hereinafter WHO Constitution].

32. On the use of these rules in addressing Covid19, see generally Gian Luca Burci, *The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations*, 11 J. INT'L HUMAN. LEGAL STUD. 204 (2020); Gian Luca Burci & Stefania Negri, *Governing the Global Fight against Pandemics: The WHO, the International Health Regulations, and the Fragmentation of International Law*, 53 N.Y.U. J. INT'L L. & POL. 501 (2021).

33. This is suggested by one of the examples reported by the 2005 IHR, *supra* note 30, at 50, which mentions armed conflicts as factors to be taken into account in the reports. The International Law Commission (ILC) mentions treaties on health issues (such as the WHO Constitution) among those "law-making" treaties that are presumed to continue to apply in armed conflicts (Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, II(2) Y.B INT'L L. COMM'N 108 (2011), Commentary to Annex(c), ¶ 16).

34. 2005 IHR, *supra* note 30, arts. 6, 8–10.

35. Longobardo, *The Duties*, *supra* note 4.

36. See *infra* Part III.B.

37. On this topic, see generally Theodor Meron, *The Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542 (1978); Naomi Burke, *A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties*, 41 N.Y.U. J. INT'L L. & POL. 103 (2008).

on Protection of Persons in the Event of Disasters³⁸ and so-called international disaster law³⁹ may play in relation to contagious diseases in occupied territory. Although a contagious disease may amount to a “disaster” under the definition provided by the Draft Articles,⁴⁰ the rules codified by the ILC are applicable to occupied territory only to the extent that international humanitarian law does not provide specific regulations covering a certain disaster in armed conflict.⁴¹ Since, as explored below, international humanitarian law extensively governs the prevention and control of contagious diseases in occupied territory, there is no room to apply the rules codified by the Draft Articles.

III. ARTICLE 43 OF THE HAGUE REGULATIONS AS A RESPONSE TO CONTAGIOUS DISEASES IN OCCUPIED TERRITORY

A. *Contagious Diseases and the Duty to Restore and Ensure Public Health as a Component of Civil Life*

Before the adoption of the Hague Regulations, some state practice in relation to the adoption of preventive and prophylactic measures in occupied territory emerged clearly. For instance, in 1895, the Japanese army, which was occupying portions of China, promulgated extensive regulations on public health in order to prevent and control contagious diseases, including the establishment of vaccination programs.⁴² As noted by one commentator, this practice was unprecedented during European wars.⁴³

38. See Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, U.N. Doc. A/71/10 (2016).

39. On this field of international law, which is attracting increasing academic attention, see generally INTERNATIONAL DISASTER RESPONSE LAW (Andrea de Guttry, Marco Gestri & Gabriella Venturini eds., 2012); THE INTERNATIONAL LAW OF DISASTER RELIEF (David D. Caron, Michael J. Kelly & Anastasia Telesetsky eds., 2014); RESEARCH HANDBOOK ON DISASTERS AND INTERNATIONAL LAW (Susan C. Breau & Katja L.H. Samuel eds., 2016); ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND DISASTERS (Flavia Zorzi Giustiniani, Emanuele Sommaro, Federico Casolari & Giulio Bartolini eds., 2018); FLAVIA ZORZI GIUSTINIANI, INTERNATIONAL LAW IN DISASTER SCENARIOS: APPLICABLE RULES AND PRINCIPLES (2021).

40. See Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, *supra* note 38, art. 3(a) (“[D]isaster’ means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.”); see also Antonio Coco & Talita de Souza Dias, *States’ Due Diligence Duties vis-à-vis the Covid-19 Pandemic*, 11 J. INT’L HUMAN. LEGAL STUD. 218, 222–23 (2020).

41. Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, *supra* note 38, art. 18(2), cmt. ¶ 9.

42. See the documents translated and commented in NAGAO ARIGA, LA GUERRE SINO-JAPONAISE AU POINT DE VUE DU DROIT INTERNATIONAL 197–201 (1986).

43. See *id.* at 197–98.

The Hague Regulations, first adopted in 1899 and then in 1907, are the first international humanitarian law treaties that embody rules that can be applied to the fight against contagious diseases in occupied territory. Since the Hague Regulations adopted in 1899 are almost identical to those adopted in 1907, this Article refers to the 1907 Hague Regulations. Although the Hague Regulations do not address health or contagious diseases directly, they contain Article 43, a general rule on the administration of occupied territory that is broad enough to encompass the protection of public health.

According to Article 43 of the Hague Regulations, which is still today considered to be the main rule governing the administration of occupied territory⁴⁴ and corresponds to previous nonbinding codification on the law of occupation,⁴⁵ “[t]he 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 *civil life*, while respecting, unless absolutely prevented, the laws in force in the country.”⁴⁶ This provision is central in analyzing the occupying power’s responsibility in relation to contagious diseases, as “civil life” is a notion that encompasses public health in occupied territory. As demonstrated by relevant case law, the duty to restore and ensure civil life regards the “whole social, commercial and economic life of the community,”⁴⁷ including “a variety of aspects of civil life, such as the economy, society, education, welfare, *health*, [and] transport.”⁴⁸ Accordingly, the spread of a contagious disease is, in itself, a threat to civil life in occupied territory that falls within the scope of Article 43. Additionally, it is possible to argue that a very serious contagious disease—such as the COVID-19 pandemic—is itself a threat to public order.⁴⁹

44. BENVENISTI, *THE INTERNATIONAL LAW*, *supra* note 14, at 69 (“Article 43 is a sort of mini-constitution for the occupant administration.”).

45. *See, e.g.*, Project of an International Declaration concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 23 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004); The Laws of Naval War Governing the Relations between Belligerents, Aug. 9, 1913, art. 43, *reprinted id.* at 1123.

46. Hague Regulations, *supra* note 13, art. 43 (emphasis added). The reference to “civil life” is the correct one in light of the only authoritative French text. The wrong translation of “l’ordre et la vie publics” in “public order and safety” has been noted by a number of authors, starting with Edmund H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 *YALE L.J.* 393 (1945).

47. *Grahame v. Director of Prosecutions*, 14 *I.L.R.* 228, 232 [Control Comm’n Ct. Crim. App. 1947].

48. *HCJ 393/82 Society Lawfully Registered v. Commander of the IDF*, 37(4) PD 785, ¶ 18 (1983) (Isr.) (emphasis added); *see also* *HCJ 202/81 Tabib v. Minister of Defence*, 36(2) PD 622, 629 (1981) (Isr.). Also consider the position of the Democratic Republic of the Congo, which asked the ICJ to adopt provisional measures against Uganda in relation to the guarantee of the right to health in occupied territory. *See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Provisional Measures, 2000 *I.C.J. Rep.* 111, ¶ 13(4) (July 1).

49. Longobardo, *The Duties*, *supra* note 4.

The gist of Article 43 of the Hague Regulations is that the daily life in the occupied territory should continue as it was before the occupation, and that the occupying power should maintain the law in force in the occupied territory and leave the local administration as unaltered as possible. This idea, which is sometimes called the “conservationist principle,” is confirmed by other rules of the Hague Regulations and is further elaborated by the subsequent GC IV.⁵⁰ Considered as a whole, the conservationist principle creates in the occupying power a duty to use the same means that the ousted sovereign would have employed to restore and ensure public order and civil life. Accordingly, the prevention and control of contagious diseases does not fall into a category of activities for which the occupying power can resort to the rules governing the conduct of the hostilities, but rather, it is entirely governed by domestic law and international human rights law.⁵¹

Even in the absence of any clear statement in this sense, the Hague Regulations govern the prevention and control of contagious diseases in occupied territory through both negative and positive measures.⁵² On the one hand, the obligations to “restore” and “ensure” civil life bar the occupying power from interfering with the activity of the local authorities pertaining to the prevention and control of a contagious disease (a negative duty); on the other, if the occupation has disrupted the health care apparatus in the occupied territory, the occupying power must undertake measures to bring it back to the standards that existed before the occupation (a positive duty). As affirmed by Marja Lehto, the ILC’s Special Rapporteur for the protection of the environment in armed conflicts, the duty to restore and maintain civil life both has “a clear focus on the immediate aftermath of hostilities and urgent risks to health arising from malnutrition, displacement and inadequate sanitary conditions,” and “implies that the occupying State, once such risks have been alleviated, should also begin to pay attention to more long-term public health issues.”⁵³ This means that, contrary to what has been suggested by

50. On this principle, see generally LONGOBARDO, *THE USE OF ARMED FORCE*, *supra* note 15, at 58–61.

51. See KOLB & VITÉ, *supra* note 14, at 419–21; see also, *mutatis mutandis*, LONGOBARDO, *THE USE OF ARMED FORCE*, *supra* note 15, at 186–94 (applying this principle to the rules on the use of armed force).

52. On these obligations, see generally Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* (Dinah Shelton ed., 2013).

53. Int’l L. Comm’n, First Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, U.N. Doc. A/CN.4/720, ¶ 65 (Apr. 30, 2018).

some commentators,⁵⁴ Article 43 of the Hague Regulations also embodies positive obligations.⁵⁵

It is important to acknowledge that the positive duty to restore and ensure civil life, even in relation to contagious diseases, is an obligation of conduct. Article 43 of the Hague Regulations identifies a result that must be obtained (restoration and maintenance of civil life), while leaving the occupying power free to choose the means to reach that result.⁵⁶ However, whether this obligation is met does not depend on whether the result is achieved, but rather, only on the basis of whether the occupying power has deployed enough diligence in its attempt to achieve it.⁵⁷ In other words, Article 43 is an obligation of conduct that requires the occupying power to endeavor to restore and ensure civil life.⁵⁸ Compliance with Article 43 must be assessed in light of the notion of due diligence:⁵⁹ the occupying power must “employ all means reasonably available to them, so as to” restore and ensure civil life, but it does not incur international responsibility if that result is not reached notwithstanding the diligence employed by the occupying power.⁶⁰ Translating this reasoning in the field of contagious diseases, Article 43 is not breached if a contagious disease spreads in the occupied territory, but it is breached only if the occupying power has

54. Some contemporary authors still believe that positive obligations later codified by the 1949 GC IV in relation to health “go above and beyond the legal duties owed to a state's own population.” See Kristen E. Boon, *The Future of the Law of Occupation*, 46 CAN. Y.B. INT'L L. 107, 113 (2008).

55. See my argument that Article 43 of the Hague Regulations should be considered a source of positive obligations articulated, in relation to economic measures, in Marco Longobardo, *The Palestinian Right to Exploit the Dead Sea Coastline for Tourism*, 58 GERMAN Y.B. INT'L L. 317, 325 (2015). See also the brief notation by Jacob Sundberg, *The War of Laws*, 28 NORDISK TIDSSKRIFT INT'L RET 268, 301 (1958).

56. MIGLIAZZA, *supra* note 14, at 161.

57. See Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 664–65 (2005); DINSTEIN, *supra* note 14, at 101–02; see also the explanation offered by HCJ 69/81 Abu Aita et al. v. Regional Commander of the Judea and Samaria Area et al., 37(2) PD 197, ¶ 50(c), www.hamoked.org/files/2011/290_eng.pdf [<https://perma.cc/S9ZF-D4XE>] (archived May 27, 2022).

58. See, *mutatis mutandis*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in Area (Nauru v. Tonga), Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 ITLOS Rep. 9, 41.

59. On due diligence obligations, see generally RICCARDO PISILLO MAZZESCHI, *DUE DILIGENCE E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI* (1989); JOSÉ FERNANDO LOZANO CONTRERAS, *LA NOCIÓN DE DEBIDA DILIGENCIA EN DERECHO INTERNACIONAL PÚBLICO* (2007); JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (2016); *LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE* (Sarah Cassella ed., 2018); Samantha Besson, *La due diligence en droit international*, in 409 RECUEIL DES COURS 154 (2020); *DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER* (Heike Krieger, Anne Peters & Leonhard Kreuzer eds., 2020). On due diligence in international humanitarian law, see Marco Longobardo, *The Relevance of the Concept of Due Diligence for International Humanitarian Law*, 37 WISCONSIN INT'L L.J. 44 (2019).

60. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26).

not endeavored to prevent and control it through measures that were adequate in light of the means available to it.

B. The Conservationist Principle and the Measures against Contagious Diseases

One of the main shortcomings of Article 43 of the Hague Regulations in relation to the prevention and control of contagious diseases in occupied territory is its strong link with the conservationist principle. If the occupying power has the duty to prevent and control contagious diseases within the boundaries of existing law in force in the occupied territory, it may be difficult to adapt old legislation to new threats, and to plan long-term actions against contagious diseases.

These issues are perceived as particularly problematic when an occupation spans for many years in so-called prolonged occupations,⁶¹ such as in the case of the OPT. Even in relation to contagious diseases, the local population's well-being may be served better outside the constraints of the law of occupation, which is preoccupied with maintaining the status quo in light of the temporary character of the occupying power's administration. Preventing contagious diseases may need long-term plans of action, such as vaccination campaigns that start at an early age and public health education initiatives.⁶² The link between the protection of the environment and the prevention of contagious diseases may require the occupying power to adopt interventions with respect to the environment that alter the law in force in the occupied territory beyond what is permitted by the Hague Regulations.⁶³ New scientific developments may direct changes in the health practices of the occupied territory to an extent that the ousted sovereign could not have taken into account (e.g., if a vaccine is created after the beginning of the occupation, the occupying power may need to impose vaccination by law in the occupied territory). These are just

61. For an overview of the relevant debate, see Richard A. Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. REFUGEE STUD. 40, 44 (1989); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AM. J. INT'L L. 44, 44 (1990); Vaios Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?*, 94 INT'L REV. RED CROSS 165, 167 (2012); Iain Scobbie, Address at the United Nations Roundtable on Legal Aspects of the Question of Palestine (May 22, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611130 [<https://perma.cc/YU8K-9KY4>] (archived May 27, 2022).

62. See Alexander Breitegger, *The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and Other Emergencies*, 95 INT'L REV. RED CROSS 83, 96 (2013); Lubell, *Human Rights Obligations*, *supra* note 26, at 752–53.

63. On this topic, see generally Int'l L. Comm'n, First Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 53, ¶¶ 63–76; Karen Hulme, *Enhancing Environmental Protection During Occupation Through Human Rights*, 10 GOETTINGEN J. INT'L L. 203 (2020).

examples, but they are sufficient to show that the prevention and control of contagious diseases may be seen as one of the fields in which Article 43 of the Hague Regulations and the conservationist principle may conflict with the well-being of the local population.

This is not the occasion to describe in detail why the conservationist principle is still binding in occupied territory⁶⁴ and why there is no such thing as customary international law pertaining to prolonged occupation.⁶⁵ As noted by Yoram Dinstein, one should always be skeptical when an occupying power declares that it has to alter the law in force in the occupied territory for the welfare of the local population.⁶⁶ Indeed, occupying powers have sometimes used arguments based on the application of human rights law to limit the protection offered by the law of occupation to the ousted sovereign and the local population.⁶⁷ Suffice it to say that Article 43 of the Hague Regulations must be interpreted in light of additional applicable international law rules and that as a result, it is possible to identify some courses of actions for an occupying power that would make it possible to prevent and control contagious diseases while respecting the law in force in the occupied territory.

A series of steps is particularly useful in order to understand the latitude of the measures that can be adopted to fight against contagious diseases in occupied territory under Article 43 of the Hague Regulations. The first step is to acknowledge that this provision demands the occupying power to adopt positive measures, as mentioned above.⁶⁸ The second step is to bear in mind that the duty not to alter the law in force in occupied territory is not absolute, but rather, local legislation can be altered if the occupying power is absolutely prevented from maintaining the local legislation: as a result of the adoption of Article 64(2) of the GC IV, the occupying power can alter the law in force in the occupied territory to implement the

64. See the debate offered by Vaïos Koutroulis, *Mythes et réalités de l'application du droit international humanitaire aux occupations dites "transformatives,"* 40 REV. BELGE DROIT INT'L 365 (2007); GREGORY H. FOX, HUMANITARIAN OCCUPATION (2008); ANDREA CARCANO, THE TRANSFORMATION OF OCCUPIED TERRITORY IN INTERNATIONAL LAW 24 (2015).

65. See the illuminating words by Antonio Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources,* in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 14, at 419–20.

66. DINSTEIN, *supra* note 14, at 132.

67. See the decisions discussed by Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation,* 19 LEIDEN J. INT'L L. 393, 418 (2006); Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1, 1 (2007); Martti Koskenniemi, *Occupied Zone: A Zone of "Reasonableness?"*, 41 ISR. L. REV. 13, 13 (2008); Marco Pertile, *Il principio di proporzionalità tra diritto umanitario e diritti umani,* in LA TUTELA DEI DIRITTI UMANI E IL DIRITTO INTERNAZIONALE 159, 194–204 (Adriana Di Stefano & Rosario Sapienza eds., 2012).

68. See *supra* Part III.A.

obligations pertaining to the health of the local population embodied in the GC IV.⁶⁹ Furthermore, as reminded above, today it is widely accepted that international human rights law is applicable to occupied territory and that international humanitarian law should be interpreted in a manner that takes into account applicable human rights law provisions.⁷⁰ This affects the interpretation of the conservationist principle under Article 43 of the Hague Regulations and Article 64(2) of the GC IV; as a result, measures enhancing the health of the local population, such as those that are necessary to prevent and control a contagious disease, may justify limited alterations of the law in force in the occupied territory, especially if the occupation is long term.⁷¹

Under the human right to health provided by Article 12 of the ICESCR, states “recognize the right of everyone to the enjoyment of the *highest attainable standard of physical and mental health*” and commit to take “steps” including “[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases.”⁷² The UN Committee on Economic, Social, and Cultural Rights has clarified that steps must be taken to provide health care that is available, accessible, adaptable, and of good quality.⁷³ Accordingly, the duty to restore and ensure civil life should aim at providing the highest attainable standard of health, rather than at providing the standard of health that was available prior to the occupation. The way in which this standard is attained is progressive rather than immediate; accordingly, during an occupation, the duration of the hostile administration plays a role in the sense that the more prolonged the occupation, the more efforts are required by the occupying power in order to achieve that result. In other words, the duration of the occupation is not a normative element (in the sense of a consideration that may generate new customary law), but rather, it is a factual element that should be taken into account in the application of relevant rules of international humanitarian law and international human rights law.⁷⁴

69. See GC IV, *supra* note 20, art. 64(2) (“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention.”). These obligations are described *infra* Part IV.

70. See *supra* Part II.

71. See Breitegger, *supra* note 62, at 95; Giacca, *supra* note 26, at 1504; see also Int’l L. Comm’n, First Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 53, ¶ 65.

72. ICESCR, *supra* note 27, art. 12 (emphasis added).

73. See CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), U.N. Doc. E/C.12/2000/4, (Aug. 11, 2020) ¶ 12. On this issue, see generally Giacca, *supra* note 26, at 1496–97.

74. See Koutroulis, *The Application*, *supra* note 61, at 276–80; Longobardo, *The Palestinian Right*, *supra* note 55, at 326–27; LONGOBARDO, THE USE OF ARMED FORCE, *supra* note 15, at 53.

If an occupation lasts only a limited amount of time—such as a few months—it is possible to conclude that the duty to restore and ensure civil life in relation to a contagious disease is satisfied if the occupying power adopts emergency measures, as far as possible through existing legislation, such as public advisories, mandatory quarantine, emergency medical treatment and supply provisions, and other emergency actions that, at a minimum, guarantee the level of health care that existed before the occupation. If the occupation lasts for more time—such as a couple of years—the occupying power should demonstrate that it has taken steps to guarantee the highest attainable standards of health care in the occupied territory in relation to contagious diseases, for instance, through the adoption of long-term prevention and prophylactic programs that address the natural and human-made causes of contagious diseases, provide adequate public health education, and develop health care infrastructure.⁷⁵

This flexibility in the content of the duties in relation to contagious diseases is not an oddity in the legal framework applicable to occupied territories, nor is it imported artificially through the application of human rights law standards. Rather, it is an embedded feature in the law of occupation, which allows some latitude to the occupying power exactly because each occupation is different. As affirmed by the Eritrea-Ethiopia Claims Commission, if the military presence of an occupying power is more transitory, not all obligations of the law of occupation

can reasonably be applied to an armed force anticipating combat and present in an area for only a few days. Nevertheless, a State is obligated by the remainder of that Convention and by customary international humanitarian law to take appropriate measures to protect enemy civilians and civilian property present within areas under the control of its armed forces.⁷⁶

This means that the duration of the occupation is a factual element to be taken into account in order to understand what is due by the occupying power under Article 43 of the Hague Regulations, including in relation to the restoration and maintenance of health care. This

75. See Giacca, *supra* note 26, at 1504–05.

76. Eritrea-Ethiopia Claims Commission, Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, Dec. 19, 2005, XXVI R.I.A.A. 291, 307–08 (emphasis added).

conclusion has been confirmed by the ILC's Special Rapporteur Lehto⁷⁷ and is supported by some state practice.⁷⁸

C. Article 43 of the Hague Regulations as a Source of Obligations in Relation to Neighboring States

Article 43 of the Hague Regulations is also considered the source of the duty not to cause harm to *other* states as a result of activities occurring in occupied territory. Absent the occupation, any state has the duty to prevent harm from occurring to other states due to the activity undertaken in its territory, both as a result of lawful⁷⁹ and unlawful⁸⁰ activities. The fact that a state controls a portion of territory without any sovereign title, as in the case of occupation, does not relieve that state from this duty; in the ICJ's words, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."⁸¹ This duty can be seen as specifying Article 43 of the Hague Regulations, which imposes on the occupying power the responsibility for administering the occupied territory.⁸²

The principle that the occupying power is responsible for the harm caused to other states by activities generated in the occupied territory has been applied to several kinds of harm. For instance, Iraq's neighboring states called upon the Iraqi authorities operating under US and UK occupation to undertake measures necessary to fight against terrorism and prevent terrorist threats from spreading into the neighboring states.⁸³ This idea was also described in detail by the ILC

77. For an application of this reasoning to the relationship between protection of health and environment in occupied territory, see the articulated view in Int'l L. Comm'n, First Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 53, ¶ 65.

78. E.g., after the beginning of the occupation of the West Bank, Israel first adopted measures to bring the health infrastructures to the standards previously offered by Jordan, and after two years, it decided to enhance the level of service by investing significant resources. See ESTHER ROSALIND COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES, 1967-1982 226-29 (1985).

79. See, e.g., Int'l L. Comm'n, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries*, 2 pt. 2 Y.B. INT'L L. COMM'N 148 (2008); Pulp Mills on the River Uruguay (Arg. V. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20).

80. See, e.g., Island of Palmas (Neth. v. U.S.A.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9).

81. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 118 (June 21).

82. See LONGOBARDO, THE USE OF ARMED FORCE, *supra* note 15, at 174.

83. See Joint Statement of Iraq's Neighboring States, Nov. 2, 2003, ¶ 7, in 2 STEFAN TALMON, THE OCCUPATION OF IRAQ: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY AND THE IRAQI GOVERNING COUNCIL 1453, 1454 (2013).

in relation to environmental harm; according to the commission, “[a]n Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.”⁸⁴ As already mentioned, the reference to due diligence means that the occupying power must “employ all means reasonably available to them, so as to” reach the desired result to prevent the harm.⁸⁵

There is no reason why this rule of international law should not apply to the spread of a contagious disease from the occupied territory to neighboring states. Indeed, the concept of “harm” encompasses the consequences of the outbreak of a contagious disease such as COVID-19.⁸⁶ As sovereign states have a duty to prevent an uncontrolled contagious disease in their territory from harming other states,⁸⁷ similarly, an occupying power must intervene to prevent and control contagious diseases in occupied territory not only in the interest of the local population, but of neighboring states as well.

The conclusion that an occupying power must prevent and control contagious diseases also in relation to the possibility of affecting other states is reinforced by the 2005 IHR.⁸⁸ Article 9(2) demands that “States Parties shall, as far as practicable, inform WHO within 24 hours of receipt of evidence of a public health risk *identified outside their territory* that may cause international disease spread.”⁸⁹ This provision pertains to sources of risk identified by a state outside its own territory, comprising risks originating from the occupied territory. Complying with this provision is one of the possible ways through which the occupying power can implement its duty not to harm other states under Article 43 of the Hague Regulations.⁹⁰

D. *Evaluating the Role of Article 43 of the Hague Regulations in Relation to Contagious Diseases*

Already two decades after the adoption of Article 43 of the Hague Regulations, during the 1919–1920 US occupation of portions of Germany, preventive and prophylactic measures in occupied territory were commonplace, both on the basis of existing law and new regulations enacted by the occupying power.⁹¹ Similarly, when

84. Int’l L. Comm’n, Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading, U.N. Doc. A/CN.4/L.937 (2019), draft principle 22.

85. See *supra* Part III.A.

86. See Coco & de Souza Dias, *supra* note 40, at 222.

87. See *id.*

88. See *supra* Part II.

89. 2005 IHR, *supra* note 30, art. 9(2) (emphasis added).

90. See Longobardo, *The Duties*, *supra* note 4.

91. See the detailed description by IRWIN L HUNT, AMERICAN MILITARY GOVERNMENT OF OCCUPIED GERMANY, 1918-1920: REPORT OF THE OFFICER IN CHARGE OF CIVIL AFFAIRS, THIRD ARMY AND AMERICAN FORCES IN GERMANY 123–53 (1943).

Germany occupied Belgium during World War I (1914–1918) and World War II (1940–1945), the occupying forces enacted particularly restrictive measures on prostitution to prevent and control the spread of sexually transmitted diseases.⁹² In the same vein, during World War II, the Allies in Italy enacted measures to prevent and control the spread of typhus, cholera, and malaria in 1943 and 1944.⁹³ It is interesting to note some details of these measures—a 1944 document mentions the creation of a committee responsible for “the prevention or control of outbreaks of epidemics or diseases of all kinds,” the “supply and distribution of medical supplies, the manufacture of medicines and the production of sera and vaccines,” as well as “the prevention and control of the diseases of animals.”⁹⁴ Although, formally speaking, the occupation of Italy terminated on February 9, 1944, some months before the publication of this memo, some scholars consider that the United States undertook responsibilities as an occupying power for many more months.⁹⁵ If this conclusion is correct, this short document is very important because it encompasses a number of elements that are relevant still today in relation to the fight against COVID-19 in occupied territory; it provides for general preventive and prophylactic measures, it is specifically concerned with human vaccines, and it takes into account the need to prevent and control diseases in animals, which could lead to human infections.

Nevertheless, it is difficult to understand whether these measures were undertaken to implement what was perceived as a legal duty under Article 43 of the Hague Regulations or for reasons of opportunity. Preventing and controlling the spread of contagious diseases in occupied territory fulfilled not only the interests of the local population, but also the interests of the occupying power, since contagious diseases in the occupied territory could have threatened the health of the occupying army. As stated by an official US document pertaining to measures applied in occupied Italy, “the health of the civilians cannot be considered as being in a separate category from the health of the Military, since the presence of an epidemic in the civilian population constitutes a direct threat to Military Operations.”⁹⁶ Even the prophylactic measures on prostitution in occupied Belgium during World War I and World War II, and in occupied Germany and Japan at the end of World War II, which aimed at preventing sexually

92. See the account by BENOÎT MAJERUS, OCCUPATIONS ET LOGIQUES POLICIÈRES: LA POLICE BRUXELLOISE EN 1914-1918 ET 1940-1945 63–99, 230–48 (2007).

93. See the official documents collected in HARRY L. COTES & ALBERT K. WEINBERG, CIVIL AFFAIRS: SOLDIERS BECOME GOVERNORS 310–27 (1986).

94. See ACC Rpt. to Advisory Council for Italy, *Functions of the ACC and Its Relations with the Italian Government*, 10 Aug 25, 1944, ACC files, 10000/136/268, in COTES & WEINBERG, *supra* note 93, at 293 (emphasis added).

95. See BENVENISTI, THE INTERNATIONAL LAW, *supra* note 14, at 157.

96. See *Msg., Gen. Wilson to CCS, Aug. 28, 1944*, MTO HS files, CAO/301, CM-OUT 6438, in COTES & WEINBERG, *supra* note 93, at 327.

transmitted diseases, were mainly adopted to protect the health of the occupying troops rather than that of the local population.⁹⁷

Commentators agree on the fact that the duty to restore and ensure civil life allowed the occupying powers to control the supplies of medicines and to adopt preventive measures against contagious diseases,⁹⁸ even if it is unclear whether this was perceived *as a duty* under the law of occupation as it was understood at the time. An element that suggests that there was no perception of such a duty under the Hague Regulations comes from unexpected sources: in 1928, the International Law Association convened in Warsaw to adopt a model convention on the international law applicable to occupied territory (Bellot Rules)⁹⁹ that included a provision demanding the occupying power ensure the functioning of health care in occupied territory.¹⁰⁰ Contemporary observers considered that the entire project did not reflect customary international law of that time, but rather, that it was a document *de jure condendo* resulting from new needs presented during World War I.¹⁰¹ Nevertheless, the relevant provision of the Bellot Rules has been saluted as a specification of Article 43 of the Hague Regulations in relation to health care services by subsequent scholars.¹⁰² This conclusion appears to be the correct one in light of the very nature of Article 43 of the Hague Regulations, which imposes the continuity—unless absolutely prevented—of the administrative apparatus of the ousted sovereign during the occupation. Thus, it is logical to conclude that, at the time the Hague Regulations were adopted, this continuity already included health care services.

The idea that Article 43 of the Hague Regulations was unfit to govern the prevention and control of contagious diseases in occupied territory is implicit in the research of some scholars for other legal

97. On Belgium, see MAJERUS, *supra* note 92, at 71. But note that during WWII, racist motivations replaced the purely medical ones as the main basis to monitor prostitution services in Belgium. *Id.* at 236. On Germany, see JESSICA REINISCH, *THE PERILS OF PEACE: THE PUBLIC HEALTH CRISIS IN OCCUPIED GERMANY* 5 (2013). On Japan, see ROBERT KRAMM, *SANITIZED SEX: REGULATING PROSTITUTION, VENEREAL DISEASE, AND INTIMACY IN OCCUPIED JAPAN, 1945–1952* 79–80 (2017).

98. See, e.g., VON GLAHN, *supra* note 14, at 142.

99. See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-FIFTH CONFERENCE HELD AT WARSAW, AUG. 9TH TO 16TH, 1928 88 (1929) [hereinafter BELLOT RULES]. See the comments by J.C. Witenberg, *Des lois de la guerre en territoire occupé*, 56 JOURNAL DU DROIT INTERNATIONAL 302, 304–08 (1929); Arnold Wilson, *The Laws of War in Occupied Territory*, 18 TRANSACTIONS GROTIUS SOCIETY 17, 30–39 (1932).

100. BELLOT RULES, *supra* note 99, rule 18, at 92 (“Public utilities for the supply of water, gas and electricity, medical, sanitary, scientific and hygienic institutions and organisations shall be permitted to continue their activities under their existing authorities, subject to inspection and control by the occupier, who may, in view of the exigencies of war, restrict the supply or services as may be found necessary.”) (emphasis added).

101. Witenberg, *supra* note 99, at 302.

102. CAPOTORTI, *supra* note 14, at 132 n.56.

grounds. For instance, the so-called Martens Clause was sometimes invoked in relation to the protection of health and the prevention and control of contagious diseases in occupied territory. According to this provision,

in cases not included in the [Hague Regulations], the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹⁰³

The celebrated Raphael Lemkin, for instance, considered that leaving the local population of occupied territory exposed to health risks violated the “laws of humanity” and, ultimately, constituted genocide.¹⁰⁴ However, the fact that the Martens Clause was part of the preamble rather than the text of the Hague Regulations, and the fact that the “laws of humanity” concept is vague, weakened the possibility of invoking it as a source of obligation at the time of its adoption.¹⁰⁵

Irrespective of some of the examples mentioned above, overall, Article 43 of the Hague Regulations immediately proved to be inadequate to protect the local population of occupied territories from the spread of infectious diseases because it was deliberately disregarded by most occupying powers. Since the wording of the provision did not refer explicitly to the protection of the local population from contagious diseases, occupying powers were able to avoid their obligations in the fight against contagious diseases.¹⁰⁶ Indeed, the very fact that the International Law Association thought that it was necessary to specify the continuity of the health care system of the occupied territory means that this was not taken for granted. The lack of efforts to prevent and control epidemics in occupied territory became impossible to ignore during World War II, when, especially in territories occupied by the Nazi regime, contagious diseases were not addressed properly. Rather, as noted by Lemkin, undesired national groups in occupied territory (for instance, in Poland) were deliberately left exposed to living conditions endangering their health and facilitating the spread of contagious diseases.¹⁰⁷ This was also the case for thousands of innocents imprisoned in the

103. Hague Regulations, *supra* note 13, pmb1.

104. RAPHAEL LEMKIN, *THE AXIS RULE IN OCCUPIED EUROPE* 92 (1944).

105. On the current potential of the Martens Clause, see generally Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 *EUR. J. INT'L L.* 187 (2000).

106. See VON GLAHN, *supra* note 14, at 142.

107. LEMKIN, *supra* note 104, at 88 (with specific reference to the Warsaw ghetto); see also *Attorney-General of Israel v. Otto Adolf Eichmann*, 36 *I.L.R.* 5, 165–66 (1961).

concentration camp of Auschwitz, in occupied Poland, who were left to die from contagious diseases that were not treated properly.¹⁰⁸

Nevertheless, although very general in character, Article 43 of the Hague Regulations is still today an applicable rule of international humanitarian law binding occupying powers. Its potential in relation to the prevention and control of contagious diseases should not be undervalued, especially since this provision embodies the duty to maintain the health care structure of the occupied territory, and because the wording of this provision is broad enough to permit more effective interpretations in light of new normative developments. This is exactly what is happening today, as Article 43 of the Hague Regulations must be interpreted and applied along with the provisions of the GC IV adopted in 1949.

Moreover, it is important to stress that Article 43 of the Hague Regulations is not devoid of legal force because it embodies due diligence obligations. First, only the positive component of the duty to restore and ensure civil life in the face of a contagious disease is governed by due diligence; the negative duty not to interfere with health care in the occupied territory is not, being an absolute negative duty. Second, due diligence obligations are obligations under international law and states can be considered responsible for their breach as demonstrated by significant international case law.¹⁰⁹ Accordingly, Article 43 still has the potential to frame the responsibility of the occupying power for the prevention and control of contagious diseases. The provisions of the GC IV and international human rights law complement and specify this general protection, as explored below.

IV. NEW RULES EMBODIED IN THE GC IV

A. Article 56(1) of the GC IV and the Cooperation Between Occupying Power and Local Authorities

1. Article 56(1) of the GC IV: A Cornerstone for the Fight against Contagious Diseases

The adoption of the GC IV in 1949 provided for new international humanitarian law rules relevant for the prevention and control of contagious diseases in occupied territory. The main provision is Article

108. *Two Hundred and Seventeenth Day: Monday, 30th September, 1946*, in THE TRIAL OF GERMAN MAJOR WAR CRIMINALS. PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY (1946-1951) 411, 466.

109. Governing Council of the Comp. Comm'n Dec. S/AC.26/1992/9, ¶¶ 12–15 (Mar. 6., 1992); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 250 (Dec. 19).

56(1) of the GC IV, which explicitly mentions “contagious diseases and epidemics.”¹¹⁰ According to Article 56(1) of the GC IV,

[t]o the fullest extent of the means available to it, the occupying power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of *contagious diseases and epidemics*.¹¹¹

This complex provision needs a close analysis, since its interpretation is fundamental to understanding the responsibilities of occupying powers.

The very wording of Article 56(1) demonstrates that the occupying power has a specific duty to ensure and maintain “the medical and hospital establishments and services, public health and hygiene in the occupied territory.”¹¹² The authoritative commentary edited by Jean Pictet confirms that this provision was introduced to reinforce the protection of the local population, in light of the tragic experience of World War II mentioned above.¹¹³ At the time of its adoption, this rule was seen as advancing the protection offered by the Hague Regulations, not only because it specifies a duty that could have been linked to Article 43 of the Hague Regulations but also because it explicitly embodies positive obligations for the occupying power.¹¹⁴ Conversely, as it stands today, this provision appears to provide only basic protection.¹¹⁵

Although this provision focuses on health care in general, in light of the limited scope of this Article, its role is examined here only in relation to contagious diseases. The very text of Article 56(1) of the GC IV points in this direction: the “particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics” means that, compared to the overall responsibilities in relation to health care, the

110. GC IV, *supra* note 20, art. 56(1).

111. *Id.* (emphasis added).

112. *Id.*

113. OSCAR M. UHLER, FREDERIC SIORDET, ROGER BOPPE, HENRI COURSIER, CLAUDE PILLOUD, RENE-JEAN WILHELM, & JEAN-PIERRE SCHOENHOLZER, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 313 (Jean Pictet ed., 1958) [hereinafter PICTET'S COMMENTARY].

114. These measures are considered to be “extremely liberal and progressive” by VON GLAHN, *supra* note 14, at 143. See also Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT'L L. 294, 325 (1949).

115. See Int'l L. Comm'n, First Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 53, ¶ 65.

occupying power must prioritize the actions against contagious diseases.¹¹⁶

As demonstrated by a comparison with Article 55 of the GC IV,¹¹⁷ Article 56(1) of the GC IV refers to the actions that an occupying power must take from *within the occupied territory*. This provision governs the interplay between the occupying power and the local authorities with reference to the resources already located in the occupied territory, establishing that they must be used to prevent and control contagious diseases. Under this provision, the nature of the contagious diseases at hand is entirely irrelevant. As explained by the International Committee of the Red Cross in the preparation of the GC IV, epidemics in armed conflicts could arise for a variety of reasons, including starvation, malnutrition, and lack of hygiene and medicines.¹¹⁸ The plain language of Article 56(1), which refers to contagious diseases and epidemics without mentioning their origins, coupled with the humanitarian object and purpose of the GC IV, make it easy to conclude that the responsibility of the occupying power covers contagious diseases both related and unrelated to the occupation.¹¹⁹

Similarly, the provision covers both human contagious diseases and animal contagious diseases which could potential cause any kind of harm to humans. This conclusion is again supported by the lack of any reference to “human” diseases in Article 56(1) of the GC IV and by the humanitarian object and scope of the convention; as COVID-19 has likely reminded everybody in the world, most contagious diseases affecting humans have zoonotic origins.¹²⁰ Accordingly, preventing and controlling contagious diseases in animals protects humans since it limits the spread of the disease from animals to humans. Moreover, the very spread of contagious diseases among animals may impair civil life under Article 43 of the Hague Regulations if those animals have economic value, or may result in a violation of Article 55 of the Hague Regulations if those animals are part of the wildlife.¹²¹ The fact that

116. GC IV, *supra* note 20, art. 56(1).

117. For more on this provision, see *infra* Part IV.B.1.

118. INTERNATIONAL COMMITTEE OF THE RED CROSS, PRÉLIMINAIRE FOURNIE PAR LE COMITÉ INTERNATIONAL DE LA CROIX-ROUGE, COMMISSION D'EXPERTS GOUVERNEMENTAUX POUR L'ÉTUDE DES CONVENTIONS PROTÉGEANT LES VICTIMES DE LA GUERRE, GENEVE, DU 14 AU 26 AVRIL 1947, 25 (1947).

119. David Fisher, *Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis*, 89 INT'L REV. RED CROSS 345, 368–69 (2007).

120. Although the exact origins of Covid19 are not entirely clear yet, initially, it has been linked to similar viruses found in animals such as bats. See the conclusions of the WORLD HEALTH ORGANIZATION, REPORT OF THE WHO-CHINA JOINT MISSION ON CORONAVIRUS DISEASE 2019 (COVID-19) 8 (2020), [<https://perma.cc/5TBC-Z5PC>] (archived Feb. 18, 2022).

121. This is not the proper occasion to explore the underexplored legal framework pertaining to animals in occupied territories. For some initial research, see Marco Longobardo, *Animals in Occupied Territory*, in ANIMALS IN THE INTERNATIONAL LAW OF ARMED CONFLICT (Anne Peters, Robert Kolb & Jérôme de Hemptinne eds., forthcoming

Article 56(1) of the GC IV also covers animal diseases is confirmed by significant state practice of occupying powers; for instance, Israel has cooperated with Palestinian authorities in preventing and controlling diseases such as foot-and-mouth disease¹²² and the avian flu.¹²³

Finally, Article 56(1) of the GC IV is silent on the ways in which preventing and controlling diseases must be undertaken, in particular with reference to the relationship between these measures and human rights. This gap is filled by the contextual application of human rights law, which not only contributes to reinforcing the aim of these measures—through the right to health—but also establishes procedural conditions.¹²⁴ In this regard, international human rights law plays a role similar to the one it plays in relation to measures aimed at preventing and controlling contagious diseases in peacetime.

2. A Complex Partition of Responsibilities

Article 56(1) of the GC IV is inspired by a main rationale: the national and local authorities of the occupied territory are the subjects primarily concerned with the prevention and control of contagious diseases.¹²⁵ This is in line with the conservationist principle embodied in the Hague Regulations—in particular, in Article 43—and in other provisions of the GC IV. From this point of view, Article 56(1) reflects the GC IV's awareness of the stratification of administrative systems in occupied territory, and the desire to maintain the local system functioning notwithstanding the occupation.¹²⁶ In this regard, Article 56(1) of the GC IV is a specification of Article 43 of the Hague Regulations, in the spirit of the aforementioned Bellot Rules.¹²⁷ Similarly, Article 14(1) of the AP I states that the occupying power “has the duty to ensure that the medical needs of the civilian population in occupied territory *continue* to be satisfied.”¹²⁸

The reference to national and local authorities means that it is irrelevant whether the occupied territory is organized in a state or not,

2022). On the role of veterinaries in the prevention of contagious diseases in armed conflict, see Katharine Fortin, *Veterinary Personnel*, *id.* (both papers are on file with the author).

122. See Elizabeth Samson, *Is Gaza Occupied? Redefining the Status of Gaza under International Law*, 25 AM. U. INT'L L. R. 915, 943–44 (2010).

123. See Alex Leventhal, Assad Ramlawi, Adel Belbiesi, & Ran D Balicer, *Regional Collaboration in the Middle East to Deal with H5N1 Avian Flu*, 333 BRIT. MED. J. 856 (2006).

124. KOLB & VITÉ, *supra* note 14, at 420.

125. PICTET'S COMMENTARY, *supra* note 113, at 313.

126. KOLB & VITÉ, *supra* note 14, at 410.

127. See *supra* text accompanying note 99.

128. See AP I, *supra* note 21, art. 14 (emphasis added). For a commentary, see COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 812 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987); DINSTEIN, *supra* note 14, at 202.

and whether the health care providers are public or private. In cases of contagious diseases, the primary responsibility rests with the authorities of the occupied territory, whereas the occupying power has a duty to cooperate with them to ensure and maintain the health care system in the occupied territory. Accordingly, the occupying power must directly intervene only if the health infrastructure of the occupied territory fails to provide adequate health care, whereas if contagious disease is under control, the occupying power is only subject to a negative duty not to interfere and to a positive duty to cooperate to strengthen the local authorities' capacity to tackle the disease.¹²⁹ As stated by the US Military Manual, "[t]he responsibility for providing and maintaining health services falls primarily on the national and local authorities, but where such authorities are unable to provide adequately for the health needs of the civilian population, the Occupying Power then has th[is] duty."¹³⁰

At this point, a clarification is needed. The primary responsibility over the local authorities is not created by the law of occupation, which only governs the conduct of the occupying power.¹³¹ Rather, the responsibility is based on the domestic law of the occupied territory and relevant international human rights law rules binding the ousted sovereign, which are taken into account by Article 56(1) of the GC IV without incorporating them. The law of occupation is only concerned with burdening the occupying power to prevent and control contagious diseases if the local authorities do not do so. From this perspective, the view that the law of occupation places a duty upon the local authorities to assist the occupying power in health care matters is inaccurate.¹³² However, international human rights law binds the local authorities of the occupied territory; this is, for instance, the case of the Palestinian Authority, which is bound by the ICESCR thanks to the Palestinian accession in 2014,¹³³ and thus has a duty to provide the right to health to individuals under its jurisdiction.

The existence of any obligation upon the local authorities, however, does not absolve the occupying power from its responsibilities under the law of occupation. If the local authorities are unable to prevent and control contagious diseases or when there is the need for measures typically undertaken by some executive and legislative

129. PICTET'S COMMENTARY, *supra* note 113, at 313; Giacca & Nohle, *supra* note 26, at 514.

130. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 11.15.1 (2015, updated Dec. 2016) [hereinafter U.S. LAW OF WAR MANUAL].

131. For more on this, if in a different context, see LONGOBARDO, THE USE OF ARMED FORCE, *supra* note 15, at 135–141.

132. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 11.42 (2004) [hereinafter U.K. LOAC MANUAL].

133. See Marco Longobardo, *La recente adesione palestinese alle convenzioni di diritto umanitario e ai principali trattati a tutela dei diritti dell'uomo*, 1 ORDINE INTERNAZIONALE E DIRITTI UMANI 771 (2014).

organs of the ousted sovereign—which are discontinued during the occupation—the responsibility to enact prophylactic and preventive measures, as well as measures to combat the transmission of contagious diseases, falls back upon the occupying power. For instance, during the Indonesian occupation of East Timor, Indonesia undertook an immunization campaign against contagious diseases that had plagued the area before the occupation.¹³⁴ Although very critical with the management of health care in occupied territory, the Commission for Reception, Truth and Reconciliation in East Timor acknowledged the success of the occupying power in immunizing the local population against diseases such as measles and polio.¹³⁵ Similarly, the Coalition Provisional Authority (CPA) in occupied Iraq decided to bar entry into the country to people “suffering from any serious communicable disease.”¹³⁶ The CPA also committed itself to “restore essential services to acceptable standards,” including “management of continued outbreaks of diseases, health education, and vaccination of children.”¹³⁷ At the end of the occupation, the CPA boasted that it had accomplished the administration of more than 30 million doses of children’s vaccinations, as well as the availability of routine vaccinations for newborns, children, and mothers every day at Ministry of Health facilities.¹³⁸

The specific measures that must be adopted in relation to a certain contagious disease are not listed by Article 56(1) of the GC IV. Rather, this provision leaves to the occupying power the task of identifying the measures that should be undertaken. This open wording should be praised because it allows for the inclusion within the scope of the duties some measures that at the time of the drafting of the GC IV did not exist. Pictet’s commentary suggests some of the measures that an occupying power can adopt:

Such measures include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the despatch of medical teams to areas where epidemics are raging, the isolation

134. COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, CHEGA! FINAL REPORT CH. 7.9 ¶ 85–86 (2005), [<https://perma.cc/HH23-36TT>] (archived Feb. 18, 2022).

135. *Id.* at 86.

136. See CPA, *Order Number 16, CPA/ORD/26 June 2003/16*, § 7, in *THE OCCUPATION OF IRAQ*, *supra* note 83, at 102; CPA, *Order Number 16 (Revised), CPA/ORD/1 December 2003/16*, § 7, in *THE OCCUPATION OF IRAQ*, *supra* note 83, at 109; CPA, *Order Number 16 (Revised) (Amended), CPA/ORD/4 June 2004/16*, § 7, in *THE OCCUPATION OF IRAQ*, *supra* note 83, at 117; CPA, *Safeguarding of Iraq’s Borders, Public Notice, June 26, 2003*, in *THE OCCUPATION OF IRAQ*, *supra* note 83, at 756.

137. CPA, *A Vision to Empower Iraqis (Draft), July 4, 2003*, in *THE OCCUPATION OF IRAQ*, *supra* note 83, at 868.

138. CPA, *Accomplishments June 28, 2004*, in *THE OCCUPATION OF IRAQ*, *supra* note 83, 261 at 1090.

and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres.¹³⁹

This list is not exhaustive, but rather, exemplificatory in nature. Identifying the measures that should be taken depends on the contagious disease at hand and should be done on a case-by-case basis. For instance, although the occupying power has no *carte blanche* in limiting freedom of movement in occupied territory under international humanitarian law and international human rights law,¹⁴⁰ Article 56(1) of the GC IV, read in conjunction with Article 43 of the Hague Regulations, can be used as a legal basis to limit freedom of movement temporarily in the fight against a contagious disease.¹⁴¹

In general, the occupying power does not have *arbitrary powers* in relation to the identification of the measures to be undertaken, but rather, it has *discretion* to pursue the best course of action to combat the spread of contagious diseases.¹⁴² Scientific knowledge should lead the decision on which measures must be undertaken. In relation to COVID-19, for instance, there is no doubt that the relevant measures encompass vaccinations against the virus.¹⁴³

The partition of responsibilities described in this section is particularly relevant in relation to the OPT, where the so-called Oslo Accords have established a framework of cooperation between the Palestinian Authority and Israel.¹⁴⁴ Article VI of the 1993 Declaration of Principles¹⁴⁵ and Article 17 of Annex III, Appendix I, to the 1995 Interim Agreement¹⁴⁶ transfer to the Palestinian Authority the responsibility for health care in certain Palestinian areas. In particular, Article 17(2) affirms that the Palestinian side shall

139. PICTET'S COMMENTARY, *supra* note 113, at 314.

140. See generally MAIS A.M. QANDEEL, ENFORCING HUMAN RIGHTS OF PALESTINIANS IN THE OCCUPIED TERRITORY 148–209 (2018); Marco Longobardo, *The Legality of Closure on Land and Safe Passage between the Gaza Strip and the West Bank*, 11 ASIAN J. INT'L L. 50, 68–78 (2021).

141. Longobardo, *The Legality of Closure*, *supra* note 140, at 70.

142. For the difference between discretionary and arbitrary powers in international law, see the entry “discrétionnaire” in DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 344 (Jean Salmon ed., 2001).

143. See, e.g., Michael Lynk & Tlaleng Mofokeng, *Israel/OPT: UN Experts Call on Israel to Ensure Equal Access to COVID-19 Vaccines for Palestinians*, OFFICE HIGH COMM'R FOR HUM. RTS. (Jan. 14, 2021), [https://www.ohchr.org/en/press-releases/2021/01/israelopt-un-experts-call-israel-ensure-equal-access-covid-19-vaccines?](https://www.ohchr.org/en/press-releases/2021/01/israelopt-un-experts-call-israel-ensure-equal-access-covid-19-vaccines?LangID=E&NewsID=26655) LangID=E&NewsID=26655 [<https://perma.cc/57VL-RMUL>] (archived Feb. 18, 2022).

144. On the Oslo accords, see generally RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES (1997); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN AGREEMENTS (2000). For an analysis of the provisions pertaining to health care, see HADAS ZIV, A LEGACY OF INJUSTICE: A CRITIQUE OF ISRAELI APPROACHES TO THE RIGHT TO HEALTH OF PALESTINIANS IN THE OCCUPIED TERRITORIES 26–35 (2002).

145. Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., 32 I.L.M. 1525.

146. Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Sept. 28, 1995, 36 I.L.M. 551.

“continue to apply the present standards of vaccination of Palestinians” and “shall improve them according to internationally accepted standards in the field, taking into account WHO recommendations. In this regard, the Palestinian side shall continue the vaccination of the population with the vaccines listed in Schedule 3,”¹⁴⁷ whereas Article 17(6) demands that “Israel and the Palestinian side shall exchange information regarding epidemics and contagious diseases, shall cooperate in combating them and shall develop methods for exchange of medical files and documents.”¹⁴⁸ These provisions clearly specify the way in which the local authorities of the occupied territory maintain their primary responsibility for the prevention and control of contagious diseases and epidemics (including through vaccinations).

In any case, provisions like these can be seen as transferring responsibility from the occupying power to the local authorities of the occupied territory so that that the occupying power is relieved from its duties. Pursuant to Article 47 of the GC IV,

[p]rotected persons who are in occupied territory 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 said territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying power.¹⁴⁹

Accordingly, the Oslo Accords cannot displace Israeli responsibility under Article 56(1) of the GC IV when the local authorities of the occupied territory are unable to prevent and control a contagious disease.¹⁵⁰ Rather, the Oslo Accords should be read as prioritizing the intervention of the Palestinian authorities to prevent and control contagious diseases in those areas where Palestinians enjoy the administration of health care (e.g., in the Gaza Strip and some portions of West Bank). If the Palestinian authorities are able to do so, Israel is only bound by a negative duty of non-interference.¹⁵¹

This division of responsibilities is confirmed by some relevant international practice. For instance, in relation to the 2005–2006 avian flu pandemic, Israeli and Palestinian authorities successfully cooperated to limit the contagion, by sharing information, doses of vaccines, and culling plans so that the disease was contained to poultry and did not spread to humans.¹⁵² Similarly, in the early stages of the

147. *Id.* Annex III, app. I, art. 17(2) (emphases added).

148. *Id.* art. 17(6) (emphasis added).

149. GC IV, *supra* note 20, art. 47 (emphases added).

150. See Lynk & Mofokeng, *supra* note 143. On this provision, see generally Robert Kolb, *Etude sur l'occupation et sur l'article 47 de la IVeme Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d'intangibilité des droits en territoire occupé*, 10 AFRICAN Y.B. INT'L L. 267 (2002).

151. See Wall Opinion, *supra* note 24, ¶ 112.

152. See Leventhal, Ramlawi, Belbiesi, & Balicer, *supra* note 123.

recent COVID-19 pandemic, significant cooperation between Israeli and Palestinian authorities in order to control the spread of the pandemic in the West Bank was reported.¹⁵³ Such cooperation received praise from the UN Security Council, which “welcomed ongoing Israeli-Palestinian coordination to address this common challenge and called for the intensification of the efforts by the parties to respond to COVID-19, in line with their respective obligations.”¹⁵⁴ Likewise, it has been reported that, at an early stage, the health care authorities of Western Sahara addressed COVID-19 in the areas under their control,¹⁵⁵ whereas Morocco took care of the situation in other portions of occupied territory in Western Sahara.¹⁵⁶ Unfortunately, at least in the OPT, cooperation between the relevant authorities has been discontinuous, with several instances where cooperation has been lacking or direct interference by the occupying power has occurred.¹⁵⁷

It must be noted that, under the law of occupation, only the occupying power is bound by the GC IV. This means that it is irrelevant whether the local authorities of the occupied territory seek cooperation with the occupying power. If the local authorities are unable to ensure and maintain the health care system already in place to prevent and control a pandemic, the occupying power is nonetheless bound to intervene under the law of occupation to protect the health of the local population. Indeed, the local population cannot renounce the guarantees offered by the GC IV under Article 8. Rather, the occupying power can alter the law in force in the occupied territory to implement its obligations under the GC IV if this is the only available means.¹⁵⁸

153. See, e.g., UN OCHA, *COVID-19 Emergency Situation Report 2* (Mar. 24-Mar. 31, 2020), <https://www.ochaopt.org/content/covid-19-emergency-situation-report-2> [https://perma.cc/9A2U-24S6] (archived Feb. 17, 2022); Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Michael Lynk, Oct. 22, 2020, U.N. Doc. A/75/532, ¶ 7.

154. See UN SEC. COUNCIL PRESS, *Elements on the Situation in the Middle East* (Mar. 30, 2020), <https://new-york-un.diplo.de/un-en/news-corner/200330-unsc-mepp/2329696> [https://perma.cc/VBS2-XBKS] (archived Feb 17, 2022).

155. Sahara Press Service, *Sahrawi State's Health System is in the Service of Her Citizen*, PUBLIC HEALTH MINISTER (Mar. 26, 2020), <https://www.spsrasd.info/news/en/articles/2020/03/26/25249.html> [https://perma.cc/5GQT-JQYQ] (archived Feb. 17, 2022).

156. Isabel Lourenço, *How Covid 19 Is Fought in the Saharawi Refugee Camps*, JORNAL TORNADO (Mar. 26, 2020), <https://www.jornaltornado.pt/how-covid-19-is-fought-in-the-saharawi-refugee-camps/> [https://perma.cc/F73M-C8H6] (archived Feb. 17, 2022).

157. See, e.g., the Israeli destruction of medical facilities in the West Bank as reported by Norwegian Refugee Council, *Israel's Destruction of Palestinian Property Undermines Efforts to Curb Covid-19*, (Apr. 15, 2020), <https://www.nrc.no/news/2020/april/israels-destruction-of-palestinian-property-undermines-efforts-to-curb-covid-19/> [https://perma.cc/KJT7-Y9QV] (archived Feb. 17, 2022); see also Elisabeth Mahase, *Gaza: Israeli Airstrikes Kill Doctors and Damage Healthcare Facilities*, BRIT. MED. J., Feb. 20, 2021, at 1 (discussing the destruction of medical facilities, including a Covid testing centre, in the Gaza Strip during the 2021 military mission).

158. See *infra* Part III.B.

B. Support from the Outside to Prevent and Control Contagious Diseases and Epidemics in Occupied Territory

1. The Duty to Bring Medical Supplies in the Occupied Territory under Article 55 of the GC IV

In order to fight contagious diseases in occupied territory, especially in the case of pandemics such as COVID-19, the resources in the occupied territory may prove to be insufficient, notwithstanding the cooperation between the local authorities and the occupying powers. In these cases, the GC IV burdens the occupying power with a positive duty to bring medical supplies into the occupied territory. This rule marks a departure from the previous approach that the occupied territory should have sustained entirely the local population and the costs incurred by the occupying army.¹⁵⁹

Under Article 55 of the GC IV,

[t]o the fullest extent of the means available to it, the occupying power has the duty of ensuring . . . medical supplies of the population; it should, in particular, bring in the necessary . . . medical stores . . . if the resources of the occupied territory are inadequate.¹⁶⁰

Although this provision pertains to all medical supplies rather than to specific means to prevent and control contagious diseases, its potential in relation to contagious diseases is enormous. Accordingly, it deserves close scrutiny.

First, it is necessary to point out that this rule is applicable only when Article 56(1) of the GC IV is not sufficient to prevent and control a contagious disease. If the medical supplies in the occupied territory are adequate, then there is no duty upon the occupying power to bring in more of them.¹⁶¹ Accordingly, on the one hand, this provision reinforces the idea that the local authorities of the occupied territory are primarily responsible for preventing and controlling contagious diseases with the medical supplies already present in the occupied territory, whereas on the other, this provision confirms that the duty to cooperate with the local authorities cannot be considered in any case as a renunciation of occupying power's responsibilities regarding the provision of health care for the local population.

In relation to the prevention and control of contagious diseases, the reference to "medical supplies" in Article 55 of the GC IV should be interpreted as including personal protective equipment, sanitizing products, testing materials, medications, and vaccines. The obligation upon the occupying power is fulfilled only if the resources of the

159. See LAUTERPACHT, *supra* note 14, at 455.

160. GC IV, *supra* note 20, art. 55.

161. See Giacca & Nohle, *supra* note 26, at 514.

occupied territory in relation to these supplies (or others that may be needed case by case) become adequate.

There are some instances of state practice in which inadequately supplied occupied territories received medical supplies from the occupied powers. For example, in the early stage of the COVID-19 pandemic, Israel claimed that it was “assisting the Palestinian Authority in the *provision of equipment needed for managing the virus*, as well as by providing training workshops and closely cooperating with the Palestinian Authority’s medical teams.”¹⁶² Similarly, in June 2021, Israel offered to transfer the Palestinian Authority one million COVID-19 vaccines,¹⁶³ but the Palestinian Authority refused them because they were very close to their expiration date and the Palestinian administration would not have been able to distribute them before that.¹⁶⁴ Irrespective of the merits of the Palestinian objection—which could be based on a lack of good faith in the Israeli implementation of its obligations under Article 55 of the GC IV¹⁶⁵—it is worth noting that it has been reported that for months Israel refused to transfer vaccines into the Palestinian territory while, at the same time, offering those same vaccines to other states in exchange for their recognition of Jerusalem as the Israeli capital.¹⁶⁶ If this proves correct, Israel would have been in violation of its obligations under Article 55 of the GC IV for months, since it is difficult to argue that bringing vaccines in the occupied Palestinian territory exceeded the extent of the means available while those same vaccines were used as tools for diplomatic bargaining.¹⁶⁷

162. *Briefing for Foreign Ambassadors on Coronavirus Management and Cooperation with the Palestinians*, STATE ISRAEL (Mar. 31, 2020) (Isr.) (emphasis added), mfa.gov.il/MFA/PressRoom/2020/Pages/Briefing-for-foreign-ambassadors-on-Coronavirus-management-and-cooperation-with-the-Palestinians-31-March-2020.aspx [https://perma.cc/5NPS-T7BW] (archived Feb. 17, 2022).

163. Andrew Carey, *Israel to Transfer at Least 1 Million Covid-19 Vaccines to Palestinians in Swap Deal*, CNN (June 18, 2021), <https://edition.cnn.com/2021/06/18/middleeast/israel-vaccines-palestinians-intl/index.html> [https://perma.cc/9NKQ-TMW6] (Feb. 17, 2022).

164. *Palestinians Cancel Deal for Israel to Supply 1 Million COVID Vaccines*, TIMES ISRAEL (June 18, 2021), <https://www.timesofisrael.com/palestinians-cancel-deal-for-israel-to-supply-1-million-covid-vaccines/> [https://perma.cc/HBP8-PLM9] (archived Feb. 17, 2022).

165. See VCLT, *supra* note 25, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”). As noted by the ICJ, “[t]he principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.” *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, 1997 I.C.J. Rep. 7, ¶ 142 (Sept. 25).

166. *For Israel’s Allies, Road to Vaccines Runs through Jerusalem*, INDEPENDENT (Feb. 24, 2021) <https://www.independent.co.uk/news/world/americas/us-politics/for-israels-allies-road-to-vaccines-runs-through-jerusalem-benjamin-netanyahu-israel-coronavirus-vaccines-allies-countries-b1806956.html> [https://perma.cc/Z92Y-WSN4] (archived Feb. 17, 2022).

167. In passing, it should be noted that recognizing Jerusalem as the capital of Israel, without differentiating East Jerusalem from the rest of the city, violates UNSC resolutions and the duty not to recognize situations created as the result of gross

Finally, Article 55 of the GC IV does not protect only the civilian population of the occupied territory, but rather, it applies with regard to the entire population of the occupied territory, including detained enemy combatants.¹⁶⁸ Indeed, the occupying power must bring medical supplies into the occupied territory to prevent and control contagious diseases as a consequence of the broad prohibition on the direct or indirect use of contagious disease as a means of warfare.

2. The Duty to Allow Relief from Outside under Article 59 of the GC IV

Article 59 of the GC IV provides for situations in which the occupied territory is inadequately supplied and the occupying power is unwilling or unable to offer medical supplies as requested by Articles 55 and 56(1) of the GC IV. This rule, which complements the protection offered by international humanitarian law to the local population of the occupied territory, is applicable to medical supplies needed to prevent and control a contagious disease in the occupied territory.

Under Article 59 of the GC IV,

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, *medical supplies* and clothing.¹⁶⁹

The provision in the first paragraph of Article 59 embodies two separate obligations pertaining to *consent* to relief operations and *facilitation* of the relief operation.¹⁷⁰ Even though they are linked, it is possible to identify autonomous normative content for each of them; if there is an impartial offer, the occupying power must consent to the consignment of medical supplies, and should adopt the technical measures that are necessary to allow such a consignment.¹⁷¹

violations of peremptory norms. See, e.g., Maurizio Arcari, *The Relocation of the US Embassy to Jerusalem and the obligation of non-recognition in international law*, ZOOM-IN 50 QUESTIONS INT'L L. 1 (2018); Emanuel Castellarin, *Le Déplacement à Jérusalem de l'Ambassade des Etats-Unis en Israël: Questions Autour de l'Obligation de Non-Reconnaissance*, ZOOM-IN 50 QUESTIONS INT'L L. 47 (2018); Marco Pertile & Sondra Faccio, *What We Talk About When We Talk About Jerusalem: The Duty of Non-recognition and the Prospects for Peace after the US Embassy's Relocation to the Holy city*, 33 LEIDEN J. INT'L L. 621 (2020).

168. Flavia Lattanzi, *Humanitarian Assistance*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, 231, 237–38 (2015).

169. GC IV, *supra* note 20, art. 59 (emphasis added).

170. See Lattanzi, *supra* note 168, at 247.

171. See PICTET'S COMMENTARY, *supra* note 113, at 320.

Article 59 of the GC IV is an obligation of result, which is implemented if the occupying power reaches the result of agreeing and facilitating the relief. In other words, the occupying power must consent to and facilitate the consignment of medical supplies. At the bare minimum, and in line with the right to health under the ICESCR, the occupying power must not interfere with the consignments of such supplies.¹⁷² Contrary to what it prescribed for relief in non-occupied territory,¹⁷³ the duty under Article 59 of the GC IV is absolute and the convention does not embody any ground that the occupying power can invoke to block this kind of relief.¹⁷⁴ The reason behind this is easy to grasp: whereas a belligerent state is granted some latitude on whether to threaten the health and life of its own population by rejecting offers of relief, the law of occupation prohibits the occupying power from making similar decisions that could endanger the local population of the occupied territory, which is an enemy population that is placed under the responsibility of the occupying power only temporarily.¹⁷⁵

The reference in Article 59(1) of the GC IV to the occupying power as acting “on behalf of the [local] population” does not imply the possibility to renounce to relief—rather, such a renouncement would be barred also to the local population by Article 8 of the GC IV.¹⁷⁶ Acting on behalf of the local population means merely that the occupying power must act at the international level instead of the local population. Admittedly, it is possible that the local population is still represented by some local authorities with international personality—such as in the case of the occupied Palestinian authority—or by a government in exile. However, usually occupying powers do not acknowledge the legitimacy of the acts of the ousted sovereign, either because they do not recognize the legitimacy of governments in exile¹⁷⁷ or because they try to sever any relationship between the occupied territory and the ousted sovereign. For instance, in Abkhazia and South Ossetia, which are usually considered Georgian territories under Russian occupation,¹⁷⁸ the administrations created by Russia in

172. See Giacca, *supra* note 26, at 1500.

173. See AP I, *supra* note 21, art. 70(1) (which does not apply to occupied territory).

174. See PICTET’S COMMENTARY, *supra* note 113, at 320; Lattanzi, *supra* note 168, at 242; DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT, ¶ 32 (2016); José Luis Rodríguez-Villasante y Prieto, *Health Care in Danger y Principios Éticos de la Asistencia de Salud en Tiempo de Conflicto Armado: La Protección de la Misión Médica por el Derecho Internacional Humanitario*, 108 REVISTA ESPAÑOLA DE DERECHO MILITAR 51, 81 (July–Dec. 2017); DINSTEIN, *supra* note 14, at 206–07.

175. See Longobardo, *The Legality of Closure*, *supra* note 140, at 30–31.

176. GC IV, *supra* note 20, art. 8 (“Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.”).

177. See generally Sundberg, *supra* note 55.

178. See generally RULE OF LAW IN ARMED CONFLICTS, MILITARY OCCUPATION OF GEORGIA BY RUSSIA (Feb. 22, 2021), <https://www.rulac.org/browse/conflicts/military->

the form of allegedly independent governments have rejected offers of COVID-19 vaccinations from Georgia,¹⁷⁹ whereas Russia provided vaccines for both its army¹⁸⁰ and the local population of the regions.¹⁸¹ In any case, and whatever the reason, the law of occupation forces the occupying power to act on behalf of the local population, but nothing prevents the local authorities, if any, from cooperating with the occupying power in relation to relief actions.

Regarding medical supplies from outside, the occupying power can only adopt measures of control, impose technical arrangements, and select which actors may conduct the relief operations if more than one is available, provided that the needs of the local population are met in accordance with humanitarian principles.¹⁸² The occupying power cannot be choosy in relation to the origin of the medical supplies as long as they are provided by states, international organizations, or non-governmental organizations acting in impartial and purely humanitarian ways. As noted by Pictet, “the immensity of the needs will make it desirable to accept the co-operation of any person, organization or institution which can lend assistance, provided that such assistance is not used for purposes of political propaganda.”¹⁸³

Exceptionally, pursuant to Article 60 of the GC IV, medical relief can be diverted from the purpose for which it is intended “in cases of urgent necessity, in the interests of the population of the occupied territory.”¹⁸⁴ This means that the occupying power could use the medical supplies consigned for a different purpose than the original one, but only in the interest of the local population and if there is a situation of emergency. This scenario covers outbreaks of contagious diseases in the occupied territory, so that Article 60 of the GC IV would

occupation-of-georgia-by-russia#collapse2accord [https://perma.cc/9MQB-687H] (archived Feb. 17, 2022).

179. See *Occupied Abkhazia, Tskhinvali Reject Offer from Tbilisi to Vaccinate Health Workers, Elderly*, AGENDA.GE (Mar. 30, 2021), <https://agenda.ge/en/news/2021/847> [https://perma.cc/F8C9-JZC7] (archived Feb. 17, 2022); *De Facto Tskhinvali Representative Murat Jioev Says Georgia’s Proposal of Vaccine Delivery Is Political Propaganda*, AGENDA, (Mar. 31, 2021), <https://agenda.ge/en/news/2021/859> [https://perma.cc/XP2N-QSA9] (archived Feb. 17, 2022).

180. See *COVID-19 Vaccination Rollout Begins at Russian Military Bases in Abkhazia, Tskhinvali*, CIVIL.GE (Jan. 15, 2021), <https://civil.ge/archives/391474> [https://perma.cc/WZD9-8DYZ] (archived Feb. 17, 2022).

181. See Sergei Kuznetsov, *Russia’s Coronavirus Vaccine Makes Inroads in Conflict Territories*, POLITICO (Feb. 26, 2021) <https://www.politico.eu/article/russia-coronavirus-vaccine-sputnik-v-inroads-conflict-territories/> [https://perma.cc/CZ2Z-9ALX] (archived Feb. 17, 2022).

182. AKANDE & GILLARD, *supra* note 174, ¶ 33. The Italian Military Manual, ambiguously, mentions a duty to accept relief shipments “at certain conditions,” which may be a consideration out of line with art. 59 of the GC IV. ITALY, STATO MAGGIORE DELLA DIFESA, MANUALE DI DIRITTO UMANITARIO § 48.15 (1991) [hereinafter ITALIAN MILITARY MANUAL].

183. PICTET’S COMMENTARY, *supra* note 113, at 321.

184. GC IV, *supra* note 20, art. 60.

allow an occupying power to use relief originally dispatched into the occupied territory for one purpose to be repurposed to fight a contagious disease such as COVID-19.¹⁸⁵

Article 59 of the GC IV should be interpreted in light of Article 2(1) of the ICESCR. This provision states that states parties must “take steps, individually and *through international assistance and co-operation*, especially economic and technical,”¹⁸⁶ to fulfill their obligations in relation to economic, social, and cultural rights, including the right to health.¹⁸⁷ Accepting relief from abroad through humanitarian organizations and neutral states is a way to comply with this human rights provision.

Some state practice illustrates how these rules have been applied. For instance, in 2019, the World Health Organization acknowledged that the Palestinian Authority was able to conduct an adequate vaccination campaign thanks to external donors, but it was reported that, due to some Israeli legislation, the Palestinian Authority spent more than other countries for the supply of vaccines,¹⁸⁸ whereas some vaccines imported by India were subject to a blockade.¹⁸⁹ These limitations are likely in violation of the duty to facilitate the consignment of medical supplies under Article 59(1) of the GC IV.

C. Measuring the Occupying Power’s Compliance with Articles 55 and 56(1) of the GC IV

One perplexing question that deserves some attention in relation to Articles 55 and 56(1) of the GC IV is the nature of the duties upon the occupying power, and the way to assess its compliance. Duties under these two provisions are analyzed simultaneously here since they pose similar challenges.

In relation to Article 56(1), it should be noted that although the provision mentions its goal (“ensuring and maintaining . . . public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics”¹⁹⁰), its implementation is not measured on whether this goal is achieved. Rather, implementation is determined on the basis of whether the occupying power has endeavored diligently to reach this

185. See U.K. LOAC MANUAL, *supra* note 132, § 11.46.1.

186. ICESCR, *supra* note 27, art. 2 (emphasis added).

187. See Giacca & Nohle, *supra* note 26, at 502.

188. See Report by the Director-General, Health Conditions in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan, W.H.O. Doc. A72/33 (May 1, 2019) ¶ 17.

189. WHO, Executive Board, 146th Session, Geneva, Feb. 3–8 2020, Summary Records of the 6th Meeting, W.H.O. Doc. EB146/2020/REC/2, 92.

190. GC IV, *supra* note 20, art. 56(1).

result. In other words, this is a due diligence obligation,¹⁹¹ which requires the occupying power to “employ all means reasonably available to them so as to” reach the desired result.¹⁹² The wording of Article 56(1) requires a very high level of diligence, since it calls upon the occupying power to employ “the fullest extent of the means available” to it.¹⁹³ Accordingly, national military manuals, which embody a lower threshold of diligence through expressions such as “as far as practicable”¹⁹⁴ or “so far as possible,”¹⁹⁵ are not in line with the GC IV.

Similarly, the inclusion of the words to “[t]o the fullest extent of the means available to it” in Article 55 of the GC IV means that the duty to bring in medical supplies to the occupied territory is a due diligence obligation. These words prevent the occupying power from being compelled to bring medical supplies in the occupied territory at the expense of the health of its own population that may need the same supplies. The reference “[t]o the fullest extent of the means available to it” demonstrates that the diligence requested of the occupying power is particularly high. For this reason, the provision of the Italian *Manuale di diritto umanitario* (Italian Military Manual) stating that the occupying power must provide medical supplies “if compatible with its means”¹⁹⁶ does not reflect the standards set by the GC IV. However, nothing prevents states from accepting more burdensome obligations, as appears to be the case of Spain, whose military manual prescribes the duty to bring in medical supplies in absolute terms.¹⁹⁷

The wording of both Article 56(1) and Article 55 of the GC IV is a deliberate choice of the drafters.¹⁹⁸ The clause “[t]o the fullest extent of the means available to it” was added upon the request of the United States during the negotiations of the GC IV, in response to the concern that more absolute obligations would have forced an occupying power to “deprive its own population, armed forces or allies of food and medical supplies for the benefit of recent foes.”¹⁹⁹

191. See Longobardo, *The Duties*, *supra* note 4. On due diligence obligations, see Longobardo, *The Relevance of the Concept*, *supra* note 59.

192. Application of Convention on Prevention and Punishment of Crime of Genocide, *supra* note 60, ¶ 430.

193. GC IV, *supra* note 20, art. 56. This expression has been criticized as too vague in *Report of the Committee on Law of Occupied Areas*, in PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION, SECTION OF INTERNATIONAL AND COMPARATIVE LAW 86, 89 (Sept. 16–17, 1952).

194. NEW ZEALAND, MANUAL OF ARMED FORCE LAW: LAW OF ARMED CONFLICT IV § 9.3.9 (2020).

195. U.K. LOAC MANUAL, *supra* note 132, § 11.42.

196. ITALIAN MILITARY MANUAL, *supra* note 182, § 48.13.

197. I MINISTERIO DE DEFENSE, ORIENTACIONES EL DERECHO DE LOS CONFLICTOS ARMADOS §9.4.c.(1) (2d ed. 2007)

198. GC IV, *supra* note 20, art. 56(1), 55.

199. Raymund T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 420 (1952).

The main issue in relation to these provisions is establishing the level of health measures pertaining to the prevention and control of contagious diseases that must be applied in occupied territory. Article 56(1) does not affirm that the level of health care in occupied territory must be brought “to the fullest extent of the means available,” but rather, the provision states that the occupying power must endeavor to maintain and ensure measures against contagious diseases to “the fullest extent of the means available” to it.²⁰⁰ Likewise, in Article 55, the expression “the fullest extent of the means available to it” does not refer to the level of supplies that the occupying power must provide, but rather, to the effort that the occupying power must endeavor to put forth in order to achieve the result embodied by Article 55 (i.e., ensuring that the occupied territory is adequately supplied).²⁰¹ However, this provision refers to the adequateness of the standards of medical supplies that should be taken into account.

Some state practice suggests that the GC IV only requires occupying power to provide the level of health care that existed before the occupation, both by maintaining the function of the local infrastructures and bringing in medical supplies if necessary. Interestingly, the Danish Military Manual quite vividly clarifies that:

As is the case in the field of healthcare, for example, the level of protection and welfare in Denmark may differ significantly from that in the territorial State. International law contains *no obligation to provide* the civilian population in the occupied territory with *the standard applicable in the Danish health care system* . . . Rather, the conditions in the territorial State *prior to occupation* constitute the relevant standard in international law. Only one modification may be necessary: If the standard *prior* to occupation was at a level that must be regarded as life-threatening to all or parts of the civilian population, the occupying power must—to the extent possible—raise the level to a *minimum* that ensures the basic vital healthcare necessities for the population.²⁰²

The Danish position is clear: there is no duty to enhance the health care standard in the occupied territory so that it matches the one of the occupying power,²⁰³ but rather, the pre-occupation standards are the measures of the health care that the occupying power is due to provide.

This argument is in line with the idea that the occupying power must ensure that the health care provided in the occupied territory continues during the occupation. Moreover, it takes into account the fact that the occupying power is not the sovereign over the occupied territory and, accordingly, has limited rights to alter the law applicable

200. GC IV, *supra* note 20, art. 56.

201. *Id.* art. 55.

202. DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 440 (2016) (emphases added).

203. See also Noam Lubell, *Legal Background*, in A LEGACY OF INJUSTICE: A CRITIQUE OF ISRAELI APPROACHES TO THE RIGHT TO HEALTH OF PALESTINIANS IN THE OCCUPIED TERRITORIES 9, 17 (2002).

in that territory, as compared to the freedom it enjoys in legislating over its home territory.²⁰⁴ However, this view risks freezing measures against contagious diseases to the means available prior to the occupation. This could be detrimental for the local population, especially in cases in which the occupation of a territory lasts for a long period of time and where a contagious disease event requires a dynamic response.

As mentioned above, international humanitarian law does not embody a simple answer to this problem since it does not provide specific regulation on so-called prolonged occupation.²⁰⁵ However, today it is well established that international human rights law is applicable to occupied territory and that international humanitarian law should be interpreted taking into account applicable human rights law provisions.²⁰⁶ Under the human right to health provided by Article 12 of the ICESCR, states must “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and must take “steps” including “[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases.”²⁰⁷ Accordingly, using Article 12 of the ICESCR as the interpretive context of Article 56(1) of the GC IV pursuant to Article 31(3)(c) of the VCLT, it is possible to conclude that the current interpretation of Article 56(1) of the GC IV demands that occupying powers enact measures of prevention and control of contagious diseases that were not provided by the local authorities prior to the occupation. The measure of the standard to be guaranteed in the prevention and control of contagious diseases is the progressive realization of the highest attainable standard of physical and mental health.²⁰⁸ As noted above, in cases of prolonged occupations, the occupying power should strive to guarantee the enjoyment of the highest attainable standard of physical and mental health in occupied territory.²⁰⁹

Similarly, the quantity of medical supplies that must be brought into the occupied territory under Article 55 of the GC IV should be assessed taking into account the human right to health embodied in Article 12 of the ICESCR, which refers to the duty to take steps towards guaranteeing “the highest attainable standard of physical and mental health.”²¹⁰ Using this provision as the interpretive context of Article 55 of the GC IV, it is possible to conclude that the occupying power must, at least, bring a sufficient amount of medical supplies to address an emergency pertaining to a contagious disease, with the long

204. See *supra* Part III.B.

205. See *supra* Part III.B.

206. See *supra* Part II.

207. ICESCR, *supra* note 27, art. 12.

208. See *id.*; Lubell, *Legal Background*, *supra* note 203, at 18–19.

209. See ICESCR, *supra* note 27, art. 12; *supra* Part III.B.

210. ICESCR, *supra* note 27, art. 12.

term aim of providing enough supplies to achieve “the highest attainable standard of physical and mental health” in relation to the prevention and control of that disease.²¹¹

The question of whether the occupying power has a duty, under the ICESCR, to upgrade the health care of the occupied territory to the health care in its own territory remains open. The Danish Military Manual states that there is no such duty under international humanitarian law alone.²¹² A contrary view contends that, in cases of prolonged occupations, such a duty can be construed under the principle of nondiscrimination embodied under Article 2(2) of the ICESCR,²¹³ and that this interpretation would also affect measures against contagious diseases such as COVID-19.²¹⁴ It is difficult to argue against the desirability of such an approach, which has been elaborated upon in the context of the Israeli occupation of the OPT, where dramatic disparities between the measures against contagious diseases in Israel and Palestine do exist.²¹⁵ However, such view conflicts with one of the basic tenets of the law of occupation, which is the fact that the occupying power must keep the occupied territory distinct from its own pursuant to the ban on the use of armed force in the UN Charter, international humanitarian law, and the principle of self-determination of peoples.²¹⁶ The duty to keep distinct the territory of the occupying power from the occupied territory bars the possibility to construct the relationship between occupied territory and occupying power as a federal analogy, which is the main rationale behind applying the principle of nondiscrimination as a bridge between health care in occupied territory and in the territory of the occupying power.²¹⁷ This view may lead to the consequence of supporting annexation claims over the occupied territory, as demonstrated by the fact that its proponents, trying to discharge any counterargument based on the Palestinian right to self-determination,²¹⁸ have to conclude that the

211. *Id.*

212. *See supra* text accompanying notes 202–3.

213. Sari Bashi, *Human Rights in Indefinite Occupation: Palestine*, 3 INT'L COMP., POLICY & ETHICS L. REV. 801, 835 (2020) [hereinafter Bashi, *Human Rights*].

214. Sari Bashi, *Israel Needs to Protect Palestinians from COVID-19*, RESPONSIBLE STATECRAFT (Apr. 3, 2020), <https://responsiblestatecraft.org/2020/04/03/israel-needs-to-protect-palestinians-from-covid-19/> [https://perma.cc/C5XP-G2MU] (archived Mar. 11, 2022).

215. For an overview of the measures adopted by Israel to control the Covid-19 pandemic, see Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross & Tamar Hostovsky-Brandes, *Israel: Legal Response to Covid-19*, in OXFORD CONSTITUTIONS ONLINE (Jeff King & Octavio Ferraz eds., 2021).

216. *See* Wall Opinion, *supra* note 24, ¶¶ 87–88. On the emergence of this principle, see generally SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* (1996).

217. Bashi, *Human Rights*, *supra* note 213, at 822–825.

218. *See* the rigorous analysis offered by Ralph Wilde, *Expert Opinion on the Applicability of Human Rights Law to the Palestinian Territories with a Specific Focus on the Respective Responsibilities of Israel, as the Extraterritorial State, and Palestine*,

ultimate source of any Palestinian administration in the OPT is Israel through the Oslo Accords, rather than the right of self-determination of the Palestinian people.²¹⁹

For all these reasons, this author cannot share the view that the standards of the measures adopted to prevent and control contagious diseases in the occupied territory should be assessed against the measures adopted by the occupying power in its own territory. It is submitted here that the principle of nondiscrimination embodied in the ICESCR applies only to the health care provided to individuals in the occupied territory, rather than encompassing, in the same balancing exercise, the health care provided to the population of the occupying power's territory.²²⁰ Accordingly, the level of health care in the occupied territory is not necessarily a paragon that may be used to measure whether the occupying power has met its obligations in relation to the health care in the occupied territory, but rather, it is *an indicator of the capacity of the occupying power to meet certain standards*. Since Articles 56(1) and 55 of the GC IV require the occupying power to act to “the fullest extent of the means available to it” in preventing and controlling contagious diseases in occupied territory and in bringing in relevant medical supplies, the assessment of its capacity may be decisive in ascertaining whether such obligations have been implemented with the high level of diligence required.²²¹

D. *An Assessment of the GC IV in Relation to Contagious Diseases*

Articles 55, 56, and 59 of the GC IV shed some very needed light on the obligations that the occupying power has in relation to the fight against contagious diseases. In this respect, these provisions complement Article 43 of the Hague Regulations in the sense that they detail some minimum actions that must be undertaken in relation to health care in the occupied territory. Particularly significant in this regard is Article 56(1) of the GC IV, which focuses explicitly on contagious diseases in occupied territory and sets the basis for the

as the Territorial State, DIAKONIA INTERNATIONAL HUMANITARIAN LAW RESOURCE CENTRE IN JERUSALEM, 4, 15 (2018), <https://www.diakonia.se/ihl/download/israeli-palestinian-conflict/applicability-human-rights-law-palestine-expert-opinion-wilde/> [https://perma.cc/32Q2-ADZK] (archived Mar. 18, 2022).

219. Bashi, *Human Rights*, *supra* note 213, at 838–839. The ICJ has recognized that the Palestinian people enjoy the right to self-determination in the Wall Opinion, *supra* note 24, ¶ 88.

220. See *infra* Part III.B for more information. *Contra* Bashi, *Human Rights*, *supra* note 213, at 831.

221. GC IV, *supra* note 20, arts. 55–56; see COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, *supra* note 134, ¶ 81 (using health indicators in Indonesia—such as life expectancy—to assess whether the Indonesian actions as the occupying power in East Timor met international standards).

complex burden sharing between the local authorities and the occupying power.

Articles 55, 56, and 59 of the GC IV form a complex architecture aimed at limiting the suffering of the local population in relation to the spread of contagious diseases. In line with the Hague Regulations, the best option is for the local authorities of the occupied territory to keep undertaking their responsibilities for preventing and controlling contagious diseases also in times of occupation (Article 56(1)).²²² However, the occupying power has a duty to ensure and maintain health care in occupied territory, primarily through cooperation with the local authorities (Article 56(1) of the GC IV).²²³ If, nonetheless, the occupied territory is inadequately supplied with those medical goods that are necessary to prevent and control contagious diseases, the occupying power must bring them into the occupied territory to the fullest extent of the means available to it (Article 55 of the GC IV).²²⁴ If, nevertheless, the occupied territory is still inadequately supplied, the occupying power must accept impartial humanitarian consignments of the medical supplies needed to address the contagious disease (Article 59 of the GC IV).²²⁵

It has been noted, in relation to the occupation of Kuwait by Iraq, that Articles 55 and 56 of the GC IV correspond to Article 12 of the ICESCR.²²⁶ Although these provisions do not overlap completely since they were created to address different contexts, it is certain that these rules may be interpreted coherently under Article 31(3)(c) of the VCLT. This way, no normative conflict may be detected, but rather, the dynamic approach of human rights law to the progressive realization of the highest attainable standard of health reinforces the obligations of the occupying power to prevent and control contagious diseases.

However, in practice, the effectiveness of the legal framework provided by Articles 55, 56, and 59 of the GC IV in relation to contagious diseases in occupied territories faces some challenges. As noted, the obligations under Article 55 and 56(1) are obligations of diligent conduct. This may undermine their effectiveness since an occupying power may argue that it deployed all the available means and, nonetheless, it was impossible to prevent or control a contagious disease. In this respect, an absolute obligation of result may appear as the best option, since it would leave no latitude to the occupying power to avoid responsibilities in cases of diseases. However, no state would have accepted such a solution because under no circumstance could a state guarantee to prevent and control absolutely the outbreak of contagious diseases. Rather, a state can be asked to endeavor to do so,

222. See GC IV, *supra* note 20, art. 56.

223. See *id.*

224. See *id.* art. 55.

225. See *id.* art. 59.

226. Walter Kálin (Special Rapporteur), Rep. on the Situation of Hum. Rts. in Kuwait under Iraqi Occupation, ¶ 200, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992).

with no assurance of the result. The first commentators of the GC IV were mindful of this circumstance and, even when they voiced the concern that the due diligence character of these provisions could result in noncompliance, they acknowledged that no other wording was a viable choice for the contracting states.²²⁷ Even though obligations of diligent conduct burden states to disclose what they have done to meet the specific goals set by the relevant provisions,²²⁸ when there is no international court with jurisdiction over an alleged violation, it may be difficult to force an occupying power to disclose the relevant information.²²⁹ Article 59 of the GC IV, on the other hand, does not suffer from these limitations since it embodies an absolute obligation that, at least according to the text of the GC IV, should leave no leeway to occupying powers.

Another risk is connected to the possibility that the occupying power adopts measures to prevent and control contagious diseases in occupied territory only for the benefit of its own population, rather than for the benefit of the local population. Indeed, in occupied territory, the occupying power has the right to deploy its own soldiers to maintain the occupation and administer the territory. A limited number of civilians²³⁰ can be deployed as part of the administrative apparatus of the occupied territory. The deportation or transfer of the occupying power's civilian population is strictly prohibited but, as demonstrated by Israeli settlements, is far from a rare occurrence.²³¹ In this respect, an occupying power may decide to adopt preventive and controlling measures in relation to contagious diseases in occupied territory only to protect its own citizens. For instance, during the COVID-19 pandemic, Israel vaccinated its population in the West Bank, including the inhabitants of the illegal settlements, while it did not provide vaccines for the Palestinian population.²³² This practice is illegal under

227. VON GLAHN, *supra* note 14, at 145; *see also* DINSTEIN, *supra* note 14, at 164–165.

228. See the recent *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2022 I.C.J. Rep. 116, ¶¶ 52, 78, 95, 118, 149, 161, 226, 241, 257 (Feb. 9); *see also Eritrea-Ethiopia Claims Commission, Partial Award: Central Front* (Apr. 28, 2004), ¶ 112 (offering an example in which, when states refuse to do so, international courts have considered them responsible for the breach of the due diligence obligations at hand); KULESZA, *supra* note 59, at 204–05.

229. See Longobardo, *The Relevance of the Concept*, *supra* note 59, 86–87.

230. Bear in mind that the local judges and public officials should continue under Article 54(1) of the GC IV, even if the occupying power may remove them under Article 54(3).

231. See GC IV, *supra* note 20, art. 49; *see also* Rome Statute of the International Criminal Court art. 8(2)(b)(viii), July 17, 1998, 2187 U.N.T.S. 90. The ICJ declared the illegality of the Israeli settlements in *Wall Opinion*, *supra* note 24, ¶ 120. The UN Security Council reached the same conclusion in S.C. Res. 2334, (Dec. 23, 2016). For an overview, see Christian Tomuschat, *Prohibition of Settlements*, in *THE 1949 GENEVA CONVENTIONS*, *supra* note 13, at 1551.

232. See Oliver Holmes & Hazem Balousha, *Palestinians Excluded from Israeli Covid Vaccine Rollout as Jabs Go to Settlers*, *GUARDIAN* (Jan. 3, 2021),

the principle of nondiscrimination, which applies to protected persons under Article 27(3) of the GC IV and Article 75(1) of the AP I,²³³ as well as to *any* civilian population in the occupied territory (settlers included) under Article 2(2) of the ICESCR. According to the latter provision, states parties “undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind* as to race, colour, sex, language, religion, political or other opinion, *national* or social origin, property, birth or other status.”²³⁴ Accordingly, actions pertaining to the right to health in occupied territory—including measures regarding the prevention and control of epidemic diseases—cannot discriminate between the citizens of the occupying power and the local population, such as what regrettably happened in relation to COVID-19 in the OPT. The Supreme Court of Israel reached a similar conclusion in a 1991 decision on the distribution of gas masks in occupied territory, in which the court affirmed that the military commander “may not discriminate between residents. When the Military Commander has reached the conclusion that protective kits must be distributed to Jewish residents in the area, protective kits must also be distributed to the area’s Arab residents.”²³⁵ Since, as mentioned above, the Oslo Accords cannot alter the guarantees offered by the law of occupation,²³⁶ the principle expressed by the Supreme Court of Israel is applicable even after the attribution of administrative responsibilities to the Palestinian authorities.

Another shortcoming of the protection offered by the GC IV is the fact that Articles 55 and 56 do not bind the occupying power “one year after the general close of military operations,” according to the text of Article 6 of the GC IV.²³⁷ The convention embodies this provision

<https://www.theguardian.com/world/2021/jan/03/palestinians-excluded-from-israeli-covid-vaccine-rollout-as-jabs-go-to-settlers> [<https://perma.cc/P8GG-TBUH>] (archived Mar. 11, 2022); AMNESTY INTERNATIONAL, *Denying COVID-19 Vaccines to Palestinians Exposes Israel’s Institutionalized Discrimination* (Jan. 6, 2021), <https://www.amnesty.org/en/latest/news/2021/01/denying-covid19-vaccines-to-palestinians-exposes-israels-institutionalized-discrimination/> [<https://perma.cc/S84S-TRKF>] (archived Mar. 11, 2022); HUMAN RIGHTS WATCH, *Israel’s Discriminatory Vaccine Push Underscores Need for Action* (Mar. 19, 2021), <https://www.hrw.org/news/2021/03/19/israels-discriminatory-vaccine-push-underscores-need-action> [<https://perma.cc/2DE5-962P>] (archived Mar. 11, 2022); see also Letter from Riyad Mansour, Minister of the Permanent Observer of the State of Palestine, to the United Nations Sec’y-Gen., the President of the Gen. Assembly & the President of the Sec. Council (Jan. 5, 2021) U.N. Doc. A/ES-10/850–S/2021/41.

233. See Knut Dörmann & Sylvain Vité, *Occupation*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 11, at 325.

234. ICESCR, *supra* note 27, art. 2(2) (emphases added).

235. HCJ 168/91, *Murkos v. Minister of Defence et al.*, 45(1) PD 467, 470-1 (1991) (Isr.) English translation quoted in the Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 861 (1990) (Apr. 9, 1991), ¶ 11. Note that the report acknowledges that the masks were not distributed as expected and that many of them were not functioning properly.

236. See *supra* Part IV.A.2.

237. GC IV, *supra* note 20, art. 6.

because the drafters thought, quite naively,²³⁸ that most occupations would cease after one year and that, if this were not the case, the local authorities would have received from the occupant significant administrative powers to the point that the occupying power would be released from most of its responsibilities.²³⁹ This assumption proved patently wrong in the face of some contemporary occupations that have lasted for many decades. As a result, Article 6 of the GC IV has attracted significant criticism, to the point that some consider it to be implicitly abrogated by the AP I and—maybe—by a new corresponding rule of customary law.²⁴⁰ For the purposes of this Article, suffice it to say that the reference to “the general close of military operations” should not be interpreted as referring to the military operations that created the occupation,²⁴¹ but rather, as pertaining to any hostility occurring in occupied territory.²⁴² This is supported by the fact that the very Supreme Court of Israel applied rules of the GC IV even though the hostilities that established the occupation of the OPT ended in 1967.²⁴³ Following this view, all the rules pertaining to the prevention and control of contagious diseases embodied in the GC IV would apply

238. For an overview of prolonged occupations that were established before the adoption of the GC IV, see DINSTEIN, *supra* note 14, at 128–29.

239. PICTET’S COMMENTARY, *supra* note 113, at 62 (“Several delegations pointed out at the Diplomatic Conference, however, that if the occupation were to continue for a very long time after the general cessation of hostilities, a time would doubtless come when the application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the Occupying Power had been handed over to the authorities of the occupied territory.”).

240. See AP I, *supra* note 21, art. 3(b). State practice supports the idea that this provision abrogated, for the states parties. Article 6(3) of the GC IV. See, e.g., GERMANY, FEDERAL MINISTRY OF DEFENCE, LAW OF ARMED CONFLICT MANUAL § 536 (May 2013); see also DINSTEIN, *supra* note 14, at 303. For a discussion on whether a customary international law rule that corresponds to art. 3(B) of the AP I exists, see Grignon, *The Geneva Conventions and the End of Occupation*, in THE 1949 GENEVA CONVENTIONS, *supra* note 13, at 1582–85.

241. This is the incorrect conclusion of the ICJ in the Wall Opinion, *supra* note 24, ¶ 125. See the criticisms by Orna Ben-Naftali, ‘*A la Recherche du Temps Perdu: Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, 38 ISR. L.R. 211, 214 (2005); Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall advisory Opinion*, 99 AM. J. INT’L L. 102, 106 (2005); Grignon, *supra* note 240, at 1579; DINSTEIN, *supra* note 14, at 305.

242. INT’L COMM. RED CROSS, EXPERT MEETING, *supra* note 14, at 77; Iain Scobbie, *Prolonged Occupation and Article 6(3) of the Fourth Geneva Convention: Why the International Court Got It Wrong Substantively and Procedurally*, EJIL: TALK! (June 16, 2015) <https://www.ejiltalk.org/prolonged-occupation-and-article-63-of-the-fourth-geneva-convention-why-the-international-court-got-it-wrong-substantively-and-procedurally/> [<https://perma.cc/R4QN-FU9T>] (archived Mar. 11, 2022); DINSTEIN, *supra* note 14, at 305–06.

243. See, e.g., HCJ 7015/02 Ajuri et al. v. IDF Commander, 125 I.L.R. 537, ¶ 17 (discussing the applicability of art. 78 of the GC IV, which would be inapplicable pursuant to art. 6(3)).

to most occupations today and especially to the OTP, where hostilities have never ceased completely. However, when no hostility has occurred for at least one year in occupied territory, only Article 59 of the GC IV on the duty to consent to relief would apply. Although this is in line with the aforementioned stricter requirements of Article 59, the inapplicability of Articles 55 and 56 significantly reduces the role of international humanitarian law. From this point of view, the fact that international human rights law supplements international humanitarian law is a very welcome development.

V. CONCLUSIONS

Occupying powers must adopt measures to prevent and control contagious diseases in occupied territory as a matter of international law. This Article has explained that the Hague Regulations, the GC IV, and international human rights law delineate a complex legal framework applicable to the prevention and control of epidemic diseases in occupied territory. This legal framework is applicable to a variety of diseases, ranging from certain sexually transmitted diseases to pandemic influenzas such as COVID-19.

The extant law is constrained between conservative and progressive dynamics. On the one hand, the law is old since it is mainly based on legal texts adopted in 1899, 1907, 1949, 1966, and 1977. Inevitably, the law reflects ideas that may be perceived as outdated today. For sure, it reflects a firm belief that an armed conflict exists between the local population of the occupied territory and the occupying power—a hostile relationship that is mitigated, not obliterated, by the duties imposed upon the occupying power. On the other hand, the law of occupation and the ICESCR incorporate flexible provisions in relation to health care so that it is possible to apply them elastically, taking into account the progressive “humanization” of the law of armed conflict.²⁴⁴ This is what this Article has attempted to do, even if the readers must be aware that the same degree of flexibility may be invoked by occupying powers to avoid international responsibility for not having prevented and controlled contagious diseases in occupied territory as demanded by international law.

The flexible nature of the obligations imposed in this field make it difficult to litigate alleged violations before national courts, which may defer to the executive organs of the occupying power in assessing their means to prevent and control contagious diseases.²⁴⁵ At the same time,

244. See generally Alessandro Migliazza, *L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'Homme*, in 137 RECUEIL DES COURS 141 (1972); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

245. See, in relation to litigations pertaining to the OPT, Aeyal Gross, *Litigating the Right to Health Under Occupation: Between Bureaucracy and Humanitarianism*, 27 MINN. J. INT'L L. 421 (2018).

the lack of binding institutionalized monitoring and enforcement mechanisms for obligations under international humanitarian law²⁴⁶ and the perceived minor justiciability of economic, social, and cultural rights²⁴⁷ make it difficult for similar issues to reach an international court or tribunal.

Overall, it is possible to perceive a sense of injustice in relation to the extant legal framework. At the end of the day, the local population of the occupied territory remains at the mercy of the occupying power to receive the means to prevent and control contagious diseases. Ultimately, the provision of vaccines and other equipment to an occupied territory without the capacity to produce them itself may result in a powerful bargaining chip, a ruthless instrument of control by the occupying power.²⁴⁸ For this reason, it is fundamental to stress that the prevention and control of contagious diseases in the occupied territory is not an act of international solidarity, but rather, a highly regimented duty under the GC IV.

246. On this vast and complex issue, see generally Silja Vöneky, *Implementation and Enforcement of International Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW*, *supra* note 11.

247. See the overview on this debate offered by ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 429–435 (3rd ed., 2020).

248. See NEVE GORDON, *ISRAEL'S OCCUPATION* 12, 19 (2008).