P.D., vol. 37(2) 197

H.C. 69/81

BASSIL ABU AITA ET AL.

v.

THE REGIONAL COMMANDER OF JUDEA AND SAMARIA

AND STAFF OFFICER IN CHARGE OF MATTERS

OF CUSTOMS AND EXCISE

H.C. 493/81

OMAR ABDU KADAR KANZIL ET AL.

v.

OFFICER IN CHARGE OF CUSTOMS, GAZA STRIP REGION AND

THE REGIONAL COMMANDER OF THE GAZA STRIP

In the Supreme Court sitting as the High Court of Justice
[April 5, 1983]
Before: Shamgar P., Bejsky J. and Shilo J.

International Law - Administered Territories - Rights and Duties of Occupying Power - Registration and Taxation - Articles 43 and 49 of the Hague Regulations, 1907.

The Petitioners carried on various businesses in their respective regions. They challenged the validity of enactments imposing excise duty on local manufacturers in Judea and Samaria and on goods and services in the Gaza Strip. along with maintaining accounting procedures. These had been levied following the introduction of Value Added Tax in Israel.

Their main submissions were (a) since the Regions where the Petitioners live and work were occupied territory. Article 43 of the Hague Regulations required the Regional Commander to respect existing law

unless the circumstances rendered it absolutely impossible. Such circumstances did not obtain in the Regions; (b) under the said Article, all enactments not designed to promote public order and safety were forbidden, whatever the purposes thereof; (c) Article 48 permits the Military Government only to adapt the collection of taxes to existing law and therefore does not give it power to enact new legislation even if it is for the benefit of the Region and its local population.

The High Court of Justice ruled:

A. (1) The basic norm on which the structure of the Israeli government in Judea, Samaria and the Gaza Strip is built, is the norm of military government.

(2) The authority of such government is temporary and it shall continue in power as long as it is effective.

(3) On assuming authority and as long as it continues, the military government occupies the place of the central government and its local authorities that ruled in the region, and concentrates in its hands every power, right and duty of such central government under the existing law in the Region, subject to such changes as the establishment of the military itself involves and the restrictions imposed by the laws of war.

(4) The authority of the military government is not limited to implementing the local law. It may translate its powers and directives in terms of security enactments subject, however, to the rules of the laws of war.

B. (1) The High Court of Justice may review the validity of acts of the military government according to the principles of Israeli administrative law so as to determine [p. 201] whether these acts are lawful under the norms which bind Israeli public servants, wherever effected.

(2) Regarding security legislation: any deviation by the military government from the guide-lines set by the IDF commander in the area, or dependence on invalid criteria can be ground for intervention of the High Court even though no reference is made to an act contrary to the laws of war, but to an act that is contrary to the local law in force when IDF control was established, or to legislation enacted by the IDF commander in the area.

C. (1) The acts of the occupying power derive their force and validity from customary international law which is embodied in international conventions and partly remains in the form of common law as reflected in the judgments of international or national judicial tribunals, in the practice of nations and in legal literature.

(2) The latter is not merely interpretative of the international conventions which codify customary rules, it may also serve as an independent source evidencing general practice accepted as law.

(3) When the High Court examines the question of the law as to whether there has been an act of omission or commission conflicting with public international law, it must differentiate between customary and conventional international law, and make a distinction between the two.

(4) Customary international law is automatically incorporated into Israeli law, and becomes part of it except when it is in direct conflict with enacted Israeli law, in which case, Israeli law takes precedence.

(5) Conventional international law does not become part of Israeli law through automatic incorporation, but only if it is adopted or combined with Israeli law by enactment of primary or subsidiary legislation from which it derives its force.

(6) The legal principles embraced by the Supreme Court on subjects arising in the occupied territories are those of customary international law which gives force also to the local courts in the occupied territories according to Article 43 of the Hague Regulations, adopted in the security legislation.

D. (1) In order to determine its substance and limitations, the term customary international law should be understood in accordance with its description in Article 38(1) of the Statute of the International Court of Justice and as such will be applied by the High Court of Justice along with local law which, for practical purposes, excepting the temporary or exceptional cases, is accepted by a significant majority of those operating within the juridical framework mentioned above.

(2) The burden of proving customary international law as characterized in Article 38 falls upon the party pleading it, a custom which should be acceptable to a decisive majority of the states. [p. 202].

(3) In the absence of conventional or customary regulation of a matter, a state may freely act according to its understanding and its principles, and in so doing it executes existing international law, because the absence of an accepted custom is part of international law.

E. (1) The Addendum to the Fourth Geneva Convention of 1907 (Hague Regulations) expresses customary international law in the framework of the laws of war.

(2) The convention contains no express prohibition on the imposition of taxes by an occupying power. The ramifications arising from Article 48 of the Addendum to the Convention should not be examined according to the narrow limits resulting from the wording of the article - which does not enable reaching definite conclusions regarding the permissible limits of taxation. But the subject should be examined in light of the quality of the military regime and its obligations, and in light of the responsibilities towards the areas which it controls.

(3) Article 49 opens the door to the imposition of additional payment on the populace: there are no restrictions on the frequency of the levy; no restrictions on the reasons for its imposition, the manner of its collection, its scope, the individual rates that shall be determined, or resulting associated features; but there is a restriction regarding the purpose of the levy, and other restrictions lacking real significance according to Article 51.

(4) Articles 48 and 49 of the Hague Regulations have the sole purpose of limiting the scope of responses in the event that either of two situations arises: One, the collection of taxes by the military regime that are intended for the needs of the State, and two, the imposition of forced levies. Should either of these two actions take place, the military regime will be restricted in

regards to methods of implementation and disposition of income, as detailed in the Hague Regulations.

(5) Regarding the implementation of the payment to be made: The amount of the debt shall be determined according to the normal rules of assessment (how much to be collected) (from whom to collect). The debit is not rigidly fixed, but is flexible to no small degree and can be fixed according to existing conditions. In this matter there is no logic in applying the same criterion to a recently established military government and to a military government that has been in charge of an area with all its attendant civilian problems for more than ten years.

(6) A forced levy by the military is clearly a means of compulsion expressed by a forced collection of cash meant to flow directly to army coffers, with no relationship or resemblance to taxes for civilian purposes.

F. (1) The military regime does not have the right to impose taxes on the inhabitants of the occupied territories and divert those taxes to the treasury of the state in whose name it acts.

(2) The doctrine of investing only the ruler with the privilege of imposing ordinary taxes and not automatically, the military does not require a limitation on the power of imposing taxes, if such imposition is for the good of the public.

(3) If the military government is permitted to impose military taxes, then automatically it may adopt more moderate measures.

(4) There is no basis to the argument that a general rule of customary international law has developed, forbidding totally and absolutely and for any reason whatsoever, all military legislative enactments imposing new taxes. On the other hand, there is no reason to conclude that the matter of new taxes is left to the sole discretion of the military regime. [p. 203].

G. (1) In light of the absence of a decisive provision in Article 48, and since it is possible to learn from the provisions of the regulations of the lacuna created as a result of the formulation of Articles 48, 49, it is to be expected that every examination of tax matters take into account the ramifications arising from the more pronounced general rules of Article 43 that deal with the obligation to maintain order in public life, and the obligation to honour existing law, unless it is absolutely impossible to do so.

(2) In the matter of ensuring an orderly public life, we are not of necessity referring to a one-time action, but rather to an ongoing obligation which is not to be maintained automatically but rather in keeping with changing circumstances from time to time if the situation calls for it. The reasons mentioned are not necessarily those of security, but rather economic and social. The obligation to return to the prior situation cannot obscure the added obligation to ensure the continued order in public life.

(3) The motivation for maintaining the law as it was is decisive, if the general conditions and circumstances demand the intrusion for a legitimate purpose, according to Article 43.

(4) Acts arising out of the need to maintain some balance between the economy of the territory and that of the occupying power are legitimate, even if they involve changes in the existing law.

(5) In this regard the duration of the military government is an extremely important element, in weighing the needs of the military, in weighing the needs of the territory, and in maintaining the balance between them.

H. (1) The Hague Regulations make no distinction between direct and indirect taxation.

(2) Indirect taxes frequently serve to regulate and balance the economy and therefore greater freedom of action is demanded in their imposition under various and changing conditions.

I. (1) The benefit of the local population is not the sole criterion. There must be a balance with military requirements.

(2) The criterion - to determine whether the military government has shown equal concern for the local population in effecting some act and/or adopting measures similar to those in the area of the occupying power, it is sufficient to show that a reasonable exercise has been made of the powers available, granted by Article 43, to introduce a value added tax.

(3) The imposition of value added tax in Israel demanded the imposition of a parallel tax in the occupied territories, in order to make possible continuation of the situation hidden in the positive economic and most important facets of the territories and their population in the existing circumstances [p. 204].

Israeli cases referred to:

[1] *H. C.* 390/79 – *Dvikat et al. v. Government of Israel et al.* (1980) 34 *P.D.* (1) 1.

[2] *H. C.* 606/78 - *Ayub et al. v. Minister of Defence et al.* (1979) 33 *P.D*. (2) 113.

[3] *H. C.* 61/80 – *Haetsni v. State of Israel et al.* (1980) 34 *P.D.* (3) 595.

[4] *H. C.* 97/79 - *Abu Awad v. Regional Commander of Judea and Samaria* (1979) 33 *P.D.* (3) 309.

[5] *H. C.* 802/79 - *Samara et al. v. Regional Commander of Judea and Samaria* (1980) 34 *P.D.* (4) 1.

[6] *H. C.* 428/78 - *Dahoud et al. v. Minister of Defence et al.* (1978) 32 *P.D.* (3) 477.

[7] *H. C.* 369/79 - *Tabgar v. Regional Commander of Judea and Samaria et al.* (1980) 34 *P.D.* (1) 145.

[8] *H. C.* 337/71 - *Almakdassa v. Minister of Defence et al.* (1972) 26 *P.D*. (1) 574.

[9] *H. C.* 302/72 - *Hilo et al. v. State of Israel et al.* (1973) 27 *P.D*. 169.

[10] *Cr. A.* 336/61 - *Eichmann v. A/G* (1962) 16 *P.D.* 2033.

[11] *H. C.* 698/80 - *Kawasma et al. v. Minister of Defence et al.* (1981*)* 35 *P.D.* (1) 617.

[12] *C.A.* 25/55 - *Custodian of Absentee Property v. Samara et al.* (1956) 10 *P.D.* 1824.

[13] *H. C.*146/76 - unpublished.

[14] *H. C*. 351/80 - *Regional Electric Corp., Jerusalem v. Minister of Energy et al.* (1981) 35 *P.D.* (2) 673.

[15] *H. C. /Bialer v. Minister of Finance et al.* (1953) 7 *P.D*. 424.

[16] *H. C.* 202/81 - *Tabib et al. v. Minister of Defence et al.* (1982) 36 *P.D*. (2) 622 .

[17] *H. C.* 256/72 - *Regional Electric Corp., Jerusalem v. Minister of Defence et al.* (1973) 27 *P.D.* (1) 124.

English cases referred to:

[18] *Chung Chi Cheung v. The King* (1939) *A.C.* 160.

[19] *Compania Naviera Vascongado v. S.S. "Cristina" et al.* (1938) *A.C*. 485.

[20] *A/G for Canada v. A/G for Ontario et al.* (1937) *A.C*. 326.

[21] *West Rand General Gold Mining Co. Ltd. v. The King* (1905) 2K.B. 391.

[22] *Grahame v. D.P.P.* (1947) *Cr. App.* R 168.

Italian case referred to:

[23] *Ligabue v. Finanze* (1952) 19 *I. L.R.* 616.

American cases referred to:

[24] *St. Louis v. The Ferry Co.* (1870) Wallace 423.

[25] *The Paquete Habana* (1900) 175 *U. S.* 677.

International cases referred to:

[26] *The Asylum Case* (1950) I.C.J.R. 266.

[27] *Ville d'Anvers v. Germany* (1925) 5 M.A.T. 712.

A. Ronen for the Petitioners in H.C. 69/81.

B. Gross for the Petitioners in H.C. 493/81.

D. Benish, Deputy State Attorney, for the Respondents.

JUDGMENT

ACTING PRESIDENT M. SHAMGAR.

1. The subject matter of the present petitions, heard together by the agreement of the parties, is the legal validity of the following two enactments:

(a) Petition 69/81 deals with legislation regarding excise duty on local manufacturers in Judea and Samaria contained in Order No. 658 of June 2, 1976. (The Law of Excise Duty on Local Manufactures (Amendment No. 2) (Judea and Samaria) (No. 658), 1976) which came into force on July 1, 1976 as provided in sec. 6 thereof, and imposed Additional Excise tax in the said Region.

(b) Petition 493/81 deals with legislation regarding Excise Duty on goods and services which was imposed in the Gaza Strip Region by Order No. 535 of May 10, 1976 (Excise Duty on Goods and Services (Gaza Strip) Order No. 535 1976) which came into force on June 1, 1976; and the Regulations relating to Excise Duty on Goods and Services and relating to the Keeping of Books and Accounts which were enacted under and by virtue of the said Order. [p. 206]

As can be seen from the above, the two petitions deal with identical issues, namely the legality of the introduction in the Administered Territories of a tax similar to the Value Added Tax in force in Israel. Since there is no argument that a new type of tax rather than merely an alteration of the rates and methods of collection of an existing tax is involved, the formal differences between the respective Security Enactments in the said two Regions bears no factual or legal significance. The dispute is not about the form of legislation but about the basic question of the imposition of a new tax. This is also the reason for joining the two Petitions.

2. The Petitioners in Petition No. 69/81 own businesses in Bethlehem and Beit Sahur respectively, selling souvenirs and gifts. The tax was introduced, as I have said, in 1976 by

Order No. 658 amending the Jordanian Excise Duty (or Fees) on Local Manufactures Law No. 16 of 1963. The implementing Regulations including those relating to keeping of books and accounts (Excise Duty on Local Manufactures (Judea and Samaria) (Order No. 31 (75)) 1976) came into force on August 1, 1976 in accordance with Regulation 98 thereof and the Excise Duty on Local Manufactures (Keeping of Accounts Regulations (Judea and Samaria) 1976, which came into force on the day of their publication). The Petitioners contend that the text of the Regulations is substantially identical to the parallel provisions regarding the operation of the Value Added Tax in Israel, 1975. One of the arguments was that until petition was made to this Court, the Regulations had not yet been duly published in the Official Gazette of the Military Government, i. e., in the Collection of Proclamations, Orders and Notices of the Regional Command of Judea and Samaria, but this argument was abandoned during the hearing.

According to the Petitioners in Petition No. 69/81, the liability to tax from 1976 until the summer of 1980 was based on assessment alone as set out in the Petition:

> "10a. From the summer of 1976 until the summer of 1980, representatives of the second Respondent used to send demands to the Petitioners every two months for payment of Additional Excise duty. These demands were based on assessment and the amounts were not final, but negotiable and subject to modification. In fact, they were modified on most occasions after negotiation with representatives of the second Respondent. The bi-monthly form according to which the Additional Excise duty was paid is similar to the form used in Israel at the same time.
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> "b. The Regulations relating to keeping books of account and collection of the Additional Excise duty between 1976 and 1980 were a dead letter and were not applied to the Petitioners and others like them. The mode and character of payment during these years were as set out in para. 10a above.
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> "c. The amount of Additional Excise duty paid by most of the Petitioners was similar but not identical. At the beginning it was a bi-monthly payment of a few hundred pounds by each Petitioner. [p. 207]

In time, the amount grew until in the summer of 1980 it reached a figure of several thousand pounds for the most highly taxed among the Petitioners.

"d. The Additional Excise duty, based on assessment and, as pointed out, negotiable and subject to modification - initially amounting to payment of a few hundred pounds and later to a few thousand pounds - which did not compel the Petitioners to keep accounts and records and the like was a tolerable nuisance, and the Petitioners saw no need to challenge its legality. Because of its relatively light character, they chose not to upset their good relations with the Respondents or to enter into a confrontation situation with them, especially since it was clear that this situation would continue for the foreseeable future."

As mentioned above, the authorities in the middle of 1980 demanded that books be kept. As a result of this demand, commercial elements, together with the Mayor of Bethlehem, asked the Respondents not to impose this obligation on the merchants, claiming that they were not capable of carrying the burden, or alternatively, that implementation be postponed for a long period or until conditions in the Region were ripe to that end. Learned Counsel for the Petitioners, Mr. Abraham Renen, applied *inter alia* to the Legal Advisors of the Regional Command and requested the Respondents to abandon their demands regarding the keeping of books. He pointed out, *inter alia,* that all payments made by his clients since 1976 had been made through lack of choice, under protest, and should not be regarded as an admission of the legality of the obligation. The Respondents replied orally and in writing that they could not accede to the request. Since the Petitioners assumed, as they claimed, that in view of various contacts amongst themselves and others with the authorities, an arrangement could be reached over the dispute about the tax, their lawyer wrote a further letter and held other meetings with officers of the Administration. Finally, however, at the beginning of 1981, a negative reply was received, and the lawyer, under the circumstances, took it to be the last word. Hence the petition to this Court.

The main submissions of learned counsel for the Petitioners were as follows: The Region where the Petitioners live and work is occupied territory and according to the rules of international law - or more precisely, in his view, according to Article 43 of The Hague

Regulations of 1907, regarding the Laws and Customs of War on Land - the Military Commander must respect the existing law unless it is absolutely impossible to do so. In the present circumstances that is not the case. Furthermore, the Military Commander of the Region lacks the authority to impose a new tax on the residents of the area. In addition, the implementing Regulations include penal provisions which, he submits, are contrary to Article 64 of the Geneva Convention relating to the protection of Civilian Persons in Wartime, 1949, since none of the purposes enumerated in Article 64 exist for permitting the enactment of new criminal provisions.

The new Excise duty is in the nature of a change in the Jordanian Excise Law because the Orders [p. 208] impose Excise Duty also on the rendering of services and on sales in shops, which were not included in the original Jordanian law.

According to the Petitioners, purposes of the law are extraneous and invalid:

> 9. The motive of the first Respondent in amending the said Law and of the second Respondent in promulgating the Regulations is invalid. The first Respondent acted to promote his interest as Military Commander of Occupied Territory and to promote the interests of the State of Israel by which he is empowered to govern the Territory, in disregard of the needs of the local population. This is true in two respects: firstly, the gap in the standard between the population of the Region including the Petitioners and that of Israel, and the inability of the former to comply with the sophisticated requirements of the Value Added Tax in force in Israel; secondly, the said amendment was not intended for the benefit of the residents of the Region including the Petitioners. but the opposite.
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> 10. The fact that the Additional Excise Duty provisions were not enforced for four years and remained a dead letter. together with the sudden decision to enforce them in the summer of 1980 at the height of debates on the future of the regional rule and its national identity, show that the Respondents acted and still act in this matter with the aim of promoting the political aims of the State of Israel in the Region and of

bringing about the complete economic fusion of Israel and the Region by creating facts on the ground and implementing them. In doing so the Respondents exceeded their authority and acted on the basis of extraneous considerations and not in good faith.

11. The submission by the Respondents' spokesman that the imposition of the Added Excise Duty in the Region is necessary because of the close economic links between it and Israel and the assumption that not to impose it might merely harm the Region's economy is without substance and an attempt to pull the wool over the eyes of the persons involved. The harm incurred by the imposition of the Additional Excise Duty is greater than its benefit.

12. It is difficult to avoid the impression that the imposition of the Added Excise Duty in the Region and, much more, the present requirements that the payments be based on the keeping of books were additionally, if not mainly, intended to improve the efficiency of the collection of Value Added Tax in Israel, to close loopholes, and so forth. And if that is so, it is prohibited under the Hague and the Geneva Conventions.

In view of the foregoing, the Petitioners claim that the Order No. 658 was *ultra vires,* and the Petitioners cannot be compelled to comply with its provisions.

3. Petition 493/81 was brought by four Gaza residents who were requested to pay Additional Excise Duty under Order No. 535 as above. The first of these Petitioners, who owns a car-repair garage, [p. 209] received a notice from the first Respondent on July 16, 1981, to pay duty as assessed, no tax return having been made by him. The second Petitioner is a scrap dealer and received a like notice on June 29, 1981. The third Petitioner, a dentist, received a notice to pay the tax on May 20, 1981; and the fourth Petitioner, who owns a grocery store, received a notice on June 29, 1981. The four Petitioners claim that the above Order and the Regulations made thereunder are void and without legal force because they are contrary to the rules of international law.

Consequently, the demands for payment are equally void and without force. The Petitioners raised these contentions before the first Respondent, but the latter was unwilling to concede the argument even after their lawyer wrote to the Respondents to this effect.

The point of departure of the Petitioners' application to this Court is that the rules of international law in general, and the 1907 Hague Convention and the Regulations appended thereto in particular, apply to the Administered Territory in which the Petitioners reside and bind the Military Commanders of the area. According to Article 43 of the Hague Regulations, all legislation, including new legislation, which is not designed for the public benefit is forbidden and has no legal foundation, whatever its purpose. As mentioned above, residents of the Gaza Strip are involved and the tax law that was in force during the British Mandate is the one that is applicable. When the Israel Defence Forces entered the Region on June 6, 1967, and took over its Administration, no Value Added Tax or Additional Excise Duty or any similar tax applicable to goods and services existed.

The Petitioners argue that Article 48 of the Hague Regulations applies, and accordingly all that the Military Government may do is to adjust tax collection to existing legislation. It lacks authority to introduce new tax legislation even if for the benefit of the Region and its residents.

In this connection, the Petitioners add that the new tax is indeed called Additional Excise Duty, evidently to associate it with the Excise duty that existed in the Gaza Strip during the Mandatory period. But the name given to the tax is irrelevant since the criterion is its nature, and in that respect, a new tax is involved. Although Excise duty on goods has existed in the Gaza Strip since October 15, 1967 by virtue of the Excise Duty on Goods (Gaza Strip and North Sinai) Order (No. 110) 1967, the legality of the Order and its implications are not an issue in this petition.

The Petitioners also dispute the Respondents' anticipated plea that the tax will serve the residents of the Region and contend that its abolition will not harm the economy of the Region. In this connection they attach an opinion by Mr. Haviv Jirada, a Certified Public

Accountant residing in the Gaza Strip, according to which there is no economic or social justification for introducing the tax in the Gaza Strip. [p. 210]

In support of their submissions, the Petitioners presented to this Court an opinion by Professor Gerhard von Glahn, who is an authority on international law in general and more specifically on the Laws of War, and they ask this Court to adopt the views expressed in this opinion, according to which the enactment of Order 535 and the imposition of the tax is inconsistent with the Hague Convention and also prohibited thereunder.

4. (a) The affidavit in reply to Petition 69/81 was made by Colonel Ya'acov Katz, Deputy Commander of Judea and Samaria.

The Respondents' first argument was laches; the tax was introduced in 1976, but the Petitioners did not see fit to challenge its legality for a period of four years. Hence, the Petitioners were perturbed not so much by the obligation to pay as by its vigorous enforcement and the insistence on compliance with the Regulations (including keeping records and making returns). This argument was based on the fact that the tax had been imposed a long time before and was actually being paid. The number of registered businesses in the Region on the date of the affidavit in reply was 14,500. Nearly all those in the category of the Petitioners in Petition 69/81 are claimed to be registered in accordance with the Order since 1976-1977. Incidentally, another like petition was presented (Petition 772/80); its argument was joined with Petition 69/81. There the Petitioners were marble carvers. But they withdrew their petition during the present proceedings.

In 1980 the residents of the Region paid tax in the sum of 50,500,000 sheqels, but some 11.500.000 sheqels were repaid. All the tax revenue, that of Additional Excise Duty included, are earmarked to cover the necessary expenses of the services for the needs of the population of the Regions; and the Area Command, *i.e.*, the State of Israel, channels further funds out of its own budget to provide for the needs of the Territories in excess of the taxes locally collected.

Secondly, the Respondents contend that if the Petitioners' plea of illegality of the Order is rejected, their alternative prayer against the duty to keep books and accounts as required by the Regulations should also not be granted.

(b) Regarding the legality of the Order it is claimed that the provision of the Hague Convention must be applied in the Region by adaptation to the conditions created there as a consequence of prolonged occupation, the establishment of close economic ties between the Region and Israel and with maximum consideration for the needs of the Region. In this regard the Respondents state:

> The Additional Excise Duty was introduced in the Region when the Value Added Tax was imposed in Israel. Prior to the imposition of the tax in Israel, the authorities debated the question of whether, [p. 211] having regard for the very close economic links which had developed between the Territories and especially between the Region and Israel, there was occasion to introduce in the Region and in the other areas (hereinafter referred to as "the Regions") administered by the Israel Defence Forces a tax system similar to the Israeli one. To clarify the question, teams including economists and lawyers made economic surveys and reached the conclusion that for reasons related to the economy of the Regions, and to prevent serious harm to that economy, the tax was to be imposed with certain modifications and adaptations entailed by the difference between the economy of the Region and that of Israel. Accordingly, it was also recommended that, as was done in Israel, various purchase taxes imposed in the Region on various goods manufactured there could be reduced and abolished. To retain different taxation on similar goods manufactured in Israel and in the Regions might cause a significant widening of the gap between the price of those goods in Israel and in the Regions and necessitate a restriction in the flow of goods between the two. It might also necessitate the imposition of custom duties on the movement of merchandise.
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> The practical effect of restricting the flow of goods and imposing customs duties would be a severe blow chiefly to the economy of the

Regions, which was greatly dependent on the Israeli economy. In that respect, it must be borne in mind that most of the products of the Region are marketed in Israel inasmuch as Israel is the main market for the surplus goods manufactured or sold in the Region that are not required by the local population and not exported over the Jordan bridges.

The tax, in principle, was not introduced to increase the revenue of the Military Government but to allay the fear that economic relations between Israel and the Region might deteriorate; thereby, first and foremost, harming the Region and its residents. In this respect, the Respondents declared:

"Having regard for the nature of the tax, the authorities who examined the matter took into account the fact that its non-imposition in the Region might entail further consequences:

"(a) Exporters from the Region would not be entitled to the reimbursement of tax on merchandise purchased in Israel, which is made to Israeli exporters.

"(b) Merchants and manufacturers in the Region who purchase merchandise and services in Israel would pay the full amount of the Value Added Tax in Israel but would be unable to deduct that amount when and if they sold their merchandise in the Region.

"(c) The imposition of the Value Added Tax in Israel was part of a general reform of the indirect taxation in Israel which also included the reduction and the cancellation of several indirect taxes, especially the purchase tax. Not to operate a similar system in the Territories would lead to a situation in which the burden of indirect taxation [p. 212] would weigh more heavily in the Region than in Israel; for in Israel the aggregate amount of the tax included that which was reimbursable, whereas in the Region the purchase tax would be imposed on manufacturers and those providing services without the possibility of obtaining any reimbursement of the assessed tax on their purchases.

"(d) A situation in which a purchaser of goods for manufacturing purposes in the Region pays purchase tax and is unable to obtain any reimbursement might with time even reduce the need of potential Israeli purchasers for goods and services for purchases of trade in the Region. From the point of view of the interests of the Region, these are only some of the practical repercussions of the failure to impose the Value Added Tax having regard to the economic realities which have been created between the Region and Israel."

The Respondents deny that their sole purpose was to close the loopholes in the administration of the Value Added Tax in Israel. To avoid that, alternative arrangements could have been found, such as those prevailing between countries with separate economies. That, however, would have also harmed the economy of the Region as well as the welfare of its residents.

Hence it is argued that even according to the rules of customary international law, the action of the Military Commander was legal and consistent with those rules. In that respect the Respondents took into consideration the following observations of E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* Carnegie Endowment (New York 1971) 49 (hereinafter referred to as: Feilchenfeld), which state:

"If the occupant collects the taxes of the occupied State, such collection is to be 'as far as possible in accordance with the rules of assessment and incidence in force.' This provision applies to tax procedure and distribution of tax burdens. It is not a 'must' provision...

"The provision would not seem to exclude, as has been asserted, taxation increases, particularly such changes as have been made desirable through war conditions or, in the case of extended occupation, general changes in economic conditions."

The proceeds of the tax are earmarked for the local population, its needs and its welfare, as we have said. To ignore the new economic conditions would, according to Feilchenfeld, harm the administered territory and be in breach of the duties of the

Occupying Power, under Article 43 of the Hague Regulations. The Respondents submit that according to Article 48 of the above:

> "The provisions of the Hague Convention regarding taxes were based on economic conceptions [p. 213] prevailing at the end of the nineteenth century. According to these conceptions the provisions of the Convention relate to taxes with the covering of government expenditures in mind and solely from this aspect are questions of the budgetary deficit and surplus viewed. According to the views prevailing at the time, the Hague Convention did not relate to the imposition of taxes as an economic act intended to affect the economy, as is usual at the present time. For this reason, as a matter of fact, the principle embodied in Article 48 is also not applicable to indirect taxation. It can therefore be said that the Convention does not have in mind the specific problem of indirect taxes.
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> "(b) Article 48, on the imposition of taxes, applied the principle set out in Article 43 to the maintenance of local law in conquered territory. Yet it was not formulated in absolute terms of not altering the law but only 'as far as possible.'
>
> "(c) When there is a clash between the rule that the local law must be kept intact and the duty to act on considerations of the maintenance and the promotion of the well-being of the inhabitants - the latter duty prevails."

(c) As for the Regulations, the Respondents do not accept the argument that the Petitioners cannot carry them out in practice. The Petitioners own extensive and established businesses with large turnovers. Some of them engage in manufacturing and not only in retail trade. There are more than enough bookkeepers and accountants in the Region and in neighbouring Jerusalem; moreover the bookkeeping does not need special professionals since the relevant directives are not complicated. In view of the extensive trading of the Petitioners, their connections with Israeli businessmen and with import and export trade, there are no grounds for their claims that they are incapable of keeping the required records.

(d) In answer to the plea that the Regulations were not duly published, the Respondents drew attention to the relevant provision regarding the mode of publication of Security Enactments as expressed in para. 6 of the Proclamation concerning Law and Administration (Judea and Samaria) (Proclamation No. 2) of June 7, 1967, in the Collection of Proclamations (Judea and Samaria) Order (No. 111) of 1967 and in the Interpretation (Additional Provisions) (No. 2) (Judea and Samaria) Order (No. 161) 1967. In addition to being published in accordance with the Security Enactments, the Orders were distributed to the Regional Chambers of Commerce and brought to the knowledge of various bodies to which they might be applicable. They were also published in the local Arabic newspapers and in special explanatory booklets. The fact that the law was not fully enforced in the past stemmed from the Respondents' desire to regulate the matter; they therefore acted in stages. This fact cannot be exploited by the Petitioners to exempt them from the obligation to pay the tax.

(e) The Respondents' answer to Petition 493/81 was set forth in an affidavit submitted [p. 214] by Margalit Sagiv, Treasury Staff Officer in the Gaza Region. As to the argument of laches against the Petitioners, the Respondents went on to submit that the Petitioners should have applied to the High Court of Justice when they commenced business, at the latest, if they did so after the relevant Order and the Regulations came into force. The Regulations imposed a duty on all merchants in the Region to register and file returns, and these obligations applied to the Petitioners in the course of doing business from the time they commenced operations, irrespective of the liability to pay the tax. If the Petitioners had wished to question the legality of the Order, they should have done so at the first opportunity, *i.e.,* if they were already in business when the legislation came into force, immediately on its application, and if they subsequently went into business, then as soon as they did so. The trouble is that they only petitioned this Court when measures of enforcement were taken against them; and their endeavours to avoid payment of the tax and compliance with the other obligations under the Order and the Regulations, therefore, cannot succeed. Furthermore, the Petitioners had the requisite standing for challenging the validity of the Order even before they went into business. As is pointed out in the reply of Respondents in this regard:

> "The Respondents submit that because of the special character of the tax which is the subject of the Petition, its legality could have been attacked even without reference to the Petitioners being merchants in the sense of the Excise Duty Order. The Additional Excise Duty tax is one which a merchant may lawfully demand from a purchaser and is in practice paid by the purchaser, or the recipient of services (Excise on Goods and Services (Gaza Strip) Regulations (No. 5)). For this reason it can be said that upon the tax being imposed in the Gaza Region, every resident who became liable to pay the tax as a purchaser was entitled to question its legality."

Moreover, if the Petitioners claim that the fiscal legislation should have remained in its 1967 form, their delay is even more significant since the Excise on Goods (Gaza Strip and North Sinai) Order (No. 110) 1967 was published as early as October 1967 and was amended in 1971. That is, the Order of 1976, the subject of this Petition, replaced the arrangements regarding indirect taxation introduced by Order No. 110 and Order (No. 412) of 1971, Excise on Goods (Gaza Strip and North Sinai).

(f) The Respondents in H. C. 493/81 completed their arguments by answering the argument of delay, pointing out that regarding commencement of business by the Petitioners:

> "The first petitioner, Omar Abdu Kadr Kendil, started a car-repair business on April 1, 1980. The second Petitioner, Fadal Abed El Halak Algrosha, a dealer in second hand merchandise, began business on April 1, 1981. The third Petitioner, Amad Hana Brabada, a dental practitioner, started to receive patients in his private clinic in January 1981. The fourth Petitioner, Metil Ismail Abdu, has run a small store for the sale of dairy products, soft drinks [p. 215] and cigarettes since the beginning of 1980. Accordingly, as far as the Petitioners are concerned, the Excise Order and the regulations made by virtue thereof apply only from the time they began their businesses."

The Petitioners argue that they had no standing in this Court before they were obliged to pay tax, unless they already came within the definition of merchants. For an interest to arise which would give standing in matters of taxation, some material financial interest must have crystallized for one who wishes to appeal to the court and complain that he is injured by the provisions of the law. The Petitioners contend that their cause of action arose only when they received assessment notices. In the wake of these notices their lawyers approached the Respondents and shortly thereafter presented the petition. The Petitioners argued that had they petitioned the Court as soon as they had started business it could be assumed that this Court would have ruled that they were premature. The argument is that there is no foundation in the Respondents' submissions that the Petitioners had in the past collected from their customers sums which constituted the tax. This is a fact to be proved by the Respondents, and they failed to do so. Moreover:

> "The task of the High Court of Justice is to review the legality of the actions of the Government and Administration, and of the actions of the Respondents since they form a part of the general Governmental system. As such, can it be assumed that this Honourable Court will condone persistent illegality for the sole reason that it has persisted? Moreover, the thesis herein propounded for consideration before this Honourable Court is that the whole doctrine of laches is totally inapplicable when a petition is directed against the validity of a law, which from the viewpoint of the Petitioners, as this Court has held not once, is primary legislation. This is true especially in this petition, where the Petitioners challenge the very legality of the Law. The Respondents' affidavit itself regarding the considerable sums received for Excise Duty indicates the need to abolish the tax if this Honourable Court indeed finds that its very basis is illegal according to international law."

They also argue that the plea that they kept silent when Order 110 was enacted in October 1967 has no foundation, since that Order did not deviate from the rules of international law.

5. This Petition calls for an enquiry of many stages, embracing both the basic facts about the nature of the legislation in force before the introduction of the Additional Excise, as well as of the new tax, in order to establish whether it contributes to changes in the existing situation, and the nature of these changes.

On the basis of these two fundamental levels - which involve findings of fact - we shall examine the legal significance [p. 216] of the legislation. In other words, if what is concerned is the variation of an existing tax or the introduction of a new tax system, we shall examine the rules applied by this Court for testing the legality and validity of the legislation enacted by the Military Government in the territories administered by Israel. Having regard for the character of the mode of decision-making of this Court in similar cases, we agree that we must bear in mind the Laws of War which are part of public international law.

The subject has two main aspects: first, the provisions regarding the modification of taxation or the introduction of new taxation; second, the guiding rules regarding the amendment of existing law in general.

In short, we shall proceed to examine the following:

(1) the legal situation existing on the eve of the entry of the Israel Defence Forces into the Regions and the enactment of Order 658 or Order 535, respectively.
(2) the rules applied by this Court in similar questions.

6. The first datum is the relevant legislation which was in force in Judea and Samaria on the eve of the entry of the Israel Defence Forces and, apart from that, the law that was in force before the introduction of the new Orders which constitute the subject matter of this Petition. We shall first address ourselves to the main legislation dealing with our problem.

(a) Jordanian Law: According to the legal and administrative orders that prevailed in Judea and Samaria following their annexation by the Kingdom of Jordan by virtue of declarations and acts having legal consequences, commencing on April 1, 1949 and terminating on April 24, 1950, (the validity of which under the rules of international law is

not our concern here), and according to the Jordanian Laws and Regulations Law introduced in both banks of the Jordan Hashemite Kingdom on September 16, 1950, the law which was in force in these territories, before the entry of the Israel Defence Forces and their assumption of control, namely the *Temporary Dues on Local Manufacturers Law* (No. 16) of 1963, applied in these Regions.

According to sec. 2 of the said Law, its provisions apply to all merchandise and material intended for consumption, use or any other purpose, in any product manufactured or made, wholly or partly, in the Jordan Hashemite Kingdom, from local or imported components, if no other tax is due on the merchandise or material under any other enactments. *Local Manufacturers Dues* will apply to such merchandise or material according to classification and with modifications as shall be introduced from time to time by Regulations made by the Council of Ministers with the King's approval. Sec. 4 of the Law provides that these classifications and rates are to be amended as the need arises. [p. 217]

Incidentally, some of the Petitioners in Petition 69/81 admit that they are also engaged in *manufacturing.*

In the field of excise and other indirect taxation, a Consolidation of Excise and Additional Taxes levied on Merchandise Imported, Exported or Produced Locally, Law (No. 25 of 1966) applied. As the name indicates, this Law consolidated Excise and Additional Taxes levied on goods which were *imported, exported or produced locally.* It provided for the conversion of the taxes and excise levied up to that time by a series of Laws into a uniform tax to be levied by the Customs, and for distribution among the bodies for the benefit of which it was collected, according to rules which should have been made by the Council of Ministers. The following are the laws that were replaced: Law No. 20 of 1949; sec. 8 of the Customs and Excise Law of 1962; sec. 49 of the Municipalities Law of 1955; sec. 3(c) of the Social Services Law of 1953; sec. 2(a) of the Sports Town Tax Law of 1963; sec. 2 of the Jordanian University Law of 1964; decisions of the Council of Ministers in accordance with sec. 5 of the National Guard Tax Law of 1954; Regulations 2 (1) to (4) of the Regulations made in 1950 under Law No. 11 of 1948. The Council of Ministers was empowered to alter the method of tax collection, to raise taxes within the

limits set out in sec. 3 of the Law or to reduce them, and even to grant exemptions from payment.

During the Jordanian period other relevant Laws were applicable: the Salt Law (No. 16 of 1950); the Production of Matches Law (No. 59 of 1951); the Stamp Duty Law 1952 (No. 27 of 1952); the Tobacco Law 1952 (No. 32 of 1952); the Intoxicating Beverages Law 1953 (No. 15 of 1953); the Excise on Petroleum Products Law 1960 (No. 63 of 1960); and the Customs and Excise Law 1962 (in one of the orders, Excise is called "Customs duties"). The only British Mandatory act that remained in force was the Banderolle Law of 1927 which had not been repealed or amended by any Jordanian Law.

(b) Legislation of the Israeli Government: Three of the provisions of the Law and Administration (Judea and Samaria) Proclamation (No. 2) which came into force on June 7, 1967 and fixed the legal *principles* to guide the Israeli Military Government have relevance in the present context:

(1) The Law in existence in the Region on the eve of the entry of the Israel Defence Forces on June 7, 1967, was to remain in force in so far as it was not inconsistent with the said Proclamation or any Order made by the Regional Commander of the Israel Defence Forces, and with such modifications as result from the establishment of the Government of the Israel Defence Forces in the Region (sec. 2 of the proclamation).

(2) All powers of government, legislation or administration respecting the Region or its residents were vested in the Regional Commander of the Israel Defence Forces to be exercised by him or by a *person appointed* by him for that purpose or *acting on his behalf* (*sec.* 3(a) of the proclamation). [p. 218]

(3) Taxes, levies, fees and payments of any kind payable to central government institutions which had not been paid by June 6, 1967, were to be paid, as from the establishment of the Government of the Israel Defence Forces, to the said Commander of the Israel Defence Forces (sec. 5 of the proclamation).

(c) Assumption of powers: According to the Appointments Under the Customs and Excise (Judea and Samaria) (Law No. 31) 1967 which came into force on June 27, 1967 (see also: the Appointments under the Customs and Excise (Judea and Samaria) (Amendment No. 1) Order (No. 75) 1967), the powers of the Jordanian Government and its agencies according to all the above Customs and Excise Laws, including Law No. 16 (as stated in sec. 1(1) of the Order) were vested in the *Officer* appointed in accordance with the above-mentioned Order. The appointment was to be made within the scope of the powers defined in sec. 3(a) of the above Proclamation, as set out above.

(d) *Customs:* Under the Regional Customs Order (Judea and Samaria) (No. 96) 1967 dated August 15, 1967, the *whole* Region was declared as one Customs Region. Under the Customs Tariff (Judea and Samaria) Order (No. 103) 1967 of August 27, 1967, by virtue of the Jordanian Law of Customs and Excise Law 1962, new rates of customs were imposed on all merchandise imported into the Region, including imports from the Jordanian Kingdom but excluding imports from Israel. Goods that were imported into the Region from Israel, on which customs had been paid, were to be exempted from payment of customs and excise under the other Customs and Excise Laws mentioned above. In the preamble to Order No. 103, the grounds of its enactment were set out as follows:

> "...Steps must be taken to maintain orderly commerce in the Region and to help the residents of the Region market their goods by way of free trade so as to improve the economy generally and especially to establish a financial base for developing the economy of the Region;
>
> "...This is necessary for the purpose of maintaining supplies, essential services and orderly government in the Region."

Customs duties were imposed under sec. 3 of the Order as follows:

> (a) Customs duties shall be levied on goods brought into the Region by any person.
>
> (b) (1) The customs duties shall be levied at a rate determined by regulations made by the Appointed Officer and shall be a fixed amount or a certain percentage of the value of the goods, or in any other way, as

may be prescribed; however, the Appointed Officer may exempt certain persons or certain goods from customs duties;

(2) Regulations made under paragraph (1) shall be kept for reference in the Regional Customs Offices, the Regional Customs Stations, Municipal Offices, Chambers of Commerce and/or any other place prescribed by the Appointed Officer. [p. 219]

(c) Goods imported into the Region from Israel *shall be exempt from payment of customs* unless one of the following applies:

(1) the goods were imported into Israel subject to certain conditions;

(2) the goods were exempt from payment of tax, customs or other compulsory payment, subject to certain conditions, when they were imported into Israel, manufactured in Israel or delivered in Israel.

(3) ……

(d) Notwithstanding sub-section (c) the following shall be exempt from customs:

(1) goods as provided in paragraphs (1) and (2), if the conditions of import or of exemption were fulfilled in the Region and as long as those conditions are fulfilled;

(2) goods as provided in paragraph 3, if tax was paid in Israel on their acquisition or manufacture.

(e) ...(the emphasis is mine - M. S.).

The expression 'goods' - includes services.

The Customs Authorities (Judea and Samaria) Order (No. 309) of February 16, 1969 granted wide powers of implementation to the said Appointed Officer and to Customs and Excise officials.

(e) *Excise:* The rates of excise on a long list of products were already fixed under the Order of July 6, 1967 and above-mentioned Dues on Local Manufactures Law of 1963. This Order was amended and extended from time to time .

To the Excise on Locally Manufactured Merchandise (Judea and Samaria) Order (No. 31(1)) 1967, amended by the Appointed Officer by virtue of the powers vested in him by the said mentioned Appointments under the Customs and Excise (Judea and Samaria) Laws (No. 31) and sec. 4 of the Jordanian Excise on Local Manufactures Law of 1963, new excise rates were fixed and merchandise subject to Excise was classified; the duty was calculated at a percentage of the wholesale price or as a fixed sum or a combination of both (sec. 2 of the Order). The payment of Excise was imposed on the manufacturer (as provided in sec. 2 of the 1966 law), and as stated in sec. 3 of Order No. 31(1), it

> "shall be paid when the merchandise leaves the place of manufacture. However, the Appointed Officer may defer the time of payment or allow the payment to be made in instalments on such terms as he shall prescribe."

The Order also deals with the marking of merchandise, setting out a list of products and other powers. The Order became effective on July 16, 1967. [p. 220]

According to the Tobacco Law (Judea and Samaria) Order (No. 32) 1967 which came into effect on June 27, 1967, the rates of excise on tobacco were changed and an *additional consolidated excise* was imposed in reliance on the said Jordanian Consolidation of the Excise and Additional Taxes Law, 1966. The rates of excise were similarly changed in reliance on the Excise on Intoxicating Beverages Law (Judea and Samaria) Order (No. 38) 1967 of July 4, 1967.

(f) *Stamp Duty:* Payments under the Stamp Duty Law were also changed from time to time (see Stamp Duty (Judea and Samaria) Order (No. 599) 1975 of July 6, 1975). The National Guard Tax which was part of the Stamp Duty was cancelled even earlier and became an additional Stamp Duty (the Levy of Additional Stamp Duty (Judea and Samaria) Order (No. 147) 1967, of October 18, 1967); this additional duty was parallel to the Jordanian National Guard Tax.

(g) The Indirect Taxation (Overpayments and Underpayments of Tax) (Judea and Samaria) Order (No. 350) 1969, of December 2, 1969 introduced provisions for the

reimbursement of indirect tax (customs or excise under the Customs and Excise Law as provided in the above-mentioned Order No. 31) paid in excess, and for the obligation to pay unpaid indirect tax, or tax reimbursed in error. This Order granted the residents of the Region new rights similar to those obtaining in Israel under the Indirect Tax Law (Overpayments and Underpayments), 1968.

The Marking of Merchandise (Judea and Samaria) Order (No. 149) 1967, of October 22, 1967 granted the Appointed Officer powers to enact provisions for the marking of goods by those holding the same.

(h) *Levy on Stock:* According to the Levy on Stock (Judea and Samaria) Order (No. 370) 1970, of January 22, 1970, the officer appointed to administer the Customs and Excise Laws (Order No. 31 of 1967) was empowered

> ....by notice in writing, to impose a levy on stock held by a merchant for the purposes of his business (see. 2 of the Order).

'Merchant' is defined as a person who engages in the sale of merchandise under sec. 3 of the Order as amended by the Levy on Stock (Judea and Samaria) Order (No. 615) 1975, which came into force on September 10, 1975:

> The Appointed Officer may prescribe by notice in accordance with sec. 2:
> (1) merchandise that is subject to excise;
> (2) rate of tax applied to said merchandise; [p. 221]
> (3) the time for payment of the levy;
> (4) the method of determining the stock of merchandise subject to the levy;
> (5) the obligation to keep books for the purpose of determining the levy and its collection.

As we have seen, the Security Enactments prescribed the payment of excise according to new classifications and rates, and since 1970 also enabled the introduction of a levy on stock, as dictated by the economic conditions prevailing at that time.

(i) On April 4, 1976 the Amendment of the Excise on Local Manufactures Law (Judea and Samaria) Order (No. 643) 1967 came into force, amending the 1963 Jordanian Excise on Local Manufactures Law and widening the circle of those paying excise by including the merchants and services specified therein. There is no need to go into the details of the provisions of this Order since soon after its enactment it was repealed by Order No. 658, which is the subject of this Petition.

7. Order No. 658, which came into force on July 1, 1976, replaced sec. 2 of the Jordanian Excise on Local Merchandise Law of 1963, as follows:

> "2. (a) Excise shall be levied on transactions at the rate fixed by regulations of the Appointed Officer.
>
> (b) The Appointed Officer may prescribe the rate of Excise as a percentage of the price of the goods or services, or as a fixed amount, or both.
>
> (c) In addition to the Excise imposed under sub-section (b), the Appointed Officer may, by regulation, prescribe additional Excise at a uniform rate of the price of the transaction.
>
> (d) In sectors where, in the opinion of the Appointed Officer, the price of a service cannot be ascertained, he may, by regulations, impose Excise as a percentage of the salary or wage paid by a dealer and of the profit he derived.
>
> (e) The following are liable for the payment of Excise:
>
> (1) on a sale the vendor;
>
> (2) on provision of services - the provider of the service.
>
> (f) For the purposes of this section:
>
> 'Excise' means Ordinary Excise and Additional Excise. 'Ordinary Excise' means Excise levied in accordance with sub-section (b).

'Additional Excise' means Excise levied in accordance with sub-section (c).

'the Appointed Officer' means the officer appointed for the purpose of the Appointments Under the Customs and Excise Law (Judea and Samaria) Order (No. 31) 1967." [p. 222]

Accompanying this Order were various regulations regarding enforcement, prescribing details of the transactions on which Excise was to be levied, the rate of the tax, the keeping of books and so forth, the details of which are not relevant here. The Order and its regulations, as amended from time to time, compose two main departures from the Excise arrangement hitherto prevailing:

(a) Excise was not applied only to production or manufacture;

(b) a new system of tax collection was introduced, similar to that for collecting Value Added Tax in Israel.

The imposition of an indirect tax on merchandise itself was not an innovation since, as we have already seen, Jordanian Law had in substance introduced such a tax by enactments made before the entry of the Israel Defence Forces into the Region and its assumption of control, principally in the above-mentioned Laws of 1962, 1963 and 1966 which replaced British Mandatory Law that had until then been in force in the West Bank (as opposed to Transjordan). These laws, moreover, did not establish a rigid and inflexible framework of definitions of the merchandise liable to tax or of the rate of tax. We have already mentioned sec. 4 of the Temporary Dues on Local Manufactures Law of 1965 and should also add here sec. 3 of the Consolidating of Excise and Additional Indirect Taxes on Imports, Exports and Local Manufactures Law of 1966.

In effect, these laws served as the basis for the Security Enactments made by the Commander of the Israel Defence Forces as early as 1967. They were intended to be concurrent with the removal of customs barriers between the Administered Territories and Israel and the inauguration of a bilateral free flow of goods and services that began in 1967 with the removal of the original restrictions on the transfer of goods (the Closed Areas Prohibition on Transfer of Goods (Judea and Samaria) Order (No. 49) of 1967). These laws

were of general and comprehensive scope and only applied during the period of formation and consolidation of the Military Government. In other words, as emerges from the data before us, the fixing of the new rates of Excise, Customs and levies on stock mentioned above and the new classification of taxable goods, were a natural result of the removal of the economic barriers between Israel and the Administered Territory and led to the introduction of uniform rates of indirect taxes in the two areas.

That means that the system of indirect taxation introduced by the Excise on Local Manufactures (Judea and Samaria) Order (No. 31(1)) 1967 and its effects were similar to those in Israel under the Purchase Tax (Merchandise and Services) Law 1952. (See M. Herzberg, *Indirect Taxation Enactments in the Administered Territories* (Hebrew), *Tax Quarterly* (1970) 347). The tariff imposed was identical with the one prevailing in Israel and the parallelism was constant [p. 223] as is evident from the periodic alterations of the tariff. The process was made fully manifest in the provisions of the Excise on Local Manufactures (Imposition of Tax and Rates) Order (No. 31(39)) 1969 which were congruent with the provisions in force in Israel at that time under the Purchase Tax Laws. The provisions for marking merchandise paralleled those in force in Israel (Official Gazette - Subsidiary Legislation 1466, (1968) 1965).

As a result, *manufacturers* in the Region were obliged to pay the same indirect taxes as vendors in Israel. The same trend was demonstrated in Order No. 103 mentioned above, relating to Customs tariffs, which were in the main parallel to the indirect taxes imposed in Israel on imports, whether as customs duties, purchase tax or compulsory levy (levied in Israel under the Emergency Regulations (Compulsory Payments) Extension of Validity Law, 1970). A similar result was achieved regarding tobacco and intoxicating beverages by Orders No. 32 and 38 mentioned above.

The legal and economic significance of the process herein described will be examined after the relevant legal provisions have been examined. It will then be possible to apply them as criteria in testing the legality of the actions taken. However, we can already reach the conclusion that Order No. 658 on which this Petition centres was enacted in the wake of consistent security enactments dating back to 1967. These security enactments were the result of the removal of barriers and the introduction of the free flow of economic relations

in *both* directions. All these enactments were meant to strengthen the economy of the Region and, among other things, to eliminate the unemployment prevalent in the area before the entry of the Israel Defence Forces and during the initial period of the military administration, thus ensuring the livelihood and welfare of the population. The main objective of the security enactments was, therefore, to introduce arrangements and tariffs in the Administered Territories, which were parallel to those in Israel, so as to encourage mutual assistance between the two economies. The claim of the Respondents is, we may recall, that had they acted otherwise, it would have necessitated leaving the Administered Territories so tightly sealed as to prevent any economic link with Israel, a course likely to be most harmful to the economy of the Region, as we shall see later. The removal or continued maintenance of barriers between the Occupying Power and the area under Military Government is the prerogative of the Military Government whose decision cannot be contested so long as its action causes no significant damage to the economy of the administered territory. Incidentally, the same principle applies to the opening of bridges to enemy-held territory. The opening of the bridges between Israel and the Jordanian Hashemite Kingdom in both directions, prevented the choking of the economy of the Region and brought about a satisfactory economic situation, a fact which will obviously be significant when we examine the intention of the Military Government and the significance of its acts according to the criteria of the Laws of War. Furthermore, at this stage, we must again remember that what is involved is *indirect taxation,* including customs regulations and, as we shall see, many authorities on the subject of the powers of Military Government regarding taxation give the matter special status under customary international law. Even among those who argue for non-interference in the existing structure, [p. 224] there are some who admit the possibility of a different and distinct approach to indirect taxes and especially customs .

8. We now turn to Petition 493/81. Since the Petitioners are residents of the Gaza Strip, we shall examine the provisions of the law in force in that administered territory on the eve of the establishment of the Military Government by the Israel Defence Forces and then, at a second level, the security legislation enacted by the Israel Military Government.

(a) Legislation from British Mandatory times: In the Gaza Strip, from the termination of the British mandate until the inception of the Egyptian Military Government, the law

existing in Palestine on May 14, 1948, remained in force (see the Order of the Egyptian Military Governor, Official Gazette of the Gaza Strip, vol. 1, p. 17, and Carol Farhi, *On the Legal Status of the Gaza Strip,* Military Government in the Territories Administered by Israel 1967-1980 (Jerusalem, vol. 1, 1982) 61).

The Egyptian Military Governor indeed exercised his authority to publish Orders changing the existing local law that was in force when the Egyptian army conquered the Region in May 1948, in the course of the War of Independence, but almost no substantial changes were made in tax law. Neither was there a policy of open economic bridges between the Gaza Strip and Egypt. As a result, compared to the differences between Egyptian law and the law in the Gaza Strip, the law in force in the Gaza Strip and that in force in Israel were identical or at least basically similar in view of sec. 11 of the Law and Administration Ordinance 1948. A considerable part of Mandatory tax laws still in force in Israel also remained in force in the Gaza Strip: The Customs Ordinance; authorizations in Matters of Import, Export and Customs (Defence) 1939; the Tobacco Ordinance, sec. 3 of which imposed excise on tobacco; the Cement Ordinance 1944. sec. 5 of which imposed excise on cement; the Stamp Duty Ordinance; the Income Tax Ordinance 1947; the Excise on Matches Ordinance; the Excise on Playing Cards Ordinance; the Intoxicating Beverages (Manufacture and Sale) Ordinance, sec. 3 of which imposed excise on such beverages and the Methylated Spirits Ordinance. Needless to say, in 1967 these laws did not include the amendments made in their Israeli counterparts by the Israeli legislator and of course were not given as a "New Version."

(b) The Egyptian Military Government: the Income Tax Ordinance was amended (Order No. 295 of April 1. 1954; Law No. 3 of 1962 of October 9, 1962; Law No. 14 of 1962 of December 4, 1962 which *inter alia* imposed on residents living permanently outside the Region. "compelled by their work outside the Region." a duty to pay income tax; Law No. 15 of 1962 of December 4, 1962; Law No. 16 of 1962 of December 4, 1962; Law No. 18 of 1962 of December 15, 1962; and Law No. 24 of 1965 of September 4. 1965 and Order No. 332 of April l, 1954 (which replaced certain provisions of the Customs Ordinance). [p. 225] But existing indirect taxes were not abolished so that the basic parallel between the tax in the Gaza Strip and that in Israel at the time of the establishment of the State, remained.

(c) Enactments of the Israel Military Government: The Law and Administration Proclamation (Gaza Strip and North Sinai) (No. 2) of 1967, promulgated in the Gaza Region, was identical in text to the Proclamation promulgated in Judea and Samaria. the essentials of which have been mentioned above .

(d) Excise: The Appointments under the Laws, Customs and Excise Laws (Gaza Strip and North Sinai) Order (No. 35) 1967 of July 12, 1967 confirmed all the powers under the said Laws given to the officer appointed as *officer-in-charge* by the Regional Commander. The term 'Customs and Excise Laws' was defined as follows:

> "Customs and Excise Laws - all laws. including Legislation, Regulation Ordinances, Orders and Provisions regarding the Customs, Customs duties, Excise duties and all other taxes of any kind whatsoever, imposed on merchandise imported, exported and locally manufactured, tobacco, intoxicating beverages, petroleum products and any other products, as they were in force in the Region on June 5, 1967."

Sec. 2 of the Excise on Goods (Gaza Strip and North Sinai) (No. 110) 1967 which came into force on October 15, 1970 stipulated that Excise shall be levied on merchandise specified in the addendum thereto at the rate mentioned therein.

The Appointed Officer was empowered to alter the addendum by adding or deleting goods, changing or amending their descriptions or the rate of the Excise, by prescribing it as a fixed amount instead of a percentage of the wholesale price, or as an addition to the percentage.

See. 3 of the Order provided that the manufacturer was liable for payment. Excise was to be paid to the Appointed Officer when the taxable merchandise left the place of manufacture, but he was empowered to defer the payment or allow it in instalments. The Order also included provisions for marking merchandise.

Sec. 8 of the Order prescribed that all amounts received as Excise under the Order should be held in a special and separate fund placed under the supervision of the Regional Commander of the Israel Defence Forces. The purposes of the fund were defined as follows:

> "9. The fund or any part thereof shall be expended solely in accordance with specific written instructions of the Commander of the Israel Defence Forces in the Region. After deduction of the expenses entailed in collecting the same in administering the fund, and in implementing the Order, the remainder shall exclusively serve the needs of orderly government and administration of the Region in maintaining supplies and essential services [p. 226] to the region and of covering the deficit of the Region."

Order No. 110 was amended a number of times. Thus, the central provision of sec. 2 regarding the imposition of Excise tax and its rate (Gaza Strip and North Sinai) was altered by (Order No. 112) (Amendment No. 1) 1967; by (Order No. 251) (Amendment No. 3) 1969 (Gaza Strip and North Sinai); and (Order No. 362) (Amendment No. 7) 1970 (Gaza Strip and North Sinai). One result was that the rate of Excise was fixed as a percentage of the wholesale price of the goods. Sec. 3 was amended to render the manufacturer *or any other person whom the Appointed Officer shall determine* liable for payment (Gaza Strip and North Sinai) (Amendment No. 2) (Order No. 120) 1967. However, the provision establishing the fund and its purposes was not amended.

The Excise on Goods (Gaza Strip and North Sinai) Order (No. 412) of December 15, 1971 which came into force on January 30, 1972 repealed the said Order No. 110 and substituted new, complete and co-ordinated provisions regarding Excise on Goods. This Order was repealed by the Excise on Goods and Services (Gaza Strip) Order (No. 535) of May 16. 1976 which came into force on June 1, 1976 and introduced the Additional Excise in the following terms:

> "Liability for Excise

2. Excise shall he levied on transactions at the rate prescribed by regulations made by the Appointed Officer.

Imposition of Excise

3. (a) The Appointed Officer may determine the rate of Excise as a percentage of the goods or services, as a fixed sum, or both.

(b) The Appointed Officer may, by regulations, prescribe Additional Excise at a uniform rate of the price of the transaction in addition to Excise levied under sub-section (a).

(c) In the sectors where, in the opinion of the Appointed Officer, it is not possible to ascertain the price of a service, he may, by regulations, impose Excise as a percentage of the salary or wages paid by the dealer and on the profit he has made.

(d) The following are liable to Ordinary and Additional Excise:

(1) on a sale - the vendor;

(2) on the provision of a service - the person providing the service."

Accordingly, Order No. 535, the subject matter of this Petition, continued to replace [p. 227] Order No. 412, which itself continued and replaced Order No. 110. The change effected by Order No. 535 was not meant to introduce Excise duty, which was already in effect, but to enable the *imposition of Additional Excise duty* as well as to lay down the procedures for its collection. Order No. 535 was accompanied by the detailed implementation of Regulations which we shall not specify; their main provisions were published in the Collection of Proclamations, Orders and Notices of the Commander of the Israeli Defence Forces in the Gaza Strip and North Sinai Region No. 44.

(e) Miscellaneous provisions: Excise on tobacco was imposed by the Tobacco Excise (Gaza Strip and North Sinai) Order (No. 115) 1967 of November 1, 1967.

The Excise on Stock (Gaza Strip and North Sinai) Order (No. 334) 1970 authorized the Appointed Officer to impose excise duty on stocks of merchandise held as inventory by a merchant for the purpose of his business.

The Transfer of Goods (Gaza Strip and North Sinai) Order (No. 291) 1969 rendered the import of goods into the Region and the export of goods from the Regional conditional upon the granting of a permit.

The Obligation to Declare and Report Wholesale Stock (Gaza Strip and North Sinai) Order (No. 23) 1967 obliged wholesalers to file a declaration of stock.

The Stamp Duty (Gaza Strip and North Sinai) Order (No. 70) of 1967 contained provisions for the application of the Stamp Duty Law which had been in force since the British Mandate and granted powers to the Appointed Officer to prescribe the duties and rates of Payment.

The Marking of Goods (Gaza Strip and North Sinai) Order (No. 168) 1968 conferred on the Appointed Officer authority to direct that goods be marked under the Customs and Excise Laws.

9. The fundamental trend of the Security Enactments in the Gaza Strip was identical to that described above in respect of Judea and Samaria, in so far as Petition 69/81 is concerned. The form of the Enactments was obviously adapted to those in force in the Gaza Strip at the inception of the Israeli Defence Forces administration and therefore any comparison of the Security Enactments of the two regions must take the relevant distinctions into account. The substantive provisions, however, are identical in form and meaning and make up the large part of the provisions of the Orders. They sought to bring about uniformity of Customs, Excise and Levies in the Gaza Strip and in Israel, having regard to the corresponding indirect taxation existing in Israel in the form of Excise, purchase tax and levies (under the circumstances described). This uniformity, which had already commenced in 1967 was also expressed, *inter alia,* in the said subordinate provision relating to wholesale stock returns and was, as already explained, a derived consequence of the free economic flow [p. 228] (with certain exceptions which obtained in Judea and Samaria and mainly concerned agricultural products; see in this connection Order No. 49 in Judea and Samaria and Order No. 291 in the Gaza Strip). There is, therefore, no need for us to repeat the purposes and trends, already explained in para. 7 of this judgment.

10 (a) Up to this point we have analysed the facts, for which purpose the main trends of the legislative development have been presented.

We now proceed to the next question, which is the second stage of the inquiry of the present matter, namely: what are the criteria to be applied by this Court when testing the legality and validity of Security Enactments in administered territories?

(b) The legal criteria by which the High Court of Justice tests the legality of an act of the Military Government has been repeatedly clarified in decisions of this Court. In *Dvikat v. State of israell* [1] at 13, Acting President Landau J. pointed out that the basic norm on which the structure of Israeli rule in Judea and Samaria has been erected - and which obviously applies equally to the Gaza Strip - is the norm of the Military Government. In other words, the law of the State of Israel does not apply to these Regions. The basic legal principles by which the Regions are governed, and the legal system, were established in June 1967 and are concisely expressed in Proclamation No. 1 regarding the assumption of power and Proclamation No. 2 of the Israel Military Governor, which are interpreted according to the rules of public international law. (See M. Shamgar *The Law in the Territories Administered by Israel,* Public Administration Jerusalem, vol. 8, 1968) 42.

From the point of view of the bounds of the legal question posed by Proclamation No. 2 and the submissions in the Petitions, it is unnecessary to make enquiries regarding the legal standing of the earlier Administration that was replaced by the Israel Military Government. This matter was dealt with in *Dvikat* [1] at 13, in *Ayub v. Minister of Defence* [2] at 127 and see also *Haetsni v. State of Israel* [3] at 595 where Landau J. said in reference to *Dvikat:*

> "The argument that Jordan did not possess sovereign rights in Judea and Samaria is an important plea voiced by Israel in the international arena. The consequence thereof is that the Fourth Geneva Convention does not apply to Judea and Samaria but that the Israel Government puts into operation the humanitarian provisions of this Convention voluntarily. This conclusion has not yet been tested in this Court (see *Dvikat* [1]) [p. 229] and at this time there is also no need to be

concerned with it. It is true that Jordan never was the legal sovereign in Judea and Samaria but it does not follow that the Regional Commander could not by declaration give legal effect to the law in existence in the Region before the entry of the Israel Defence Forces. The question of sovereignty in Judea and Samaria under international law must not be confused with the right and the duty of the Military Commander to maintain public order in the Region, to assume his control there and to introduce the rule of law for the benefit of its residents. This right and this duty of his stem from the customary law of war as formulated in Article 43 of the Hague Regulations. This Court expanded on the *Almakdassa v. Minister of Defence* [8] where the then *Acting President (Sussman)* said:

> "Article 43 above obliges the Occupying Power to respect the law that was in force in the administered territory unless he is absolutely prevented from doing so (at 581)...

"....In his article, *The Observance of International Law in the Administered Territories,* Israel Yearbook on Human Rights, vol. 1, p. 262, Meir Shamgar writes about the need to maintain public order in an area under the control of military government:

"The expression 'restoration and maintenance of public order' - 'la vie publique' is. it would seem, a paraphrase of the words 'normalization and rule of law.' Rule of Law, in its turn, is based on the defined norms of a given legal system.

"And later, at p. 276 he describes the legal system set up by Proclamation No. 2 as implementing this objective. These observations match the views of Oppenheim-Lauterpacht, paras. 169 and 172, International Law, (Seventh Edition). It emerges therefrom that the Regional Commander acted within his authority under international law in directing the continuation of the law *(de facto)* in force in the Region on the eve of its conquest by the Israel Defence Forces (subject to the

changes he deems necessary to assure his control over the Region) without needing to delve into the question of the sovereignty in the Region. The proclamation therefore refers to "the law that was in existence in the Region" and this also is a recognition of fact and not as giving retroactive validity to this law according to international law. In so doing the Commander merely preserved the legal system to which the residents of the Region had been accustomed and facilitated his administration of the Region without undue turmoil (see G. von Glahn, *The Occupation of Enemy Territory,* under the "Preservation of Laws" p. 94 ff)." [p. 230]

(c) As a result of the war in which the previous occupier of the area was defeated and fled, the power of rule and all the authority invested therein was transferred to the Military Force which *has since then effectively controlled the area* and prevented the continued activity of the return of the previous ruling authority. The authority or the Military Governor is, as we know, *temporary* in the sense that its continuing force lasts only for as long as effective control exists over the territory and as long as the Military Government established in the area is maintained. But once it has assumed power, and as long as it remains in existence, and public international law sets no restrictions on its duration, the Military Government replaces the Central Government and its agencies that ruled the territory and sees itself as the sole authority in delineating the rights and obligations of the central government according to the law existing in the Region *(Abu Awad v. The Regional Commander of Judea and Samaria* [4] at 316. But this is subject to the changes arising from the establishment of Military Government and the restrictions deriving from the provisions of the Laws of War. In other words, any restriction expressed in the Laws of War may derogate from the full operation of the governmental and legislative powers possessed by the previous Ruler (see M. Shamgar - *Legal Concepts and Problems of the Israeli Military Government in the Territories Administered by Israel* 1967-1980 (Jerusalem, 1982) 13.

The Military Commander heads the Military Government and its authorities which derive their powers as a point of law from their effective control of the area, and from public international law, and in greater detail from the Laws of War (see *Dvikat* [1] at p.

13) which dictate the scope of permitted action. Furthermore, the power of the Military Commander is not limited to the implementation of existing law but is also competent to translate his authority and directives into terms of Security Enactments (as defined in the Interpretation (Judea and Samaria) Order (No. 130) 1967) largely in the form of Proclamations, Orders and Notices. However, regarding its aims and degree of intervention in existing law, the authority of the Military Commander is limited by the rules of the Laws of War.

11. (a) Concurrently with examining the legality of Government activity according to the Laws of War:

> "We must *also* enquire whether an Order was lawfully issued in accordance with Israeli domestic law since ...there exists the authority to examine on a *personal basis* the office holders in the Military Government who are members of the State executive arm as 'persons who occupy public office under law' and are therefore subject to supervision by this Court under section 7(b) (2) of the Courts Law 1957" *(ibid.)*. (Emphasis mine - M.S.) [p. 231]

This second test means that the Court reviews the legality and validity of the action in accordance with the principles of Israeli Administrative Law, to ensure that the holder of office, carrying out functions of the Military Government, acts lawfully and according to the norms binding on Israeli Public Servants *(Samara v. The Regional Commander of Judea and Samaria* [5] at 4). More particularly, all this does not signify that Israeli Administrative Law applies to the Region and its inhabitants or that an act performed in the Administered Territory will be examined solely according to Israeli law. The above dictum means that actions of the Military Government and its authorities, as instruments of the Israeli Executive arm, will be tested regarding their legality and validity by additional criteria. Although the rules of Israeli law are not binding on the Area, the Israeli office holder in the area is duty bound to act in accordance with *additional* standards called for by reason of his being an Israeli agency, wherever he may be. Thus he bears the further and cumulative duty so to conduct himself that the norms of Israeli Administrative Law do not release him from the duty to abide by the Laws of War. He cannot rely on those norms to

avoid a duty or prohibition applicable to him under the customary Laws of War. Conversely, *in the view of this Court,* an office holder does not generally fulfil his duty by merely abiding by what the rules of international law require of him. Since more is demanded of him as an Israeli agent in the area of Military Government, he must also act in accordance with principles that constitute fair and orderly administration. Thus, for instance, the Laws of War do not reveal any firmly embodied rule about the *right to be heard,* but an Israeli authority will not have discharged its duty when its acts are judicially reviewed by this Court for not respecting that right in those cases where it arises under the norms of our own Administrative Law. All this is obviously subject to specific legislation prescribing special regulations in any particular matter. It was to this that the following remarks were directed that describe the Israeli two-level conception.

> "From the normative point of view, the rule of law in the territories found its expression in the adoption of two main principles of action:
>
> (1) the prevention of the development of a legal vacuum by the *de facto* observance of customary international law and the humanitarian rules included in the Hague Rules and the Fourth Convention and furthermore;
>
> (2) the supplementation of the above-mentioned rules and provisions by the basic principles of natural justice as derived from the system of law existing [p. 232] in Israel, reflecting similar principles developed in Military Government, *supra* at 48-49)."
>
> (M. Shamgar, *Legal Concepts and Problems of Israeli Military Government, supra* at 48-49).

Incidentally, para. 2 cited above is not to be understood as meaning that the other countries mentioned have adopted a similar guideline in military government territories controlled by them. The principles mentioned there are rules of natural justice as adopted in our legal domestic system.

Implementation of the norms of administrative law, in order to examine the acts of the Israeli Government authorities, is not an issue in this case, where fiscal Security Enactments are almost exact copies of the legal rules prevailing in Israel. Therefore it is

possible to review and determine what the principal guideline is for the applicable substantive law, that will be a guidepost in our examination.

(b) To complete the picture I may add that our examination of the subject will *ipso facto* entail consideration of the substantive provisions of the applicable laws. If the Military Commander, seeking to make use of certain powers granted him by the local law, acts *ultra vires* regarding our case law, and with no reference to legislative powers of the wish to implement them, flouts the local law through error or arbitrariness, or the application of invalid criteria, *(Dahoud v. Minister of Defence* [6]) his act may be declared null and void regarding the substantive provisions of the local law only. The same applies to Security Enactments. Action of a Military Government agency beyond the powers vested in it by the Regional Military Commander - *for example,* in the matter of State Property (Judea and Samaria) Order (No. 59) 1967, or in the matter of Security Provisions [Consolidated Version] (Judea and Samaria) Order (No. 378) 1970, or in the application of invalid criteria (see para. 11 (a) above) - this can constitute a cause for the intervention of this Court, notwithstanding the fact that what is involved is not an act contravening the Laws of War but one contravening the rules of the local law in force under Proclamation No. 2, namely the law in existence on the eve of the establishment of government by the Israeli Defence Forces or the enactments of the Israeli Defence Forces (Tabgar *v. The Regional Commander of Judea and Samaria* [7] at 149.

12. What then is the criterion by which the enactments of the Military Government are to be tested? As in the past, learned Counsel for the Respondents did not dispute the competence of this Court to review the actions of the Military Government, (see for instance, *Almakdassa v. Minister of Defence* [8] at 580 [p. 233] and *Hilo v. State of Israel* [9] at 176), the acts of an Army operating in an area which fell under its effective control as a result of war, as described above. In this case it is immaterial whether we are referring to the regular army forces who are in control of the area as a result of battle or whether we are referring to a special organization created to govern and administer the area. Units of the Military Government derive their powers from *customary laws of* war, (Hilo at 176) (M. Shamgar, *The Law in the Territories Administered by Israel in Public Administration, supra* at 42), parts of which *have already been integrated* into international Conventions, or found expression in other parts of the said Conventions which include only convention

law. Other parts are still incorporated into simple customary law, reflected in the written judgments of national or international tribunals, state practice or professional legal literature.

On the other hand, a court does not review these activities according to *conventional* international law, as such, which does not constitute a norm applied by Israeli Courts unless embodied in enacted legislation. (Y. Dinstein, *International Law and the State* (Schocken 1971) p. 143, 148). When this Court addresses itself to the question as to which law it must apply on a plea that some act or omission is in conflict with the rules of public international law, we must distinguish between the rules of *customary* international law, including the general legal principles embodied in international law, and the rules of conventional international law. As it was decided in *Eichmann v. the Legal A-G* [10] and according to the law in force in Israel, which is similar in this respect to English law (see *Chung Chi Cheung v. The King* [18] at 168 (1939) and the observations of Lord MacMillan in *Compania Naviera Vascongoda v. S.S. Cristina et al.* [19] at 497 (1938); of Shamgar *Legal Concepts and Problems of the Israeli Military Government, supra* at 47), the acceptance of norms drawn from international law and their relation to national law, is decided according to a number of leading principles:

> "(1) A rule of law has undergone reception and becomes an integral part of the system of local law only after it has obtained general international concensus....;
>
> (2) That will only occur when no conflict exists between locally enacted legal provision and the rule of international law, but where such conflict does exist, the Court must give preference to and enforce the provisions of the local legislator...;
>
> (3) However...when enacted law is open to varying interpretations and its content does not necessitate any other interpretation, it is to be interpreted in accordance with international law" (*ibid.*, pp. 2040-41) (*Eichmann v. A-G,* (1962). [p. 234]

Professor Dinstein sharpens the matter by stating (op. cit. at 146) that the rules of customary international law automatically become an integral part of the Israeli law, but where obvious conflict arises between those rules and Israeli enacted law, the enacted law

prevails. That is not the case regarding conventional law (Ayub [2] *Kawasma v. Minister of Defence* [11] p. 627). Like the English practice *(Cf. A.-G. for Canada v. A.-G. for Ontario et al.* (1937) [20] and see an example applicable to the present English Law (The Geneva Conventions Act, 1957), - and differing from the American practice under its Constitution - the rules of conventional international law are not adopted automatically and do not become part of the law as applicable in Israel, so long as they have not been adopted or incorporated by way of statutory enactment or subsidiary legislation deriving its force *praeter legem* (Cf. sec. 10 of the Military Justice Law 1955). In this connection Berenson J. ruled in this Court *(The Custodian of Absentee Property v. Samara* [12] at 1829):

> "The Rhodes agreement is a treaty between the State of Israel and another State. Whatever the force and validity of such a treaty in point of international law, it is not a law to which our Courts will have to refer or recognize. The rights it grants and the obligations it imposes are the rights and obligations of the States who signed the treaty and their implementation lies in their hands alone through the special ways of effectuating international agreements. Such an agreement does not fall at all under the jurisdiction of state courts except in so far as they, or the rights and duties deriving from them, have become integrated into state legislation and received the status of binding law. In this instance, the Court is not in truth bound by the agreement as such but by the Law that set its seal upon it and breathed life into it under our domestic legal system. It also follows that where the Law and the agreement are not consistent, although it is apparent that the Law was intended to implement and embody the agreement, the Court will give preference to the Law, which alone is binding upon it. Moreover, even when an inter-state or international agreement stipulates that certain rights are to be vested in certain individuals, the obligation contained in the agreement is in the nature of an inter-state obligation only. The persons affected do not acquire any substantial rights on the basis of the agreement and cannot effectuate their right in court as beneficiaries of the agreement or otherwise."

To be precise, one must also distinguish between a question arising in a territory where the law of the State of Israel is in effect, and a matter arising in the Administered Territories. The legal principles [p. 235] applied by this Court, in cases of the kind mentioned above, are the principles of customary international law, and by virtue of these the Court is also bound by the applicable local law under Article 43 of the Hague Regulations, which was in essence adopted by sec. 2 of Proclamation No. 2. That is to say, the Court will turn to local law and the Security Enactments made by the Regional Commander under the Laws of War. As has been said (M. Shamgar, *Legal Concepts, supra* pp. 47-8):

> "Within the framework of municipal law, the rules of customary international law are regarded as incorporated therein but only in so far as they are not inconsistent with rules enacted by statute or finally declared by national courts or tribunals. In cases of conflict of law in military government regions, the order of precedence is different: such regions are governed according to the norms of international law which provide, *inter alia,* that the local law there in force continues as a rule to be valid; alteration of the existing law, its suspension or repeal, or the promulgation of new laws are examined according to the restrictions prescribed in Article 43 of the Hague Regulations and Article 64 of the Fourth Convention and is permitted when the exigencies of war, the maintenance of public order and the safety or the welfare of the population so require. Legislative changes have been examined by the Israeli courts according to these criteria."

As has already been mentioned, cases may occur where a submission is made to this Court based substantially on local law alone (see (13)), but here as well the norms of recognized international law assist in consolidating the main guideline: inquiry into the acts of the executive agency, in the light of local law consequent upon its assuming the authority under sec. 3 of Proclamation No. 2, includes not only the examination and interpretation of the applicable law in the territory, whether it be local law or security enactments; but when deciding on a petition, the Court also takes into consideration - at least by implication - the question of how the exercise of authority is reflected in the rules

of recognized international law as expressed, for instance, in Article 43 of the Hague Regulations (*cf. Regional Electric Corp. v. Minister of Defence* [14]). [p. 236]

13. The differences between customary and conventional international law, on which I dwelt above, have faced this Court in the past, in petitions by residents of the Administered Territories. In *Ayub* [2] at 119-1, Witkon J. said in this connection:

> "The first question to which we must pay attention is whether the Petitioners may, as protected persons, themselves claim rights under these Conventions - and this, in a "municipal" (internal) court of the Occupying Power - or whether only those states who are parties to the Conventions are competent to claim the protected rights - and that, obviously, at the international level. As is known, the answer depends on another question: Has the same provision in the international Convention, which it is sought to enforce, become part of the municipal (internal) law of the state whose court is asked to deal with the matter, or does the provision remain rather in the nature of an agreement between the states, as such, without becoming part of the internal municipal law? In the first event, one is speaking of 'customary' international law recognized by the municipal law itself as long as there is no conflicting provision in the body of the municipal law. In the second event, one is speaking of 'conventional' international law which only binds the states involved.
>
> "Nevertheless, before being precluded from considering the actions of the army from the point of the provisions of the Hague and Geneva Conventions, I would have to be persuaded that these Conventions are not to be treated as customary international law but only as conventional international law. Indeed, at one point I thought so on the basis of three judgments of this Court - *Steinberg v. A-G, Almakdassa* [8] at 580 and *Abu eI-Sin v. Minister of Defence.* The first of these precedents concerned the provisions of international law in general, but the other two dealt expressly with the Hague and Geneva Conventions.

In the view of the justices who gave judgment, these two Conventions are conventional international law, and accordingly cannot be relied upon in a municipal court of Israel.

"In the meantime Professor Y. Dinstein published his instructive Note 'The Judgement in the Matter of the Rafiah Gap' in 3 Iyune Mishpat 934, in which he explained that there was a difference between the two Conventions. Whilst the Geneva Convention remains part of conventional international law (and therefore did not become part of municipal law), it is otherwise with the provisions of the Hague Convention. The latter gives expression to the law which is accepted [p. 237] in all civilized countries and is thus regarded as customary international law. In view of this Note, I reconsidered the matter and I am not satisfied that the Hague Convention is recognized as customary law under which a municipal court may be asked to act. The same conclusion follows from Schwarzenberger's *International Law,* vol. 2 (1968) pp. 164 ff.; see also Von Glahn, *Occupation of Enemy Territory* (1957) p. 11. Schwarzenberger writes:

'As in relation to other codifications of the laws and custom of land warfare, so in relation to the law of belligerent occupation, the question arises whether these treaty provisions are merely declaratory of international customary law or constitute a development of such rules and, thus, are binding only on parties to these conventions.' "

Acting President Landau (as he then was) went on to add in *Ayub* [2] at 128-129:

"The affidavits in reply submit that the Respondents abide by the humanitarian provisions of the Geneva Convention...I have no intention of going deeply into this aspect, since that convention entirely (and all the more so this specific provision in it) is of the nature of conventional international law which, following the English rule that prevails with us, does not bind this Court, its enforcement being a matter for the

states which are parties to the Convention (see *Custodian of Absentee Property* [12] and *Eichmann* (10)).

The Hague Regulations are very widely held to be customary international law and this Court will so regard them and implement them so long as they are not inconsistent with local statutory law (Hilo [9] at 177 and *Eichmann* [10] at 2055) .

In *Dvikat* [1] at 16 as well, for example, the Court pointed out that the same criterion serves to give judgment in the concrete case before it in the said Petition (see also *Hilo* [9] at 177).

In sum, the Court will inquire into the legality of an act according to customary international law; and in the matter before us this criterion directs us, to the provisions of the laws of war and the local law. [p. 238]

There has been no claim that the orders of the Military Commander exceeded the limits he set himself when establishing the legal and administrative system of Military Government, as provided in Proclamation No. 2, or in later legislation. On the other hand, we are presented with the argument that such enactments of the Military Commander are inconsistent with and have modified the local law. As to this, we saw above that part of the Excise Duty Order is properly based on laws and directives (depending on the Region) that were in force when the military government was established.

There remains the question of whether the introduction of changes and innovations, that is, the introduction of the *Additional Excise Duty,* is in line with the rules of customary international law according to which a military commander must act in military government territory. As will be seen later, the relevant provisions are those of the Hague Regulations. In the present case, no question arises directly involving examination of the Geneva Convention which lies within the framework of conventional international law since that Convention contains nothing with regard to *taxation.* Nevertheless, in order to *complete the picture* we shall have to return later to Article 64 thereof, dealing as it does with the protection of civilian persons in times of war since 1949, when we consider the

meaning to be attached to the Petitioners' argument that it is forbidden to introduce penal provisions in an order imposing additional excise duty.

In view of the foregoing, we must, at the next stage, turn our attention to the relevant provisions of customary international law; but before so doing, it is proper to preface a number of observations on the nature and limits of this theme.

14. (a) The term customary international law should rightly be understood - for the purpose of determining its contents and limits - in the manner described in article 38 (1) of the Statute of the International Court of Justice:

> "(b) international custom, as evidence of a general practice accepted as law."

according to the translation by Prof. Y. Dinstein on p. 45 of his book.

From the nature of the matter, it refers to accepted behaviour which has merited the status of *binding law* (Dinstein, op. cit., p. 52): General practice, which means a fixed mode of action, general and persisting - to distinguish it from action that is occasional and temporary - which has been accepted by the vast majority of those who function in the said area of law. In other words, the fact of the existence of international custom derives from the consciousness of all those who apply and further the international law [p. 239] in accordance with which they are obliged to act in the manner prescribed by accepted custom, or to refrain from any acts that accepted custom prohibits. I have referred to the *consciousness* of those involved and not only of their actual practice, since a custom is binding as written in Article 38 when it is *accepted as law* by those who apply it. As Schwarzenberger has written (op. cit., vol. 1 (1957) p. 27) in this connection:

> "In the case of rules of international customary law, the collective body of subjects of international law, whose practice accepted by them as law is requisite for the creation of any particular rule, forms a... principal agency... In any individual instance, room for disagreement on the exact composition of each of the ... principal agencies exists. This does not, however, affect the general conclusion that, in relation to each particular rule, only the collective body of subjects of international law

which is required for the creation of such a rule constitutes its relevant law-determining agency."

and later on (at p. 28):

"Only the ensemble of each of these agencies can fulfil this function."

A custom is not necessarily formed by virtue of a uniformly held viewpoint by a complex of different national and international tribunals, since it is possible that not one of them has been invited to deal with the question. However, anyone wishing to know whether a custom has crystallised may make inferences from the acts of different states in the international field and their views on any matter. That is to say, 'a practice which is accepted as law' may indeed be deduced *only* from the acts of those engaged in the practice, although there is no denying that the decisions of international *tribunals* carry relatively far greater weight because of their more varied composition and their *relative* independence from any single defined national interest that may actuate them. It is, however, unnecessary to say that what is desirable is not always feasible and that *a complex* of different and even conflicting interests does not necessarily lead to the desirable shared balanced view but rather to a kind of tug of war between those who hold differing and conflicting views as Schwarzenberger has shown [p. 240] in another connection in International Law, *(Law of Armed Conflict,* vol. 2, London, 1968) 4, from which it is difficult to extract an accepted rule.

Customary international law is derived to a large extent, of course, also from the writings of 'the most qualified publicists of the various nations.' Since the process of codification of customary law in the form of Conventions is a slow one, because the case law is only concerned with problems that come before the tribunals for judicial decision, and also because state practice is not always open and declared and certainly not uniform, legal literature has become the most varied and prolific source. But here trouble arises, as Schwarzenberger has said, International Law vol. I, *supra* at 36:

> "It is about as difficult to find out who are the most highly qualified publicists in a field of international law as to say with any claim of objectivity what is a peace-loving nation."

In the English case of *West Rand General Gold Mining Co. Ltd. v. The King,* Lord Alverstone C. J. said (at 407):

> "Any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted that it can hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations."

Thus far as to the sources from which customs and the knowledge thereof are derived. It should be added that examination of these sources can also lead to the conclusion that a custom once accepted [p. 241] and binding as law has been eroded, in the course of time and because of changes in international conditions, lost its force or binding character, either in whole or in part.

(b) Anyone wishing to investigate the existence of a custom, can run into a series of facts, lacking a generally agreed upon and unified viewpoint, which indicate the existence of a custom accepted as expressing a law, although there exist indications that the custom is not sufficiently established as to be binding, or that it has become eroded in the past. The burden of proving its existence and status, as described in its fundamentals in Article 38 of the Statute of the International Court of Justice, is borne by the party propounding its existence:

"The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the Party." (*The Asylum Case* (1950) [26], at 276).

Incidentally, in this last case, which involved a dispute between Colombia and Peru over political asylum, the court, in referring to the features of binding custom, adopted the phrase 'constant and uniform usage', as elements essential for the creation of a custom already emphasized above.

Although a generally accepted practice is involved, as mentioned above, it is not always possible to prove that it is recognised by every one without exception, especially when the viewpoints of the different constituents of the international community are taken into account. However, the views of an ordinary *majority* of states are not sufficient; the custom must have been accepted by an *overwhelming majority* at least (see H. Kelsen, *Principles of International Law: the Overwhelming Majority* (New York, 2nd ed., by R.W. Tucker, 1967) 450.

(c) What is the import of an absence of the requisite international consensus? H. Kelsen says in the first edition of his book *Principles of International Law* (New York 1952) 305:

"If there is no norm of conventional or customary international law imposing upon the state...the obligation to behave in a certain way, the subject is under international law *legally free to behave as it pleases;* and by a decision to this effect existing international law is applied to the case." (The emphasis is mine - M. S.) [p. 242]

Meaning that, in the absence of an arrangement, customary or conventional, a state is free to act according to its own understanding of principles, and by so doing it applies

existing international law, since any conclusion regarding the absence of a binding custom is part of international law.

I may add that I accept the view of Professor Dinstein (op. cit. p. 58) that along with customary law one must also inquire into the application of principles of general law. For the purpose of the present case (Added Excise Tax), there is no theoretical or practical significance to such an inquiry and I shall therefore not dwell on this point.

15. In his above cited work, the *Law of Armed Conflict* (vol. 2, p. 3), Prof. G. Schwarzenberger gives two necessary warning signs that must be taken into account by anyone inquiring into the existence of a binding rule under the Laws of War. One points to the tendency of creating the impression of greater certainty of the existence of binding legal rules that can be attained in the area of the Laws of War in which belligerents seek to retain for themselves, as is natural - although it may not seem so to others - the maximum freedom of action. The second warning concerns the obstacle set up by the unwarranted praise heaped on a given usage with which it is sought to dress up a particular interest with a universal rule that is inappropriate. The viewpoints of parties or sectors of states, parties interested in the upholding of a rule, do not reflect the existing law, but rather only to a description of the legal situation they desire.

The practical conclusion that is to be reached at this stage, is that a careful, detailed and *all-inclusive* examination is required, giving proper weight to various opinions on a specific subject, to determine whether we are referring to a view acceptable to the overwhelming majority, or to only one of various possible viewpoints.

We can now proceed on to the next stage of examining the treaties containing a codification of customary law or an *attempt* at codification, such as the Instructions of Prof. F. Lieber, the Brussels Declarations, the Oxford Proposal and the Hague Regulations of 1899 and 1907. Thereafter, we shall refer to the writings of the international law specialists and concurrently to the practice of different states and the available case law. This order of treatment does not necessarily indicate the relative importance of these sources; the arrangement has been largely influenced by the frequency with which the present subject has been addressed in these sources.

16. (a) The American Civil War provided the stimulus for the first attempt at consolidation of the modern laws of warfare into an inclusive system of rules. Prof. Francis Lieber of Columbia College, N. Y., [p. 243] drafted a series of guide-lines (hereinafter: Lieber's Instructions) which were reviewed by a staff of officers and later published on April 24, 1863 by President Lincoln under the title of *Instructions for the Government of the Armies of the United States in the Field* - General Orders No. 100 Adjutant General's Government Printing Office, Washington. See F. Lieber, *Contributions to Political Science, Miscellaneous Writings* (vol. 2, 1881) 245.

These Instructions were clearly binding only upon the U. S. armed forces - initially during the Civil War when they were published - but their effect on the codification of the laws of war and on the adoption of similar provisions in other countries was considerable. They served as a platform for the preparation of the Project of an International Declaration Concerning the Laws and Customs of War presented to the Brussels Conference on August 27, 1874. For the French text, see. G. F. Martens, *Nouveau Recuil General de Traites et Autres Actes Relatif aux Rapports de D'oit International;* (Gottingen, 2e serie, Tom. 4, 1876-1908) 219: and for the English text, see J. B. Scott, *The Proceedings of the Hague Peace Conference 1899* (New York, 1920).

The Lieber Instructions also guided those who drafted the Hague Conventions of 1899 and 1907. We shall return later to their relevant provisions as well as to the express references thereto made by Alexander Nelidov, president of the Hague Conference of 1907 and Russian ambassador in Paris, in his opening address to the Conferencion June 15, 1907 as reported in the minutes thereof. (Deuxieme Conference Internationale de la Paix. - Actes et Documents, La Haye, Impremerie Nationale 1907, vol. 1, 49). For the influence exerted by the Lieber Instructions, see also T. E. Holland, *The Laws of War on Land* Oxford, 1908) 18; H. Kirchhoff, *Die Kriegerische Bezetzung Feindlicher Landesteile* (Hamburg, 1917) 14; G.B. Davis *Doctor Francis Lieber's Instructions* 1 Am. J. Int'l L. (1907) 22; D. A. Graber, *The Development of the Law of Belligerent Occupation.* 1863-1914 (New York, 1949) 14.

In the matter which concerns us here, clause 37 of the Lieber Instructions states:

> "The United States acknowledge and protect, in hostile countries occupied by them religion and morality; strictly private property; the persons of the inhabitants, [p. 244] especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.
> "This rule does not interfere with the right of the *victorious invader to tax the people or their property,* to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats and ships, and churches, for temporary and military uses." (The italics are mine - M.S.)

According to D. A. Graber (supra at 112) clause 10 of F. Lieber's Instructions also states:

> "... certain other phases of public law and administration would nearly always be interfered with by the occupant. Examples are police and tax *administration*". (Italics mine - M. S.)

According to E. Loening, (L'Administration du Gouvernment General d'Alsace. R. D. I. et de L. Comp.. vol. 4. 1872) 650, taxation law figures among the laws having political importance which military government may from its initiation, suspend in the area under its control.

The viewpoint expressed in the Lieber Instructions is that the military regime has the authority to collect taxes from residents of the areas, including property taxes as well as imposed compulsory loans. According to the wording of clause 37 there are no accompanying restrictions or conditions of any kind, through existing taxes or otherwise. Furthermore, the clause employs a broad manner of expression - "tax the people or their property" - that embraces the imposition of new taxes as well as the collection of existing ones. It is up to this point that we shall deal with Lieber's Instructions.

(b) To see the matter in its proper perspective, I should add that there was a radical difference in the basic approaches and emphases during the time of Lieber as compared to the same features at a later date. At that time, attention was directed to expressing in detail the powers of the occupying power and his authority. But later (see e.g., Bluntschli, *Das Moderne Kriegsrecht der Civilisierten Staaten,* 1866) 8, the *restrictions* on these powers and authority *were emphasised.* [p. 245] This emerged from Bluntschli's thesis that existing law is not to be amended unless it is unavoidable, a rule that was adopted afterwards in Article 43 of the Hague Regulations. As regards the matter before us, Bluntschli wrote that if the military government wishes to exercise the power of taxation, its acts will be valid only if consistent with the necessities of war or the requirements of the area and its inhabitants. If the military government levies taxes, there simultaneously arises an obligation on its part to cover the administrative expenses of the area (Bluntschli, supra at 26). This duty was later expressly included in the Hague Convention, which we shall discuss later. (See also Heffter, *Das Europaeische Voelkerrecht der Gegenwart* (5th ed., 1867) p. 337). A similar but more moderate formulation of the restrictions is contained in the final proposal to the Brussels Conference, which was embodied in Article 43 of the Hague Convention (N. R. G. de T. 2d series, IV, 6-7). Incidentally, the Italian proposal at the said Conference sought to confine the power of amending laws only to those laws that were political, administrative, or fiscal in nature. (*ibid.* at 77).

According to D. A. Graber (supra at 152, 160, 287, 290) the pendulum of changes of emphasis mentioned above came to a rest on the eve of the First World War when the expected compromise, so to speak, was reached, to the effect that the existing arrangement should be honoured and no departure therefrom should be made except in case of need. The approach adopted after the First World War will be dealt with at a later stage, after considering the Hague Conventions and the rest of their announcements.

17. (a) *The Brussels Proposal* discussed at the Conference held in Brussels in August 1874 did not give rise to the formulation of generally accepted customary rules. The final protocol signed in Brussels on August 27, 1874 by fifteen states (but not ratified by them) explained that the project was what it said it was and remained in the area of a platform that was open for study and discussion. It said:

"The modifications which have been introduced into the Project, the comments, the reservations, and separate opinions which the Delegates have thought proper to insert in the Protocols, in accordance with instructions, and the particular views of their respective Governments, or their own private opinions, constitute the ensemble of their work. It is of the opinion that it may be submitted to the respective Governments which it represents, as a conscientious inquiry of a nature to serve as a basis for an ulterior exchange of ideas, and for the development of the provisions of the Convention of Geneva of 1864 and of the Declaration of St. Petersburg of 1868. [p. 246] It will be their task to ascertain what portion of this work may become the object of an agreement, and what portion requires still further examination."

The subject of the present Petition is dealt within Articles 5 and 41 of the Proposal, and is expressed in English as follows:

"Art. 5. The army of occupation shall only collect the taxes, dues, duties, and tolls imposed for the benefit of the State, or their equivalent, if it is impossible to collect them, and, as far as possible, in accordance with the existing forms and practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as the legitimate Government was so obligated.

"Art. 41. The enemy in levying contributions, whether as an equivalent for taxes (see Article 5) or for payments that should be made in kind, or as fines, shall proceed, as far as possible, only in accordance with the rules for incidence and assessment in force in the territory occupied.

"The civil authorities of the legitimate Government shall lend it their assistance if they have remained at their posts.

"Contributions shall be imposed only on the order and on the responsibility of the commander-in-chief or the superior civil authority established by the enemy in the occupied territory.

"For every contribution, a receipt shall be given to the person furnishing it."

It follows from the above quotations that those who submitted the Proposal sought to limit the collection of taxes, payments of debts, property taxes, dues and the like to those that were meant to serve the State. That is to say, a request was made to classify a tax according to its purpose. But since the authors of the Proposal sought to protect the property of the authorities, and private property, not of the enemy state as such, they also meant, for example, to prevent *the occupying power from collecting* [p. 247] what was due to municipalities, other authorities, or individuals. For this purpose, the occupying power replaced only the occupied state, and not the authorities that were non-state, nor its citizens nor its inhabitants, who acted as individuals. The first part of Article 5, delineating the permitted limits of taxation is substantially parallel to and complements the last part of Article 5, dealing with the ways in which the collected taxes are to be used.

In sum, permitted levies are linked as has been indicated, to payments imposed to serve the requirements of the state. *Only these* may be collected, but if collection of a tax cannot be effected, a parallel and alternative tax may be collected in its place.

Since impossibility to correct an original tax is involved, it is not to be assumed that the *alternative* tax must in essence be identical with the original one for that would lead to a contradiction: the very need for the alternative tax and the power to introduce and collect it arise only when it is impossible to collect the original tax. It seems that the impossibility of collecting the tax, a concept not included or indicated in the draft proposal, can therefore be coupled with the inability to impose the dominant criterion delineating the nature of the tax or manner of its assessment (for instance, property tax that cannot be collected because land registration records, or other necessary records are not to be found in the occupied area, being held by the former administration, not in the occupied area) and not necessarily because of the impossibility of applying existing procedures (for instance, absence of the possibility of requiring tax returns to be made). A separate sentence is devoted only to the impossibility of applying *methods of collection* - *i.e.* 'as far as possible in accordance with the existing forms and practice' and this therefore strengthens the view that the first part of the article is to be construed only by reference to the lack of possibility to proceed

according to the substantive basis that serves as a criterion for imposing the tax. That means, that what is involved is not only the same tax under another *name* but a tax having other criteria. The impossible, (to use the language of the article) becomes the possible only if another yardstick is prescribed regarding the imposition of the tax with a similar criterion regarding the collection of the original tax which does not imply, among other things, the accompanying impossibility of collecting the original tax. To sum up this point - the equivalency, according to the text of the article, *does not have* to relate to the nature of the tax; it may relate to some other dominant feature from which stems the impossibility of collecting the tax.

As I have already said, there is no occasion for concluding that imposition of an equivalent tax must of necessity relate to the impossibility of acting in accordance with existing procedures, because for this matter there is a separate passage in Article 5 according to which there is no obligation to do so, if the former practice is impractical. Further support for the view supporting the need to understand the term 'equivalent' as being between the essence and character of the tax [p. 248] and the practice of its implementation can be derived from Article 41 which expressly refers to the assessment and collection of the new alternative tax. If the words 'as far as possible, in accordance with existing forms and practice' which figure in Article 5, had also applied to the new alternative tax (equivalent) there would have been no necessity to add anything of the same sense which is expressed separately in Article 41, and relates frequently to the assessment of the new tax and determines that even this shall be *as far as possible* within the existing framework.

This means that, according to the proposed text, the introduction of taxes, customs, duties or other dues identical in purpose in their general nature to those already existing would, in defined circumstances, be permitted, when it was not possible to collect the tax in its original shape and form. The forms and practices regarding the collection of taxes, customs, duties or other dues, as the case may be, are those that exist, but if it *is not possible* to follow them, other forms and practices are permitted as far as allowed in the terms of the text.

The point is that there is no absolute and rigorous prohibition at all on new taxation. All that is prescribed is the criterion of the ability of implementing the existing laws. It is here that mention should be made of the fact that the question of introducing a *new* tax was not overlooked by the experts who discussed the project. At one stage they even proposed the addition of an express provision recognizing the right to impose a new tax, since the cost of the war was, at any rate, making that necessary. (N. R. G. de T. 2nd series, IV, (1879-80) 80). The proposal was not accepted but this was because of reservations very similar to those voiced at the Hague Convention, to which we shall return. The reservations are relevant in this case. Thus Lansberger argued, that while it can be presumed that an occupying power would levy new taxes, he should not be given the authority to do so in advance. G. Moynier maintained that if there was a need for additional revenue, it could be raised by the imposition of levies (G. Robin Jacquemyns in R.D.I. et de L. Couv., vol. 411, (1875) 477). The provision for imposing levies instead of taxes that are not collectable was included in Article 41 for this reason.

The absence of any obligation, absolute and without exception, by virtue of which one must act in accordance with the forms and practices in force on the eve of the occupation takes us back to the phrase 'as far as possible', which expresses implied permission to deviate from the existing situation. The phrase, to which we shall have to return in regard to the Hague Convention, does not subject the possible and the implementable to reasons of military and security exigencies only. That is to say, it is not only the limitations deriving from conditions of war and belligerency that can be legitimate grounds for deviating from the customary and from what is already firmly established. As has been indicated, this text also served as the opening for the recognition of the innate difficulties in the ability of implementation, pure and simple, such as obstacles that resulted from the non-co-operation on the part of former officials. It is obviously impossible to foresee and pinpoint all the circumstances that may be used as grounds for deviation from existing conditions, when the collection of tax, valid and in force before the occupation, has become impossible to implement. [p. 249]

b) The absence of an absolute prohibition obligates reiteration of the guideline referred to in para. 14 (c) above: The prohibition has no force in any particular area of military government activity unless it is derived from a customary rule, and no customary

rule can be considered as a firmly recognized principle unless it has received expression in one of the sources we have mentioned.

Sometimes *general* guidance may be given regarding the form of a solution to be utilized for the case of a lacuna in the laws of war. Thus, the eighth paragraph of the preamble to the Second Hague Convention of 1899 and the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 refers us to

> "...the principles of the law of nations derived from the usages established among civilized peoples, (from) the laws of humanity and (from) the dictates of public conscience."

Seemingly the laws of humanity and the dictates of conscience cannot serve as a certain guide for those seeking an answer to the question of introducing new taxation, but in so far as something may be learned from the trends and viewpoints common at the particular time among civilized peoples, the Lieber Instructions and the Brussels Project serve at least as aids for understanding the developments that found expression in the subsequent Hague Conventions, in which expression for the accepted common denominator was requested.

18. As mentioned above, the Brussels Proposals remained as the basis for theoretical discussion.

To complete the picture, it should be mentioned that in 1880 the Oxford Institute of International Law published a manual to the *Laws of Land Warfare,* the work of Gustav Moynier (see *Annuaire de l'Institut de Droit International,* vol. V (1881-82)186, and J. B. Scott, *Resolutions of the Institute of International Law,* New York (1916) p. 26).

The manual was designed as well to assist in the gradual codification of the area of international law with which we are concerned. The introduction states:

> "The Institute.... does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being

bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a Manual suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies. Rash and extreme rules will not, furthermore, [p. 250] be found therein. The Institute has not sought innovations in drawing up the Manual; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable."

The question of taxation is dealt with directly in Article 57 of the Manual, and indirectly in Article 58, as follows:

"Art. 57. The occupant may collect, in the way of dues and taxes, only those already established for the benefit of the State. He employs them to defray the expenses of administration of the country, to the extent in which the legitimate government was bound.

"Art. 58. The occupant cannot collect extraordinary contributions of money, save as an equivalent for fines, or imposts not paid, or for payments not made in kind. Contributions in money can be imposed only on the order and responsibility of the general in chief, or of the superior civil authority established in the occupied territory, as far as possible, in accordance with the rules of assessment and incidence of the taxes in force."

Again there is reference to taxation for the benefit of the state as distinct, for example, from taxes and dues intended to provide funds to a local authority or some other special agency. The point is, however, that the proposed text restricts the military authority for the first time to "only those taxes already established."

The Manual did not achieve official standing: some of its ideas are echoed in the Hague Regulations but, as we shall see, in a different form.

19. (a) In May 1899, on the initiative of the Russian Czar Nicholas II, there was convened in the Hague, the *first* Peace Conference attended by the representatives of twenty-six countries. The *second* Peace Conference met in 1907 with a larger number of participants and continued as the one before in the preparation of Conventions on the Laws of War. (The Conventions were published by the Dutch Foreign Ministry: Conference Internationale de la Paix 1899 and 1907, Ministere des Affaires Etrangeres, La Haye, Imprimeries National, 1899-1907). With regard to the Final Acts, D. Schindler and J. Toman, in *(The Laws of Armed Conflict,* Geneva, 2nd ed., 1981) 49 - write as follows: [p. 251]

> "The Final Acts constitute authoritative statements of the results achieved. They were signed by the delegates but not ratified by the participating states. They have no binding force."

Among the Conventions signed at both Conferences are Convention No. II of 1899 with Respect to the Laws and Customs of War on Land, and Convention IV of 1907 Respecting the Laws of War on Land which came into effect regarding the ratifying states on 4 September 1900 and 26 January 1910, respectively.

(b) During the years that passed after the signing of the Conventions the view steadily grew that the Regulation annexed to the Fourth Convention of 1907 represented customary international law in the field of laws of war, binding on everyone. (See *Cession of Vessels and Tugs for Navigation on the Danube* Arbitration 1 R.I.A.A. p. 99, 104 (1921); *cf.* E. Fraenkel, *Military Occupation and the Rule of Law* (Oxford. 1944) 183-189. Regarding the attitude of the German courts in a case of this kind during the occupation of the Rhine region after the *First* World War. D. Schindler and J. Toman, supra at 57, write:

> "The provisions of the two Conventions on Land Warfare, like most of the substantive provisions of the Hague Conventions of 1899 and 1907, are considered as embodying rules of customary international law. As such they are also binding on states which are not formally parties to them. In 1946 the Nuremberg International Military Tribunal stated with regard to the Hague Convention on Land Warfare of 1907: 'The

> rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption ... but by 1939 these rules ... were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war' (reprinted in AJIL, Vol. 41 (1947) pp. 248-9). The International Military Tribunal for the Far East expressed, in 1948, an identical view." (See, *Judgment of the International Military Tribunal* [p. 252] *for the Trial of German Major War Criminals,* (Nuremberg, 1946) Cmd. 6964 p. 65)

The statements of the International Military Tribunal are unequivocal and have served many scholars as guide-lines when dealing with the question of the binding force of the Fourth Hague Convention: (See, for example, L. Oppenheim, *International* Law (London, 7th ed; by H. Lauterpacht. vol. II, 1952) p. 234 and Prof. G. Schwarzenberger, *The Law of Armed Conflict, supra,* vol. II, pp. 164-65).

It may be noted that at the same time that the International Military Tribunal wrote its judgment, the Allied Military Government in Germany did not consider itself bound by the rules of the Hague Convention since these did not apply to them according to the then accepted rules of international law in the case of *debellatio* (see L. Oppenheim, supra, at 602 and the arguments presented there, but as opposed to this see, G. Schwarzenberger, *supra* at 319, and A. Verdross, *Voelterrecht,* Vierte Ausgabe (1959) p. 385).

At all events, we have already mentioned the view that regards the appendix to the Fourth Hague Convention of 1907 as expressing customary international law in the field of the laws of war, a view adopted by this court in Ayub [2]. (See also Dinstein, *The Judgement* in *the Matter of the Rafiah Gap*. loc. cit.). There was, therefore, no argument before us on this point.)

20. The provisions pertinent in this case which have been dealt with extensively by the parties are contained in Articles 48 and 49 of the appendices (the Regulation) to the Second Convention of 1899 and the Fourth Convention of 1907. The textual differences

are marginal but for the purpose of accuracy and comparison it is only proper to give both versions, side by side:

1899

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do it, as far as possible, in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

Art. 49. If, besides the taxes mentioned in the preceding article, the occupant levies other money taxes in the occupied territory, this can only be for military necessities [p. 253] or the administration of such territory.

1907

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Art. 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or the administration of the territory in question.

For the binding customary international law in effect *now*, we must turn to the Hague Regulations of 1907; but in order to understand the background and to facilitate comparison between the versions, both texts of the articles are quoted, as they appear in *both* Conventions.

It may be added here that the British Army Manual (Sir H. Lauterpacht, *The Law of War on Land* being part III of the Manual of Military Law (London, 1958) (hereinafter: The British Manual) reproduces part of an English translation of Article 48 which differs from that of J. B. Scott as quoted below:

> "...as far as possible, in accordance with the *rules of assessment and incidence in force."*

In the fifth appendix of the British Manual which contains an excerpt from The Hague Regulations (1907), the above passage, at 208, appears as follows:

> "as far as possible, in accordance with *the legal basis and assessment* in force at the time."

It seems that the British Manual version is more correct since the French version of the text is as follows: [p. 254]

> "Si l'occupant preleve, dans le territoire occupe, les impots, droits et peages etablis au profit de l'Etat, il le fera autant que possible, d'apres les regles de *l'assiette et de la repartition* en vigueur..." (The emphasis is mine - M.S.)

It follows from the original text that the term *les regles* (the rules) accompanies the words *assie* and *repartition,* as a descriptive noun common to each of them. The meaning of *assiette* is base or basis *(base or fondement)* as defined in the Larousse dictionary. Together in its relationship to tax is the word *impot* which dominates the French text of Article 48, meaning (the legal) basis of the tax. Hence the translation of the words *regles de l'assiette* corresponds to provisions or rules in relation to the legal basis of the taxes or dues. Therefore the British Manual translated the French expression *regles de l'assiette* to the English text with the words: "legal basis."

The term *repartition* means in French distribution or partage. The reference is to the way of determining *who is subject to tax* (see Larousse above, the explanation of the term

impot de partition). The British term incidence also refers to the answer to the question of who is subject to tax and how much it is. (H.W. Fowler, *The Concise Oxford Dictionary of Current English,* Oxford, 5th ed. 1964).

21. Article 48 -The text accepted in 1899 and that in the Convention of 1907 use the conditional tense, (that is to say... *if* ...) as opposed to the positive declaratory style that we find in Article 56 of the same regulations, and in other articles, a style more decisive than that demanded by the Oxford manual quoted in para. 18 above. As is acceptable to us in interpretations of statutory law or conventions, the reasons for variations that occur in texts of the same case must be investigated, for the change in text may result in a change of intention, content, and ramifications.

The use of the conditional form of necessity limits the meaning and operation of the article to the given set of circumstances, to the situation created if the occupying power decides to levy existing taxes meant to serve the interests of the state. If it does so, the article provides, it is also bound by defined duties, and more specifically: if it collects taxes as defined it must defray the expenses of the territory and may not fill its own coffers and leave the territory and its problems unattended. The levying of a tax carries with it the duty linked to the tax. On the other hand, as the article is formulated, there is no general and guiding principle applicable to every matter of taxation. The article, according to its structure and content, refers only to what has to be done when existing government taxes are collected [p. 255] and it is thus confined to these given circumstances alone. Likewise, Article 49 also prescribes a duty that the new tax will carry, *if* the new tax is introduced.

It is indeed apparent that the above-mentioned text, which does not, in a general and positive manner, declare whether the occupying power is allowed to collect existing taxes or levy new ones, was not adopted by chance or in vain, but is a clear and conscious expression of the adoption of part of the achievements in this area of the Belgian representative Auguste Beernaert, in the two peace conferences. At the opening of the debate in 1899, Beernaert posed a *general* problem centred around the provisions of a chapter of the Convention that dealt with the occupied territories, and which also included Article 48. He expressed the misgivings that the text would present, generally and positively, and in an exhaustive manner, just what actions are permitted to the occupying

power, in order to draw up a sort of series of rights, indicating in advance all the legal possibilities open to him. According to Beernaert, that would:

> "expressly to legalize rights of a victor over the vanquished and thus organize a regime of defeat." (E. Rolin, Report to the Conference from the Second Commission on the Law and Customs of War on Land; Proces - Verbaux, pt. 1, p. 34. Address by A. Beernaert of June 6, 1899).

He saw as unwise a text that accorded rights to an occupying power that would legalize its actions. He proposed that the Convention embody no provisions, that it recognize the existing situation without according vested rights to an occupying power.

In this connection, A. Beernaert and den Beer Portugael (the Dutch representative) proposed deleting from the appendix to the Fourth Geneva Convention, the provision like the one appearing in para. 3 of the Brussels Project, which is also similar to Article 43. They were supported by the Swiss representative (Odier) (See: N. R. G. de T. 2nd Series, vol. III 120, 121; J. B. Scott, The Reports to the Hague Conferences of 1899 and 1907 (Oxford, 1917) 139, 149. These arguments are also mentioned in the Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports (New York, 1916) 49. In order to understand the basic purposes of the drafters of the Regulations it is important to recall the views of E. Robin that Regulations should only emphasize what prohibitions apply to the occupying power and not necessarily what he is *permitted* to do. (Conference de la Paix, La Hague, 1899 Part III, p. 120). Against this background it is easier to understand why the provision that was included in the Brussels Project was omitted at the Hague, a provision according to which, under certain conditions it was permitted to collect a tax "equivalent" to the existing tax. [p. 256]

The principle of the matter, in the light of A. Beernaert's remarks in Article 48; it was agreed in the second Commission of the Conference that this article should adopt a *moderate* approach prescribing the significance and ramifications *in the event* that the occupying power decided to collect the existing taxes as indicated in Article 48; and *not* introduce a provision that prescribes in a general way, the scope of authority of the

occupying power in the field of taxes through a complete presentation of prohibitions and allowances. As E. Robin, the Rapporteur, remarked during presentation of his proposals to the Second Commission to the plenum of the Conference:

> "It may be observed that the new article adopts a conditional form. This wording was proposed by the reporter with a view to obtaining the support of Mr. Beernaert and other members of the subcommission who had expressed the fears with which every wording seemingly recognizing rights in an occupant as such inspired in them." (J. B. Scott, supra at 150)

Thus, it is clear why a version was chosen from which it is possible to learn only the obligations that fall upon the occupying power regarding the purpose of the collected taxes *in the event* that he collects the existing government tax (Article 48) or levies new taxes (Article 49). On the other hand, there is no provision, either in the 1899 or 1907 conventions, detailing in any way whatsoever the rights of the Military Government in the field of taxation. At any rate, it is difficult to conclude from Articles 48 and 49 of the Hague Convention appendix that there is a rule of customary international law prohibiting, as it were, imposition of new taxes by the occupying power. There is no such express statement in the Convention, and as may be learned from the discussion that preceded its adoption, there was no intention of including such a provision. Since we are prevented from taking a general position in this particular matter, the basis for a simplistic viewpoint can be discarded under any circumstances that the Convention purports to present a rule inclusive, exhaustive and absolute, which, as it were, might at once resolve the difficulty before us.

In the 1916 edition of Wheatkon's book, attention is directed to the fact that Article 48 does not, according to the opinion of the author, permit collection of taxes, nor does it prohibit it. Rather, it imposes certain limitations incumbent upon the occupying power if he decides to collect the existing taxes (Wheatkon's *Elements of International Law,* Coleman Philipson edition 1916, p. 534).

22. (a) Article 48 relates to 'taxes, dues and tolls imposed for the benefit of the state.' The terms 'taxes, dues and tolls' represent, from the viewpoint of classifications acceptable to

us, taxes, compulsory payments, dues and property taxes (cf. A. Witkon and Y. Ne'eman, *Tax Law: Income Tax, Estate Duty* and *Capital Appreciation Taxes* [p. 257] (Schocken, 4th ed., 1969) pp. 4-7, and *Bialer v. Minister of Finance* (15)), although in the interest of uniformity and simplicity, inclusive expressions may generally be used, like 'tax,' 'taxes' or 'taxation' as the case may be. As mentioned, we are speaking of taxation, the proceeds of which are intended for the purposes of the state.

The term 'contributions' appearing in Article 49 would be translated as 'dues' or 'tolls.'

b) Article 48 is made up of two principal parts. The first is the description of circumstances, the factual background, from which emerge other directives and restrictions contained in the second part of the article. Said factual situation arises as indicated, when the military government decides to collect the existing taxes.

The second part of the article contains the provisions that present the principal obligations that derive from the formation of the factual circumstances. These obligations also fall into two groups, as we shall see subsequently.

Regarding the first part: the conditional circumstances arise, as already mentioned, at the time the military government decides to collect the existing taxes that serve the *state,* as opposed to taxes that serve any other agencies operating within it. The factual situation described, as appears in the first part of Article 48, follows the pattern of the Brussels Project. However, it must be remembered that the latter was drafted not in a conditional form but in an absolute form that was rejected by the delegates who drafted the Hague Convention, for the reasons set out above.

The power described is of restrictive significance at another level, and that is, that the decision of the military government to collect the government taxes also obstructs the *previous* administration from continuing to collect the taxes. In this connection, the learned Frenchman (P. Fauchille, Trait[169] de Droit International Public, (vol. 2, 1921) p. 263) points out that it is in the interest of the occupying power to block the sources of revenue of the enemy, and it can achieve this, *inter alia,* by taking over the tax revenues. He says that the authority according to Article 48 has *two* facets:

> "L'occupant a deux droits correlatifs - (a) le droit d'empecher la perception de l'impot au profit de l'Etat dont il detient une portion du territoire; (b) le droit de percevoir l'impot a sa place."

That is to say, we are speaking of two interdependent rights one of which is the right to prevent the collection of taxes by the defeated state, part of whose territory has been taken over by another state; [p. 258] and the right to collect the tax in its stead (See also R. Lapidot, *The Rules of Public International Law Regarding Taxation in Occupied Territory* (1968) 3 Tax Quarterly pp. 111-2).

Regarding the second part: as mentioned above there are two restrictive conditions attached to the collection and use of the tax. One is the manner of *collecting* the tax, and the other is the manner in which the collected revenues *are to be used.* First things first: In the matter of the manner of collection there has been a transition from a *strict* condition in the 1899 version to broader terms in the 1907 version. The 1899 Convention prescribed that collection of taxes should be carried out, to the extent possible, in accordance with the *rules* in existence and according to the assessment. This added restriction came into being during the discussion on the Brussels Project and the same is true regarding the restriction on the use of the revenues from taxation. (N.R.G. de T. 2nd series, IV, p. 79). The formulation of 1907, as presented by J. B. Scott as mentioned earlier, prescribes, on the other hand, that the tax shall be collected, to the extent possible, in accordance 'with the rules of assessment and incidence in force.' That is to say, in terms of formulation, there was a change in the binding criterion to be obeyed, in so far as possible, according to Article 48: in place of the *existing* assessment, which in the natural course of things does not change, and will remain the same even under inflationary conditions, for instance, the 'rules of assessment' in the 1907 regulation permit the adoption of changing values that can be affected by changing economic circumstances and the like.

The 1899 wording related to the collection of tax that was imposed, and whose assessment was determined *before the occupation,* whereas the 1907 Convention relates only to the principles guiding the manner of imposition of the taxes, and the circumstances under which the obligation to pay arises. Thus, if there remains any doubt about the conclusion to be derived from Article 48 as it was interpreted by the committee in 1907 when taken literally, a *comparison* between the two versions dispels it.

The principle is that the duty to follow the rules of assessment and incidence is not absolute: similarly to the Brussels Project, the Hague Convention does not prescribe rigid and absolute rules regarding the collection of tax from which no deviation is permissible. Rather, it stipulates that the guiding principles mentioned above depend upon it being

capable of implementation 'as far as possible.' In connection with the flexibility applied to this criterion, at this point it is pertinent to compare this formulation with that of Article 56 of the Hague Convention Regulations for instance, wherein it is clearly stated without conditions or reservations whatsoever that 'any seizure or destruction... is forbidden,' even under circumstances described as the demands of war. [p. 259]

(c) The phrase 'as far as possible' limits the obligation of acting according to the rules of assessment and incidence, and apportionment of the tax burden. As already noted, when the Brussels wording was discussed, the practical ability of implementing the existing arrangements was a condition limiting the obligation to do so. That is, if the matter cannot be executed for reasons such as these, to which we shall refer later, there is no obligation to adopt the principles of assessment and the rules of apportionment of the tax burden, and incidence of imposition and payment of tax.

The question arises, in greater detail, as to the scope for action created by the use of the expression 'as far as possible.' It would seem that the phrase should be interpreted in light of the general understanding expressed in the Convention, for instance, in the letter and spirit of Article 43. Under this article the laws in force are to be honoured, and no change in the law can be made except as a result of substantive data that make it impossible to act in accordance with the article. But comparison of the wording of Articles 43 and 48 of the same Convention, which deal with essentially similar matters, also indicates a difference in the language employed, which reflects varying degrees of emphasis of the prohibition of making changes. Thus, Article 43 says to honour existing law 'as far as possible' while Article 48 says 'unless absolutely prevented.' (See *Almakdassa* [8] at 581). In terms of severity, one can only conclude from the differences of expression that Article 43 imposed a more absolute obligation than that mentioned in Articles 48 and 49.

It is obvious that conditions of battle and military pressures can make continuation of action in accordance with existing tax laws incapable of being carried out. However, as stated above, there is no reason to make the possibility of implementation, on the one hand, and the deviation therefrom, on the other, subject to military pressures alone. The simple technicality of missing land registers or lists of debtors, may also constitute cause for precluding implementation, depending on the factual circumstances. It would seem that

substantive economic fiscal changes that have a decisive effect on the economic situation and that could render meaningless continued action in accordance with the old rules, may also allow for deviation from those rules.

The British manual suggests that *deviation* from the existing system of tax collection is permissible *only* if the officials of the previous government have *fled*, or if they interfere in any way with the collection of the tax. This is, without a doubt, an example of a situation wherein the collection of the tax cannot be implemented in accordance with the existing pattern. However, we do not know the source of the view described earlier which treats these specific circumstances as the *only* circumstances in which deviation is permitted. Incidentally, the French Army Manual for Officers of 1893, that preceded the Hague Regulation (Manuel de Droit International a l'Usage des Officers de l'Armee de Terre, (3eme ed. 1893) 95-104) has a more general wording, and a mention of the possibility of imposing a new tax at the existing rates (see the Brussels Project) if it is not possible to collect the existing tax in accordance with the prevailing provisions. [p. 260]

Every set of circumstances must be examined in the light of its substantive character and its implications. But if, for example, we take a case where many years have passed since the previous government had introduced the existing rules of taxation, and if the economic situation has undergone a drastic change, and no opportunity exists of maintaining a reasonable relationship between the tax collection under the prior criteria and upholding the *purpose* for which the taxes were intended, as in the second part of Article 48, then rigid adherence to the previous practice does not have to be treated as binding under that article, nor can the article increase the burden falling on the shoulders of the military government because of Article 43, which we will discuss later. In this connection, G. von Glahn, in *The Occupation of Enemy Territory* (Minneapolis 1957) 151, wrote:

> "the wording of the Hague Regulations does not prohibit the increase in rates when such increase may be justified truthfully as being in the interest of public order and safety."

The same applies, for example, to very great variations in the level of average income, exchange rates, purchasing power and the like. As we shall see later, the duty of the

military government to maintain the *vie publique* on an ongoing basis, and to do so efficiently, is a legitimate consideration in regard to continuation of the possibility of acting according to the rules that had served the previous administration, which had acted under a decidedly different reality. Every legislative act is subject to a number of relevant considerations, to be dealt with later, but it must always be accompanied by the common denominator of a fixed consideration expressed by the restoration and continuation of orderly government. It is superfluous to emphasize once again that in accordance with the basic concepts that restrict any deviation from the law in force before the occupation, no changes or innovations may be made unless dictated by decisive considerations. Accordingly, the obligation of honouring the existing rules is not to be taken lightly. Only pressures or changes of circumstances of severity as mentioned above (and the list does not purport to be exhaustive) permit abandonment of the existing rules. So far we have dealt with changes that render impossible the implementation of the existing rules for the purposes of the first part of Article 48.

(d) The second obligation, which follows from the decision of the military government to collect the tax, is connected to the condition that determines the *disposition* of the monies raised. If the military government collects the taxes, which are meant for the state *per se,* it will thereby be obligated to defray the expenses of administering the territory and at the same time maintain the standard of implementation dictated to it, since under Article 48 it must fulfil its obligations to the same extent that the previous government had been bound.

Incidentally, the identity of the agency collecting the tax does not of necessity determine the disposition of the tax collected. A local agency [p. 261] may collect tax for the central authority and the tax so collected will be treated like the tax mentioned in Article 48 - 'imposed for the benefit of the state' - (G. von Glahn, *supra* at 152). The same approach applies in reverse. If a given tax is collected by the central government, acting solely as the collecting agent, and the tax is *prima facie* intended for the local authorities, then it is incumbent on the military government to treat this tax as it would have acted before its establishment, and it is not to treat the tax as a government tax. (See also R. Lapidot, op. cit. at p. 113). Nevertheless, the military government is also competent *to supervise* the collection of land taxes payable to the local authorities, in order to ensure that

they are not used for purposes directed against the military government. (Spaight, *War Rights on Land* (1911) p. 378).

This section of the article does not employ here, in connection with defraying the needs of the territory, the wording of 'as far as possible,' nor does it relate to circumstances in which there are insufficient funds for this purpose. However, this may raise the related question of what is the obligation of the occupying power in the event that the sources of revenue in the territory do not produce enough money to defray its administrative expenses? In other words, does that obligate the military government, under Article 43 of 1907, to provide what is required out of its own resources to fulfil its obligation

"to restore, and ensure, as far as possible, public order and safety."

This difficulty does not arise in the case before us, and can therefore be left for future consideration. It is dealt with by E. H. Feilchenfeld, *supra* at 84-85.

Inherent in the collection of the tax is the obligation to defray expenses according to the standard usual in the past, but regarding *surplus* revenue, if any, there is nothing in the terms of the provision that requires expenditure of the surplus solely for the needs of the administration of the territory. All that is ensured by the provision is to ensure the priority of defraying the expenses of the administration over other expenditures, without prohibiting the use of the *surplus* to fill the needs of the military government.

If the monies collected *are insufficient* to cover the necessary administrative expenses of the territory, the government also has the option as derived from Article 49, of imposing other obligatory levies. However, regarding these supplementary payments there is clear provision that places absolute restrictions on its use. (See the end of Article 49 in this regard). It can be inferred from what is said in Article 49, according to which monies collected in the framework of supplementary taxation (see the Convention of 1899) or other financial levies are not to be used (as stated in the Convention of 1907) for anything other than *military needs,* or administrative expenses, thus further strengthening the conclusion that Article 48, whose wording is different, gives priority to defraying the costs of administering the territory, but does not contain a prohibition [p. 262] to render illegitimate the use of surplus revenue, if any, for other purposes. (See the British Manual, para. 527, p. 146).

23. (a) Article 49 of the Hague Regulations of 1907 recognized by implication the authority of the military government to impose levies. This authority is not conditional on the inability to collect the existing taxes (compare Article 58 of the Brussels Project), since the article we are dealing with speaks of collection of taxes *in addition* to those mentioned in Article 48. That is to say, the Hague Regulations removed the restriction according to which taxes were to be imposed only in place of taxes not collected, or instead of requisitioned property, or imposition of fines, as was customary when the Brussels Project and the Oxford proposals were drafted. The restriction was now expressed by indicating the purpose for which the collected tax may be used. (D. A. Graber, *supra* at 251, but see the contrary view of R. Jacomet, *Les Lois de la Guerre Continentale,* (Paris, 1913) 9-80).

Article 49 also employs a conditional wording, *i.e.,* all it prescribes is that *if* the occupying power collects other taxes, there arises the concurrent absolute obligation to use the income for military needs, or for the administration of the territory. This income cannot be used, as stated, to serve any other purpose, and all that has been said above about *surplus* revenue from existing taxes does not apply here. All that the article indicates, as mentioned, is the disposition of the income, *if* taxes were imposed, with no detail as to when and under what conditions the levy can be instituted. We therefore said above that we can learn of the existence of the right to impose taxes by *implication* only.

The purposes for which the tax revenue is intended are military needs, which means participation in the war effort, or needs of the government of the territory, and no more. The purpose of detailing the aims as stated is to prevent the application of the taxes for the enrichment of the occupying power. As put by Edouard Rolin, the rapporteur:

> "On the whole, what is forbidden is levying contributions for the purpose of enriching myself." (J. B. Scott, *supra* at 151).

(See also the British Manual. para. 605. p. 168).

To complete the picture, it is well to recall the conclusion that the Convention in its *present wording* is sufficient to prevent the subjective use of the monies collected as *levies* so that their collection will not revert to a means of self-enrichment, or for pressuring the population, was not everyone's opinion. There were those who thought that the Convention did not contain a clear and detailed prohibition such as this, despite the fact that it should,

and it still requires clarification and completion on this point. [p. 263] (See Hyde, *International Law*, Chiefly as Interpreted and Applied by the United States, (Boston, 1922) Sec. 692; J.W. Garner, *International Law and World War,* (New York, Vol. II, 1920) 114).

There is no denying that the use of the authority to impose levies, according to the examples taken from the accounts of E. H. Feilchenfeld and W. Winthrop and others, strengthens the doubts of J. W. Garner and Hyde, as above, regarding the use of force in the imposition of levies. However, it seems that the aberration in the use of taxes which occurred in practice did not actually come about through the vagueness of the wording of the article or a lack in the accompanying interpretative rule.

(b) As indicated, we are dealing here with 'contributions.' Article 49 of the Convention of 1899 referred to 'other money taxes' *i.e.,* as if the same applies to supplementary 'taxation.' But the expression employed in the 1907 Convention clearly referred to contributions in money, which are parallel, and even identical in substance, to levies in the form of requisitions in kind (as stated in Article 52) which in the English text, in the translation of the 3rd paragraph of Article 52 as cited by J. B. Scott, are called 'presentations in nature.' The British Manual, in connection with the latter, suggested the translation 'supplies in kind.' (The British Manual, para. 605, p. 168).

Incidentally, para. 605 of the British Manual avoids the proper distinction, as required by the wording of Article 52, between 'requisitions in kind and in services and seizure in kind.' In this connection, the British Manual says that:

> "Cash, over and above taxes, may be *requisitioned* from the inhabitants, and is then called a 'contribution.' " (My emphasis - M. Shamgar)

The use of the word 'requisition' in this connection is imprecise, (see also E. H. Feilchenfeld, *supra* at 41) but that is not our concern here.

What are these *contributions?* They are the imposition of the payment of sums of money, taking the form of a quota fixed in advance or a similar forced imposition of payments upon a settlement or its inhabitants or every resident of the State. To a great

degree this is an act of war of the victor as such, reminiscent of the *vae victis* story of Livy (vol. 5, 48).

A list of examples regarding exercising of the authority to impose 'contributions' is given, *inter alia,* by E. H. Feilchenfeld, *supra* at 41-43. From these we may infer the nature of the obligation [p. 264] and the basic difference between a contribution and ordinary taxation, direct or indirect, which is related to the fiscal or economic processes of a territory and not with the simple and apparent aim of filling the coffers of the State that is the victor, either temporarily or permanently. The following instructive passages are from examples cited by E. H. Feilchenfeld, *ibid.*, 42-44:

> "169. Germany was accused in both 1870-71 and 1914-18, of levying excessive contributions not justified by the needs of the army. In examining such accusations it should not be overlooked, however, that some excesses were committed as allegedly lawful reprisals, that the financial needs of modern armies are very great, and that the ultimate use of contributed money is not as easily checked as that of a requisitioned article.
>
> 170. In 1866 Prussia imposed a heavy contribution on the city of Frankfurt. In 1870-71 almost all occupied cities were forced by the Germans to pay contributions which, it was alleged, were higher than justified by the needs of the occupying army. Thus, the Department of the Lower Seine was forced to pay 24,000,000 francs, and Rouen over 6,000,000 francs, within five days.
> Paris, after its capitulation, had to pay a contribution of 200,000,000 francs within a few days. The levying of contributions continued after the signing of an armistice. However, the total of contributions was lower than that of requisitions, which was estimated at 327,581,506 francs....
>
> 172. During the War of 1914-18, the German occupation authorities in Belgium levied special contributions on many cities, towns, and villages. In addition, by a decree of December 10, 1914, they imposed a

general contribution of 480,000,000 francs on the nine occupied Belgian provinces....

173. In November, 1915, this contribution was extended indefinitely, and in November, 1916, it was increased by 10,000,000 francs. A third contribution of [p. 265] 300,000,000 francs was imposed on November 20, 1916. This time the monthly payments were raised from 40,000,000 francs to 50,000,000 francs. The fourth contribution came only half a year later, on May 21, 1917. Monthly payments were again raised by 10,000,000 francs per month, being fixed at 60,000,000 francs per month, which remained the amount payable to the end of the occupation...

175. In France, during the first few months of the war, the Germans collected over 10,000,000 francs from Lille, Amiens, Roubaix, Tourcoing, Lens, and Armentieres.

176. In Rumania the Central Powers imposed a contribution of 250,000,000 lei, but merely in order to cover salary and administration expenses. There is no account of any controversy over this measure.

177. The German practices were severely condemned by writers after 1918. Some voices were raised in favor of a total abolition of contribution. Others suggested that a more definite term than 'needs of the army' should be adopted."

The imposition of forced payments as aforesaid was a practice obviously not peculiar to the Prussian or German armies. N. Winthrop, in his classic work on military law *(Military Law and Precedents* (Washington 2nd ed., 1920) 806) describes some of the incidents of the 19th century, and adds:

"Contributions as have been exacted in nearly all the European wars, and conspicuously in the conquests of the English in India, are

generally expressed to be for the purpose of defraying the expenses of the war. A contribution may also be levied for the paying of the cost of the military government itself during the period of occupation. Or it may be justified as a penalty imposed upon the conquered nation for having initiated hostilities in violation of treaty or otherwise without legitimate excuse; [p. 266] or as a commutation for the plunder to which the population would otherwise be subject, or a compensation for the protection of life and property and preservation of order under circumstances of difficulty; or as a mulct for the commission by the troops or people of the invaded country of acts specially injurious to the occupying army or to the persons under the protection.

Contributions are generally exacted not from individuals but from the enemy government, or from communities in the mass - as from separate districts, towns, etc., and through the local authorities. Thus, upon the conquest of Mexico in 1847, Gen. Scott levied assessments, (G.O. 287, 395, Hdqrs. of Army, 1847) 'for the support of the American military occupation,' upon the nineteen States of that Republic, in sums from $5,000 to $688,332, the latter being the amount levied upon the Capital. Previously, 1825 in March of the same year, at Monterey, Gen. Taylor had made and enforced an assessment upon the inhabitants of Tamaulipas, New Leon and Coahuila, by way of indemnification for the pillage and destruction of his wagon trains...

Scott states in his Autobiography (p. 582) that there actually came into his hands 'about $220,000,' of which $102,000 was expended for the benefit of the soldiers, and $118,000 was sent to Washington for the purposes of the founding of an Army Asylum - the present 'Soldiers' Home.' Strictly, this latter, as being in the nature of an investment of the contribution for the profit of the Government, was not a legitimate use of the funds."

See also: Spaight, *War Rights on Land* (1911) 303; J. W. Garner, *Community Fines and Collective Responsibility,* 11 Supp. Am. J. Int'l. L. (1917) 511, International Law, vol. 2, *supra* at 106; D. A. Graber, *supra* at 217, 285.

Thus all this does not speak of ordinary taxation but a *special* and exceptional contribution in the form of compulsory collection of money for defined purposes, necessitated by the circumstances of occupation and the requirements of the military government, and constitutes [p. 267] a substantive part of the occupying power's means of defraying its expenses, and also to oppress the population. Therefore, why was it deemed necessary to attach to the very mention of the possible exercise of the said authority of the military express restrictions regarding the legitimate purpose of the contributions and flexible restrictions as to the means of imposition and collection (see J. B. Scott, *supra* at 150)? As explained, the subject matter is a contribution, the purpose of which is to raise funds for the needs of the army and *therefore* this authority is similar or parallel to the requisitioning of vehicles or other movable items required for the operations of the army. The explanations of the British Manual dealing with the purposes of the contribution and its disposition indicate directly its character as a direct military and financial means, the main purpose of which is to defray the cost of maintaining the occupying military forces or the administration of the territory, as stated in the Manual (para. 606, p. 168):

> "The purpose of the contributions is to distribute the burden of requisitioning between the towns and the more productive country districts, cash contributed from the former being used to purchase produce in the latter."

The contributions are not and have never been the sole exclusive means of collecting money from the local population for the requirements of the army. It is sufficient to mention here also collective fines and compulsory loans (see E. H. Feilchenfeld, *supra* at 46-47).

(c) With regard to the manner of collecting the contributions, Article 51 of 1907 prescribes a series of formal limitations, some of them singular to contributions and some similar to those applicable to 'collection of the existing taxes':

"No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributor."

(Compare Article 41 of the Brussels Project).

(d) In the occupied territories which have been administered by the Israel Defence Forces since 1967, no use has ever been made of the power to levy contributions, fines or forced loans.

24. It is possible to attempt to summarize for our purpose the conclusions ensuing from the wording of Articles 48 and 49. [p. 268]

(a) No explicit provision can be found in the wording of the 1899 or 1907 Conventions that "it is forbidden to levy taxes on the population." This means that the most extravagant argument can only take the form of a conclusion *implied* by the wording, but not the form of a conclusion derived from a clearly expressed provision. Moreover, as we shall see, the implications of that stated in Article 48 are not to be tested within the narrow limits confined by the wording of the article, which, as mentioned, contains nothing to allow an unequivocal conclusion to be drawn regarding the limitations of what is permitted in the area of taxation, but the matter must be considered in the light of the nature of the military government, and its duties and responsibilities towards the territory it controls.

(b) From the wording of Articles 48 and 49 and from the study of the projects and proposals that were prepared prior to the formulation of the Conventions, we can infer that the parties which convened to draft the Conventions wished to avoid as far as possible any all-embracing positive determination of what is permitted and what is forbidden, and that they merely sought to limit the scope of action to a case where either one of two sets of circumstances would arise, that is, the collection of taxes by the occupying power, for the needs of the state, or the imposition of compulsory contributions. *If* either of these were to

occur, the occupying power would be limited in the *means of implementation and disposition of revenue,* as set forth in the Hague Regulations.

(c) Regarding means of implementation, that is, the rules of assessment and the rules of incidence, the obligation is neither decisive nor absolute. Rather, it is flexible to no small degree and conditional upon the existing rules still being capable of implementation. The concept of 'as far as possible' may vary with the circumstances and something that is possible under a certain given set of circumstances may become impossible under another. The essence is that the rules of assessment *i.e.,* the rules which determine the amount to be collected, and the rules of incidence and apportionment, which are the rules that determine from whom the tax is to be collected, may vary, of course, in the course of time, or if the objective conditions change substantively. In this regard, there is no logic in applying the same criterion to a newly established military government and to a military government that has administered a territory with all the problems of civil administration, for ten years or more.

(d) As regards contributions, it is not explicitly laid down that it is the sole, exclusive means of continuing to raise revenue from the population. It was merely said that *if* the military government exercises the relevant authority, then the sole use of the revenue shall be as prescribed by the last part of Article 49.

(e) Contributions are a distinctly military coercive measure, a direct result of the assumption of control by the victor. They are expressed in the forced collection of money destined to flow directly into the coffers of the military. They have no connection with taxation (customs duties or indirect taxation, for example) that are civilian in status, purpose and form. [p. 269]

25. (a) It may be argued that there is a bond between Articles 48 and 49, as indicated by the wording of the reference in Article 49, and that this has implications as to the extent of the powers of the military governor. To what does this apply? Article 49 of 1907, as its wording shows, is concerned with the imposition of *other* contributions (other money contributions), and this:

"in addition to the taxes mentioned in the above article."

That is to say that, as it were, it can be inferred that the taxes, dues, tolls and land taxes mentioned in Article 48 are merely forms of contribution, and it could be argued that the implication of Article 49 is that the only addition in the area of taxes to that deriving from Article 48 is that which arises from the provisions of Article 49, and nothing more. This means that, if the existing taxes are insufficient, the military is permitted to make up the deficit by means of imposing forced contributions, but in no other manner.

(b) The conclusion reached in sub-paragraph (a) above is not in accord with the nature of the fiscal concepts as expressed in the wording of the Regulations. There is no substantive similarity, in terms of classification and in terms of nature and substance, between "taxes, dues and tolls" on the one hand, and on the other, between "contributions" which, as described, are a forced military levy, which is the result of the belligerent occupation. As L. Oppenheim succinctly defines it, *supra* at 408:

> "Requisitions and contributions in war are the outcome of the eternal principal that war must support war. This means that every belligerent may make his enemy pay, as far as possible, for the continuation of the war."

(A more restrictive view is expressed by E. H. Feilchenfeld, *supra* at 41).

The use of "other" in connection with "money contributions" in relation to "taxes" is therefore a generalization, which leads to inaccuracy. It is obvious that any collection of money can be called "taxes," and that every tax is a "contribution" to the government controlling a given territory at a particular time, but except for this general similarity, the two kinds of payments ("taxes" on one hand, and "contributions" on the other) are not to be placed in the same framework. The word "other" which qualifies "money contributions" is merely a relic from the wording of the 1899 Regulations, which related in Article 49 thereof to "other money taxes."

Had the first part of Articles 48 and 49 delineated a positive framework for what was permitted and what was prohibited, it would, of course, have been possible to infer from

the variation of the terminology of Article 49 ("money taxes" in the 1899 Regulations, and "money contributions" in 1907) what constituted the limit of the power and authority of the military government. In other words, it could have been argued that while the 1899 wording [p. 270] permitted the imposition of additional taxes, the 1907 version permits only the imposition of war contributions, and nothing else. However, the first part is merely a circumstantial element and merely contains a presentation of a series of theoretical facts, in the form of a conditional clause, accompanied by the remark that if the circumstances described in the conditional arise, the factual background will be created, which will require action according to certain legal constraints. This means that the words "money taxes" or "money contributions" are included only as a description of a theoretical situation, and one cannot conclude that all alternatives have been exhausted thereby.

For this reason it was not argued, for example, that forced loans (see E. H. Feilchenfeld, *supra* at 46) are also illegal, since they are not mentioned in the Hague Regulations. Feilchenfeld (*ibid.* at 92) found nothing wrong even in forced loans *for the benefit of private persons,* a matter of which there is also no mention or hint in the Regulations.

The central point - where the judicial rules are entrenched - is incorporated only in the legal component, *i.e.,* the limitations expressed at the *end* of Article 48, the *end* of Article 49 and in Article 51, that present the limitations of the permitted and prohibited *in the event* that the factual component exists, *i.e.,* when the military government decides to act in one of the ways presented at the beginning of Articles 48 and 49, whichever the case.

(c) Any view that seeks to limit the authority of the occupying power only to the collection of taxes *that existed* before the occupation and the imposition of war contributions, and nothing more, is not without basis in the laws of war. According to the perception of its supporters, who wish to give it a theoretical foundation, it is anchored in the fundamental doctrine of the laws of war, according to which the military government merely temporarily fills the place of the previous administration that was defeated in the war. Its power and authority derive from its military status and its military government, which arises from its effective control of the territory and from the inability of the previous government to continue to fulfil its function and exercise its powers. According to L. Oppenheim, *supra* vol. II at 436-37:

> "...as the legitimate Government is prevented from exercising its authority, the occupant requires a temporary right of administration over the territory and its inhabitants....the administration of the occupant is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration."

Since the power of imposing ordinary taxes are within the domain of the sovereign alone, accordingly, it is argued, it does not pertain to anyone whose authority is temporary and military, as described. However, while no one disputes [p. 271] the theoretical base of this doctrine, it does not of necessity create a limitation on the power to impose taxation *if the benefit and requirements of the territory deem it necessary,* since the maintenance of proper balance between them and the requirements of the ruling army is a constant central guiding principle of military government. This character of military government indeed explains why taxes may be imposed only for the requirements of the territory (or requirements of the army when army contributions are involved), but it does not necessarily lead to the conclusion that the limitation on the imposition of taxes also takes precedence over the obligation to satisfy the needs of the territory and its inhabitants, and as far as possible, to restore normal life, including the economic aspect thereof.

(d) Furthermore, the military government may not impose on the inhabitants of a territory taxes intended for the *coffers of the state* on whose behalf it is acting, even if they are levied on the inhabitants of the territory after they were forcefully transferred to the area of the mother state of the military government (J. Fried, *Transfer of Civilian Manpower from Occupied Territory,* Am. J. Int. L. 40) (1946) 303, 316. However, here the lack of legitimacy of the taxation as described stems from over-stepping of the power of the state to levy taxes, power which is limited to the territory under its jurisdiction, and does not apply to those who were transferred within its borders against their will *(St. Louis v. the Ferry Co.* (1870) [24] at 430).

Parallels can be drawn between the rules applying to the said authorities of the state within its own frontiers, and the powers of the military government to impose taxation because of circumstances derived from the needs of the territory and the needs and welfare of its inhabitants. E. Isay says, in Internationales Finanzrecht: *Eine Untersuchung [248]ber die - ausseren Grenzen der Staatlichen Finanzgewalt* (Stuttgart, 1934) 48:

> "Taxation of aliens always requires a special justification. Therefore, we (experts on the international finance) have established the doctrine of equivalence: as a matter of principle, a foreigner may be taxed only to the extent to which such taxes form a counter-value for the advantages that he derives from his contact with the regime (inlandische Staatsordnung). Taxes which go beyond this extent are illegal. To demand (zu muten) from a foreigner that he should, without benefiting from the state, enhance the purposes of such state by contributing a part of his own assets, would mean to ask membership fees from a non-member who is prevented from receiving even a limited number of advantages resulting from membership. To subject a foreigner to taxation [p. 272] which is not the counter-value of benefits granted to him, is a usurpation."

The foregoing clearly does not apply to the subject of taxation in military government territory and for the benefit thereof, but the notion it embraces is that the relationship between the imposition of tax on a non-citizen and the return expected by him from the fiscal measure, should rightly be examined. This relationship, in the form it takes in the laws of war, takes us back to the matter of the duty of the military government according to Article 43 of the Hague Regulations. Having returned to this question, examination is required as to the implications in terms of the residents of the territory, in the event that the limitation as argued above is applied to the authority to impose taxation.

(e) The thesis of exclusivity of the authority under article 49 as a singular deviation from that described in Article 48 is extreme in terms of its significance for the local population, for whose protection the Hague Regulations are specifically intended. We can take as an example the case where the needs of the territory change as a result of the extension of services to the *inhabitants.* If Articles 48 and 49 are exclusive, then ordinary fiscal measures would be unable to defray the necessary expenditures. The military government will not be able to adjust the direct and indirect tax structure to changing needs, although such taxation is considered an acceptable and orderly means as long as they conform to the economic conditions of the area and the capacity of the economy

operating therein, and as long as the limitations on the purposes of the revenues are respected. If the old tax system has become obsolescent and has lost touch with the new economic conditions, only one harsh and extreme alternative, as it were, seems to remain for the military government, and that is to impose *military* contributions, which will take money directly from the pockets of the inhabitants, in keeping with the age-old custom of the armies of all parties in many of the military campaigns of the past century and the beginning of this century, some of whose exploits are described by W. Winthrop and E. H. Feilchenfeld (*supra*).

It would appear to be more reasonable to conclude that the greater includes the lesser (as E. H. Feilchenfeld believes, *supra* at 46), and that if contributions may be levied, the more moderate means may also be employed. It is difficult to reach the conclusion that narrowing the scope of discretion to a choice between two exclusive alternatives - *i.e.,* existing taxation on the one hand, or compulsory contribution on the other - accurately reflects the spirit of the Hague Conventions and the intentions of those who drafted them. It certainly does not fit in with a modern vital and developing economy, and because of this it conflicts with the concept expressed in Article 43, to which we will yet return later. The fact must not be overlooked, that freezing taxation activities in their general form as employed by the military government in the beginning of its rule may bring about over the years, particularly if a few decades are involved, a freezing of the economy, cause its fluctuations, development and self-adjustment to the changes taking place in the world economy, the economy of the area, and the economy of the state which is responsible to the military government, to be ignored if the latter [p. 273] has any implication on the economy of the area under military control. In any event, the inflexibility involved in the contention, the significance of the practical application of which is under discussion here, does not necessarily follow from the wording of the Hague Regulations.

(f) In principle, even if we were to adopt an extreme interpretation as was presented at the beginning of sub-paragraph (2), there is no dispute that the wording of Article 48, contains a clear and obvious opening for flexibility as far as it relates to the means of implementation and rules of incidence, and Article 49 offers an opening to the imposition of additional payments on the inhabitants. There are no restrictions on the frequency of the contribution, nor any real limitation on its accompanying considerations, its means of collection, its extent, the individual rates to be prescribed by virtue thereof, or other

features of this kind. The only restriction is that of the purpose of the levy ("the needs of the military" and "requirements of the administration of the territory"), which leaves a very wide opening, as well as restrictions of no practical significance under Article 51, regarding determination of who is to be the decision-maker, following as *far as possible,* the rules of assessment and incidence, and the obligation to issue receipts.

(g) D.A. Graber, *supra* at 290, indicates a limitation entrenched in the Hague Regulations. She indicates that, in view of the many complexities which were involved in the occupation of territory in our time, particularly during World War II, when extensive areas were militarily occupied under military rule for extended periods, the only conclusion to be drawn is that the Hague Regulations and the literature of the period up to 1914 are too fragmentary and inadequate to serve as a suitable guide to the practice of military government. Many of the provisions employed very general wording and left their meaning unclear. She believes that the explanation for this lies in the fact that they were formulated during a relatively calm period, during which:

> "belligerent occupations were generally of a short duration so that occupants were not forced to assume the full governmental burdens which had rested on the displaced sovereign."

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

(h) To summarize, in view of the absence of an unequivocal provision in Article 48, and since inferences may be drawn from the other provisions of the Regulations on how to fill with content the lacuna created by the wording of Articles 48 and 49, which was adopted as a result of the proposals of A. Beernaert and others who took the same approach, as described above, it is right and proper that any examination of the question of taxation take into account the ramifications arising from the more general provisions contained in Article 43 of the Convention. [p. 274] This article deals with the obligation to maintain "l'ordre et la vie publique" and the obligation to uphold the existing law, unless it

is absolutely *prevented* from so doing *(Almakdassa* [8] at 581). The applicability of this article hereto will, of course, be clarified at a later point.

26. (a) The scope of activity permitted under Articles 48 and 49, which in terms of wording express avoidance of an exhaustive and exclusive treatment of the subject of taxation, has found expression in the interpretation of the rules of customary international law, given in the legal literature, and this subject requires separate treatment, as will be given later.

(b) Reference to the legal literature dealing with the matter before us obliges repetition of a preliminary remark: That which is stated in the said literature does not merely constitute interpretation. of the Conventions, which themselves are in a form of codification of customary rules. Rather, they can also serve as an independent *source* indicating the existence of an international custom, as evidence of general practice, which is recognized as law (Prof. Y. Dinstein, op. cit. , p. 44) *i. e.,* in so far as it pertains to the matter before us, even without regard specifically to the Hague Regulations. Therefore, attention must be paid to the foundations upon which rest the conclusion of a particular legal expert, that is to say, is he attempting to interpret the Hague Convention or is he referring to a custom that has taken hold and exists without corresponding to what the Convention actually provides, the description of which does not come within the ambit of what is stated in the Regulations? It is superfluous to add, that both alternatives are relevant to the matter before us.

A defined and accepted custom *prohibiting the levying of a new tax* could on the face of it have developed only after the Regulations were drafted, since had there been an existing, prevailing, and binding custom as aforesaid at that time, it would have left clearer indications in the Regulations, despite the reservations of Mr. Beernaert. However, the work preceding the drafting of the Regulations do not lead to the conclusion that during the period preceding the Regulations there was, in fact, any general practice as aforesaid which was recognized as law, but rather the reverse: what is indicated by the projects and proposals, which *preceded* the Regulations as mentioned above, is that there was no consensus on the matter of the authority to levy a new tax, nor does the practice then prevailing lead to a different conclusion.

(c) In 1870, the Germans revoked the validity of the French customs laws (A. Merignhac, *Les Lois et Coutumes de la Guerre* (1903) 258), as did the U.S.A. in its war against Spain (La Fur, R. G. de D.I.P. (1898) vol. V, 749).

In 1870, the Germans imposed a new, uniform tax in place of all the various taxes that had previously been in force in Occupied France (Nys, *Le Droit International* (1906) vol. III 336; E. Loening, *R.D.I. et de L. Comp* vol. V (1873) 120). [p. 275] The Russians did likewise in Bulgaria, as did the Italians in North Africa, and the Turks in Greece. In reference to the Greek-Turkish War of 1897, N. Politis mentions that the latter imposed a *new* tax on sheep in Thessaly, and in practice also replaced the excise on salt and tobacco with a new excise (Revue General de Droit International Public (1897) vol. 4, 680, 702, 710), and during the Spanish-American War (1898), as mentioned, the United States changed the customs laws immediately upon the capture of Cuba (R.D.I.P. t.v. 805).

(d) Even during the period following the establishment of the Regulations, there are no signs of the emergence of a different recognized *practice.* Rather, the opposite is true, which led to the opinion of Sir A. Wilson in his work *The Law of War in Occupied Territories* (Transactions of Grotius Society) (1933, vol. 18) 17, 33, which deals with the first World War, that new taxes may be imposed, if there arose conditions that were such that the sovereign would have done the same had it continued in power, that is, if it were required for the orderly administration of the territory. A modern reflection of this approach may be found in the works of Prof. J. Stone, to which we shall refer later. Of the new taxes imposed subsequent to the Hague Regulations of 1907, Le Fur mentions the tax on sheep (beglouk) imposed by Bulgaria in the first World War in the occupied areas of Serbia (R.D.I.P. vol. 5, 804). To this example may be added the tax on chattels imposed in occupied Belgium by the Germans in 1917 (W. R. Bisschop, *German War Legislation in Belgium,* Transactions of the Grotius Society (1919, vol. 4) 110, 140. See also P. Fauchille, supra 265).

The French introduced their own customs tariff in Alsace-Lorraine in force from 1.2.1919 (Journal Officiel der 31.1.1919, p. 1142) despite the fact that the jurisdiction thereover only returned to France by the Versailles Treaty on 28.6.1919 (Article 51); the return of sovereignty was ratified retroactively from 11.11.1918, apparently so as to legalize actions that were taken during the intermediate period between the Armistice and

the signing of the peace treaty. The implied validation arising from the retroactive ratification of the imposition of sovereignty does not, of course, indicate anything about the *practice* prevailing before the signing of the Versailles Treaty.

(e) R. Lemken describes German customs during the Second World War in Europe *(Axis Rule in Occupied Europe* (Washington, by H. Fertig, 1973) 63, 64). The theoretical basis he presents is that the occupying power is permitted to collect taxes only for defraying the required expenses of administering the territory. It may well have the power to change the procedure of assessment of the tax since Article 48 adopted the well-known inconclusive wording (*i.e.,* "as far as possible"). However, these changes are allowed only if they are essential for maintenance of orderly administration in the territory. He therefore [p. 276] disqualifies the German edicts in Poland which introduced tax exemptions which were granted only to German residents of Poland, (*ibid.*, at 225) and he also criticizes the high poll tax which was imposed on settled areas and collected from the population there (Edict of the German Finance Minister, 9.12.1940).

(f) During the period of the Allied Military Government in Germany, after the First and Second World Wars, the problem of new taxation apparently never arose. The economic crisis after the First World War (E. Fraenkel, *supra* at 13) and the general economic collapse after the Second World War (H. Zink, *American Government in Germany* (New York, 1977) 108) prevented the orderly functioning of any taxation from the outset.

(g) Naturally, it is of special interest to examine the system that operated in this country when it was under British Military occupation after it was captured from the Ottoman Empire. On 7.5.1918 the Military Government proclaimed the renewal of the collection of taxes that had been in force during the period of Ottoman rule (N. Bentwich, *Reinstatement of Taxes, Legislation of Palestine, 1918-1925* (Alexandria, 1926) 369) which led to the proclamation regarding Export Duties and House and Land Taxes (15.11.1918, p. 371).

However, the civil administration acting on behalf of the Military government, also introduced new taxes from 1921 onward (Port Dues Ordinance 1921, vol. I, 133 Foreign Imports Additional; Duty Ordinance 1921 vol. I, 650; Tobacco Taxation Ordinance 1921,

vol. I, 651) and also enacted extensive legislation relating to banking, mortgages and guarantees. It also issued orders for the re-evaluation of land for the purpose of house and land tax. Re-evaluation of Land for Purpose of House and Land Tax, vol. II, 42).

27. It is clearly impracticable to review the legal literature in its entirety. One can only carry out a selective examination, taking care to present and reflect adequately the variety of views on the subject before us.

We may commence by saying that the conclusion that clearly emerges from a review of the legal literature is that there is no single clearly established view testifying to the existence of a rule in customary international law prohibiting the imposition of a new tax under all circumstances. It is highly doubtful whether one might say that a *majority* opinion exists, let alone that there is a *decisive* majority (H. Kelsen, *supra* loc. cit.) supporting the thesis of the Petitioners. The views vary in favour of both parties and the conclusion arising therefrom, which adds to that which arises from the wording of the Regulations, and corresponds to that which is implied by the content thereof, will be presented and the end of this review. From here, let us proceed to a sampling of opinions that appear in judiciary literature. [p. 277]

28. Looking at the literature chronologically, the British and American Army Manuals, dating from before the First World War, set broad limits to the powers of the military government. However, they nevertheless noted the obligation to maintain the prevailing law as far as possible (Great Britain, War Office, Manual of Military Law (6th ed.) 288-291; U.S. War Department, Rules of Land Warfare 1914, 108-111). *Inter alia* it was noted that the legislative, administrative and executive powers of the sovereign passed to the army for the duration of its rule. The latter may exercise only such powers as required by the needs of the war, the preservation of public order and security, and the orderly administration of the area. It was also noted that the need to change the tax laws might arise, although the view was expressed that no new tax was to be imposed (spaight, *supra* at 378-380). Bonfils et Fauchille, *Manuel de Droit International Public* (7eme ed., 1914) 839, pointed out that the military government may be compelled to change the system of tax collection.

29. P. Fauchille, *Traite de Droit International Public* (Paris, Tome II, 29 (Guerre et Neutralite, 1921) 264, para. 1189), holds that the military government does not lawfully have the power to impose new taxes. To quote:

> "...il ne peut pas legitimement creer des impots nouveaux."

The writer nevertheless suggested that a method comprising embodiment of all the existing taxes, forming them into a single new tax would be legitimate. It may happen, he describes, that tax officials will resign, or flee with the retreating forces, where the military government would be unable to collect all the taxes by recruiting new clerks capable of collecting the indirect or direct taxes. In this event, or any similar circumstance, tax will be collected by collecting a total "equivalence" sum. Incidentally, this expression takes us back to the phrasing of the Brussels Project of 1874.

> "On totalisera le rendement de tous les impots directs ou indirects que devait produire le pays occupe d'apres la loi de finances. Cette somme totale sera repartie entre les arrondissement ou provinces, puis entre les communes de l'arrondissement ou de la province, et enfin entres les habitants de chaque commune". (P. Fauchille, *ibid.*, 264, para. 1190)

That is to say, it is permissible to total up all the expected revenue from all taxes, direct and indirect, amount, and to divide the total sum received anew amongst the districts, communities and residents thereof. [p. 288] It is superfluous to stress that this method in practice will lead to the introduction of a new tax. Since totalling indirect and direct taxes and imposing them on the residents, by place of residence, leads to the imposition of a new tax not only in theory, but in practice as well, a tax that the resident would often not have had to pay at all if not for the method of embodiment and totalling as described above, the more so since, according to P. Fauchille, it is possible to include contributions, as a further component, as long as the rates are not exaggerated (P. Fauchille, *supra* at 265, para. 1190). This means that P. Fauchille's words create an opening for taxation created by the military government, in a form of imposition and collection, and in a scope entirely different from the existing taxation. In other words, while Fauchille clings to the view that there is an obligation to maintain existing frameworks of taxation, and to treat the

declaration of a new tax as illegitimate, he nevertheless holds that the term "existing framework" includes the entire series of existing frameworks , which were joined together and imposed on the individual in a matter which in practice is not unlike new taxation .

30. Hyde, in his International Law (2nd ed., vol. II, 1951) of 1886, maintains:

> "The military occupant enjoys large freedom in the mode of raising revenues to defray expenses of administration, as well as in the application of funds acquired for that purpose..."

A similar opinion is expressed by Colby in his article *Occupation under the Laws of War* 26 Columbia Law Review (1926) 146, 166, 168.

In this respect, Hyde even adopts the view of P. Fauchille that taxes may be combined and re-allocated according to the internal administrative division of the territory for collection from the population, as he says:

> "as a capitation tax or otherwise"

For the purpose of this thesis Hyde relies on the Manual of the U.S. Army (U.S. War Department Rules of Land Warfare from 1940, para. 294).

In connection with the imposition of new taxes, Hyde writes, the Manual of the War Department of the U.S. published in 1934 said that the imposition of a new tax was prohibited, since that power was retained by the sovereign alone and the military government is entitled only to impose contributions or to seize property. However, Hyde chose to stress that no such declaration was included in the new edition of the Manual in 1940. Moreover, he added (*supra* at 1887): [p. 279]

> "Doubtless the occupant may lay duties on imports and thereby obtain a convenient source of revenue otherwise difficult to collect. *American military occupants resorted to such procedure....* "(Emphasis mine - M. S.)

The argument regarding the practice followed by the American military governments is based on C. E. Magoon, *Reports on the Law of Civil Government under Military Occupation* (Washington, 1902) which cites the Order of President McKinley of 12 July 1898 concerning customs duties and taxes in the Philippines, which was under American military rule at the time. According to C. E. Magoon, *ibid.*, at 227:

> "It would seem that the payment of customs duties, if considered as taxes levied by a government resulting from military occupation of hostile territory or as military contribution required from hostile territory or as a condition imposed upon the right of trade with hostile territory, are each and all legitimate and lawful requirements imposed by exercise of belligerent right."

The thesis that follows from the above is that it is possible to identify and accord all the provisions affecting *imports* (and according to Magoon, also trade with the enemy territory), to the ambit of the military government and in this field it is permissible to impose new taxation.

Had the Hague Regulations contained a prohibition of new taxation, there would have been no place for the above distinction, since Articles 48 or 49 do not differentiate or make distinctions between import, export or any other particular area. It also follows that Hyde, who relies, *inter alia,* on Magoon, does not hold that the Hague Regulations of 1907 changed in any way the right of the military government to impose new taxation on imports. Hyde's reference to contributions also tells us about the relative freedom of action he propounds. He says that contributions are only

> "such payments in money as exceed the produce of the taxes"

and he holds that:

> "By a method other than the imposition of taxes or the collection of customs duties, a belligerent may in fact [p. 280] proceed to increase

his revenues from the territory under his control. He may levy contributions."

That is, contributions, which are in effect any payment levied in excess of existing obligations are a legitimate means of increasing the revenues of the military government.

As a consequence of the above approach of Hyde, he also recommended (*supra* at 1888) that the Conventions prescribe clear and more precise limitations on the authority to impose contributions, in order to avoid self-enrichment of the military government.

Incidentally, this is the place to mention that some legal scholars hold that contributions should be levied only upon communities and settlements and not directly upon residents as individuals (J. W. Garner, *supra* at 115, *Contributions, Requisitions and Compulsory Service* in *Occupied Territory,* 11 Supp. Am. J. Int. L. (1917) 74, 83. However, it seems that this viewpoint, which was not adopted as a practice, is only theoretical anyway, since contributions are not collected from the settlement funds only, but ultimately from the residents of the settlement (see K. Strupp and H.J. Schlochauer, Woerterbuch des Voelkerrichts (Berlin, vol. II, 1961) 299, para. 3(c)).

31. (a) In his article *The Legal Relations Between an Occupying Power and the Inhabitants* 33 L.Q. Rev. (1971) 363, L. Oppenheim sets out the contents of Articles 48 and 49 of the Hague Regulations without going into the interpretations and ramifications.

(b) Neither in L. Oppenheim, vol. II at 442-448 (ed. Sir H. Lauterpacht) is there a positive or negative reference to the introduction of *new* taxes: a summary deals with *existing* taxes*,* referring to Article 48 only, and no conclusion can therefore be drawn from there about the stand which would be taken in the matter at hand.

32. In dealing with the powers of the military government according to the distinction between "competence jurisdictionelle" and "competence reglomentative," Rousseau, in his book, *Droit International Public* (Paris 1953) 559, points out that after the occupation ceased, the courts of the occupied countries recognized the legitimacy of acts that had been based on considerations of the general public good (considerations d'interet general). In this connection, he mentions instances of *taxation,* as distinct from cases where the fiscal

laws were changed *arbitrarily.* The concept raised here found a similar expression in the study of W.R. Bisschop, *supra* at 110, 141, which has already been mentioned. [p. 281]

In connection with new taxes on property, which the Germans introduced in Belgium during the first World War (at 141) he says:

> "It seems to me that, in principle, these ordinances were not *ultra vires,* but everything depends upon their execution and the extent to which they were required by the circumstances."

It is not the imposition of a new tax which is illegal, but its imposition made without objective economic justification or exploitation for extraneous reasons, like the imposition of taxes on Belgians who had already left the country (tax of 16 January 1915).

Rousseau (*supra* at 570) lays down the major principle that taxes should be collected, as they were before the occupation, but since the application of this principle is difficult (*cf.* Loening, *supra* vol. 5, 100) the occupying power may initiate an alternative tax:

> "il peut le percevoir sous forme de remplacement."

Therefore, in spite of the difference in terminology, this is similar to the view of Fauchille when he spoke of "equivalence," where he discussed the creation of a new tax embodying all the direct and indirect taxes.

33. In the book *"Les Lois de la Guerre et de L'Occupation Militaire,* "Charles-Lavauzelle (1956) 50, Capitaine Lubrano Lavadera dealt with the matter before us. He was of the opinion that the right to collect existing taxes is bound up in the obligation of the military government to ensure operation of the administrative agencies under its control.

Incidentally, this definition of the obligation of the military government, as the writer puts it "assurer le fonctionnement des organes administratif" leads us by implication to the wording of the obligations under *Article 43,* although this provision of the Convention is not specifically mentioned in this connection. In any events, Article 48 manifests no connection as aforesaid between the definition of the obligation and the right to collect taxes, since Article 48 lacks any description of the reason for according this right.

Lubrano-Lavadera adds further that the military government has the right to impose supplementary contributions for the needs of the army or administration of the territory, and the reference is clearly to Article 49, although this article is also not clearly mentioned in this connection.

34. Debbaseh, in his *"L'Occupation Militaire*"(Paris, 1962) 39, maintains that the occupying power [p. 282] has no right to enact legislation for new taxation, and he bases this view on "international law and the spirit of the Hague Regulations." ("Le droit international et l'esprit du Regliment de La Hag").

Yet, he adds that Article 48 is among the provisions that were imprecisely drafted, because the prohibition of instituting new taxes arises merely indirectly, and from conclusions arrived at by negative inference: (in the words of the author: "indirectement et a contrario"). This thesis is similar to that which von Glahn expressed in his opinion submitted to this Court, that we may infer the absence of any other powers from the powers *granted* by the article as though the article were describing the powers exhaustively and exclusively.

We now turn to a contrary viewpoint. Dr. C. Meurer in Die *Voelkerrechtliche Stellung der von Feind besetzten Gebiete* (Tuebigen, 1915) 76, a book published during the First World War, contends that Article 48 deals only with the authority to collect *existing* taxes. During the deliberations of the first Hague Conference it was repeatedly emphasized that the right to levy new regular taxes is not restricted by what is stated in Article 48. That power exists, and in the opinion of the author, arises from Article 49 which, provided he holds the necessary balance permits the imposition of "Steuer Kontributionen," which are contributions intended as taxation, a subject also presented in the works of K. Strupp & H. J. Schlochauer.

A similar view is expressed by R. I. Miller *The Law of War* (Lexington, 1975) 92 who contends *inter alia* that:

> "The funds with which to pay for requisitioned property can be secured by the occupant through 'contributions' levied on the local population. These contributions are actually taxes levied by the occupant."

That is to say, with regard to specific circumstances which demand monetary resources, the writer expresses his contention that Article 49 is nothing other than a basis for the creation of new taxation.

35. The present Manual of the U.S. Army, The Law of Land Warfare (FM 27-10 Department of the Army, July 1956) 156, deals with "Public Finance" and in this regard refers first to the wording of Article 48. At para. 426 (*ibid.*, at 157), in connection with changes of tax provisions, it states:

> "426. Changes in Taxes [p. 283]
>
> a. When Existing Rules May be Disregarded. If, due to the flight or unwillingness of the local officials, it is impracticable to follow the rules of incidence and assessment in force, then the total amount of taxes to be paid may be allotted among the districts, towns, etc., and the local authorities required to collect it.
> b. New Taxes. Unless required to do so by considerations of public order and safety, the occupant must not create new taxes."

From the *negative* expression used in para. 426(b) above, we may infer the positive, *i.e.,* if considerations of "public order" and "safety" require it, new taxes *may be created.* The use of the term "public order and safety" indicates its sources, since it is patently clear that the wording of Article 43 was adopted and is viewed by the American Manual as the authority for the introduction of new taxes when the circumstances demand it. Thus, the term "public order" must be taken in its meaning in Article 43, and not literally, *i.e.,* it is not the mistaken English translation of Article 43 that shall be used as a guide-line in prescribing the limits of rights, but rather the French original which refers to "la vie publique"-an expression wider and different from the English "public order," which expresses concern about public order only. As the British Criminal Court of Appeal of the Supervision Committee in Germany stated in *Grahame v. Director of Prosecutions* (1951) [22], at 232:

> "L'ordre et la vie publique, (is) a phrase which refers to the whole social, commercial and economic life of the community."

(See also *Almakdassa* [8] and E.H. Schwenk "Legislative Power of the Military Occupant under Article 43, Hague Regulations" 54 Yale L. Rev. (1944-45) 393).

The reference in Article 43 to taxation reflects the conclusion already dealt with, that Article 48 is not exhaustive and does not cover all the aspects of the problem of taxation. Incidentally, the conclusion that in specific provisions of the Regulations, no complete answers to general problems likely to arise in occupied territory, are to be found (D. A. Graber, *supra* at 290) is expressed not only in the reference to the general provisions, which are contained in Article 43. When the question arose before the U.S. authorities after World War II, whether it was permissible to print and issue occupation currency in Italy, a matter not dealt with in the Regulations, it was deemed fit to rely on the general provision [p. 284] (Martens clause) of the preamble to the Hague Convention relating to the laws and customs of war on land, to the effect that:

> "in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nation, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."

Since the introduction of the currency did not conflict with the recognized practice of civilized peoples, the laws of humanity or the dictates of public conscience, they deemed it lawful to do so (Hearings on Occupation Currency before Senate, 80th Congress, 1st session (1947) 72, 84; see also W. Bishop, *International Law.* (Boston, 2nd ed., 1962) 821).

To sum up, the question of the introduction of a new tax, in the view of the U. S. Army Manual, depends upon whether it is necessary for the purposes of "la vie publique" and "safety" in the occupied territory.

36. The question before us was discussed in K. Strupp and H. J. Schlochauer, *supra* vol. II. at 298 in an article by I. Seidl-Hohenveldern, that speaks for itself:

> "If existing taxes as such are collected, it is not a matter of war contributions (Kriegs-kontribution); but frequently the military

> governor will levy a special tax instead (eine besondere Steuer), and that because the collection of regular taxes cannot be effected for technical reasons. Such imposition of taxation (Steuer Kontribution) is permissible even today under Article 43 (Remark: not Article 49 - M.S.) of the Hague Regulations, and the same applies to the increase of regular taxes, which is almost always required."

That is to say that a special tax levied on the grounds of difficulty in implementing existing taxes, is permissible under Article 43, and is not necessarily to be regarded as a contribution under Article 49. As to *increase* in taxes, the writer sees it as a normal and acceptable action.

The above serves to emphasize the variety of the *range* of interpretations in the matter before us. [p. 285]

E. Castren, in his book *The Present Law of War and Neutrality* (Helsinki, 1954) 224 points out that there are those who hold the opinion that the removal of customs barriers between the occupied territory and the state of the occupying power (the home state) is illegal, and that the currency of the home state may not become legal tender in the occupied territory, and that no other action intended for the enrichment of the home state is permitted. However, he adds that Article 49 is the basis for the authority to impose *supplementary taxes,* when the needs of the army require it. His remarks in connection with supplementary taxes (at 241) follow:

> "The most important money contributions are the real *war taxes,* which according to Article 49 of the Land War Regulations may be imposed to cover the *costs of the occupation* when the regular State taxes referred to in Article 48 do not suffice for this purpose. Additional taxes may be levied to meet the *needs of the army of occupation.* The origin and limitation of the right to collect taxes of this kind is, like that of requisition, *military necessity,* and some of the principles of and limitations on the right to requisition may be applied to them. Some writers have correctly observed that the right to levy war taxes involves

a dangerous inroad upon the protection of private property." (Emphasis in the original - M.S.)

38. Verdross, *supra* at 383 mentions the government's right to levy regular taxes, customs duties and fees, as well as the right to impose extraordinary contributions in the form of money or requisition of goods or services. He does not mention the levy of new taxes, and it may be assumed, in view of the context that he does not support the existence of such a right, since according to what he says he sees the rules he himself has set out as an exhaustive description of the limitations of the laws of war.

39. (a) The 1958 edition of the British Military Manual does not unequivocally prohibit the introduction of new taxes but, on the contrary, it indicates that circumstances permitting it may arise. Indeed, it presents this as an extraordinary measure only, but the inference is clear. In regard to our matter, the Manual states (at 146):

"529. Unless required to do so by considerations of public order and safety, the Occupant must not create [p. 286] new taxes, as this is the right of the legitimate Sovereign and temporary possession does not confer it (1). However, as will be seen, he may raise money by way of contributions (2).

(l) Thus in 1870, the German occupation authorities in France suspended the tobacco monopoly.

(2) See para. 605 and Hague Rules 49."

The Army Manual mentioned above, the 1958 version of which was edited by Sir. H. Lauterpacht in 1958 and from which the above extract was cited, deals with *all* its aspects of taxation and not merely with new taxes (*supra* at 146, paras. 527-529). The basis for his conclusions regarding the rules applicable to taxation rests exclusively on the Hague Regulations. The implication is that the above view about *new* taxes contained therein must also correspond to the thesis guiding the editor of the Manual regarding the legal ramifications of Articles 48 and 49 of the Hague Regulations. In other words, since the rules of taxation are not derived from a separate and independent source, but from Article 48, it therefore follows logically that the above quoted passage, in the view of the author,

agrees with the rules of what is permitted and prohibited *as expressed in the Hague Regulations,* Moreover. although not explicitly stated, it follows from the wording, *i.e.,* from the reference to "public order and safety," that Article 43 is the basis for the exception permitting the introduction of new taxes. Thus, the approach taken by the British Manual is the same as that expressed, for example, by E. H. Feilchenfeld, and by the U.S. Army Manual of 1956.

40. The present question was also discussed by M. Greenspan *The Modern Law of Land Warfare* (Berkeley, 1959), who argues in his introduction to this subject that the Military Government *does not have* the right to introduce new taxes, since that is the prerogative of the sovereign. His view is based *on his book, ibid.* at 228, on the British Manual and on Rolin, *Le Droit Moderne de la Guerre,* but he adds that:

> "Hyde, III, 1887, points out that while a statement to the effect that the occupant could exercise such powers was contained in the United States *Rules of Land Warfare* of 1934 (Rule 295) the statement was not repeated in the 1949 edition of those rules. However, the 1956 edition (*The Law of Land Warfare*) now states: 'Unless [p. 287] required to do so by considerations of public order and safety, the occupant must not create new taxes.' "

In a footnote, M. Greenspan at 229, note 54, adds:

> "Apparently the manner in which customs are levied and the method of collection might be varied, provided the incidence of the dues is not materially altered, *e.g., ad valorem* dues might be substituted for specific dues and categories might be regrouped. See also on customs duties, Hyde, III, 1887. Feilchenfeld, *op. cit.* p. 49, states that Art. 48, Hague Regs. would not seem to exclude taxation increases, 'particularly such changes as have been made desirable through war conditions, or, in the case of an extended occupation, general changes in economic conditions.' Further, he appears to be of the opinion that the occupant may introduce new taxes and customs duties in cases where they are

> necessary to safeguard the welfare of the territory and therefore maintain public order. *Cf.* U.S. Law 426b; Br. M.M.L., pt. III, par. 529."

Thus, M. Greenspan first presents an apparently absolute view concerning the imposition of new taxes, which he bases on the *British* Manual (which does not contain any absolute prohibition, as we have seen) and on Rolin, but in conjunction with this he presents a different view of his own, *i.e.,* that expressed in the U.S. Army Manual and in E. H. Feilchenfeld, which we have already dealt with at length above.

It is clear from this that M. Greenspan does not purport to make reference to a firmly recognized thesis of customary international law. The picture we once again obtain, which we have encountered throughout the course of our analysis of the literature, is that there are at least two principal schools of thought in the interpretation of the rules of what is permitted and what is prohibited, one permitting the introduction of new taxes, including new customs duties when it is justified - either expressly or by implication, as explained - by considerations based on the obligations of the military government as set out in Article 43 or by way of interpretation of Article 49, and the other rejecting the above .

41. Prof. J. Stone in his *Legal Controls of International Conflict* (Florida, 1959) 713, takes the usual approach that the collection of *existing* taxes rests on Article 48. [p. 288] In his opinion, nothing in Article 48 prohibits an increase in taxes. He emphasizes that he is aware that there are other views, but he adopts the approach of E. H. Feilchenfeld, which will be dealt with later. The principal thing, is that in his opinion it is also possible to impose new taxes and customs duties. (At 712-713), he says:

> "It is arguable that even new taxes and duties may be warranted where (due to changes in yield) the sovereign himself would have to resort to them."

This shows that he holds that new taxes may be introduced, if there arise circumstances which would also have provoked the previous government to introduce a new tax. To remove any doubt, he observes that the criticism of the introduction of a new tax that the Germans imposed on the Belgians, who had left Belgium in the first World

War (decuple tax) was not levelled because it was a new tax, but because of the reason it was levied, because it was an extra-territorial tax and because there was no substantial justification for it.

When we turn to the question of how the preceding government would have acted, it is clear that it will be mere supposition, since there is no possibility or logic in asking the theoretical opinion of government authorities that have been ousted, if they still exist, how they would have behaved under the circumstances. Their negative response is foreseeable, if they would respond at all to the enemy's request, and it is extremely doubtful that this reaction or lack thereof would add or detract anything.

Prof. J. Stone also refers to the use of the authority to levy contributions as a means of introducing new taxes. He holds that contributions can have two legal grounds (at 713), the first:

" 'extraordinary' taxation to meet the needs of administration."

Secondly, as a contribution for the needs of the occupying army. The first ground, he adds, is taken by the British as the only *legal* basis for creating a new tax. The second reflects the views of those legal scholars who regard the authority to impose contributions as an opening for creating a new tax, that is, according to this view the possible basis for creating a new tax is not Article 43, but Article 49. These conclusions from Stone's observations indicate once again the variegated nature of the approaches to the existence of a lawful possibility of imposing new taxation.

42. Prof. G. Schwarzenberger, *supra* vol. 2, holds that the provisions on taxation are a consequence of the leading rule that the military government [p. 289] must respect private property. Hence, his opinion that taxation must remain, *as far as possible,* within the limits that existed before the military government was established. *Supplementary* monetary contributions may be raised only for the needs of the army, *i.e.,* for the purposes of the occupying military forces or for maintaining the administration in the territory (*ibid.,* p. 246). In summary, Schwarzenberger raised two restrictions. The first, to respect the existing situation *as far as possible,* that is a wording similar to the limitations set forth in Articles 43 and 48, which involves an obligation that must be upheld "unless absolutely

prevented," and second, the purposes for which the funds may be used are only those defined above, which derive from Articles 48 and 49. In essence, the writer does not advance a thesis of an outright prohibition or a categorical restriction of changing the existing tax system.

43. E. H. Feilchenfeld devoted his book to the economic aspects of government of occupied territory. In summary form he summarizes his approach to the matter of taxation as follows:

(a) The needs of the *army* occupying the territory should be defrayed by imposing *contributions* but not by drawing on regular taxation.

(b) A contribution may also serve to defray the requirements of the territory and its inhabitants, but this is not the only way, and money collected through *existing* taxes designed to serve the state may also be used for such purposes.

(c) The military government has the right to levy taxes for its own purposes and call them contributions, as he says at 49:

> "The occupant is quite free to levy taxes for his own benefit and to call them contributions. Hyde observes that a military occupant 'enjoys large freedom in the mode of raising revenues to defray expenses of the administration, as well as in the application of funds acquired for that purpose.' "

(d) It is permitted to increase the rates of existing taxes.

With regard to Article 48 (apparently particularly to the phrase "as far as possible" therein), E. H. Feilchenfeld writes:

> "The provision would not seem to exclude, as has been asserted, taxation increases, particularly such changes as have been made desirable through war conditions or [p. 290] in the *case of an extended*

occupation, general changes in economic conditions." (Emphasis added - M. S.)

(e) Regarding new taxes, E. H. Feilchenfeld is of the opinion, *ibid.* 49:

"It is not clear that the occupant may introduce new taxes and customs duties. There have been several instances of such practice. Article 48 does not authorize them expressly but *they may be justifiable in individual cases* under the occupant's power to restore and ensure public order. The revenue laws of an occupied country may provide for inadequate revenue; the amount of revenue produced by any one tax may change materially in wartime; new needs may call for new revenue; *if the occupation lasts through several years* the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. *A complete disregard of these realities may well interfere with the welfare of the country* and ultimately with 'public order and safety' as understood in Article 43." (Emphasis added - M.S.)

This shows that there may be justification for introducing a new tax, if there are special conditions, like those arising from substantial changes in the economic conditions or the changing requirements that accompany the extended existence of a military government. It can also be understood from what the writer says that the absence in Article 48 of express permission to introduce a new tax need *not* be used as a prevention for doing so, when circumstances obliging it exist. The obligation to follow the basic intention of Article 43 will prevail, since it ranks preferable to the significance attributable to the absence in Article 48 of any reference to the introduction of new taxation.

To demonstrate his view that there is express occasion for introducing a new tax under certain circumstances, examples of which have been quoted above by the writer, E. H. Feilchenfeld refers to the criticism levelled against a new tax in the form of *forced levy,* which was even penal in character, when it was introduced in the First World War during the German occupation of *Belgium.* He expresses his opinion in this connection, which

view was also adopted by Prof. J. Stone, that it was not the *novelty* of the tax that disqualified it. He says in his book (at 50):

> "203. During 1914-18 Germany imposed a 'decuple tax' [p. 291] on all Belgians who had voluntarily left their domicile unless they returned by March 1, 1915. This imposition has been severely attacked. *If it was unlawful, its illegality would flow from more serious reasons than that it was a 'new' tax.* This measure evoked vigorous protests and complaints. It became, on May 1, 1916, the object of a decision of the Belgian Court of Cassation, at that time functioning in France. In its decision the court refused to recognize the decuple tax. One does not have to look at the amount of the tax, however, to find sufficient grounds for this decision in the body of Belgian case law. The Belgian courts throughout denied the right of Germany to interfere with 'ordinary' legislation and, of course, were even more opposed to extraterritorial effects of such measures.
>
> Actually, a technical answer may turn on the question of whether the decuple tax should be regarded as a tax or as war contribution. If it was a regular tax, that is, a tax collected for the benefit of the Belgian State, then its character is very dubious indeed. If, however, it was a war contribution, that is, a levy for the benefit of the occupying army, then it may have been justified as a contribution in so far as it affected merely assets situated in Belgium. It is true that even then it was clearly not in conformity with the modes of levying and imposition prevailing in Belgium; *but the provision to this effect in the Hague Regulations is not mandatory;* it only stipulates that the occupant shall follow a certain procedure *if possible.* Its possible extraterritorial effect raises, of course, additional and different questions." (Emphasis added - M.S.)

To sum up, E. H. Feilchenfeld is of the opinion that the Regulations do *not* prohibit the introduction of a new tax.

44. In chapter 12 of his book, *The Occupation of Enemy Territory* (*supra* at 150 ff), [p. 292] Prof. G. von Glahn discusses the question of taxation, basing his conclusions on Article 48 of the Hague Regulations. Regarding the matter in question he says:

> "While the occupant is legally empowered to collect existing taxes, he is not permitted to create new and additional taxes, either for his own benefit or for that of the occupied territory (6), if additional revenue is needed, it has to be collected in some other form, such as through monetary contributions. The obvious reason for the legal inability of the occupant to institute new taxes is that such a power is vested exclusively in the absent legitimate sovereign and not in the temporary belligerent occupant."

The author's conclusion is this a result of the vesting of the power to levy regular taxes in the *sovereign,* as distinct from the military power, which is temporarily administering the territory. The possible implications of this point of view have already been examined above, but attention should be paid to the fact that von Glahn saw fit to qualify the absoluteness of this conclusion by a note which he attached to his above quotation. The following is footnote (6) to his remarks on the levying of new taxes quoted above (at 159).

> "(6) British Manual, para. 372; Bustamente y Sirven, op. cit., p. 373; Fauchille, II, 263; *on the other hand, both JAGS No. 11, pp. 196-197 and Land Warfare, para. 426 (a-b), imply that an occupant could impose new taxes and also would not be bound, under certain conditions, by the previously existing rules of assessment and incidence."* (Emphasis added - M.S.)

The reliance placed on the British Manual in this footnote does not seem to be very precise, since the 1958 edition of the Manual does not prohibit the imposition of new taxes, but the reverse, since para. 529 thereof implies that when required for reasons of "public order and safety," such imposition is permissible.

In any event, the writer's review embraces the two opposite prevailing approaches to the matter. [p. 293]

As for customs duties, the writer points to the existence of greater flexibility and freedom of action. He says (at 154):

> "The right of an occupant to modify tax laws is fairly limited, as shown in the preceding section, *but no real restrictions appear to exist with respect to the collection and rates of customs duties* in the occupied territory, unless such duties would be held to be included in the 'dues' mentioned in Article 48 of the Hague Regulations of 1907. The current interpretation of the question seems to be that customs duties, under the conditions described, rest on a dual basis: on the rights of the occupant based on the Hague Regulations, and on such direct and lawful orders as may be issued by the authorities of the occupying state." (Emphasis added - M.S.)

The side-by-side presentation of the rules derived from the Hague Regulations and the orders of the state responsible for the military government cited at the end of the above quoted passage is an improper combination of unlike situations and seems to by-pass the matter. Von Glahn seems to be referring to Presidential directives in the Spanish-American War (see *supra* at 54) regarding customs duties that were changed by the U. S. on the spot; thus new duties were imposed on imports from the U.S. immediately when Puerto Rico was captured. However, military government regulations are valid and legal in the event that they are based on the laws of war, or to be more exact, in the event they are not restricted by the principles on which these laws are based, or by the specific provisions contained therein. As Schwarzenberger, *supra* vol. II at 191, puts it in relation to the nature, force and structure of the laws of war:

> "The scope of the legitimate powers of a belligerent occupant is limited only by such restraints as are imposed by international law."

The domestic laws and provisions of a state establishing military government have no independent status *in complementing,* as it were, the laws of war, as might be inferred from von Glahn. Hence, the only pertinent question here is whether the laws of war created an

opening for the introduction of new customs duties. The answer would be in the affirmative if Article 43 were deemed a basis for new fiscal legislation, when required by circumstances. In any case there is no basis for any distinction - from the viewpoint of the Hague Regulations - between *customs duties* and *taxes.* Von Glahn has also not explained the source for his approach, which distinguishes between one piece of fiscal legislation and another. [p. 294] If a *prohibition* proceeds from Article 48, as he now believes, that would apply both to taxes and dues, and if no such prohibition exists, as would emerge from views of other authors, according to which one can deduce from Article 48 only the regulation of the specific problem it deals with (*i.e.,* all aspects of the *collection of existing* taxes) and that it does not prevent the application when necessary of Article 43 for enacting new or amended fiscal legislation - then that opinion would apply equally to taxes, dues and tolls. It is superfluous to add that edicts proclaimed in the home country of the military government, whether presidential or otherwise, are immaterial to the distinction between "taxes" and "customs (dues)."

Ultimately, von Glahn's views on new customs duties, as he presents them in his book, may support by implication the thesis that circumstances may arise which permit the military government to enact new customs legislation or to amend the existing customs legislation.

The difference, however, in approach to direct tax, on the one hand, and to customs duties (indirect taxes) on the other, may have another effect on the subject of our present concern. Indirect taxes, not only customs dues, are not merely an auxiliary means of augmenting the treasury of the government, but frequently serve as a means of economic regulation and balance: they have repercussions on the flow of imports and exports, and affect supply and demand, and are thus an important and essential constituent of any process of organizing the economy and its proper operation. The latter functions are part of the tasks of those entrusted to ensure public life and accordingly the subject of indirect taxes goes beyond the mere question of arranging collection *per se* and for this reason calls for much wider freedom of action than that applying to the collecting of existing taxes, which *largely* serve the budgetary requirements of the territory. The incomplete collection of direct taxes from a population whose average income is not high may entail a budgetary deficit that will need to be made up by drawing upon the financial resources of the home country; however, the lack of proper application of indirect taxes (including customs duties) because of abolishment, variation, addition and the like, may also affect, in a

significant manner, the economy of the territory and lead to unemployment, shortages, flooded markets and other like negative phenomena. Accordingly, control over indirect taxation by adjustment to ever-changing requirements is, frequently a not unhappy necessity.

45. Prof. G. von Glahn also deals with taxation in military occupied territory in a recent book *Law Among Nations* (1981) where he writes (p. 686):

> "It has been asserted by a few commentators that an occupant may impose new taxes in occupied enemy territory, and the Israeli authorities in the West Bank area did introduce an 8 per cent 'value-added' tax in 1976 [p. 295] (such a tax had been in effect in Israel proper for several months). Imposition of the tax resulted in repeated business strikes called by the mayors of a majority of the communities on the West Bank. Neither *Geneva*-IV nor PR-I mention the subject of new taxes, but the American *Law of Land Warfare* states (par. 426-b) that 'unless required to do so by considerations of public order and safety, the occupant must not create new taxes.' That view appears to be shared by a majority of governments and of commentators."

The main conclusions of this passage are, first, that the author emphasizes that the Fourth Geneva Convention and the Supplementary Geneva Protocol of 1977 contain no reference at all to the subject of the imposition of new taxes, but in view of what follows, it is particularly interesting that the author does not propound the view that Article 48 of the Hague Regulations creates an absolute prohibition on the imposition of new taxes. Secondly, the author refers to the American Military Manual now in force, which indicates that new taxes are not to be imposed unless considerations of "public order and safety" require it. That means that if such considerations *are present,* the imposition of a new tax is permissible. Moreover, Prof. von Glahn adds that *this* is the view held by a *majority* of countries, and is shared by most commentators. Thirdly, at the beginning of the passage he points out that only few commentators think that imposition of a new tax is permitted. In view of the *latter* part of the passage according to which considerations of public order and safety allow the imposition of new taxes, and according to which most commentators

support this view, one can but understand that the first part of the passage is directed towards the view (if such indeed exists) that would permit imposition of a new tax under any circumstances, even when military government is not required to do so by considerations of "public order and safety."

> "required to do so by considerations of public order and safety (at 686)."

Although the author linked his reference to the introduction of value added tax in Judea and Samaria to this last view, he gives no details as to why and on what basis he did not connect the matter to circumstances - for public order (la vie publique) - which necessitated the introduction of the tax, a view currently advocated by the majority of states and commentators. To great sorrow, the only conclusion to be drawn as supported by the footnotes of his book, is that the author on this matter took no more trouble [p. 296] than examining certain newspaper reports nor did he examine the considerations and explanations of the government authorities in Judea and Samaria.

It is noteworthy, as mentioned, that there is nothing in his book of 1981 to support the contention that it is prohibited to impose a new tax in any and all circumstances.

46. (a). The Petitioners to the High Court of Justice in H. C. 493/81 submitted to the Court the written opinion of Prof. G. von Glahn. The main points he expresses therein are: the financial resources needed for administration of the territory are usually covered by the taxes and contributions collected in the territory. There *have* been precedents where the military government also imposed new taxes, in which cases the question arose as to whether this action was permissible according to international law.

Later in the opinion, he examines this Court's rulings regarding the applicability of the Hague Regulations to the occupied territories, the meaning of Article 43 and its implications on the legislative power of the occupant, a subject to which we shall return.

Prof. von Glahn analyzes Article 48 of the Hague Regulations, and on the central issue before us, has this to say in the opinion:

"I am not unmindful that *Land Warfare,* par. 426-b *implies* that new taxes may be created by the occupant under certain conditions, cited by Von Glahn, 150:

'426-b. *New Taxes.* Unless required to do so by considerations of public order and safety, the occupant must not create new taxes.'

"The British War Office *Manual of Military Law* (1914 edition), par. 372, repeated in the 1958 edition, par. 529, duplicates the American manual par.
426-b.

"However, this paragraph in the American and British manuals is not a statement taken from a valid treaty or from customary law but an interpretation of the U.S. Department of War, not binding on any court or tribunal .

"I fail to see what considerations of public order and safety are relevant to the creation of new taxes. If unstable [p. 297] conditions in the occupied area required expenditure for order and safety above revenues received from existing taxation, such funds could be raised either by increasing tax rates or by levying money contributions under the provisions of Articles 49 and 51 of the *Regulations*. It is regrettable that par. 426-b was inserted in *Land Warfare* at all, for if it is interpreted by an occupant as a given permission to create new taxation, it could easily lead to the very abuses that were corrected by the binding provisions of Article 48 of the Regulations. But a few writers have ventured to defend an alleged right of an occupant to impose (create) new taxes in occupied territory. But in modern times the consensus of a handful of most writers on the subject is in favour of a denial to the occupant of creating new taxes."

Thus, the opinion shows that Prof. G. von Glahn dissociates himself from the wording of the rules of what is permitted formulated in the U.S. and British Manuals, and as we

have also seen from his book, which was published in 1981. He claims that the approval which is apparent in the U.S. Army Manual could form the basis for abuse of the power to levy taxes. He says that prevailing modern opinion rejects the power to impose new taxes, but he does not go into detail on what he bases his assumption of the purported existence of consensus on this matter.

Prof. von Glahn refers to the argument that *prolonged* military government weakens the binding force of the *strict* observance of Article 43, and the principle of his summary follows:

> "There exists a considerable and somewhat inexplicable confusion among legal writers concerning the influence of a prolonged duration on a belligerent occupation. The problems center on an uncalled-for intermingling of the occupant's powers relative to legislation and to taxation. The provisions of Article 43 of the *Regulations* clearly are not graven on stone; they permit changes in legislation by the occupant subject to the limitation that such changes are limited to the restoration and ensuring [p. 298] of public order and 'civil life.' It is thus conceivable that in the course of time an occupant may, lawfully, introduce new legislation, all designed to enable him to fulfill his responsibilities under Article 43. Such a development can be anticipated particularly in an extended occupation and may come in a multitude of aspects of the social and economic life of the inhabitants. (See also Schwenk, *op. cit.,* 399-401, for a set of cogent comments on the legality of changes in *legislation* during an extended occupation.) On the other hand, however, when the question of taxation *per se* is considered, Article 43 must be viewed as retreating into the background and the provisions of Article 48 become the governing rule, coupled with the related provisions of Articles 49-51. Article 48, however, is possessed of an inflexible point of view concerning the imposition of taxes; nowhere does it contain a permissive provision for the introduction of new taxes nor does it contain any reference to the length of an occupation. 'The obvious reason for the legal inability of the

occupant to institute new taxes is that such power is vested exclusively in the absent legitimate sovereign and not in the temporary belligerent occupant.' (Von Glahn, 151). And 'temporary' has never been defined in a binding legal instrument dealing with the law of belligerent occupation."

On the divergence from the provisions of the Regulations because of the economic link between Israel and the Occupied Territories, which has created over the years a kind of single integrated entity, and on the argument that the link justifies military legislation introducing new taxes which equalize the situation in the Territories with that in Israel, von Glahn's opinion is:

"It cannot be denied, of course, that extensive economic relations have developed between Israel and the Gaza Strip, both in the form of trade (exports and imports) and the utilization of Palestinian labour in Israel, derived from the Gaza Strip. On the other hand, exaggerations of importance of the trade have appeared, [p. 299] and inasmuch as the Gaza Strip has few economic resources outside of manpower, the viewing of Israel and the Gaza Strip as an economic totality does not appear too close to reality.

"The absence of specific authority to create new taxation by a belligerent occupant represents a restriction based on customary international law. This provision is clear and unequivocal.

"It is almost axiomatic that in all cases of occupation, economic changes and in some instances material changes - have taken place after the inception of the places; good examples are supplied by the Allied occupation after World War II, by the German occupation of both World Wars, and by the American of Japan after 1945. If one were to allow the changes in question to set aside in whole or in part, the limitations imposed on an occupant by the Hague *Regulations* Article 48 would in effect become meaningless.

"On the other hand, I understand that it has been argued that, the primary responsibility of an occupant being the 'civil life' of the

inhabitants under the interpretation of Article 43 of the *Regulations,* even new taxes could be created by the occupant, if this act would enable him to better fulfill his lawful responsibilities (see Shefi, *op. cit.,* 290). In other words, so the argument runs, if to a certain extent occupant and occupied territory develop into one extended economy, subject to one set of economic laws, then, if a new tax were needed in the occupied part of that economy, Article 43 allegedly would override Article 48 of the *Regulations.*

"While the growth of economic relations between Israel and the Gaza Strip is undeniable, and while an Israeli intention to promote the 'civil life' of the inhabitants of the Strip is in accordance with the intent of Article 43 [p. 300] of the *Regulations,* Article 48 of those same *Regulations* poses an instrumentable obstacle to any claimed attempt to implement Article 43 through the imposition of a new tax in the occupied territory.

"The occupant's avowed reason for the VAT tax was *not a* desire to increase revenue for the use of the administration of the Gaza Strip, but, it has been claimed, a fear on the part of the military authorities that economic relations between the Gaza Strip and Israel would be affected adversely if taxes between the two areas were not equalized. Furthermore, it was alleged, exports from the Strip were to be encouraged by exempting them from the application of the VAT, and, secondarily the imposition of the tax would enable collection in full of income taxes (Note: this probably means VAT-M.S.) *in Israel,* for the tax would follow the production process across the border into Israel.

"The last-mentioned claim in support of the imposition of a VAT cannot be supported from the point of view of International Law, because the claimed result is for the benefit of Israel rather than of the occupied area. The other claims in support of a VAT fail, under International Law, because they attempt to support what well may be legitimate endeavours under Article 43 of the Regulations by resort to the unauthorised new tax in violation of Article 48."

The concluding summary is that:

> "a belligerent does not possess the legal power to introduce new taxes in occupied territory....the restoration and maintenance of order (and of the civil life of the inhabitants) cannot be assisted by an introduction of new taxes, in view of the provisions of Article 48 of the Regulations. The prohibition on the imposition of new taxes in occupied territory [p. 301] is divorced totally from questions of legal sovereignty over the occupied territory before its occupation, from the length of the belligerent occupation, and from any growth in economic ties between the occupied area and the homeland of the occupant. The principles laid down in the 1907 *Regulations,* accepted as indications of prevailing customary international law, override the factors mentioned and bar the occupying Power from *levying new taxes in occupied territory, for such is beyond the competence of the occupant.*
>
> "Accordingly, the imposition of 'value added' tax in the Gaza area by the Israeli military authorities is not legal and cannot be supported, or warranted by, from any point of view of the Hague *Regulations."*

(b) As has already been indicated, Prof. G. von Glahn in his opinion abandons, by implication, the thesis on the problem of taxation he presented in his books, of which relevant passages have been cited above. He also seeks to show that statements in the U.S. Army Manual and the British Army Manual have no foundation in customary international law. Whilst in connection with his book in 1957 it may still be argued that it merely refers to a directive of the U. S. Army Manual and no more, without taking any position on whether the directive has a firm basis in customary international law, it seems more difficult to accept this argument upon comparing it with what he has to say in his later book *Law Among Nations* (1981), where he explicitly observes that the directive in the U.S. Army Manual enabling the imposition of *new* taxes if "required" for "consideration of public order and safety" is the accepted doctrine of the *majority* of governments and commentators. Furthermore, at the beginning of the relevant passage in his book (*ibid.*), as quoted above, appears the statement that the opinion of a *number* of commentators is that the military government has the power to impose new taxes under certain circumstances.

The view of most commentators and governments is different, from the point of view of legal standing, and certainly from the point of view of weight, from the quotation of the U. S. Army Manual alone, although regarding what is said therein, it is difficult to accept the thesis that it is a new creation and is merely the result of interpretation by the Defence Dept. of the U. S., and that it is independent and divorced from the law and without reference to customary law.

I agree that caution is always needed in reaching conclusions as to what falls within the framework of customary international law, especially when the view of any particular learned commentator, does not necessarily reflect [p. 302] the opinion held by the overwhelming majority. As C. G. Fenwick, *International Law* (New York, 3rd ed., 1948) 74 says:

> "The works of great writers must, however, be used with the caution that they have often failed to distinguish sharply enough between rules that have been generally adopted by the nations as a body and those to which two or more nations, their own included, have given their consent. Moreover, many writers have been inclined to adopt the role of advocates in the endeavor to show that the practice of their own country was the correct rule of law on controversial questions."

However, notwithstanding all the proper caution in relying on interpretation as aforesaid, the views expressed by experts may be used as admissible, valid and even convincing evidence of the existence of a custom or the absence of a prohibition under customary law. Justice Gray therefore said in the well-known judgment of *"The Paquete Habana"* (1900) [25] 700, in reference to the significance of the articles of the analysts and legal experts in the field of international law, that:

> "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

It is superfluous to add that there is particular evidential weight to the practice of states (C. G. Fenwick, *supra* at 73, 76) especially of those among them who possess status in the enlightened world. Therefore, it is difficult to deny the force and value of the U. S. Army Manual and the British Army Manual, and cancel them with the stroke of a pen, as it were.

If von Glahn had satisfied himself with asserting that in view of the conflicting opinions in support of either view, no undue status is to be accorded to any of them in particular, and that one must conclude that no firm rule binding in international law has emerged on the subject before us, it would have been easier to accept his opinion. However, his rejection of the interpretation of the Army Manuals of two states that possess special standing in regard to the shaping and formation of the laws of war, and his disavowal of what he had determined in his own book to be the views of most states and analysts, arouses, in the nature of things, doubts and surprise. In any event, Prof. G. von Glahn's change of approach has not been satisfactorily explained. [p. 303]

The other assumptions of the learned writer in his said opinion raise difficulties, which are no less serious. Prof. G. von Glahn points out, in regard to the U. S. Army Manual. which says

> "considerations of public order and safety are relevant to the creation of new taxes."

that he cannot understand what are the considerations of public order and safety that can be relevant to the institution of new taxes. He says, that if the situation in the territory is unstable, further resources are required to ensure order and safety, and if they cannot be covered by existing taxation, then, he says, it is permissible to raise the tax rate or to impose forced contributions. He seems to have ignored the significance of "public order and safety" and reverted to the literal English meaning of the term (in which the emphasis is on the safety of the military government) and ignored in *this* passage of his opinion the French original which the said translation attempts to reflect. What is involved is "l'ordre et la vie publique." and von Glahn himself saw fit to refer to the meaning of the term in an earlier passage of his opinion where he indicates that it means "ensuring" (in English, "ensure" - in French, "assurer") *the civil life* of the residents of the territory (page 6 of the

opinion). That means, according to the clarification in the judgment of Grahame [22], as mentioned above:

> "L'ordre et la vie publique" (is) a phrase which refers to the *whole social, commercial and economic life* of the community. (Emphasis added- M. S.)

Acting President (as he then was) Sussman explained in Almakdassa [8] at 582:

> "The scholars of international law did not overlook the fact that where the military occupation is very prolonged, until peace is achieved, the occupant's duty towards the civil population may even oblige it to amend laws, since the needs of society change in the course of time and the law must respond to those changing needs.... Leurquin says regarding the German conquest of Belgium during the First World War....
>
> "When the occupation is prolonged and when owing to the war the economic and social position of the occupied country undergoes profound changes, it is perfectly evident [p. 304] that new legislative measures are essential sooner or later."
>
> (The passage from Leurquin is cited from his *"The German Occupation in Belgium and Article 43 of the Hague Convention"* - M.S.). "Life does not stand still, and no government, whether an occupier or not, can fulfil its duty, toward the population as it should if it freezes the laws and avoids changing them to meet the needs of the times."

(See also H. C. 202/81 [16]; Professor Y. Dinstein, *The Power of Legislation in the Occupied Territories;* E. Nathan *The Power of Supervision of the High Court of Justice over Military Government; Military Government in the Territories Administered by Israel 1967-1980* (Jerusalem 1982)109 149).

The decision to impose taxes need not only arise from the needs of safety as such, as is implied in the opinion of Prof. G. von Glahn, but may also ensue from the aim to ensure

(assurer) the economic needs and well-being of the population and, for example, to provide essential fiscal arrangements required for maintaining the balance of the local economy and avoiding serious harm to the livelihood of the inhabitants of the area. Levying contributions or increasing the rates of existing taxes may be entirely impractical for achieving these aims where the economy has changed in a substantial manner since the inception of the military government (see the tables appearing in Military Government, (*ibid*.) p. 442). For this reason, apparently, Prof. G. von Glahn also regarded *customs duties* in military government as a field which should be exempted from the usual restrictions that he imposes upon the imposition of new taxes (see his *The Occupation of Enemy Territory, supra* at 154, cited above). Here arise difficulties; as has already been noted, this distinction between customs duties and taxes is not reconcilable with his interpretation of Article 48, since all the restrictive meaning he attaches to the article applies equally to both taxes and customs duties, as shown by the wording of Article 48 as analysed above. If Prof.
G. von Glahn's hypothesis, with which we have already dealt, were correct, *i.e.,* that Article 48 imposes an absolute prohibition on any new tax, one cannot understand whence he derives the view that one may act much more liberally with regard to *customs duties,* a view which is also accepted by most analysts. It is superfluous to repeat that the regulatory and balancing effect on the economy from the exercise of powers in relation to *all indirect taxes* is similar, in its consequences in economic implication to the regulatory and balancing effect arising from changes in customs duties, since these are nothing other than a form of indirect tax. [p. 305]

That is, the wonder expressed by Prof. G. von Glahn about the possible connection between public order and safety and the imposition of a new tax is incomprehensible if we bear in mind that we are dealing with the assurance of "la vie publique" in its original French meaning, and not necessarily with the safety of the forces of the military government.

(c) We saw above that Prof. G. von Glahn takes the stand that the provisions in the British and American Manuals are without any foundation in customary international law. However, the professional literature, some of which was reviewed above, does not support this extreme hypothesis. There are, we have seen, a variety of opinions on both sides'

readings, but a *thesis* which propounds that the Manuals are inconsistent with *customary* international law - *i.e.,* as if there is a firm customary rule which is clearly in conflict with them - is a complete novelty in the opinion, and has no basis even in his book of 1981, wherein he saw fit to present the U. S. Manual as expressing the view of a *majority* of states and commentators. It would have been proper for the opinion presented to this Court to have attempted to explain the reason for the digression from the former opinion, and the basis for it.

The main thing is that a review of the literature does not support the argument of Prof. G. von Glahn that a consensus purportedly exists denying the right to introduce a new tax. The reverse is the case; there is a clear school of thought among the experts to the effect that the needs of "la vie publique," may, perforce, call for changes in tax law. (K. Strupp and H. J. Schlochauer, J. Stone, E. H. Feilchenfeld and others, as cited above).

The view that the provisions of Article 43 in all questions of taxation yield to the purportedly absolute prohibition in Article 48 is also a novel one. Here, one must remember that we are not inquiring into whether *such a view* can be presented as *de lege ferenda,* but whether there is any basis to accord it the benefit of having the status of an accepted *customary* rule of international law which reflects general practice recognized as law. All that has been said above - prior to the examination of von Glahn's opinion - including the review of the wording of the Regulations, their background and development, and a representative review of the professional literature, is diametrically opposed to the contention that a customary rule has evolved from which an absolute prohibition to imposing tax may be inferred from Article 48, or that the rules implied from the article, which deviate from what it expressly provides, as to the extent of the authority vested under Article 43 are to be preferred. (It is enough to recall here, for example, the observations of Prof. J. Stone and E. H. Feilchenfeld cited above). In this connection, Prof. G. von Glahn emphasizes that Article 48 does not contain "a permissive provision for the introduction of new taxes," but we have already explained that, in essence, the article was not designed by its drafters to create a permissive provision, but rather one that is restrictive, having implications on the subject of the collection of existing taxes with which it deals. Here, we need only refer back to the reservations of Beernaert during the discussions on the drafting of the Regulations and to the remarks of Prof. G. Schwartzenberger (see para. 44) set out [p. 306] in para. 42 of this judgment. The thesis that Article 48 is an insurmountable barrier to applying Article 43 to the problem of

introducing new tax conflicts with the opinions of many writers, as I have said, including E. H. Feilchenfeld, J. Stone, G. Schwartzenberger, and H. Lauterpacht (the author of the British Manual).

(d) In discussing the *necessity* for introducing the value added tax, G. von Glahn refers as aforesaid to the argument that the new tax is an essential consequence of economic developments. Unfortunately, the facts regarding the nature of the economic ties between the two systems - that of Israel and that of the Territories - were insufficiently set out as required by the subject dealt with in the opinion, and we shall return to this matter later.

47. In brief, the professional literature, including the books of von Glahn, but excluding his opinion as presented to this Court - cannot serve as a basis for the conclusion that there is a recognized customary rule prohibiting the introduction of a new tax under any circumstances - that is, even when it is required according to criteria embodied in Article 43. I see no reason to relate once again here to the theoretical proposition that links additional taxation to the provisions of Article 49, since it was not argued that it is this article which served as the legal basis, in the case before us, for the introduction of the value added tax. This view is recalled simply for the purpose of completing the picture, that is with regard to the categorical argument of G. von Glahn in his opinion that there is a "clear and unequivocal" prohibition to introducing a new tax under any circumstances.

48. In the case of *Ligabue v. Finanze* [23] (1952) (Guirisprudenza Italiana 1952, L. 2.719) there is a translation of a judgment of the Venetian Court of 28.1.52. The plaintiff owned a bonded warehouse at which the German army confiscated a shipment of brandy, during the occupation of northern Italy. The confiscation order stated that no excise duty would be levied on the confiscated brandy, and the proceedings centred around the question as to whether it was permitted to collect the tax.

The Italian Court held that the confiscation was effected during a period of military occupation and therefore the German forces were competent to issue directives, and the Hague Regulations - which in view of the grounds cited in the judgment were to be considered as part of the law then applicable in Italy - were applicable to the subject at issue. On the problem around which the petition centred, the court said (at 617-618):

"It is the opinion of writers, and it appears, indeed, from the wording of that article (48), that the obligation to respect so far as is possible the tax system already in force in the occupied territory, as distinct from the obligation to defray the costs of administration on [p. 307] the same scale as the legitimate Government *does not disable the Occupying Power from imposing new taxes or abolishing or modifying those already in existence.* And on this basis, orders of the Occupying Power cancelling customs duties on goods imported for military purposes or for the needs of the occupying force may be seen to be justified. But, if the rule laid down in Article 48 is not to be deprived of all force as a provision designed for the protection of the population of the occupied territory, it must be held to require that the imposition of new taxes or the remission of old ones shall be effected by *measures of a general character*. Fiscal impositions or exemptions effected under colour of the Occupant's power of taxation by particular orders, and creating in effect privileges for individuals prejudicial to the general civil order which the Occupant is bound to maintain, must be regarded as contrary to the international laws of war.

"It follows that the orders for the waiver of customs duties which were made by the German command in favour of Ligabue were irregular in terms of international law; for, as is not disputed, they were made from time to time as requisitions were made upon him, and were not based on any general legislative provision modifying the fiscal system. They were in reality concessions in the nature of privileges such as the international order does not permit." (Emphasis added - M.S.)

To summarize: the court held that the occupying power *does* have the power to levy *new* taxes, provided that such is made by virtue of a *general* provision of a legislative nature, and not by granting extraordinary personal consensi, which have no general legislative form. The petition by the owner of the bonded warehouse was not successful

because of reasons which are irrelevant to our case. Evidently, in regard to the essence of our case, the reasons given by the Italian Court speak for themselves.

This Italian judgment is cited by A. D. McNair (Legal Effects of War (Cambridge 1986) 386, note 5) as a reference source on the rule of permissible *changes* that may be effected in the fiscal system of a territory which is under military occupation. [p. 308]

49. This sampling of the views of legal scholars and the mention of a number of instances exemplifying the practice of states lead us to a series of conclusions which are worthwhile summarizing in an interim summary for the purpose of continuing examinations of the petitions according to the relevant criteria.

(a) There is no foundation for the argument that a binding rule has evolved in customary international law, prohibiting absolutely, *under any circumstances,* any military government legislation seeking to introduce new taxation.

(b) *Nor is there,* on the other hand, room for any conclusion that new taxation is left to the unrestricted discretion of the military government.

(c) Examination of the commentaries reveals a variety of views. Some assert that Article 48 of the Hague Regulations is an exhaustive description of the powers of the military government, and that anything not expressly permitted therein is prohibited (see, for example, O. Debbasche, op. cit.). This view, it seems, is held by the minority. There is a view which permits the introduction of new taxation, but only when required for the purposes of public safety or "la vie publique" (see, for example, the British and American Manuals and Prof. J. Stone). Among those who hold this view, some refer expressly to Article 43, and some take the stand, *in general,* that "public order and safety" allow for such legislation, without reference to Article 43 specifically. There are also those who infer that the power to introduce new taxes lie in Article 49, which deals with contributions (see, for example, Seidl-Hohenweldern in the book by K. Strupp and H. J. Schlochauer). However, the application of this thesis is necessarily limited, according to the interpretations, by the wording of Article 49 in everything pertaining to the purposes for which it is permitted to impose contributions, and by the other limitations and requirements

accompanying the imposition of contributions, according to the Regulations. Ultimately, the existence of a variety of viewpoints contradicts the thesis that a customary rule has evolved, reflecting a general uniform practice, recognized as law.

(d) Most commentators link the powers relating to the imposition of taxation to general legislative powers and the resulting conclusion is that the powers are delineated and restricted by the provisions inherent in the wording and the interpretation of Article 43 of the Hague Regulations.

50. (a) The view adopted by the Respondents is that they acted within the framework of the provisions of Article 43, and did not overstep its bounds.

Having rejected the argument that a binding customary rule exists, absolutely prohibiting new taxes, and having raised the argument that the Respondents acted within the framework of Article 43, we must now examine the extent of the powers according to the said article, in order to be able to determine whether the Respondents indeed did not deviate from Article 43 to the extent that justifies our intervention. [p. 309]

(b) The boundaries and interpretation of Article 43 have been considered by this court on various occasions *(Regional Electric Corp., Jerusalem v. Minister of Defence* [17], *Ayub* [2], *Dvikat* [1], *Haetsni* [3], *Abu Awad* [4], and recently *Tabib* [16] in the judgment of my honoured friend, Judge Shilo). The matter has also been examined comprehensively by Prof. Y. Dinstein in his article "Judicial Review of the Acts of the Military Government in the Occupied Territories" (1973-74). Iyunei Mishpat 330, 334 and by E. Nathan in his above mentioned article.

Hence, there is no reason for me to repeat the main points of the article and I will be satisfied with a summary of what is acceptable to me in this matter. This summary is required *inter alia,* because of the lack of uniformity in emphasis present to some degree in the rulings of this Court, on the one hand, and in the remarks made in the course thereof, on the other.

(c) The duty of the military government, which is defined in Article 43, as has already been explained, arises out of the very fact that it has set up effective rule in a territory. After the clouds of battle disperse and it becomes apparent that the former Government has

been defeated, and the military power which removed it from the territory is in power, the duty automatically arises to take the steps dictated to it by Article 43, and they are:

> (1) *Restoration* (in the original "retablir"), as far as possible, of order and public life.
> (2) *Assurance* (in the original "assurer", to ensure), as far as possible, of order and public life.

Here it is irrelevant whether the armed forces that were involved in the fighting still exert authority, or whether a special governmental framework has been created, whose particular task is that of administering the territory. However, a permanent and continuing administrative system will be faced with a greater range of problems demanding solution, than the military forces which subjugated the territory, whose function is military/operational, and not administrative. Nor is it redundant to recall that the *restoration* of order and public life to what they were is not in line with the duty to assure these aims: restoration, as far as required, is the first step, and *assurance* of the above mentioned aims is an added and separate obligation that is not necessarily satisfied in every case by restoration to the former situation, and it exists even if the situation did not deteriorate during the battle and there was no need for restoration to the former situation. That is, in the matter of the obligation to assure public life, a continuing obligation is involved, rather than a one-time act, and it should accordingly be fulfilled, only in consideration of the circumstances, which change from time to time, and with due regard to the needs occasioned by the passage of time, and that will continue to change with the passage of time. The circumstances referred to are not simply those of security, but also relate to the economy, health, communications and the like. Therefore, the duty to restore things to what they were, cannot overshadow the further duty, which is linked to the dynamics of life. [p. 310]

The drafters of the Regulations defining these duties did not use unequivocal and absolute language, but from the outset kept in mind the objective difficulties that might emerge from a change of government resulting from a military operation, when the new government continues to function as a military government which is of legal temporary character. Hence, the duties were defined as being conditional on what is possible (d'autant

qu'il est possible). The degree of possibility of fulfillment of the duties is measured according to a complex of circumstances, that is, not only in the light of the needs of the territory, but also in the light of the legitimate needs of the military government (*cf.* Dr. E. Rauch, *The Concept of Military Necessity in the Context of the Law of War,* Federal Ministry of Defence, (Bonn 1979)12), who is responsible for the concept of "belligerent occupation" (translation of the expression by Prof. Y. Dinstein) and whilst striving for a proper balance between the two.

(d) In restoring and ensuring public life, the military government must obey the existing laws in the territory, unless it is absolutely prevented from so doing *(sauf empechement absolu* - unless absolutely prevented). What does this condition mean? Prof. Y. Dinstein, in his article in Iyunei Mishpat B, p. 509, says:

> "It is generally agreed that the adjective 'absolute' is not as absolute as it sounds and in truth makes little difference. The correct and accepted meaning of 'absolute prevention' is 'necessity'. "

The *necessity* referred to is military necessity, on the one hand, and humanitarian considerations, on the other, and absolute prevention may therefore arise from the legitimate interests of the military government and the maintenance of public order, or from interests of concern for the local population and the assurance of its public life, all, of course, whilst maintaining a reasonable balance between the considerations, whilst the military interest or necessity is not in itself enough to permit a serious violation of human rights. A similar conclusion was reached by Schwartzenberger (*supra* vol. 2 at 193) who inferred from the decision of a mixed German-Belgian tribunal in *Ville d'Anvers v. Germany* (1925) [27] at 716, that the term "absolutely prevented" should not be taken literally but should be seen as an imperative which is relative and conditional upon a combination of circumstances.

> "as any other supposed absolute in international law"

As he said:

"the word "absolutely" had to be interpreted in functional terms." [p. 311]

That is, the obstacle to observing the law in its old formulation is absolute if conditions and circumstances demand legislative intervention for a purpose legitimate under Article 43.

The British Army Manual sums up the matter in even broader terms, that is, without prescribing a duty to balance the different necessities saying at 145, para. 523:

"If the exigencies of war, the maintenance of order, or the welfare of the population so require, it is within the power of the Occupant to alter or suspend or repeal any of the existing laws."

Among the examples cited there are all the provisions regarding trade relations between the area of the military government and its home country, including the removal of customs barriers (at 146, para. 530). Likewise, the introduction of the currency of the home country as legal tender, as well as other similar fiscal measures, are permitted, provided that their purpose is not solely for the benefit of the military government and its state, and provided that they are not designed to harm the economy of the territory, in order to enrich the state maintaining the military government. The opposite may also be inferred from these observations, that is, that divergence from existing legislation and the introduction of new legislation is a form of expression of the presence of "absolute prevention" to continue to observe the law enacted by the previous government, if the new legislation truly and honestly flows from the necessity of adapting the territory's economy to changing circumstances and avoiding *adverse effects* on its stability and strength, adverse effects that are foreseeable if the new legislation is not enacted. The new legislation will not be disqualified merely because at the same time it fits in with the fiscal policy of the military government and of its home country, which has nothing to do with the interest of self-enrichment or the intention to harm the economy of the territory. The need to preserve balance and co-ordination between the economic systems so as to maintain orderly economic life in the territory is therefore legitimate even if that requires changes to the existing law. The same spirit was expressed by my honoured friend, Judge Shilo, in H. C. 202/81 [16] where he said (at 630-631):

"The duty lies on the government to respect the laws in force when the territories were occupied unless there is an 'absolute prevention.' What is an 'absolute prevention?' E. H. Schwenk rightly notes in his comprehensive and exhaustive article that this juxtaposition of words has no meaning in their context, since the occupant, as supreme power, will never be prevented from respecting the laws in force, if he sq wishes. E. H. Schwenk, in the same article, refers to the views of many scholars on this point. None of them takes the stand that the duty to respect the law in force is absolute. [p. 312] We shall cite only some of them. L. F. L. Oppenheim holds that the law in force may be modified if the modification arises from the occupants' interests or military requirements; E. H. Feilchenfeld believes that change is permitted when it is 'sufficiently justified.' Another view is that 'absolute necessity' justifies a modification of existing laws. What all these views have in common seems to be that as long as the occupying power is diligent in restoring and ensuring public life he is not bound by the existing laws, especially in the area of administrative and public laws, to differentiate perhaps from laws intended to ensure the basic rights of the citizen. E. H. Schwenk himself says:

"....it seems that Article 43 enables [the occupant -Y.S.] to amend civil and criminal law in those matters where the change is justified by the needs of the good of the public, or of its (the occupant's) military concern."

And in summing up, Judge Shilo (at 415) remarks:

"Although the legislative power of the military occupant is theoretically limited, in practice it includes general authority over all aspects of the civil life of the enemy population, if the occupation continues for an appreciable length of time..."

In H. C. 337/71 (1) at 581-582, Acting President Sussman, after considering the views of E. H. Schwenk, says:

> "The occupation of enemy territory vests in the occupying power the right to do whatever is required for military purposes and the security of its forces, and as Oppenheim-Lauterpacht write in *International Law,* para. 169 - to this end its authority is almost absolute....
>
> "In fact, the rule is that the occupant continues to administer the affairs of the occupied territory according to local laws as they were in force on the date of occupation. However, scholars of international law have not overlooked the fact that when military occupation persists for a lengthy period...the duty of the occupant towards the civil population even requires it to amend the laws, since social needs change during the passage of time and the law must respond to those changing needs."

From all the foregoing, it can be understood why E. H. Feilchenfeld (*supra* at 49) linked the authority to initiate new taxation necessitated by the territory's requirements to the powers vested in military government by Article 43. [p. 313]

In this connection, there is special importance attached to the *time element,* of which more later.

(e) The needs of any area, whether under military government or otherwise, will naturally change over the course of time, along with attendant economic developments. As explained above, the drafters of the Regulations were not satisfied with defining a duty which is discharged by restoration to the former situation. The length of time that a military government continues may affect the nature of the needs involved, and the urgency to effect adjustment and reorganization may increase as more and more time elapses. The argument put forward by Prof. G. von Glahn in his opinion as submitted to this Court that there is no foundation for the idea that the duration of military government affects the character of the duties and the extent of the powers of military government, is, therefore, irreconcilable with the character of the duties and powers vested in it by Article 43. It is true that this article contains no rules as to adjustment or reclassification bound up

with, or conditional upon the time element, but the effect of the time dimension is implicit in the wording, according to which there is a duty to ensure, as far as possible, order and public life, which patently means order and life at all times, and not only on a single occasion. The element of time is also decisively involved in the question of whether it is absolutely impossible to continue acting in accordance with existing law, or whether it is essential to adapt that law to new realities. In the legal interpretation of Article 43, the relationship between the time element, and the form taken by the provisions of Article 43 is stressed more than once. It follows that the time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the needs of the territory, or maintain equilibrium between them.

Reference to the subject of time in legal literature is frequent, but I mention only as an example Loening's study in *Revue de Droit Internationale et de Lois Comp.* vol. IV, 632-634, where he stresses the duration of the military government; if a short period is involved the adoption of minimum measures in order to ensure safety and the requirements of belligerency is sufficient. If, however, a lengthy period is involved, he holds that special attention must be paid to the needs of the population. D. A. Graber, *supra* at 290, points out the absence in the Hague Regulations of specific provisions in many fields and, in this connection she adds that the longer the military government continues, the greater its obligation, as she says,

"to assume full governmental burdens."

The observations of Prof. J. Stone on the matter at hand have already been mentioned. It may be inferred from the stand he takes that, from the viewpoint of the extent of the duty and its attendant powers, the passage of time creates a gradual process of equating the status of the military government with the status of the former government.

In his notes on H. C. 337/71 (8) Prof. Y. Dinstein in Iyunei Mishpat 2 at 511, [p. 314] also refers to the legislation of the British military government in this country since 1918. As we have seen above, that government refrained from amending Ottoman law, but after a lapse of two years the needs of military administration and of the population together apparently necessitated the introduction of amendments, including the enactment of new

taxation. We have already given the details of this above (*cf*. N. Bentwich, *The Legal Administration of Palestine under the British Military Occupation.* The British Year Book of International Law (1920-21) 139, 145-146).

To sum up, it seems that one cannot do better than to recall the words of Acting President Sussman (his title then) in H. C. 337/71 (8) at 582. He said:

> "Life does not stand still and no government, whether an occupier or not will not properly fulfil its duty to the population if it freezes the legislative situations and refrains from adapting it to the needs of the times."

I accept the observations, which vary in form, of Dinstein, (Iyunei Mishpat 2, at 509-510; Judge Nathan, supra at 109, 165) that the welfare of the population should not be the sole criterion but should be integrated and balanced with the considerations of military necessity. However, in the prevent case, the legislative change which is the subject of the hearing also meets these requirements: Undoubtedly, military government has a clear and direct interest in avoiding any disruptions in the regional economy and *inter alia* it will do all it possibly can to prevent as far as possible reduction in trade or increase in unemployment. To cut off existing markets, especially those created during the period of military government, has a direct effect on incomes and therefore upon the standard of living; unemployment is a fermenting and unsettling factor from the standpoint of security and both these phenomena are among those the military government tries to avoid in so far as possible; at least a military government that aspires to the good of the public in the territory, and the good of the security interests of the occupier in so far as possible and practicable. It is all the more reasonable in the case of the Israeli military government, which not only does not enrich itself from the revenues of the territory but injects money of its own into the territory (Y. Lipshitz, *Economic Development in the Occupied Territories* 1967-1969 (Maarachot 1970) (in Hebrew); The Administered Territories 1972/1973 - Data on Civilian Activities in Judea and Samaria; The Gaza Strip and Northern Sinai (Co-ordinator of Government Operations in the Administered Territories, Ministry of Defence) p.14; Survey of the Administered Territories 1967-75 (Ministry of Defence) 5, 10),

Prof. Y. Dinstein (Iyunei Mishpat 2, at 511) notes that no objective criterion exists to distinguish between a valid or invalid concern [p. 315] for the local population. However, in most cases, the criterion can be very simple, that is whether the military government is filled with the same concern in regard to its *own people* and applies the same measures taken in the area of military government in its own area. I do not think that this criterion is *exhaustive* and it would seem that neither does Dinstein think so. Since situations may occur where conditions in a territory and special circumstances demand legislative steps not required at the time, or at all, in the home country, but for the present purpose, the above criterion will suffice to demonstrate the reasonableness of the use of the powers vested by Article 43 for instituting a value added tax. It is not an extraordinary arbitrary tax, but the introduction of a fiscal measure with positive aims, which was also introduced in Israel at the same time.

To remove doubt, I should add that adoption of the above test is in addition to the above, that is, it is an additional consideration justifying the conclusion that harming the territory's economy by cutting off the labour force and trade from its environment in *existing political conditions* injures the population and creates - simultaneously and concurrently - a definite security danger. This point of view was expressed - at least as regards the declaration of intentions - in The Administered Territories 1967/1971- Data on Civilian Activities in Judea and Samaria; The Gaza Strip and Northern Sinai (Co-ordinator of Government Operations in the Administered Territories, Ministry of Defence) 76 where it is said (at 8):

> "The Six Day War abolished to all intents and purposes the 'green line' that in the past demarcated the Israeli sector from the administered territories. Naturally and unavoidably, these areas are becoming dependent upon Israel for all their economic and service needs. As long as this situation continues.... it will become harder and harder to preserve a standard of living that differs markedly in the territories from that in Israel. If one wants to prevent a potential outbreak of social unrest, the only way is to work consistently to raise the standard of living and the standard of services...."

As we have already said, securing the rights of the population under Article 43 is achieved not only by taxation in the territories but is also accompanied by streaming resources from Israel (see Meron, *The Economy of the Administered Territories* 1977-78 (Research Department of the Bank of Israel, 1980) (in Hebrew); Y. Lipshitz, in his above-mentioned book, at 111). This emphasizes the relevance of the conclusions submitted to the Treasury in 1972 by [p. 316] the Asher Committee on whose recommendations value added tax was introduced into Israel:

> "The security and social requirements of the State do not make possible the drastic reduction of expenses. It may be foreseen that these requirements will even increase in the near future. In such a situation it is essential to seek out resources to ensure the necessary income without adversely affecting the will of the population to work and produce."

51. In view of what the Asher Committee said, some explanation of the nature and purpose of value added (excise) tax is also called for at this point.

The term "value added" indicates the addition in value which an economic unit contributes by its activity. Generally speaking, this added value is expressed by the difference between the purchases and sales of an enterprise, or between the costs of services provided and services received (Value Added Tax Bill, 5735-1975). Every businessman and provider of services in Israel (and under a corresponding order, in the territories as well) is liable for the said tax. This includes members of the free professions and every person - other than salaried employees - who does work, carries on a trade, or renders a service for a consideration. A consequence of the tax is that every businessman must keep records and accounts according to the size and nature of his business; a small business is obliged to keep books on an *elementary* basis only, but as the business turnover increases, more detailed accounts are necessary. The businessman calculates the tax on the basis of what he sold, and he is *entitled to deduct* from it the amounts that he paid as value added tax on goods he purchased or services he received. The businessman is also entitled to deduct the tax that he paid on goods imported for his business purposes. The same rights are available to business people in the occupied territory, also applicable, of course, to goods they bought in Israel or imported via Israel for which they paid the tax as usual.

Obviously, the method of calculating the tax prevailing in Israel under the above tax regulations, would of itself have created a gap necessitating fiscal or other protective measures, had the territorial contiguity and the free movement of goods and services not been accompanied by identical indirect tax laws as described.

In light of the broad base of the tax - and its character of a tax reform - it was also accompanied by substantial changes in the system of indirect taxation that was in force in Israel at the time of its introduction, to which the system prevailing in the occupied territories had been equalized by the late sixties and the early seventies (see the article by Advocate M. Hertzberg and Review of the Occupied Territories 1972-73, *supra* at 82).

The tax was initiated after a comprehensive comparative study, because it was also in practice in the European Common Market and other countries in Europe, in North Africa and South America. [p. 317]

A Knesset committee that in 1971 toured European countries where the tax was in effect, concluded (Knesset Minutes (5735)2420) that:

> "It is the most reasonable, just and effective of all existing indirect taxes known in the world. It encourages export and investment and it is capable of preventing injustice and discrimination and is neutral in relation to various elements of the economy and their activities."

The Treasury regarded the tax as a central means for the achievement of their objectives in economic policy, especially fiscal policy (Knesset Minutes, *supra*). Its noteworthy features were simplicity of operation because of its *uniform* rate, general application on a broad basis, the contribution it makes to exports and investments and its resulting non-discrimination between different branches of the economy. Israel's association with the Common Market made its introduction especially important as a side effect of the removal of customs barriers between the members of the EEC and Israel, a matter which understandably had direct repercussions in the territories. The integration of Israel into the EEC and the reduction of customs duties that followed in its steps automatically obligated, the existing political and economic situation, the imposition of the tax, which was present in all the countries of the Market, and the changing of customs duties. Economic integration - as a compelling motive for introducing the tax - was

obviously a dominant factor in all decisions having implications on the economic relations between Israel and the territories.

52. (a) The fiscal purposes outlined above of necessity oblige consideration of the facts of economic life in the territories. However, this obviously means the *principal characteristics,* since it is impossible to conduct an exhaustive study and discussion in this field in the judgment of this Court.

In his opinion, Prof. G. von Glahn refers to the economic connections between Israel and the territories but, unfortunately, does not give the sources of the information he used as a basis for his conclusions. He negates the significance of the argument about the economic dependence of the territories on Israel or of the specially close relations between Israel and the territories, and it seems that anyone wanting to learn from the facts presented in his opinion would conclude that in actuality there is nothing more than a movement of labour and trade between the occupied areas and Israel.

The picture he draws does not conform to reality.

(b) To present the processes in a general and summary fashion it would be proper to look at the facts just prior to the introduction of the value added tax in 1976. In this regard the Review of the Administered Territories 1967-75, mentioned above, points out, at p. 2:

> "In the period mentioned, the economy of the territories was characterized by a very high rate of growth. The growth rate of G.N.P. reached on the average 18% per year, which was [p. 318] higher than that of many other economies in the world. As a result of technical improvements, changes in labour methods and practices, the introduction of new materials and modern mechanization in many branches of manufacture, including agriculture, local output per worker grew at the average rate of 12% per year.
>
> "The unprecedented rise in income and profits in manufacturing industries, as well as the increase in the availability of work in Israel,

> led to an average 11% increase in private consumption per year (an outstanding increase in comparison with many developed countries).
> "The ties created between the limited economy of the territories and the developed Israeli economy grew much closer during the eight years. As a consequence, there was a yearly increase in the imports and exports to and from the territories. Exports, of which the export of labour services to Israel is the main constituent, increased by 28% annually while imports, mainly from Israel, increased by an average of 19% per year.
> "As a result of the increasing demand for labourers in the territories and in Israel since 1968, unemployment was eliminated and the number of employed persons increased by 6% per year. As a result, there was an average 15% annual increase in workers' wages, while the wage increases of the middle income group in the territories contributed to greater equality in the division of income."

We shall now examine these processes in greater detail.

The effect which Israel had upon the territories was and remains significant for the welfare of the population. The most outstanding indication of that is the growth and expansion it brought to the economy of the territories (A. Bergman, *Economic Growth in the Administered Territories* 1968-73 (1974) p. 9). Thus, in Judea and Samaria, the *G.N.P. trebled* during 1968-72, and in the Gaza Strip the result was even more emphatic. As a result of modernization of labour methods and technology, *agricultural* productivity rose by about 12% per year, and this statistic is very important, because agricultural production in 1972, for example, was 37% of total production. The increase in agricultural products was due, to a decisive degree, to the assistance from Israel and the innovations it instituted. It may thus be noted, for instance, that the number of tractors in Judea and Samaria increased from 459 in 1968 to 1,898 in 1979, and in the Gaza Strip from almost nothing in 1968 to 418 in 1979 (Military Government in the Territories Administered by Israel 1967-80, p. 449). *Industry* in Judea and Samaria was not developed in 1967 with the establishment of the Military Government, and it represented only 8% of Jordanian industry. During the period of military government it has grown gradually by 15% per year (from IL 43,000,000 a year in 1968 to IL 75,000,000 per year in 1972), and this increase

maintained the status of industry. During the same period, the number of workers in industry increased from 2,000 to 7,000. [p. 19] Industrial output also increased (Quarterly of Statistics in the Territories, III, 3, (1973) p. 46, 52; Israel CBS, Statistical Abstract of Israel 1973, No. 24 (Jerusalem, 1974) 473). During the same period, sub-contracting connections were established between Israeli industry and industry in the territories. Industries were also established with direct Israeli investment, and loans were made to industry.

A third important statistic is that income *from wages* earned in Israel (incoming revenues) constituted a significant proportion of the G.N.P. (*e.g., 30% in 1973). (M. Nissan, Israel and the Territories,* 1967-77, Turtledove Publ. (1978) 188). It should be mentioned here that as a consequence of the 1967 War, unemployment in the territories rose to 30%. That changed very quickly, largely as a result of employment in Israel (A. Bergman, in his above-mentioned book, p. 34), as a direct effect of the removal of the prohibition on movement and the creation of free conduct from Israel to the territories and vice versa. As a result of this, unemployment disappeared (M. Nissan, *supra* at 127).

In light of these economic statistics the commercial relations between Israel and the territories were described by M. Nissan, *supra* at 127 as:

> "a de facto common market between Israel and the Administered Territories."

Incidentally, according to what Nissan says, more than half of the exports of the territories to Israel are *industrial goods,* and not agricultural produce, that is to say, products which are subject to value added tax, which is the subject of this petition. M. Nissan adds in this connection (at 189, note 28):

> "It is important to note that, in fact, more than one-half of West Bank exports to Israel were industrial - not agricultural - products. This suggests that the classic 'colonialist model' applies only at a very general level."

Thus, Israel has become a major partner in trade with the territories. Now as to the tangible expression of development in the standard of living in the territories: in 1966-67, average annual per capita income in Judea and Samaria was $200. By 1970, that figure had already increased to $300 (M. Bruno, *Israel Policy in the Administered Territories* in I. Howe and C. Gershman, *Israel, the Arabs and the Middle East* (New York, 1972) 255-256). [p. 320] Incidentally, for the growth of ownership of household appliances in the territories, see Military Government, *supra* at 442, 448, 449.

Returning to the analysis of M. Nissan (at 129):

> "The general economic prosperity in the territories was due considerably to close trading ties with Israel - and was not based primarily on domestic development. The rise in the Arab standard of living and a changed lifestyle, based on economic prosperity, was founded insecurely on the accessibility of Israeli employment and products."

I draw attention to the world "insecurely" in the above passage which has direct implications, under *existing conditions,* to the present matter, in so far as changes in the flow of commerce and manpower are concerned.

The initial picture described above did not change following the Yom Kippur War in 1973, that is, before the introduction of the value added tax in the territories. M. Nissan, *supra* at 150, says:

> "The war did not upset the pattern of intensive trading ties between Israel and the territories whose economies were, by then, closely integrated and mutually dependent. In 1975, 83 per cent of the area's trade (imports and exports) was with Israel as opposed to 73 per cent in 1972. Nearly 90 per cent of the area's foreign products were imported from Israel in 1973 and this formed approximately only five per cent of Israel's foreign trade. The benefit of close trading relations maintained its economic value over time."

The statistics set out above point to the great dependence of the economy of the territories on that of Israel and it is therefore obvious that any separation of the economies as long as Israel rules over the territories - if that were at all possible in view of the territorial contiguity and the continuation of free conduct - would likely have immediate destructive effects on the economy of the territories and the well-being of the population. Cessation of free movement would immediately have even more serious ramifications from the viewpoint of manpower in the territories and from the viewpoint of trade and industry.

(c) To sum up, in view of the economic realities created by the conjunction of political facts (military government) and geography (territorial contiguity) directly bound up with the relative sizes of the economies and the sectors comprising [p. 321] them (agriculture, industry, employment), the economy of the territories is umbilically tied to the economy of Israel. For this reason, it was decided at the time of the establishment of the military government that the two economies would not be separated (see Lipschitz, in his book, above-mentioned) along the lines, as it were, of the Armed Truce before 1967. To separate them as aforesaid would impede the possibility of a return to orderly life and prevent the effective observance of the duty regarding the assurance of "la vie publique."

(d) As a result, the military government at its outset took action to equalize rates of indirect taxes. The argument of the Respondents, that economic development in other countries with which Israel and the territories maintain close economic ties cannot leave the territories untouched is therefore reasonable. Having seen that a value added tax must be introduced in Israel, the wheel could not have been turned back without affecting the proper fulfilment of the duties deriving from Article 43. It is such circumstances that E. H. Feilchenfeld meant when he said *(supra* at 49):

> "If the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with 'public order and safety' as understood in Article 43."

The integration and binding together of economies has both good and bad results: just as they found expression in developments and changes in the standard of living, they also required strict attention to the parallel supervision of fiscal developments. That had been done in regard to customs duties and indirect taxes in the past, and the same was required upon the introduction of value added tax in Israel.

That is to say, fiscal or economic developments that are of significance in Israel directly affect the territories either negatively or positively, and both the welfare of their inhabitants and the needs of Israel affect - in a way not given to clear differentiation - the answer to the question of whether parallel fiscal measures should be introduced at the same time in both Israel and the territories. The method of tackling economic problems in Israel cannot, it seems, stop at the old pre-1967 borders which today are open for passage of people and trade. An economy supported by and leaning on the Israeli economy in many different aspects, will be immediately harmed if any attempt is made to restore economic relations to what they were before 1967. In view of the foregoing, the evaluations of the committees appointed to examine the need for the introduction of the value added tax as presented in the Petitioners' reply, cannot be rejected. [p. 322]

A similar approach was adopted by the Israel National Section of the International Commission of Jurists in its publication *The Rule of Law in the Territories Administered by Israel,* (1981), at 94-95, where it is said:

> "Immediately prior to the Introduction of VAT in Israel in 1975, the question arose as to whether a similar arrangement was necessary in the Region in view of the close economic ties that had developed over the years between Israelis and the local population.
>
> "In order to examine this question, two committees of economists were set up, one by the Ministry of Defence and the other by the Ministry of Finance. Both these committees came to the conclusion that the same arrangement in this regard should apply to both Israel and the Region, primarily to avoid causing economic harm to the merchants and traders in the Region.

"More particularly, it seemed to the committees that if such an arrangement were not applied in the Region, the following results would ensue :

(a) Exporters in the Region would not be entitled to recoup the VAT in the same way as Israeli exporters.

(b) Israelis accustomed to purchasing goods or services in the Region would cease to do so because they could not deduct from the VAT chargeable on their subsequent transactions the taxes, other than VAT, that had been paid by the residents of the Region. Consequently, the Israelis would look for alternative sources in Israel so as to obtain such tax benefits.

(c) Residents of the Region accustomed to purchasing goods or services in Israel would pay the VAT in Israel but would not be able to offset such tax on a subsequent transaction in the Region. As a result, [p. 323] they would effectively be making a smaller profit than their counterparts in Israel, particularly where the sale price is fixed.

(d) All Israeli Government companies are prohibited from purchasing goods and services other than those included in the VAT system. As the activities of Government companies in Israel are very extensive, great harm would be caused to those residents in the Region who had been selling them goods and services.

(e) VAT was introduced in Israel within the framework of reform of indirect taxation, and, as a result of its introduction, many other indirect taxes, especially purchase tax, were subsequentially reduced. Therefore, had VAT not been introduced in the Region, indirect taxes there would have been appreciably higher than in Israel."

53. (a) When the Israel Defence Forces entered Judea and Samaria in 1967, there already existed in the Region a framework of legislation that permitted the imposition of excise duties and indirect taxes on certain local and imported products. This legislation allowed for further types of goods to be taxed from time to time, along with changes in the rates of

taxation. On the other hand, no tax like the added excise duty was then in force in the Administered Territories.

(b) Shortly after the military government was set up, the customs barriers between the territories and Israel were abolished and the rates of indirect taxes and excise duties in the territories were equalized with those in force in Israel. At the same time, close bilateral economic relations were instituted that were expressed inter alia in the movement of *trade and manpower*.

(c) The existence has not been proven of any customary rule in public international law that prohibits, in all circumstances, legislative amendments in existing taxes, nor has the existence been proven of any practice accepted as law that adopts an interpretation of Article 49, from the positive provisions of which one may infer the negative with regard to any further powers in the field of taxation. On the contrary, not a few analysts hold views opposite to those put forward by the Petitioners. The main point is that the divergence of the opinion among the commentators is substantial. [p. 324] Accordingly, there is no majority, or decisive majority, in support of the interpretation put forward by the Petitioners.

(d) Even among those commentators whose views are close to those advanced by the Petitioners, there are some who distinguish between direct and indirect taxes, and see the scope of activity of the military government regarding the latter, as being very wide. Customary international law does not contain any prohibition on dismantling customs barriers, provided that the purpose of the action is not to harm the economy of the occupied territories.

(e) Some commentators see Article 43 as a basis for new fiscal legislation if conditions in the territory warrant a departure from what exists and adoption of new rules necessary to fulfil the purposes facing the military government, in light of the first part of Article 43.

(f) In view of all this, we have not seen fit to dismiss the submission of the Respondents that the introduction of the value added tax in Israel also necessitates as a

consequence the introduction of parallel taxation in the territories, that is, that the fiscal solution adopted was *necessitated* by the complex of economic facts confronting the military government, and that it was in the nature of an *essential* measure in the existing political reality, in order to facilitate continuation of a situation embracing a variety of positive economic phenomena that are most important for the territories and its population, in the given situation, and further, and this is the main thing, the argument is not to be denied that the opposite approach, which is pleaded by the Petitioners, is likely to bring serious economic harm to the territories and its population, which would cause security dangers. The reasonableness of the Respondents' approach is patent, and in the light of the comprehensive review of the rules of customary international law in general and the Hague Regulations in particular, in the light of their development, interpretation, and practice that has evolved in consequence thereof, we find no occasion to deny the legality of the steps they took .

54. The Petitioners also submitted that Article 64 of the Fourth Geneva Convention of 1949 purportedly prohibits the imposition of penal sanctions for non-observance of the obligations arising under the added excise Orders. We have expanded earlier on the distinction for the purpose of this Court between conventional and customary rules of the Laws of War. However, even if we had referred to the terms of Article 64, it would not have helped the Petitioners. Among other things, that article permits penal legislation:

> "to maintain the orderly government of the territory."

In view of the recognized interpretation, this concept is parallel to the provisions regarding the permitted purposes of legislation arising under Article 43 (J.S. Pictet, Commentary (vol. N 1956) and G. Schwartzenberger, vol. II, *supra* at 194). There is nothing, therefore, in Article 64 to add to or detract from the case before us. [p. 325]

55. The Petitioners also argued that it was technically impossible to abide by the instructions regarding the keeping of books, as required by the said Order. In view of the nature and extent of the Petitioners' business one can only express surprise that this plea was raised at all. The requirements of a small businessman are elementary, and the owner of a larger business cannot seriously plead this argument.

56. The Respondents opposed the petition of the Petitioners by pleading laches. I shall not deal with the question of whether in the circumstances of the case there was anything on which to base this plea, but it is not to be inferred from the reference to the matter itself that the plea was entirely without foundation as regards the Petitioners or some of them. However, according to the discretion vested, in my opinion, in the High Court of Justice in such matters, and in view of the far-reaching implications of the matter, we have decided that it would be right for this case to be adjudged on its merits and not merely on the basis of some procedural plea.

57. In view of the foregoing, it has been decided to dismiss the Petitions and set aside the orders nisi made thereunder.

The Petitioners in each of the Petitions shall as a group bear jointly and severally the costs of the Respondents in the sum of IS 25,000 for each group of Petitioners in each of the two Petitions.

Judgment given on April 5, 1983.