

International Law & House Demolitions

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Prolonged Occupation

Israel is obligated to create and maintain conditions that will ensure Palestinians' realization of their rights to self-determination, participation without discrimination in public affairs, and their right, as individuals and collectively, to develop and advance their respective communities economically, socially, culturally, and politically, according to their needs. That assertion has been authoritatively upheld by the International Court of Justice (ICJ) in its 2004 Advisory Opinion: *"The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] [...] of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter. [...] Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. The Court would observe that the obligations violated by Israel include certain obligations erga omnes. [...] The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law."*

For a viable, just solution to be attained, and for the realization of the alienable, erga omnes right to national self-determination, the very nature and legality of occupation must be addressed, as well as the principals and outline for a political compact. The legal framework applicable to occupation, in particular the Hague Regulations and the Fourth Geneva Convention, had been envisaged to regulate short-term occupation, and nothing under international humanitarian law (IHL) would prevent the occupying power from embarking on a long-term occupation. However, IHL experts assert that prolonged occupation raises legal issues requiring reinterpretation and adjustment.

The tension between an occupying power's duty to maintain the status quo in an occupied territory (presumably in anticipation of a permanent sovereign quickly assuming control over the territory, immediately following the pacification of armed conflict) and its duty to maintain public order and safety grows ever more significant in the case of a prolonged occupation, such as Israel's. It must therefore be kept in mind that calling on Israel to create conditions for Palestinians to develop and progress is potentially at odds with its obligation to refrain from making legal and physical changes to the territory. However, ICAHD firmly holds that despite the complexities of the situation, Israel's occupation can no longer be considered temporary and that other obligations should be invoked, such as the right to development and the right to self-determination. Hence, when occupation persists to a degree it is protracted, and with no end in sight, the customary principle of conservation must be reconsidered, since a freeze on development, for instance, would inevitably lead to stagnation, and would be detrimental to the population. Moreover, decisions related to economic, social and political rights should be decided with a view towards the welfare of the local population.

It is widely agreed that international human rights law (IHRL) must be referenced in order to flesh out the notion of population welfare, and to delineate and set restraints on the occupying power's actions. In particular IHL experts refer to the rights to health, education, food and housing, enshrined inter alia in the Universal Declaration of

Human Rights of 1948 (Art. 25(1)); the International Covenant on Economic, Social and Cultural Rights of 1966 (Art. 11); the International Covenant on Civil and Political Rights of 1966 (Art. 17); the International Convention on the Elimination of All Forms of Racial Discrimination of 1969 (Art. 5(e)(iii)); and the Convention on the Rights of the Child of 1990 (Arts. 16, 27).

Arguably, the longer an occupation lasts, the more the local population should be consulted on decisions pertaining to the administration of occupied territory, land and people. Moreover, the consent of the local population should be used to determine the validity and legality of intentions behind the occupying power's actions. However, inclusion in the decision-making process would rely solely on the good faith and willingness of the occupying power, a willingness that Israel has consistently failed to demonstrate in the course of five decades of occupation. Therefore, another means to achieving self-determination and upholding IHRL must be considered. ICAHD firmly holds that only the transfer of authority from occupying power to local communities would entitle them to administer their lives according to their political will.

In this context, we are reminded of The ICJ convergence doctrine which holds that a state's obligations under international human rights law are not suspended when the state enters into an armed conflict. In numerous cases, including the 2004 Advisory Opinion, the ICJ held that an occupying power had obligations not only as the occupying power under the Fourth Geneva Convention but also had obligations under any treaty obligations taken by the occupying power in relation to its sovereign territory extraterritorially in occupied territory under its effective control. *"In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law."*

In any case, measures taken by the occupying power should not further its own interests, such as using the assets of occupied territory to benefit its own population or economy. However, In a December 2011 controversial ruling on the legality of Israeli owned quarries in the West Bank, the Israeli High Court of Justice held that the unique characteristics of Israel's belligerent occupation of the OPT, primarily its duration, grant additional powers and rights to the occupying power under international humanitarian law. The Court's misguided interpretation of IHL seeks to modify its provisions on the pretext of prolonged occupation to allow for economic exploitation of occupied territory. This dangerous approach is reflected in the long-term, entrenched relationship of occupied and occupier in the OPT and East Jerusalem, starkly contradicting the Palestinian aspiration for national self-determination.

Moreover, In July 2012, the Edmond Levy Committee appointed by the government to explore the legalization of settlement outposts, completed its work and its report was published. Retired Israeli Supreme Court Judge Edmond Levy and other Committee members (retired District Court Judge Techia Shapiro, and Adv. Alan Baker) upheld the legal doctrine of the Missing Reversioner, claiming that the provisions of the Fourth Geneva Convention do not apply in the case of Israeli occupation of Palestinian land and people. According to the Committee, the Geneva Conventions apply only to the sovereign territory of a High Contracting Party, and therefore do not apply, since Jordan never exercised sovereignty over the region. The Missing Reversioner doctrine was authoritatively negated by the ICJ Advisory Opinion on the Wall (2004) *"Under customary international law, the Court observes, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories have done nothing to alter this situation. The Court concludes that all these territories (including East Jerusalem) remain occupied territories and that Israel has continued to have the status of occupying Power."* While the recommendations have no legally binding effect, they signify a precarious approach towards the emulsion of occupied territory into the recognized sovereign territory of Israel, while disenfranchising its Palestinian inhabitants.

We further wish to recall the statement made by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 Prof. Richard Falk (November 2010): *"The Palestinian experience suggests the need for a new protocol of international humanitarian law, some outer time limit after which further*

occupation becomes a distinct violation of international law, and if not promptly corrected, constitutes a new type of crime against humanity.” For our purposes a crime against humanity means any of the following acts, designated by the Rome Statute of the International Criminal Court: deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, and gender in connection with any crime within the jurisdiction of the Court; and the crime of apartheid.

The crime of apartheid should be understood to mean inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. the Committee on the Elimination of Racial Discrimination (CERD) called Israel in its 2012 concluding observation (CERD/C/ISR/CO/14-16) to take immediate measures to eradicate apartheid policies or practices which severely affect the Palestinian population in the OPT, and which violate the provisions of the Convention on the prevention of racial segregation and apartheid: *“The Committee draws the State Party’s attention to its General Recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urges the State party to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory.”*

Judaization and Annexation: De facto and De jure

The demolition of Palestinian homes and other structures, forced or resulting displacement, and land expropriation are politically and ethnically motivated. The goal is to limit development and confine the four million Palestinian residents of the West Bank, East Jerusalem, and Gaza to small enclaves, thus effectively foreclosing any viable, contiguous Palestinian state and ensuring Israeli control and the “Judaization” of the occupied West Bank and East Jerusalem. Judaization refers to the view that Israel has actively sought to transform the physical and demographic landscape to correspond with a vision of a united and fundamentally Jewish land under Israeli sovereignty in historic Palestine. Israel pursues a concerted policy of land expropriation, demolitions, forced evictions and discriminatory development, displacing Palestinians and introducing Jewish inhabitants. Israeli Government ministries openly continue to advance ‘evict and Judaize’ programmes, whereby Palestinians are displaced, directly or indirectly, and Jewish inhabitants are introduced in their place, despite international remonstrations.

Moreover, following a February 2012 visit to the West Bank and East Jerusalem, the UN Special Rapporteur on the Right to Adequate Housing, Prof. Raquel Rolnik concluded that in the West Bank the territorial fragmentation and the severe deterioration of Palestinian standards of living are furthered by decades of accelerated expansion of Israeli settlement units that expropriate land and natural resources. *“To a certain extent, these territorial and demographic changes promoted in the West Bank mirror changes [that] occurred within the Israeli territory after 1948, where Palestinian presence was progressively limited in parallel to a disproportional support to the expansion of Jewish communities.”* Prof. Rolnik concluded that after the Oslo agreements Israel retained official temporary control over the vast majority of the occupied West Bank (Area C). At present more than half a million Israeli-Jews have settled in the Occupied Palestinian Territory, including East Jerusalem: *“Throughout my visit, I was able to witness a land development model that excludes, discriminates against and displaces minorities in Israel which is being replicated in the occupied territory, affecting Palestinian communities. The Bedouins in the Negev – inside Israel, as well as the new Jewish settlements in Area C of the West Bank and inside Palestinian neighborhoods in East Jerusalem – are the new frontiers of dispossession of the traditional inhabitants, and the implementation of a strategy of Judaization and control of the territory.”*

If current trends of displacement and expropriation prevalent in the West Bank are not stopped and reversed, which seems unfeasible, the establishment of a viable Palestinian state within the pre-1967 borders seems more remote than ever. In actuality, the window of opportunity for a two-state solution has closed, mainly due to the continued expansion of Israeli settlements and access restrictions for Palestinians in Area C, the only contiguous area in the West Bank surrounding Area A and B. Moreover, Israeli Parliament Members, hailing from the Likud ruling party and

other members of the coalition government have recently established a parliamentary caucus for the annexation of Area C. The caucus introduced a draft bill in May 2012, calling for the application of Israeli sovereignty to Area C of the West Bank. Deliberations on the draft bill were postponed by the Prime Minister, but are likely to resume in the fall of 2012 when the Israeli Parliament (the Knesset) reconvenes after its summer hiatus, in the form of draft bill targeting particular areas. The parliamentary caucus relates to the "Partial Annexation and Pacification" program advocated for by the former Prime Minister Chief of Staff, explicitly calling for the de jure annexation of 62% of the West Bank in order to stifle the Palestinian people aspiration for self-determination, and to solidify Israeli dominance. In July 2012 the parliamentary caucus for the annexation of Area C, headed by MK Miri Regev (Likud) tabled a draft bill calling for the de-jure annexation of the Jordan Valley, with the exception of areas under the nominal control of the Palestinian Authority (Areas A and B which constitute less than 13% of the Jordan Valley). The draft bill necessitates the application of Israeli sovereignty to all Jewish territory and settlements in the Jordan Valley, referring to the Palestinian statehood initiative as the pretext for annexation at this time. The draft bill further cites the long standing position of Israeli governments that in any final status agreement signed with the Palestinian Authority, Jewish settlements will remain under Israeli sovereignty. Moreover, the draft bill cites Israeli government claims that in any final status agreement, the Jordan Valley and its Jewish settlements will remain under Israeli sovereignty.

The legislative attempts to De jure annex vast expanses of the West Bank, and continuing efforts to Judaize Area C signal a precarious approach towards the realization of Palestinians self-determination, and the validity and political feasibility of realizing a sovereign, territorially contiguous, viable Palestinian state in the 1967 borders.