Setting a time limit: The case for a protocol on prolonged occupation

Itay Epshtain
11 May 2013

Given that international law does not significantly distinguish between short-term and long-term occupation, what are the legal consequences for the right to self-determination of Peoples under prolonged occupation, and in particular the Palestinian People under Israeli rule? In a recent statement to the United Nations General Assembly High-Level Meeting on the Rule of Law, UN High Commissioner for Human Rights Navi Pillay has urged all states to “fulfil their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all.”¹ In stark contrast, for as long as they have been living under Israeli occupation, dating back to June 1967, Palestinians have been denied such fundamental rights and freedoms, while Israel has negated its inherent responsibility to respect, protect, and fulfil the rights of all those under its effective control. The Palestinian experience may suggest the need for a new protocol of international humanitarian law, setting a substantive or time limit, after which ongoing occupation may become a distinct violation of international law.

The short-term nature of occupation in IHL

The normative framework applicable to occupation, in particular the Hague Regulations and the Fourth Geneva Convention, were envisaged to regulate short-term occupation, although nothing under international humanitarian law (IHL) would prevent the occupying power from embarking on long-term occupation, such as Israel has imposed over the last 45 years. However, IHL scholars, including the International Committee of the Red Cross (ICRC) 2012 expert meeting on occupation and other forms of administration of foreign territory,² assert that prolonged occupation raises legal issues requiring reinterpretation and adjustment. This temporary nature of occupation in existing frameworks is also highlighted by the International Criminal Tribunal for the former Yugoslavia (ICTY), according to whom occupation is “a transitional period following invasion and preceding the agreement on the cessation of the hostilities.”³

Vincent Bernard, Editor-in-Chief of the International Review of the Red Cross, recently asserted in a volume dedicated to occupation law that inasmuch as occupation is considered a temporary, short-term situation, it is difficult to reconcile the principles of occupation law with prolonged occupation. He asks a question that captures one of the main issues concerning long-term occupation: “Doesn’t the prolonged nature of the occupation also require greater emphasis on human rights, in particular on people’s economic and social rights?”⁴

Violations of IHL and IHRL

It is a given that as the Occupying Power, Israel is bound by the provisions of IHL, namely the Hague Regulations of 1907 and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949, both of which constitute binding customary international law. The government of Israel’s claim that occupation law does not apply to the Occupied Palestinian Territory (OPT) has been consistently rejected by the international community, including the UN Security Council² and the International Court of Justice (ICJ)⁶.
Nevertheless, in July 2012, the Edmond Levy Committee appointed by the Israeli government to explore the legalization of settlement outposts, published its findings contrary to the assertion that IHL is *lex specialis* in relation to the territories occupied in 1967. Retired Israeli Supreme Court Justice Edmond Levy and other Committee members (retired District Court Justice Techia Shapiro, and Adv. Alan Baker, former Legal Counsel to the Ministry of Foreign Affairs) upheld the legal doctrine of the Missing Reversioner (or the Missing Sovereign), 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 occupied sovereign territory of a High Contracting Party, and therefore do not apply, since neither Jordan nor Egypt exercised sovereignty over the region in question. Whereas the Committee’s recommendations have no legally binding effect, they signal a precarious slide toward the absorption of the occupied territory into the recognized sovereign territory of Israel, while disenfranchising its Palestinian inhabitants.

It has long been established by UN Treaty Bodies, to which Israel is party, that its practices in the OPT not only violate the provisions of IHL, but further violate Palestinians’ economic, social, cultural, civil, and political rights enshrined in several bodies of international human rights law (IHRL). From the genesis of Israeli occupation of Palestinian Territory some 45 years ago, UN bodies have consistently rejected both the Israeli assertion that IHRL does not apply extraterritorially in the OPT, and Israel’s claim that it can legitimately discriminate on the basis of citizenship between Israelis and Palestinians in the OPT with respect to human rights.

**Deflecting responsibility**

In recent years, Israeli delegates appearing in international forums, including UN Treaty Bodies and the Human Rights Council, have given no indication of mens rea (“guilty mind”) when addressing matters related to Israeli policies and practices in the OPT. This most likely is done with a view toward building defences in international criminal law, the relevance of which can be seen notably in ICC Statute Article 30: “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”

Other defences in international criminal law (duress, self-defence, mental incapacity) do not seem appropriate, and invoking military necessity would be extremely difficult given the nature and scope of Israeli practices, which are pronouncedly administrative.

**Occupation and maintaining the status quo**

The tension between an occupying power’s duty to maintain the status quo in an occupied territory commonly known as the conservationist principle (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 is clear that that calling on Israel to create conditions under which Palestinians may develop and progress is potentially at odds with its obligation to refrain from making legal and physical permanent changes to the territory.

However, I firmly hold that Israel’s occupation can no longer be considered temporary, and that other obligations should be invoked, such as the right to self-determination. Hence, when occupation persists to a degree it is protracted, and with no end in sight, the principle of conservation of occupied territory must be reconsidered. A freeze on development, for instance, would inevitably lead to stagnation and be detrimental to the wellbeing of the population. Moreover, decisions related to economic, social, and political rights should be decided with a view toward the welfare of the local population.
Consequently, 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.

Prolonged occupation as a crime against humanity

In November 2010, Prof. Richard Falk, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, made an important statement on the issue of prolonged occupation: “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.”14

A crime against humanity is understood to mean 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 grounds in connection with any crime within the jurisdiction of the Court; and the crime of apartheid.

International law does not – and most likely will never – prohibit occupation in general. But in cases of prolonged occupation, there should be a way for international law to respond to the metastasized nature of the occupation and clearly distinguish temporary and legal occupation from prolonged and illegal occupation.

The protracted nature of Israel’s occupation of the OPT demonstrates that the drafters of the Hague and Geneva Conventions did not envisage the possibility of prolonged occupation, and suggests that occupation law may be inappropriate and irrelevant in practice in the case of the OPT, and perhaps in other cases of prolonged occupation. In an international system based on equal sovereignty of states and the indelible right to self-determination, prolonged occupation deviates substantially from fundamental principles. Thus, I firmly hold that the international legal system should define prolonged occupation as a prohibited activity under international law, an activity that should be seen as breaching jus cogens,15 and which consequently should be criminalized.

Concluding remarks

In sum, when reaching a conclusion on the matter of prolonged occupation and self-determination, it is paramount that we are guided by the principles of the Charter of the United Nations, and are aware of the established principle of international law on the inadmissibility of the acquisition of territory by force, as well as that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of Peoples is among the purposes and principles of the Charter of the United Nations. Moreover, we ought to be directed by Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, and Additional Protocol I to the Geneva Conventions when recalling that an Occupying Power has obligations not only under the Fourth Geneva Convention, but likewise extraterritorially in occupied territory, pursuant to human rights treaty obligations undertaken by the state in relation to its sovereign territory.

I therefore wish to affirm in particular the applicability within the Occupied Palestinian Territory of international humanitarian law and international human rights law. Being further aware that Israel’s occupation can no longer be considered temporary, it is obliged to respect Palestinians’ right to self-determination, as asserted by the numerous UN Security Council resolutions and the ICJ Advisory Opinion.

www.phap.org
An international system based on equal sovereignty of states and the indelible right to self-determination allows us to determine that prolonged occupation deviates substantially from fundamental *jus cogens* of international law, and consequently may be prohibited. The Palestinian experience suggests the need for a new protocol of international humanitarian law, setting an outer time limit, or a substantive limit related to the exercise of self-determination, after which further occupation may become a distinct violation of international law.

As a concrete step towards clarifying the situation, I wish to suggest that in accordance with Article 96 of the Charter of the United Nations, the General Assembly should request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question: “What are the legal consequences arising from prolonged Israeli occupation of Palestinian Territory including East Jerusalem, and prevalent and related Israeli policies and practices in the aforementioned territory, considering the fact that international law, including the Fourth Geneva Convention of 1949, does not distinguish temporary and legal occupation from prolonged and possibly illegal occupation?”

**About the author**

Itay Epshtain is the former Co-Director and representative to the United Nations Office in Geneva of the *Israeli Committee Against House Demolitions* and former Executive Director of *Amnesty International Israel*. He currently serves as a consultant to the Diakonia International Humanitarian Law Resource Centre. Epshtain is a graduate of Harvard University, Kennedy School of Government Executive Education Program and holds a Diploma in International Environmental Law and a Diploma in International Humanitarian Law from the *International Committee of the Red Cross (ICRC)*.

**Notes**

1 Office of the UN High Commissioner for Human Rights (14 September 2012), "Pillay calls on all States to pledge to strengthen the rule of law, based on fundamental human rights principles."
2 International Committee of the Red Cross (2012), "Occupation and other forms of administration of foreign territory: expert meeting."
5 UN Security Council Resolutions UNSC 242 (1967) and UNSC 338 (1973).
6 International Court of Justice (9 July 2004), "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," para. 78.
8 "The West Bank and Gaza Strip are disputed territories whose status can only be determined through negotiations. Occupied territories are territories captured in war from an established and recognized sovereign. As the West Bank and Gaza Strip were not under the legitimate and recognized sovereignty of any state prior to the Six Day War, they should not be considered occupied territories. Furthermore, the fact that there were no established sovereigns in the West Bank or Gaza Strip prior to the Six Day War means that the territories should not be viewed as "occupied" by Israel. When territory without an established sovereign comes into the possession of a state with a competing claim - particularly during a war of self-defense - that territory can be considered disputed.” Israel Ministry of Foreign Affairs (February 2003), "Disputed Territories: Forgotten Facts about the West Bank and Gaza Strip."
9 See for example the following UN Treaty Bodies Concluding Observations: E/C.12/ISR/CO/3; CERD/C/ISR/CO/14-16; CCPR/C/ISR/CO/3.

10 *The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." Hague Regulations of 1907, art. 43; "Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." Fourth Geneva Convention of 1949, Art. 64.

11 Office of the UN High Commissioner for Human Rights (29 November 2010), “Prolonged occupation, a new type of crime against humanity”

12 *Jus cogens*, also known as a peremptory norm, is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is ever permitted.