



OCCUPATION, COLONIALISM, APARTHEID?  
A RE-ASSESSMENT OF ISRAEL'S PRACTICES IN THE OPT  
UNDER INTERNATIONAL LAW

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— SYMPOSIUM PROCEEDINGS —

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**Colonialism under International Law,  
and Economic Aspects of Israeli Colonialism in the OPT**

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**Part One – Introduction**

Before I start, I want to thank Al-Haq and Adalah for organising this symposium which I hope will be the start of a process of further publicising the HSRC report in the hope that it will have some practical effect. Fatmeh and I are going to discuss some of the report's findings on colonialism. This discussion is in three parts:

- i. I am first going to give a brief introduction to the legal issues on which our analysis of whether Israel is engaged in colonialism in the occupied Palestinian territories is based. This focuses on the definition of colonialism for the purposes of international law; the relationship between colonialism and occupation; and the legitimate powers of an occupant to make law for the territories it occupies;
- ii. Fatmeh is then going to discuss the legal mechanisms which Israel has employed to create and maintain a colonial regime within the occupied Palestinian territories—issues such as the use of military orders, the intrusion of Israeli law into the territories because it applies to settlers: in many ways, the creation of parallel legal systems which deal with Palestinians and settlers; and
- iii. after Fatmeh has finished, I'll then talk about what can be termed economic aspects of colonialism—in particular, the exploitation of natural resources and the structural regulation of the economy.

You will appreciate that we have decided not to discuss the most apparent material aspects of Israel's colonial enterprise—the annexation of East Jerusalem, settlements, the road system and the wall. These are dealt with at length in the report. As we have limited time, Fatmeh and I decided that during this session we should concentrate on the legal meaning of colonialism; the methods used to implement a colonial regime; and the economic dimensions of colonialism.

**Colonialism and occupation:**

The starting point with any discussion of the OPT is that they are territories under occupation. Occupation is not in itself unlawful: it is recognised by law as a possible outcome of an armed conflict, that entails that it is subject to a clearly defined regime of legal regulation.

Principally this lies in the law of armed conflict, but this is supplemented by human rights law. Fundamentally the law of occupation is set out in the 1907 Hague Regulations on the law of war on land and also in the Fourth Geneva Convention of 1949.

Colonialism, on the other hand, is unlawful because, essentially colonialism is the denial of a people's right to self-determination by a State. In the *East Timor* case in 1995, the International Court of Justice declared that self-determination was one of the essential principles of contemporary international law. The core content of self-determination is quite clear. A people entitled to self-determination has the right to decide freely its political status and to pursue its economic, social and cultural development. In 2004, in the *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, the International Court ruled, and ruled unanimously, that the Palestinian people possesses the right to self-determination. This was not a ground-breaking decision: it simply affirmed the consensus already held by the international community.

One of the conclusions of the HSRC report is that Israeli practices in its administration of the Palestinian territories amount to colonialism. In other words, the Palestinian people has been denied its right to self-determination by Israel and prevented from exercising its free choice in the conduct of its political, economic and social life. This is an unlawful situation under international law which has legal consequences not only for Israel but also for the international community as a whole. Nevertheless, the fact that colonialism has become overlaid on the occupation does not alter the fact that the starting place to determine Israel's rights and obligations in the Palestinian territories is the law of occupation. Colonialism can be seen as a specific breach of the law of occupation because it violates fundamental provisions of international human rights law. It is self-evident that an occupant may not purport to use its legitimate powers conferred by international law to allow for the orderly government of occupied territory to pursue an end that is unlawful in itself.

#### **The legitimate powers of an occupant:**

The fundamental rule of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant may not annex the territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory. It requires that the territories involved—the occupied territory and the occupant's home territory—are to be treated as separate entities. This has a number of implications. One concerns a separateness of legal regulation, which Fatmeh will discuss in detail. Another aspect of this principle of separateness is that the economy of the occupying State and the economy of the occupied territory must be kept distinct. This requirement was stated by the US Military Tribunal at Nuremberg, in the *Krupp* case in 1948. It ruled that "the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort". The Tribunal also said that "the economy of the belligerently occupied territory is to be kept intact, except for carefully defined permissions given to the occupying authority—permissions which all refer to the army of occupation". One of the implications of this requirement that the economies be kept separate is that an occupant may not create a customs union between its territory and occupied territory because this almost invariably be an element of annexation. I'll be dealing with this later after Fatmeh has discussed the legal mechanisms Israel has used to create and maintain a colonial situation in the Palestinian territories.

#### **The occupant's legislative powers:**

International law recognises that an occupant may make changes in the law of territory it occupies, for example, to ensure the security of its forces or to promote or protect the interests of the population of the occupied territory. Its right to make legislative changes is, however, limited because an occupant is not the sovereign of that territory. It only has temporary powers of administration which arises from its factual control of the territory. The occupant's powers are regulated by Article 43 of the Hague Regulations which requires the occupant to restore and ensure public order and civil life in territory it occupies. In discharging this duty,

however, the occupant must also respect “unless absolutely prevented, the laws in force in the territory”. This introduces some flexibility and means that although the occupant has legislative power over occupied territory, these are limited. Changes in the law of the territory will be contrary to international law unless they are required for the legitimate needs of the occupation. A further limitation inherent in the occupant’s legislative competence is that any changes that an occupant introduces must respect the temporary nature of occupation. However, when changes are introduced, the need for each change must be scrutinised. The occupant does not have a general power to change or update the law as this would give the occupant powers of sovereignty—and an occupant is not the sovereign of territory it occupies but only its temporary administrator.

Another limit on the occupant’s legislative powers is that it may not adopt any measure which is in breach of international law. It is self-evident that an occupant may not purport to use its legitimate powers conferred by the regime of occupation to pursue an end that is unlawful in itself, for example, to pursue a colonial enterprise.

Depending on the way in which the occupant exercises its legislative competence, the question may arise whether the occupant has annexed the occupied territory, whether in law or in fact, and thus whether the situation may be categorised as colonialism. For example, if an occupant takes action which is not of a temporary nature, this could be seen as an indication that it has colonial intent.

### **The question of prolonged occupation:**

International law assumes that occupation should be essentially a temporary regime to govern territories occupied during hostilities until the conclusion of a peace agreement between the belligerents. The fact that the Palestinian territories have been occupied for over 40 years is anomalous: occupation was never meant to last that long. Nevertheless, the prolonged nature of an occupation does not, in itself, render that occupation illegal, and it is wrong to a prolonged occupation as some special legal category. To do so might suggest that the law of occupation ceases to apply with its full vigour through the passage of time, and thus reward the occupant for prolonging the occupation rather than encourage its termination. Nevertheless, Israel has claimed that a long term occupation in itself modifies the obligations imposed on an occupant by Article 43 of the Hague Regulations. This has been rejected by some academic commentators, but in a number of important cases, Israel’s High Court has employed a notion of “prolonged occupation” to decide whether legislative measures adopted by the Israeli authorities are lawful. This notion of “prolonged occupation” is simply not mentioned in the international law which regulates occupation.

The High Court’s doctrine of prolonged occupation has its roots in the *Christian Society for the Holy Places* judgment which was decided in the early 1970s. In his opinion in this case, Deputy President Sussman ruled that the occupant has a duty to adapt the law to respond to changing needs in economic and social matters. To decide whether changes were legitimate, the occupant’s motives were crucial. Did the occupant legislate in order to advance his own interests or out of a desire to care for the well-being of the civil population? Sussman concluded that any legislative measure not concerned with the welfare of the inhabitants is invalid and goes beyond the authority of the Occupant.

The High Court’s interpretation of Article 43 under its doctrine of prolonged occupation has been criticised on the ground that it has unduly weakened the restrictions placed on Israel’s legislative powers, substituting convenience for necessity. To decide whether a measure was adopted in the interest of the welfare of the inhabitants of occupied territory, the High Court has used the “parallel application” test. This boils down to the idea that if an occupant enacts legislation in occupied territory which is the same as or equivalent to legislation introduced in its own territory, then this change is legitimate under Article 43. This parallel application test is inadequate. An occupant may not amend the law of occupied territory simply to make it agree with its own law, as this does not demonstrate that this change is necessary in the territory it occupies. If necessity is not shown then there is the danger that the occupant could gradually extend of its laws to the occupied territory under a strategy of creeping annexation.

And on that note, it is now time for Fatmeh to discuss the legal mechanisms which Israel has employed to further its colonial ambitions in the Palestinian territories.

[Part Two – Fatmeh on legal mechanisms]

### **Part Three – economic aspects of colonialism**

If you recall, one of the points I made earlier is that an occupant is under the duty to keep the economy of territory it occupies separate from its own economy. A failure to do so can be seen as evidence of an intent to colonise that territory as it is a denial of the economic aspect of self-determination. It denies the right of the occupied territory to freely determine its own economic future by tying it to the economic policy of the occupant. Another way in which the economic dimension of self-determination is expressed is the doctrine of permanent sovereignty over natural resources: that a people entitled to exercise self-determination, such as the Palestinian people, has the right to control and decide how its natural resources should be used.

The desire to control resources has always been a feature of colonialism. The law of occupation itself places strict limits on an occupant's entitlement to exploit the natural resources of a territory it occupies. In principle, if a resource is privately owned, the occupier may not confiscate it. If a resource is publically owned, then the occupier may continue to exploit that resource at the pre-occupation level, but this very limited right of exploitation can only be used for the benefit of the army of occupation. It cannot be used to benefit the occupant's home population. Nor may it be used to benefit settlers: they are civilians who are not part of the army of occupation.

I want first to consider Israel's exploitation of the natural resources of Palestinian territory, and then the wider question of its rejection of the separateness of the economies.

The natural resource I want to focus on is water. In 2008, the International Law Commission adopted a draft law to regulate the use of transboundary aquifers. Article 4 of this draft provided:

Aquifer States shall utilise a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilisation.

This is rather an open formula to determine how a shared water resource is to be used, but it is embedded in international law. It is the standard employed in, for instance, the 1966 Helsinki Rules on the Uses of International Rivers and the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses. This standard was held to be part of customary international law by the International Court of Justice in a case involving Hungary and Slovakia in 1997. Also, in commenting on an earlier version of the ILC's draft Articles on transboundary aquifers, Israel stated that the "equitable and reasonable utilisation" formula had gained State approval.

So, whether surface or groundwater, transboundary water resources, such as those shared by Israel and the OPT, must be used and divided fairly and reasonably. At the start of the occupation, however, Israel asserted control over all water resources in the OPT. This facilitated a discriminatory system of water exploitation and supply to the detriment of the OPT and the benefit of Israeli—whether they were settlers or living in Israel itself.

The construction of the wall is also relevant. Its route is very similar to the red line which resulted from a survey commissioned by Israel in 1977 to delineate those areas of the West Bank from which Israel could withdraw while still retaining control over key water resources used to supply Israel and the settlements. If, as seems to be its clear intention, Israel wants the wall to define the boundary between it and the West Bank portion of a future Palestinian State, then this would be an illegal annexation of the areas in question and constitute colonialism.

Israel's treatment of water resources in the OPT breaches international water law

because it allocates the resource in a discriminatory basis; it breaches the law of occupation because water is not only being used to supply the needs of the army of occupation; and it breaches the principle of permanent sovereignty over natural resources because control of water has been taken out of the hands of Palestinians. In breaching the principle of permanent sovereignty over natural resources, the right of self-determination is also breached—and that is an incidence of colonialism.

Water is only one natural resource being unlawfully exploited by Israel in the OPT. Land is also being abused in the construction of settlements and roads. More recently, similar allegations have been that stone is being unlawfully quarried in the West Bank. We are faced with the situation that Israel, in relation to an array of natural resources, is breaching the principle of permanent sovereignty and thus the economic dimension of the Palestinian people's right to self-determination. As this appears to be an attempt to introduce permanent changes, it is evidence of colonial intent on the part of Israel.

As for the duty that the economy of occupied territory is to be kept separate from that of the occupant, Israel's policies again breach this duty in a manner which frustrates the economic dimension of self-determination and provides further evidence of colonial intent.

As early as 18 November 1968, Moshe Dyan was arguing in the Knesset for the economic integration of the OPT into Israel. Support was gained for this proposal during Cabinet meeting on 21 November 1968. The process of economic integration through the creation of a customs union was cemented by the passage of VAT legislation in 1976. That legislation gave rise to the proceedings in the *Abu Aita* case. In his opinion in that case, Shamgar started from the proposition that it had been decided at the start of the occupation that "the two economies would not be separated" because the economy of the occupied territories was "umbilically tied to the economy of Israel". This was effected by the removal of the customs barriers between the occupied territories and Israel and the introduction of uniform rates of indirect taxation, including value added tax.

Invoking the prolonged occupation argument, Shamgar asserted that freezing the tax regime as it existed at the start of the occupation could, through time, be detrimental to the economy of occupied territory by preventing its development and adjustment to changes in the world and regional economy, as well as to changes in the economy of the occupant. Shamgar also employed the parallel application argument, that VAT had been introduced in Israel as well as in the occupied territories, to claim that this was a reasonable use of the powers granted to Israel by Article 43.

Israel's association agreement with the European Economic Communities had made its adoption of VAT vital as a consequence of the removal of customs barriers between Israel and EEC member States, and Shamgar claimed that this "had direct repercussions in the territories":

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.

The alternative was to separate the economies of the occupied territories and Israel, but this would breach Israel's duties under the law of occupation because as value added tax must be introduced in Israel to fulfil its duties under Article 43 of the Hague Regulations, it must also be introduced into the occupied territories because:

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.

This turns the justification for legislative changes in occupied territory allowed by Article 43 of the Hague Regulations upside down. VAT was introduced into the occupied territories not to serve the welfare of the population of the territories but rather to advance the economic interests of the occupant in its relations with the European Community. This cannot be

justified by Article 43 but, on the contrary breaches that provision. It is impossible to justify this innovation by reference to the test that legislative changes within occupied territory should be determined by its own interests and not those of the occupant. Legislative changes which give preference to the occupant's own interests are unlawful, all the more so when the rationale for its necessity was the earlier unlawful act of the integration of the economies.

When one also takes into account the creation of water and electricity dependence, and the weight given to the interests of settlers unconnected with the administration of the occupied territories in determining policy, it seems apparent that the interests of the population of occupied Palestinian territories have been made completely subservient to Israel's domestic concerns. This is not simply an effacement of the separation of the territories and the distinctiveness of their interests. It amounts to a rejection of the rationale of the law of occupation as it amounts to a de facto annexation which denies Palestinian interests weight in the formulation of policy, far less their active participation. It has occurred, nevertheless, under the cloak of observing the law of occupation, and this perception has been cemented by the intervention of Israel's High Court. In 1990 Roberts observed that the law of occupation had provided the basis for denying the inhabitants of the occupied Palestinian territories normal political activity and thus had effectively kept them permanently under Israeli control as second class citizens or worse:

From this perspective, the longer the occupation lasts, the more akin to colonialism it seems.

That conclusion we found to be inescapable in the course of our work on the HSRC report. We found ourselves faced with the situation of colonialism through legal and economic assimilation, as this denies self-determination in political and economic matters.

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