Lifting the Guise of Occupation and Recourse to Action before the ICJ and ICC

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I Characterization of the Occupation

There is much debate about how Israel’s occupation of the occupied Palestinian territory (oPt) and, more strictly, the occupation of the West Bank and East Jerusalem,  are to be characterized. Is it purely a system of belligerent occupation of foreign territory—along the lines of Nazi Germany’s occupation of the Netherlands during World War II—as argued by those who deny the apartheid analogy? Does the prolonged nature of the occupation give it a special status? Do the illegal acts committed by the occupying power negate its status as belligerent occupation and instead render it a case of illegal occupation?

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1 While Gaza remains occupied territory (because Israel retains effective control over its land crossings, air space and sea space and exercises this control by incursions into Gaza), there are important differences between the West Bank and East Jerusalem on the one hand and Gaza on the other, resulting from Israel’s military withdrawal from Gaza and the withdrawal of settlers from Gaza in 2005. This article therefore focuses on the situation in the West Bank and East Jerusalem.


Does the transfer of settlers from the occupying power to the occupied territory make it a form of colonialism? Does the creation of a dual legal system, in which one group (settlers) is favored over another group (Palestinians) give it the character of apartheid? Or should we forget about all these characterizations and simply label Israel’s presence and actions in the oPt as either genocide or aggression?

Each of these characterizations warrants a lengthy essay, which neither time nor space permits. It should suffice to clarify a number of points. Firstly, Israel is the occupier of Palestine and is bound to comply with the Fourth Geneva Convention, which governs the regime of belligerent occupation. Secondly, Israel has violated its obligations as occupying power by seizing the land of the occupied people for the construction of settlements and the Wall—which is prohibited due to the fact that it constitutes a change that could seriously influence the outcome of a future political settlement. This violation of the occupying power’s obligations is so serious that it could be said to transform the occupation from a ‘normal’ occupation into an illegal occupation. Thirdly, the occupation is undoubtedly prolonged, constituting the longest occupation in the history of international law. Israel claims that it has softened its powers as occupier to accord more rights to the occupied people as a result of this prolonged occupation, but the truth is very different. Israel has used the time it has gained from prolonged occupation to expand settlements, seize land under the guise of building a ‘security wall’ and entrenching its control over Area C. In short, it has used this time to de facto annex large portions of the occupied territory.

Fourthly, however brutal the occupation may be, it cannot be described as genocide or aggression. The crime of genocide requires intent to cause the physical destruction of the Palestinian people in whole or in part and Israel’s occupation falls short of this threshold. Even actions such as Operation Cast Lead is best seen as collective punishment (which is prohibited by Article 33 of the Fourth Geneva Convention) rather than genocide. It should be noted that

5 Virginia Tilley, Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories 79–106 (2012).
6 Id., 107–229.
7 Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 101 (July 9) [hereinafter Wall Advisory Opinion].
8 Zilbershats, supra note 2, footnote 19.