PROLONGED MILITARY OCCUPATION: THE ISRAELI-OCCUPIED TERRITORIES SINCE 1967

*By Adam Roberts**

To what extent are international legal rules formally applicable, and practically relevant, to a prolonged military occupation? The question has assumed prominence because of the exceptional duration of the occupation by Israel of various territories that came under its control in the war of June 5–10, 1967. The situation there has had two classic features of a military occupation: first, a formal system of external control by a force whose presence is not sanctioned by international agreement; and second, a conflict of nationality and interest between the inhabitants, on the one hand, and those exercising power over them, on the other. In highlighting these features, the Palestinian uprising, or *intifada,* which began in Gaza and the West Bank in December 1987, has added urgency to the question of the law applicable to prolonged occupations.

There is a simple answer, and a perfectly serious one, to the central question addressed here. Israel has given express commitments over the years to implement the terms of a large number of treaties, and is also, like all states, bound by international customary law. These are solemn obligations. There is no need to engage in the laborious business of seeking to prove that any or every commitment passes an artificial test of "applicability" in a given situation. Rather, the burden of proof lies on an obligated state to show, if it can, that in the actual situation a given commitment does not apply. Hence, it can be asserted, simply but also persuasively, that the Israeli occupation of various territories has been, and continues to be, covered by a wide range of agreements, with which Israel must conform.

The Legitimacy and Treatment of Resistance

In most cases of prolonged occupation, resistance emerges in some form, whether violent or nonviolent. However, the main international conven-

tions on occupations say little about its legitimacy or otherwise, and only slightly more about the treatment of those involved in it. The most detailed rules governing the treatment of resisters are in Articles 5, 49 and 68 of the fourth Geneva Convention. There is also a much larger, but widely dispersed, body of case law, especially from the time of the Second World War.

The legitimacy of resistance in occupied areas, and of support from abroad for such resistance, has always been a difficult question for diplomatic conferences, courts, writers on the laws of war and governments. It has been raised in sharp form by events in the 1980s in Afghanistan, Nicaragua, Namibia and elsewhere. What is the status of combatants other than the members of the regular armed forces of a country? Is popular resistance (whether violent or nonviolent) a breach of a notional contract between occupier and occupied?[127] Is active outside support of resistance in occupied areas justified? Is the recovery of lost territories, including those under prolonged occupation, a justification for war?[128] These questions, which are by no means new, do not admit of absolute answers: it is placing too heavy a burden on international law to expect answers from it, but it can offer some criteria and guidelines.

In the post-1945 period, following Allied support for resistance in Axis-occupied countries, and the ending of the European colonial empires, the international community has tended not only to support self-determination in principle, but also—and increasingly—to view resistance against outside domination as justifiable. The 1974 UN Definition of Aggression contained the statement:

> Nothing in this Definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right . . ., particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter . . . .[129]

As a corollary of this approach, a degree of recognition has been granted to certain liberation movements. Thus, on November 13, 1974, PLO Chairman Arafat addressed the UN General Assembly. On November 22 of that year, the Palestine Liberation Organization was one of several national liberation movements accorded observer status in the General Assembly and UN-sponsored conferences.[130]

[127] A famous exploration of resistance is Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1950).

[128] For a brief, skeptical discussion of this issue in relation to the 1973 war, which Egypt and Syria justified partly as a war for the recovery of territory under prolonged Israeli occupation, see W. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 286 (1981).

[129] Definition of Aggression, Art. 7, Annex to GA Res. 3314 (XXIX) (Dec. 14, 1974). See also the similar formula in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2625 (XXV) (Oct. 24, 1970).

[130] GA Res. 3237 (XXIX) (Nov. 22, 1974). On recognition, see also *supra* note 122.

In countless statements, UN bodies have criticized the actions taken by Israel in response to resistance of one kind or another. For example, a telegram dispatched by the UN Commission on Human Rights on March 8, 1968, called on Israel "to desist forthwith from acts of destroying homes of the Arab civilian population in areas occupied by Israel."[131] Eighteen years later, in 1986, a General Assembly resolution called on Israel "to release all Arabs arbitrarily detained or imprisoned as a result of their struggle for self-determination and for the liberation of their territories."[132] In 1988, almost a year after the outbreak of the *intifada,* a General Assembly resolution stated that it

> [*c*]*ondemns* Israel's persistent policies and practices violating the human rights of the Palestinian people in the occupied Palestinian territories, including Jerusalem, and, in particular, such acts as the opening of fire by the Israeli army and settlers that result in the killing and wounding of defenceless Palestinian civilians, the beating and breaking of bones, the deportation of Palestinian civilians.[133]

Much Israeli policy and practice in dealing with resistance has deserved criticism. The above-quoted resolution was properly critical of the policy of "force, power and beatings" enunciated by Minister of Defense Rabin on January 20, 1988. This approach—though subsequently clarified by the Attorney General in a ruling that beatings could only be administered to subdue rioters while resisting arrest—led to the issuing of certain orders that were criticized by an Israeli military court in 1989 as "manifestly illegal."[134]

Yet the General Assembly's tendency to criticize almost all Israeli actions against resistance has resulted in failure to take note of those that have recognized legal standards in the treatment of resisters; and an equal failure

[131] Mentioned in GA Res. 2443 (XXIII) (Dec. 19, 1968). House demolitions have been widely criticized as an extrajudicial measure of collective punishment.

[132] GA Res. 41/63A (Dec. 3, 1986). In logic, one could question the claim that the Arabs have been detained "arbitrarily," when the reason for their detention occupies the rest of the same sentence in the resolution. In reality, however, it does appear that many cases of detention and imprisonment have been arbitrary.

[133] GA Res. 43/21 (Nov. 3, 1988). In April 1989, the ICRC stated

> that it had been extremely concerned for some time by the increasingly frequent use of firearms against civilians in the occupied territories, and by acts of physical violence against defenceless people. Over the past 16 months, more than 400 Palestinians and around 17 Israelis have been killed, while thousands of people have been injured. In addition, the institution stated that the evacuation of the wounded, the work of medical staff and the smooth running of hospitals in the occupied territories were hampered by Israeli forces.

ICRC BULL., No. 160, May 1989, at 1.

[134] Judgment of an Israeli military court, May 25, 1989, hearing the case of four soldiers accused of manslaughter of a Palestinian beaten to death after trying to protect his son from arrest. The four were convicted on the lesser charge of brutality. The court said that, under Israeli law, obeying orders is no defense if, as in this case, they were manifestly illegal. Charles Richards, reporting from Jerusalem, concluded: "Prosecutions and disciplinary actions have been rare; the army protects its own. . . . Since the Uprising began in December 1987, two soldiers have been convicted of manslaughter. Nearly 500 Palestinians have been shot dead or beaten to death in this period." The Independent (London), May 26, 1989, at 12, col. 1.

to note that the dilemmas Israel faces are difficult and its rights under the law on occupations real. Consequently, General Assembly resolutions bearing on the treatment of Palestinian resistance have had diminished impact, having been easy for Israelis to dismiss.

In general, United Nations involvement in the subject of resistance has been highly controversial, and has contributed to criticism of the Organization. It has sought simultaneously to maintain the Charter prohibitions on the use of force and to offer an "innovatory adumbration of the principles of the Just War."[135] UN support for struggles of national liberation has often been expressed rhetorically, without addressing important issues. One finds little awareness of the Burkean distinction between the possible existence of a right (e.g., of resistance, or of recovery of territory through war) and the wisdom of actually exercising that right in a given situation. Further, one finds little serious discussion of choice of means of pursuing a given right; for example, UN resolutions have given no clue as to whether liberation struggles ought to be fought within limits derived from, or akin to, the laws of war. This omission has been especially serious since terrorist attacks against wholly innocent civilian targets were already alarmingly widespread in the early 1970s. The record of the United Nations in this respect has not been wholly negative: it has, of course, been involved in drawing up conventions and resolutions dealing with various aspects of terrorism, and it has been increasingly critical of this phenomenon.[136] The real criticism is that UN resolutions have lacked intellectual coherence, and (for a time at least) they lost sight of laws of war principles as a possible restraint not just on occupying powers, but also on liberation movements.

The issue of making legal restraints clearly applicable to liberation struggles is addressed in Geneva Protocol I, which includes within its scope of application "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[137] This formula, which is echoed in countless UN documents, clearly includes the peoples of southern Africa and Palestine.[138] If implemented, Protocol I would require any liberation movement to observe extensive restrictions as regards methods of operation, weaponry and targets. The provisions in respect of such movements, and, indeed, whether the Protocol encompasses such movements at all, have inspired considerable debate, especially in the United States.[139] Nevertheless, the Protocol does establish that there are rules that would apply to participants in liberation struggles as well as to other types of combatant—which is more than can be said of some UN resolutions.

[135] Howard, *The UN and International Security*, in UNITED NATIONS, DIVIDED WORLD 31, 37 (A. Roberts & B. Kingsbury eds. 1988).

[136] For results of the UN consideration of terrorism, including the texts of conventions on the subject, see especially GA Res. 3166 (XXVIII) (Dec. 14, 1973); GA Res. 34/146 (Dec. 17, 1979); and GA Res. 40/61 (Dec. 9, 1985).

[137] Protocol I, *supra* note 27, Art. 1(4).

[138] M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 36, at 51–52. Since neither South Africa nor Israel has become party to the Protocol, its formal applicability to these territories is of course doubtful.

[139] The main positions are outlined in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AJIL 910 (1987); and its continuation, 82 AJIL 784 (1988); *see also* Gasser's further letter, 83 AJIL 345 (1989).