

Israel/Occupied Palestinian Territory, Occupation and Natural Resources

INTRODUCTORY TEXT: The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk underlines in his report how Israel fails to comply with its obligations as an occupying power. The main focus of this report is Israel's practice of exploitation of natural resources, which according to the Special Rapporteur violates not only international humanitarian law, but also international human rights law and international environmental law.

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967

[Source: Human Rights Council 40th Session, Agenda Item 7: Human rights situation in Palestine and other occupied Arab territories, A/HRC/40/73, 15 March 2019, available at <https://www.ohchr.org/EN/pages/home.aspx>, footnotes omitted]

[...]

III. The Right to Water, Natural Resources and the Environment

[...]

27. For the almost five million Palestinians living under occupation, the degradation and alienation of their water supply, the exploitation of their natural resources and the defacing of their environment is symptomatic of the lack of any meaningful control they have over their daily lives as Israel, the occupying power, exercises its military administrative powers in a sovereign-like fashion, with vastly discriminatory consequences. All peoples, including peoples under occupation, enjoy the sovereign right to control their natural wealth, and international law strictly regulates what an occupying power may do with the resources of an occupied territory. Yet the Israeli occupation – with its appetite for territory and settlement-implantation, and its sequestration of natural resources – has become virtually indistinguishable from annexation.

[...]

A. Sovereignty, Occupation and the Right to Natural Wealth under International Law

International Humanitarian Law

29. The relevant body of international humanitarian law, including the law of occupation, applies *in toto* to the Palestinian territory: the West Bank, including East Jerusalem, and Gaza. As the occupying power, Israel is restricted by law to acting only as the temporary administrator of the Palestinian territory until it returns the territory in full, in as short and as reasonable a time as possible, back to the inherent sovereign and protected population: the Palestinian people. As such, the occupying power acquires no sovereignty right over any of the territory, and it is prohibited from taking any steps towards annexation. It must govern the occupied territory in good faith, and it must act as trustee in the best interests of the protected people throughout the occupation, subject only to its own legitimate security and administrative requirements. In previous reports, the Special Rapporteur has determined that Israel is in breach of these foundational principles of international humanitarian law, and it is now presumed to be the unlawful occupant of the Palestinian Territory.

30. While acting as the temporary occupant, among Israel's most important legal duties is to respect and preserve the fundamental rights of the protected population under international law. Regarding the natural wealth of the occupied territory – which includes its water, its soil and lands, its environment and both its finite and renewable natural resources – the occupying power assumes a number of specific legal responsibilities. Three can be mentioned here.

31. First, the occupying power is entitled only to a limited use of the public natural resources of the occupied territory. Article 55 of the 1907 Hague Regulations stipulates that the occupying power is acting “only as administrator and usufructuary” of the public immovable property of the occupied territory. Flowing from this, it must safeguard the capital of these resources according to the principle of conservation. Accordingly, the occupying power has no legal authority to exploit any of the resources and property of the territory for the

benefit of its own economy. The purpose of this rule is to remove any incentive for the occupying power to act in a predatory or avaricious manner towards the occupied territory and its wealth, thereby discouraging war and prolonged alien rule.

32. Otherwise, the occupying power may only use the natural wealth of the territory to furbish its armed forces during the occupation, as strictly required by security, military and administrative necessity and without exceeding normal use. It is required to take steps to restore the economy by enabling the extraction of the territory's natural wealth for the benefit of the protected people, as long as these assets are not wasted, neglected or abused, and they are not usurped for the benefit of the occupier's economy. Any use of this wealth beyond these allowances would likely amount to looting and pillage, which are forbidden acts under the laws of occupation. Furthermore, the occupying power is prohibited from destroying or appropriating moveable private property, except for requisitions in kind for the occupying army, and in proportion to the resources of the territory.

33. Second, the occupying power is absolutely forbidden under the 1949 Fourth Geneva Convention to transfer any of its civilian population into the occupied territory, and according to the Rome Statute, such transfer is considered a war crime. This rule is meant to eliminate the temptation of annexation and colonialism. One of the inevitable consequences of transferring the civilian population is the occupying power's requisition of the territory's natural wealth to sustain this colonializing population; in such circumstances, this wealth is invariably appropriated in a deeply discriminatory fashion to the detriment of the protected population.

34. Third, the occupying power's duty to act as trustee towards the protected population would include the obligation of good governance. Among other things, this obligation would require the occupying power to safeguard, to the extent possible, the ability of the protected population to enjoy at least an adequate standard of living, including all of the necessities for personal and economic life, environmental conservation and the sustainable use of natural resources. These principles of trusteeship and good governance would incorporate the duty to preserve and protect the territory's natural wealth in preparation for the expeditious end of the occupation and the full restoration of sovereignty. The trustee and good governance principle would also include the strict prohibition against discrimination.

International Human Rights Law

35. International human rights law applies at all times to all peoples during all occasions, including during armed conflict and military occupation. Notwithstanding their distinct purposes, international human rights law is to be read as being complementary to international humanitarian law in situations of occupation, thereby satisfying the purpose of both of these bodies of law to provide a broad protection of rights to everyone, including to protected peoples under occupation.

36. As such, the full panoply of social, economic, cultural, political and civil rights enshrined in international human rights law is available to peoples living under occupation to protect their sovereignty over their natural wealth. [...]

[...]

B. The Right to Water in the Occupied Palestinian Territory

41. Water is an indispensable pre-condition for life, a vital public good, an economic cornerstone, a finite resource and a necessary crucible for ensuring human dignity. [...]

42. The right to water requires that water supplies should be sufficient, safe, acceptable for consumption, physically accessible and affordable. It also commands that access to safe and clean drinking water and sanitation must be equitable and non-discriminatory, both within societies and among states. Furthermore, states are required to refrain from interfering with the enjoyment of the right to water, including by refraining from any practice that would limit access to, or destroying, water services and infrastructure as a punitive measure or for the purpose of driving out the protected population. Under the laws of occupation, groundwater is considered immovable public property, and its appropriation by the occupying power is restricted to normal use for military and administrative necessity.

[...]

C. Water in the context of the Israeli occupation

44. There are three primary sources of natural fresh water in the Occupied Palestinian Territory: (i) the Jordan River; (ii) the Coastal Aquifer; and (iii) the Mountain Aquifer, which is divided into three basins: (a) the Western Aquifer Basin; (b) the North-Eastern Aquifer Basin and (c) the Eastern Aquifer Basin. Although the Jordan River forms the eastern boundary of the Occupied Palestinian Territory, Israel has prohibited the Palestinians from drawing any of its waters since the occupation began in 1967 by declaring its river banks a closed military zone and by destroying Palestinian pumps and irrigation ditches. The Coastal Aquifer lies beneath Gaza and the coastal plain of Israel, but its availability as a source of drinking water for Gazans has been severely compromised by over-pumping and by the infiltration of seawater and sewage. The Mountain Aquifer is primarily located in the West Bank, but also crosses the 1949 Green Line; it is the largest water source in the region. Israel annually extracts far above its population share of the waters from this Aquifer.

45. Following the start of Israel's belligerent occupation in 1967, it placed all Palestinian water usage and development under its military control. Military Order No. 92 (August 1967) transferred authority over all water resources in the occupied territory to the Israeli military, while Military Order No. 157 (November 1967) prohibited Palestinians from constructing new water installations or the maintenance of existing installations

without a military permit. These orders remain in force today, and apply only to Palestinians, not to Israeli settlers, who are governed by Israeli law. In 1982, ownership of all West Bank water supply systems was assumed by Mekorot, the Israeli national water company, which is 50 percent owned by the Government of Israel.

The West Bank

46. Although the Oslo accords which Israel and the Palestine Liberation Organization signed in the early and mid-1990s devolved some governance powers to the Palestinian Authority, Israel did not relinquish its primary domination over the waters of the West Bank. For the purposes of this report, Oslo signified [...] significant developments.

47. [...] The accords created three separate areas of control in the West Bank, with Israel in overall security control over the entire territory, and the Palestinian authority exercising civil control over 40% of the territory of the West Bank, and within that, nominal security control over only 18%. In Area C, consisting of 60% of the West Bank, Israel has exclusive civil and security control. All of Israel's West Bank settlements are in Area C, which also contains the majority of the Occupied Palestinian Territory's agricultural lands, water sources and underground reservoirs, to which the Palestinian Authority does not have access.

[...]

Gaza

53. Gaza's water situation is a crisis verging on a humanitarian catastrophe. The United Nations estimated in 2017 that more than 96% of the Coastal Aquifer groundwater – Gaza's sole source of natural water – had become unfit for human consumption, and the Aquifer would be irreversibly damaged as a drinking source by 2020 without a radical intervention. [...]

54. Gaza's water crisis is creating a serious public health danger for its inhabitants. The lack of a secure power supply – because of a war-damaged power-plant, a chronic lack of fuel to operate what remains of the plant, and insecure external sources – has meant that Gaza's waste treatment system functions poorly, when it functions at all. This results in the discharge of 110,000 cubic meters of partially or entirely untreated waste daily into the Mediterranean Sea. More raw sewage is collected in unstable lagoons and waste pools, which often leeches into the subsoil and the Aquifer. All of this has resulted in very high levels of nitrates, chemicals and chlorine in Gaza's waters, which contributes to the threat of waterborne diseases. [...]

55. [...] But, as a recent medical study in *The Lancet* observed: "Occupation and siege are the primary impediments to the successful promotion of public health in the Gaza Strip." Until Israel completely lifts its blockade of Gaza, and until Palestinians in Gaza can exercise their freedom of movement and their right to development free of occupation, even the most imaginative technological solutions to Gaza's water crisis will

always be susceptible to the vagaries of a lopsided power relationship and asymmetrical war.

D. Natural resources and the occupation

56. Israel's approach towards the natural resources of the Occupied Palestinian Territory has been to use them as a sovereign country would use its own assets. Rather than obey the repeated entreaties of the international community to respect and apply international law during its occupation, Israel has repeatedly relied on disfigured and fringe interpretations of the law and on raw economic entitlement to justify its exploitation of the natural wealth of the occupied territory. Three examples illustrate the phenomena.

57. Quarrying: Israel has permitted mining concessions to ten Israeli-operated quarries in Area C of the West Bank. According to Yesh Din, the volume of quarrying has increased substantially in recent years, with production reaching 17 million tons in 2015. Approximately 94% of the production – which yields stone, gravel and gypsum – is shipped to Israel for construction and infrastructure purposes. These West Bank operations make up between 20%-30% of Israel's annual quarrying requirements, with royalties paid to the State of Israel. In 2011, Yesh Din challenged the legality of Israel's quarrying operations before the Israeli Supreme Court. In a ruling which reflects the ritual of the Court to provide judicial sanction for many aspects of the occupation, it dismissed the petition. The Court held that the 1907 Hague Regulations allow for economic development and normal life under occupation, but without distinguishing between the interests of the protected population and the prohibitions against economic exploitation by the occupying power. According to Michael Sfard, an Israeli human rights lawyer, the Supreme Court ruling in the quarry case: "... transforms limitations on the powers of the occupant to exploit the natural resources of an occupied territory into an authorization to advance the very colonial enterprise they were set to eliminate."

[...]

E. Environmental Protection and the Occupation

60. States are obligated to ensure that the enjoyment of human rights is not affected by environmental harm, and to [...] adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights. Environmental justice is an integral part of international environmental law. This concept is grounded in the principles of care and prevention, which oblige both states and non-state actors to protect and nurture the environment, and to reduce, limit and control activities that would cause harm to it. Public consultation and transparency are key to upholding these principles. In the Occupied Palestinian Territory, the occupying power exercises substantial control over the fate of the environment, and in some cases its actions have negative human rights consequences, in particular as a result of the environmental impact of these actions. Further, the environmental impact of Israel's practices may be felt not only by Palestinians, but also by Israelis and others in the region. [...]

61. Waste Disposal: At least 15 Israeli waste treatment facilities have been created in the West Bank – an area beyond Israel’s domestic environmental regulatory regime – to treat such hazardous pollutants as sewage sludge, used oils, solvents, electronic waste, batteries and infectious medical waste. [...] Israel views the West Bank as a separate legal entity where its environmental laws do not apply, yet it treats the territory as its own in that it does not seek the consent of the Palestinian authority in order to dispose of waste. Israel’s actions would appear to violate its trustee obligations as an occupying power, and breach its human rights duties to ensure the provision of quality public health and hygiene for the protected population. In addition, the impact of these “sacrifice zones” on the local water supply, on health of people living in surrounding communities, is unknown.

[...]

IV. Conclusions

63. An occupying power that took its responsibilities under international law seriously would rule in the best interests of the population under occupation, and aim to end its alien rule as soon as reasonably possible. It would recognize that the territory’s natural wealth, environment and resources belongs to the protected people. As such, it would encourage them to assume increasing authority and management over this wealth as a necessary precondition for a short and successful occupation, and a peaceful and cooperative future. An occupying power governed by these principles would not pillage. It would respect both public and private property. Any development or use of the natural resources would be conducted strictly within the limits of usufruct. It would seek to conserve and to preserve. Above all, it would not appropriate the occupied territory’s natural resources for its own gain or exploitation.

64. Israel has strayed extremely far from these legal responsibilities. Indeed, its temporary-permanent occupation of the Palestinian territory has been the photo negative of what is required of a faithful occupying power. During its five decades as occupant, it has appropriated private and public property without lawful authority. It has regarded the Palestinian territory as its own for acquisitive purposes and someone else’s territory with respect to the protection of the people under occupation. Its expropriation of Palestinian hydro resources breaches both international humanitarian and human rights law, and scorns the principles that underlie the right to water. Its usurpation of the territory’s natural resources and its disregard for its environment robs the Palestinians of vital assets that it requires should it ever achieve its freedom. [...]

[...]

DISCUSSION

I. Classification of the Situation and Applicable Law

1. (*Paras 29, 46-47*) How do you classify the situation at hand? What is the applicable law? (Hague Regulations 1907, Art. 42; GCs I-IV, Art. 2)

II. Natural Resources

2. (*Para. 27*) Has the population of an occupied territory a sovereign right to control their natural wealth? Under international law? Under IHL? (Hague Regulations, Arts 43, 52, 55)

3. (*Paras 29-34*) What are the obligations of an occupying power with regard to an occupied territory's natural wealth? Is its use by the occupying power prohibited or limited by IHL? In what circumstances may it use those resources? For economic purposes? For the benefit of the occupying power's population? For the population of the occupied territories? (Hague Regulations, Arts 43, 52, 55; GC IV, Arts 27, 53)

4. (*Para. 32*) Under IHL, is pillage prohibited only in occupied territories? Is it prohibited only when it concerns the property of protected persons? Does the prohibition apply to natural resources? In our case? (Hague Regulations 1907, Arts 23 (g), 28 and 47; GC IV, Art. 33; CIHL, Rule 52)

5. (*Paras 29, 31, 41-42*)

a. How are fresh water resources as aquifers, rivers and lakes protected in IHL? (Hague Regulations 1907, Art. 55; P I, Art. 54 (2))

b. Is water an object indispensable to the survival of the civilian population? If so, what are the consequences for the obligations of an occupying power? (P I, Art. 54 (2); CIHL, Rule 54)

6. (*Paras 29, 31 44-46, 51, 53, 57*)

a. According to the Special Rapporteur, did Israel act in conformity with its obligations regarding the sources of natural fresh water in the Occupied Palestinian Territory? Why not?

b. May an occupying power transfer the running of the water supply system in the occupied territory to a company of the occupying power? (Hague Regulations 1907, Arts 43, 53, 55)

c. Which resources might be subsumed under Art. 52 and which under Art. 55 of the Hague Regulations? Would the qualification change Israel's obligations as an occupying power? Under Art. 52, would it be permissible to sell resources?

7. (*Para. 57*)

a. How does the Israeli Supreme Court interpret Israel's obligations as an occupying power? Does IHL

allow measures for the economic development in the occupied territories? For whom? (Hague Regulations, Arts 43, 55)

b. May an occupying power exploit quarries in an occupied territory? If so, at what pace? May it give licenses to its own companies to exploit such quarries? Does it matter whether the quarries are situated on public or private land? (Hague Regulations, Arts 46, 47, 55; GC IV, Art. 53)

8. (*Paras 54, 60-61*) Which IHL obligations could be violated by Israel because of the poorly functioning waste treatment system and the resulting release of dangerous substances? Can Israel therefore be regarded as having caused widespread, long-term and severe damage to the natural environment? (Hague Regulations, Arts 43; GC IV, Art. 56; P I, Arts 35 (3), 55 (1))

9. When does the exploitation of natural resources amount to a war crime? (ICC Statute, Arts 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii), 8(2)(b)(xvi), 8(2)(e)(v))

III. Interplay of IHL and IHRL

10. (*Paras 27-30, 34-36*) Does IHRL apply during armed conflict? During occupation? What is the relationship between the two branches of international law? According to the Special Rapporteur? According to you? (Hague Regulations 1907, Arts 43; GC IV, Arts 27, 64 (2); P I, Art. 54 (2))

IV. Environment

11. (*Paras 60-61*) Does International Environmental Law apply during armed conflict? During occupation? If yes, what is the relationship between the two branches of international law? (Hague Regulations 1907, Arts 43; GC IV, Art. 64 (2))

12. How is the environment protected under IHL of international armed conflicts? Is the environment explicitly protected? Is every part of the environment a civilian object? What is to be understood by “the natural environment”? (Hague Regulations 1907, Art. 55; P I, Arts 35 (3), 55; CIHL, Rules 43, 44, 45; ENMOD, Art. 1 (1); San Remo Manual, Rules 44, 47 (h); HPCR Manual, Rules 88, 89)

13. Can the maltreatment of the environment amount to a war crime? Even through conduct of an occupying power in a territory it occupies? (ICC Statute, 8(2)(b)(iv))