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THE HAGUE INITIATIVE
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A Report full of dynamite

Dr. Matthijs de Blois

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Introduction

The Special Rapporteur on the situation of human rights in the Palestinian territories, the Canadian law professor S. Michael Lynk, has recently written a report on this situation (the Report).[2] It was sent to the General Assembly of the UN. The Report has the clear objective to heighten the pressure of the "international community" on Israel considerably. It is not without reason that the *Jerusalem Post* headlined: 'Special Rapporteur calls for making Israel a 'pariah state''[3]. The rapporteur's intention is clearly to bring Israel in the same position as South Africa at the time of the Apartheid regime. South Africa has been the object of severe economic sanctions and international isolation. We will first summarize the main points of the Report. Subsequently we will subject it to a critical appraisal.

Main points

The Report, rather than focusing on specific alleged violations of human rights in the territories, is a reflection on what the author qualifies as the occupation of the territories, more specifically, Gaza, the "West Bank"[4] and East Jerusalem (considered to be part of the "West Bank"). He briefly addresses the situation in these areas. So he discusses the electricity crisis in Gaza, the settlement expansion on the "West Bank" and the Greater Jerusalem Bill.

His main issue is the legal framework of the occupation. Lynk observes that Israel's occupation of the Palestinian territory is the longest running military occupation in the modern world. He notes that so far Israel was seen by the international community as the lawful occupant, albeit that it was criticized for violations of the international law of occupation. Lynk now takes it a step further by claiming that the occupation as such has become illegal. In order to substantiate this claim he takes as starting point the central importance of fundamental rights and, more specifically, the right to self-determination in international law. Based on that, he develops a fourfold test to decide if belligerent occupation remains lawful, drawing inspiration from a number of scholarly writings, viz.

1. the belligerent occupier cannot annex the occupied territory;
2. belligerent occupation must be temporary and the occupant must seek an end to it as soon as reasonably possible;
3. the belligerent occupier should act in the best interest of the people under occupation;
4. the belligerent occupier should administer the occupied territory in good faith, in full compliance with its duties and obligations under international law as a member of the UN.

Next to these principles, Lynk defends the applicability of the 1971 Advisory Opinion of the International Court of Justice (ICJ) on Namibia, more specifically, on the administration of the Mandate

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[2] 23 October 2017, A/72/43106.
[3] *Jersusalem Post* 27 October 2017.
[4] The name given by Jordan to Judea and Samaria after it had annexed these territories in 1950.

for Namibia (South West Africa) by South Africa (as a mandatory), leading to the conclusion that the continuation of the latter's presence in the territory was illegal. Lynk uses this Opinion as a precedent relevant for the position of Israel in the occupied Palestinian territories.

After the exposition of this framework, the Report continues with its application to the position of Israel in respect of the occupied territories. Lynk concludes that, contrary to the first point of the test, Israel has both *de jure* (East Jerusalem) and *de facto* ("significant parts of the West Bank", referring to the settlements) annexed occupied territory. He infers from the Israeli policy concerning the settlements since 1967 that it intends to create permanent control over part or all of Palestinian territory, thereby violating the second principle of temporariness of occupation. According to the Rapporteur, Israel has not acted in conformity with the best interest of the Palestinian population, by subjecting them to a harsh and arbitrary legal system, by discriminating them when it comes to access to natural resources and commercial development, by detaching the inhabitants of East Jerusalem from their connections on the "West Bank" and by driving the Gaza Strip back to the dark ages. Israel is in the eyes of Lynk ruling the Palestinian territory as a colony. Finally, he observes that Israel has not acted in good faith, not only because it failed to comply with the first three principles discussed above, but also because it did not implement the numerous resolutions of the UN Security Council condemning the occupation, and also for reason of breaching international humanitarian law and human rights law.

All this leads the Rapporteur to the conclusion that Israel, like South Africa in the past, has breached its fundamental obligations as alien ruler over another territory under international supervision. The determination that the occupation is illegal serves in his view several far-reaching purposes. Firstly, it would encourage member states to prevent or discourage national entities to invest in or sustain the occupation. Secondly, it may encourage national and international courts to apply the laws to prevent or discourage involvement with the occupation. In the third place, it would invite the international community to review its cooperation with Israel, as long as it continues with its occupation. Fourthly, it would create a solid precedent for judging other occupations of long duration. It would, finally, 'confirm the moral importance of upholding the international rule of law when aiding the besieged and the vulnerable.'

The Rapporteur recommends the UN General Assembly to

- commission a UN study on the legality of the occupation,
- consider the advantages of seeking an advisory opinion of the ICJ on this question,
- commission a legal study on the fulfilment of the duties of the Member States to ensure respect for international law, including non-recognition, cooperation to bring an end to an unlawful situation and the investigation and prosecution of grave breaches of the Geneva Conventions,
- consider the adoption of a Uniting for Peace resolution with respect to the question of Palestine, in the event it is determined that the occupation by Israel is no longer lawful. (NB A Uniting for Peace resolution allows the General Assembly to bypass the Security Council in case the latter's decision making is blocked by a veto of one of the Permanent Members.)

A critical appraisal

Maybe more than previous reports of the so-called Palestinian territories, the Report includes an impressive looking legal argumentation. Its implementation could have serious consequences for the position of Israel. Its objective is to pave the way for isolation of Israel in the way South Africa has been isolated in the past. The legal and factual findings of the Report are however highly disputable and, in certain instances, erroneous. It deserves therefore a critical appraisal.

Are the territories occupied Palestinian territories?

The presupposition of the Report is that the territories discussed, the "West Bank" and Gaza, have been occupied by Israel since 1967, meaning since the end of the Six-Day War. They are in the view of the author *occupied* territories in the sense of the international law of belligerent occupation. The Rapporteur further presumes that the territories occupied are *Palestinian* territories. Both presumptions are however questionable. We first should have a look at the historical background of the situation of the territories concerned, an issue completely ignored by the Rapporteur. To start with, we can safely assume that both the undisputed part of the territory of the State of Israel and the "West Bank" and the Gaza Strip were part of the original territory under the Mandate for Palestine. After the proclamation of its independence on the 14th of May 1948 Israel was attacked by five Arab states. This War of Independence resulted *inter alia* in the occupation of the "West Bank" by (Trans-)Jordan and of the Gaza strip by Egypt. It has to be noted that Jordan at that time expelled all Jews from of the Old City of Jerusalem and other parts of the Mandate territory. Synagogues were destroyed. In 1950 (Trans-)Jordan annexed the territory, an illegal act, only recognized by three states. In 1967 both the "West Bank" and Gaza came under control of Israel after it had been the victim of aggression by Arab states, including Egypt and Jordan. So what happened is that Israel brought territories under its control which were originally part of the Mandate territory – according to Article 2 of the Mandate destined for the establishment of the Jewish national home - and *not* territories of another sovereign state. On the basis of Article 80 of the UN Charter the rights of the Jewish people under the Mandate are still relevant in legal terms.[5] Moreover, it is confusing and incorrect to state that Israel occupied *Palestinian* territories. In 1967 there was no Palestinian territory. There never was a Palestinian state. Also, in the (in-)famous Resolution 242 of the Security Council, adopted after the Six-Day War, there is no reference at all to Palestinians or to Palestinian territory. Israel did not occupy the territory of a High Contracting Party under the Fourth Geneva Convention, as is required in Article 2 for its applicability. There was no sovereign ousted from the territory. The Rapporteur chooses to ignore these arguments, which have been widely discussed in the literature. He restricts himself to observing that Israel denies the applicability of the Fourth Geneva Convention and does not recognize the territories as being occupied, without paying serious attention to the legal background of this position. The Israeli position, that the "West Bank" is a territory over which competing claims exist, which should be resolved in peace negotiations, is quoted in a footnote, but not seriously discussed by the Rapporteur. In an approach with a strong emphasis on academic debate this is a remarkable omission. The remark that the Israeli position has been widely rejected, is not as such convincing. The Rapporteur moreover does not address the relevance of the Oslo Agreements, which not only created various degrees of

[5] 'Article 80. 1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.(…)'

autonomy for Palestinians, but also confirm the Israeli position that the competing claims have to be resolved in peace negotiations. This only confirms that the territories are not ordinary occupied territories.

Gaza

Even if one would ignore what has been said above and accept the "West Bank" as being occupied, it is difficult to understand how the Rapporteur can assume that Gaza should be seen as occupied territory. Israel withdrew its military and civilians from this territory in 2005. It has not any control over the international affairs of that territory and its inhabitants. Gaza is ruled by Hamas. Israel only controls its borders with Gaza, it preserves a naval blockade of its coast and controls the airspace to protect itself. But that is not the same as an occupation in the sense of international humanitarian law. Note in this connection Art. 42 of the Hague Regulations concerning the Laws and Customs of War (1907): 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' It is interesting to see how this provision has been interpreted by the European Court of Human Rights in its Judgment in the case of Sargysan vs. Azerbaijan: 'The Court notes that under international law (in particular Article 42 of the 1907 Hague Regulations) a territory is considered occupied when it is actually placed under the authority of a hostile army, "actual authority" being widely considered as translating to effective control and requiring such elements as presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign…' [6]. Applied to the situation in the Gaza Strip that would lead to the conclusion that it is not occupied. Rapporteur Lynk nevertheless considers Gaza to be occupied. He suggests that Israel is responsible for the humanitarian situation in Gaza[7]. That seems, by the way, to be inconsistent with an observation, earlier in the Report, that the problems with the supply of electricity are the consequence of the internal political divide between Hamas and Fatah.[8]

The illegality of the occupation

The main objective of the Report is to convince the General Assembly of the illegality of the occupation. In this regard the Rapporteur develops a theory which lacks a firm basis in the international humanitarian law of occupation. Even if we would for a moment follow the idea that the territories are indeed occupied, the reasoning is not convincing.

The first argument is about annexation. The author suggest that Israel has annexed not only East Jerusalem, but also *de facto* significant parts of the "West Bank" because of the presence of settlements and settlers. This is difficult to understand having regard to the recent history. It appears that Israel has been prepared to give up territories and to remove settlers. Think of Gaza, but also of the proposals made by Israel during negotiations with representatives of Palestinian Arabs. The existence of settlements therefore does not automatically imply annexation.

The second point is the temporariness of the occupation. In Lynk's view the occupation is now 50 years old. The passing of time makes in his view the occupation illegal. Even if the occupation lasted longer

[6] ECHR (Grand Chamber) 16 June 2015, *Sargysan v. Azerbaijan* (par. 144). See also Marko Milanovic, European Court Decides that Israel is not occupying Gaza, *EJIL: Talk!* June 17, 2015, https://www.ejiltalk.org/european-court-decides-that-israel-is-not-occupying-gaza/

[7] Par. 55.

[8] Par. 9.

than some other occupations in recent history, that fact as such does not make it illegal. The author compares the situation with the allied occupation of Germany after WW II, the American occupation of Japan and the occupation of Iraq, led by the US. He surprisingly overlooks the occupation of Tibet by the People's Republic of China, since 1950, that is 67 years ago. There is no rule in international humanitarian law that imposes a time-limit on occupation. Of course occupation is meant to be temporary. But it is up to the belligerent parties to negotiate a peace treaty, which may result in transfer of territory. However, the history of Israeli-Palestinian negotiations is not very promising so far. Israel has to deal with "partners" who have refused to recognize Israel as a Jewish state, which is of vital importance having regard to the blatant antisemitism prevalent in the Palestinian society. Moreover, there are factions of the Palestinians that even refuse to accept the existence of Israel as such.

When it comes to the third element of the test developed by the Rapporteur, i.e. the best interest of the population, we have to make a few remarks. It cannot be denied that Palestinians in the territories face serious difficulties as a consequence of the situation. Having said that, it has to be observed that the Rapporteur completely overlooks the security situation. It is a fact that threats and attacks against Israel and its inhabitants do originate from the territories, which necessitates Israel to take security measures. The controversial security barrier (called a *Wall* by the General Assembly of the UN and the ICJ), for example, was a response to the Second Intifada. The Rapporteur complains about the fact that Palestinians and Israeli settlers are subject to different legal systems. We guess however that subjecting the Palestinians in the territories to Israeli law would lead to the protest that Israel has annexed the territories, as they indeed did with East Jerusalem, by the introduction of Israeli law after the reunification of the city in 1967.

Finally, as to the good faith test, we observe that Israel's non-compliance is primarily measured by its refusal to act in conformity with UN Security Council resolutions on the occupation. For an international lawyer it would have been appropriate to note that none of the resolutions referred to are binding under international law. They have not been adopted under Chapter VII of the Charter of the UN. Therefore, the fact of not heeding these resolutions cannot support the conclusion that the occupation is illegal.

Is there sufficient similarity between mandate territory and occupied territory?

Another point is that the rapporteur uses the 1971 Advisory Opinion on Namibia, concluding that South Africa's presence there was illegal, as a precedent relevant for the position of Israel in the occupied Palestinian territories. Also this argument is flawed. The position of a mandatory under the mandate system of the League of Nations differs fundamentally from the position of an occupying power under the law of belligerent occupation. A mandatory has authority over a territory in order to lead that territory and its inhabitants to independence. It is a trust, subject to a well-structured system of international supervision. The legal position of an occupying state under the law of belligerent occupation is different. Occupation is the result of hostilities. The control exerted by the occupying state is a function of the military interest it has to protect its own security, notwithstanding the fact that the occupying power has obligations vis-à-vis the inhabitants. It is up to the parties, not to an international supervisory institution, to bring it to an end. Moreover, in the light of the reasoning developed above, that the "West Bank" and Gaza are parts of the territory under the Mandate for Palestine, the similarity with the Namibia-situation is even more remote. In that perspective Israel is not to be compared with South Africa, but with Namibia.

The choice by the Rapporteur of the Namibia Advisory Opinion as a precedent is of course not by chance. It serves in his Report as the prelude to the conclusion that Israel should be internationally isolated in a way similar to that of South Africa during apartheid.

Conclusion

The Rapporteur suggests that the conclusion that the occupation is illegal should motivate states to actively support a *B*oycott of Israel and *D*isinvestment in that country. The international community should subject Israel to *S*anctions leading to international isolation. It is a remarkable example of what seems to be common practice within the UN: the singling out of Israel, while other states controlling contested territories (such as China, Turkey, Morocco etc.) are not the target of such measures. This singling out of the Jewish state brings the criticism of Israel close to antisemitism. The Recommendations to the General Assembly, including the suggestion to submit a request for an advisory opinion of the ICJ, are intended to decorate the way to isolation with legal arguments. We have shown that the arguments submitted by the Rapporteur are highly questionable and, in certain cases, wrong.