

Laws of occupation

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Introduction

Occupation under international law covers two distinct concepts. The first is occupation as the basis for the acquisition of title to territory that is deemed to be *terra nullius*. This lay at the heart of the advisory opinion given by the International Court of Justice on the Western Sahara that has already been discussed. It is worth noting the oral statement by Judge Bedjaoui, the then Algerian judge on the International Court, who decried nineteenth century international law as a game played by European states to justify and give legal effect to their colonial ambitions – an ‘uncontrollable weapon in their hands’.¹ The ongoing failure of the international community to give effect to international law in the case of the Saharawi people illustrates Judge Bedjaoui’s concerns.

The second legal concept of occupation relevant to Western Sahara since 1975, is that of belligerent or military occupation. In this presentation I shall look at the legal definitions of belligerent occupation and its consequences. What might be termed ‘occupation law’ is both complex and lacking in clarity. These difficulties derive from both legal and factual considerations. Factually, the state of occupation covers a range of political and ideological scenarios. These are as diverse as the post-war occupations of Germany and Japan following total surrender in 1945, the Soviet occupation of Afghanistan in the 1980s (following, in Soviet terms, an invitation to intervene), the long-lasting Israeli occupation of the Occupied Palestinian Territories (following the 1967 conflict), and the short-lived Iraqi occupation of Kuwait in 1990-1 (following invasion condemned by the UN Security Council).

Some occupations have received widespread attention and legal analysis, most recently the United States and United Kingdom occupation of Iraq in 2003-4, while others, such as the Western Sahara, have been comparatively little publicised.²

Legally, occupation law is found across a range of treaties, soft law instruments, customary international law, and, in the case of Iraq, modified by Security Council (SC) resolution. This last has led to a spate of litigation and academic writing which poses the question whether occupation law has undergone significant transformation, or whether the situation in Iraq is exceptional and of little precedential value. The very multiplicity of legal regimes creates inconsistencies and gaps in the law. Despite the inconsistencies and uncertainties in occupation law, one aspect is uncontroversial: occupation is the flip side of the coin to self-determination.

Morocco as an occupying power in Western Sahara

First it is necessary to consider the legal definition of occupation – when it starts and when it terminates. The core instruments are The Hague Regulations, annexed to the Hague Convention respecting the Laws and Customs of War on Land 1907, which are widely accepted as customary international law, and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva IV) supplemented by Additional Protocol I, 1977. Article 42 of the Hague Regulations, determines that ‘Territory is considered occupied when it is actually placed under the authority of the hostile army’. Geneva Convention IV, article 2 affirms that it applies to ‘all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’. Geneva IV was applicable in 1975 as both Spain and Morocco were parties (Spain since 1952; Morocco since 1956).

The authoritative International Committee of the Red Cross (ICRC) commentary on this paragraph makes it clear that it encompasses cases where the occupation has taken place without a declaration of war and without hostilities, which would encompass the Green March. Nevertheless, the ICRC has remained equivocal about the status of Western Sahara as occupied territory. It is irrelevant whether the territory was occupied pursuant to an unlawful use of force in international law – it is the fact of occupation which creates the legal regime. Occupation is a matter of fact resting upon the assertion of authority and control.

The other definitional question is when does occupation end? Essentially, it ends when there is a change of status such as through the lawful exercise of self-determination, or the withdrawal of the occupying force. Geneva Convention IV, article 6, envisages occupation to be short-lived as it speaks in terms of the end of military operations, and states that the Convention applies until one year after this time. Protocol I, article 3(b), rescinds this language and states simply that the application of the Geneva Conventions and Protocol I (for parties to it) ceases 'in the case of occupied territories, on the termination of the occupation'. Termination of occupation is also a matter of fact and even formal transfer of power may not terminate it. In the case of Iraq some commentators have argued that the formal transfer of power from the Coalition Provisional Authority (CPA) to the Interim Government of Iraq that took place on 28 June 2004 and was endorsed by Security Council resolution 1546 did not change events on the ground. The United States and United Kingdom troops remained, albeit now as a multinational force at the request of the Iraqi government, and laws promulgated by the CPA remained in force. Adam Roberts concluded that occupation may have formally ended but the factual, and therefore the legal

situation, did not change completely overnight.³ If internal violence reaches a sufficiently high threshold to constitute armed conflict not of an international character, common article 3 to the Geneva Conventions would also apply.

From these legal definitions Adam Roberts has distilled two main characteristics of military occupation: first, a formal system of external control by a force whose presence is not sanctioned by international agreement, and secondly, a conflict of nationality and interest between the inhabitants and those exercising power over them.⁴ Another commentator describes occupation as the actual conditions under which a population is living.⁵

If we consider the Western Sahara in light of these definitions, whatever its status immediately prior to 1975, it was not, on the authority of the ICJ, part of Morocco,⁶ consider that the current position is that Morocco's exercise of *de facto* administrative authority, backed by its military control over more than two-thirds of the Western Sahara, constitutes a formal system of external control. As the United Nations Legal Adviser spelled out, the 1975 Madrid Agreement did not transfer sovereignty over the territory, nor did it make any of the signatories the administering power – a status which Spain could not have transferred unilaterally.⁷ The continued search for 'a just, lasting and mutually acceptable political solution'⁸ shows that Morocco's external control has not been sanctioned by international agreement and there is continuing conflict of interest between the Saharawi people and the controlling authority. Morocco is in occupation of that area but not, of course, in the refugee camps in Algeria.

The factual situation is backed by the resolutions and practice of the United Nations, although unlike the case of Iraq in 2003-4, neither the Security Council nor the General Assembly has spelled

out that occupation law applies. In 1975 the Security Council 'deplored' the march into the Western Sahara and called upon Morocco to withdraw from the territory.⁹ It did not adopt another relevant resolution until 1988 when it referred only to the 'question' of Western Sahara but did support the holding of a referendum for self-determination. The General Assembly has used the term occupation. General Assembly resolution 34/37, 21 November 1979 deplores what it called the 'aggravation of the situation resulting from the continued occupation of Western Sahara and the extension of that occupation to the Territory recently evacuated by Mauritania'. Resolution 35/19, 11 November 1980, largely reiterated this language. Subsequent resolutions do not repeat the term 'occupation', but they do reaffirm the need for self-determination – the antithesis of occupation. With respect to practice, in 1963 the General Assembly had included Western Sahara in its list of Non-Self-Governing Territories under Chapter XI of the Charter¹⁰ and placed it on the agenda of its Special Committee of 24 on Decolonisation. In 1976 Spain informed the Secretary-General that it had terminated its presence in the Western Sahara and considered itself exempt from any further responsibility of an international nature in connection with the administration of the territory. Morocco has never been listed as the administering power of the territory in the list of Non-Self-Governing Territories, and has never transmitted information on the territory under United Nations Charter, article 73(e). In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonisation, which remained to be completed by the people of Western Sahara. In the so-called Second International Decade to Eradicate Colonialism, 2001 to 2010, the General Assembly lists sixteen non-self-governing territories, including the largest – Western Sahara. No administering power is listed.

Characteristics of occupation

Occupation law is part of what is generally termed international humanitarian law (IHL) or the law of armed conflict. It perhaps epitomises what Mr Ruddy described yesterday as the ‘law for highway robbers and gangsters’. The legal regime does not create the status of occupation – exercise of power does this – but rather imposes constraints and obligations upon the occupier in an attempted mitigation of naked military force. Roberts describes occupation law as both permissive (accepting that the occupier can exercise certain powers) and prohibitive (imposing limits on the exercise of powers). The basic aim of occupation law is to provide minimum humanitarian standards and to protect civilians – the basis of IHL in general – not the occupying army. Occupation law does not determine status, and cannot detract from the right of peoples to self-determination. On the other hand, it allows the occupier to ensure the security of its military presence and administration. It is also well established that ‘International law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory’.¹¹

There are some particular characteristics of Western Sahara as occupied territory. First, the occupation is long term, what Roberts has called ‘prolonged military occupation’.¹² This is not a legal term of art but describes an occupation that lasts over many years – Roberts suggests in excess of five years – so that the temporary character is lost. Hostilities are likely to decrease so that in some ways at least, the occupation comes to resemble peacetime, for example through the creation and functioning of institutions and the emergence of civil society movements among the inhabitants of the territory. Clashes between the latter and the authorities of the occupying power and ensuing human rights abuses are extremely likely to occur.

Secondly, it is unilateral belligerent occupation not multilateral occupation under the auspices of the United Nations in the form of an international territorial administration as was the case in Kosovo or East Timor prior to the independence of both those territories. Western Sahara has been the subject of multiple Security Council resolutions, but the Council has not used its mandatory powers to sanction Morocco. On the other hand, neither has it endorsed the occupation as was arguably the effect of Security Council resolution 1483, 22 May 2003, in the context of Iraq. In that resolution the Security Council transformed the applicable law through enhancement of the occupiers' powers beyond those contained in the Hague Regulations and Geneva Conventions.¹³ This has not been the case with Western Sahara. Indeed, throughout the over thirty years during which Western Sahara has been on the Security Council's agenda, the Council has imposed only a light institutional footprint and has avoided a coercive United Nations Charter Chapter VII approach. For example, although the Council adopted the 1991 Settlement Plan, it did not do so under United Nations Charter, Chapter VII, did not designate the situation as a threat to international peace and security, and established no enforcement mechanism. After the 2001 Framework Plan, Algeria proposed a form of international territorial administration whereby the United Nations would assume sovereignty over the Western Sahara in order to implement provisions that appeared identical to the 1988 Settlement Plan. The Secretary-General and his Personal Envoy considered this option to have no more likelihood of working than the Settlement Plan.¹⁴

Third, the occupation is not acknowledged as such by Morocco, which in official United Nations documents, such as reports to the United Nations human rights treaty bodies, call it Moroccan Sahara.¹⁵ The Office of the High Commissioner

for Human Rights noted in its 2006 Report into human rights in the area that Morocco allows no questioning of its sovereignty over the territory. Accordingly, Morocco also does not acknowledge the applicability of occupation law. This stance is not relevant to its status as occupying power.

Legal obligations arising from occupation

Obligations of status

Legal obligations resting on an occupying power may be considered as constituting two types. There are those relating to the status of the territory, and those relating to the obligations of the occupier towards the inhabitants of the occupied territory. The former arise under general principles of international law, for example those relating to the prohibition of the use of force, equality of states, and non-intervention. The most important is that occupation does not denote any change of status: it is not annexation, nor is it 'liberation', whatever the occupiers might claim.¹⁶

Occupation does not transfer sovereignty over the territory to the occupier and does not denote permanency. This distinction is the foundational basis for the distinct legal regime of occupation. Any purported annexation, or agreement for annexation, such as the 1975 Madrid Agreement, is ineffective and does not change the status of occupation. These principles derive from a range of international instruments from the United Nations Charter onwards, but are perhaps articulated most clearly in the 1970 General Assembly Declaration on the Principles of Friendly Relations and the 1974 Definition of Aggression. The former states that :

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not

be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

The final sentence is absolute and applicable to all situations of use or threat of force, making the status of the Western Sahara in 1975 when the occupation commenced, irrelevant to this issue.

Nor does it matter for the question of status that the occupation has become prolonged. An argument was put forward after Australia entered into the Timor Gap Treaty, 1989 with Indonesia that, however Indonesia had acquired access to the territory, at some point Australia was entitled to recognise that an illegally acquired title had consolidated into a legal one:

There comes a time when realities, however illegal or inequitable they may have been initially, appear to have become irreversible and the world community's interest in orderliness and stability justify cloaking it with the mantle of legality.¹⁷

This so-called doctrine of historical consolidation denotes a cynical preference for effectiveness over legality that was argued to represent existing international law. However, it discounted the resolutions of the General Assembly and Security Council and is disproved by state practice. The Baltic states regained their independence after over forty years of occupation; East Timor itself gained independence as a consequence of the 1999 referendum after over twenty years of occupation. Further, the attempts since 1988 to resolve the status of Western Sahara contradict any assumption of consolidation of the *status quo*. I consider this doctrine to have no credibility under international law.

Nevertheless it must be admitted that some language has been used in political documents that seems implicitly to deny the status of occupation. For example, the Draft Framework

Agreement 2001 used the wording 'preservation of territorial integrity [of Morocco] against secessionist attempts from within or without the territory'.¹⁸ The same paragraph also makes symbolic concessions to Morocco such as use of its flag within the Western Sahara. Similar language is used in the Peace Plan. Secession implies separation or breaking away from an existing state, which continues in existence, in order to create a new state.¹⁹ Unlike a legitimate claim to self-determination, there is no international law right to secession, and Polisario rightly saw this language as militating against the status of occupation and as a way of allowing for annexation, in effect amounting to *de facto* recognition of Morocco as administering power.²⁰ Such language should be resisted so as to avoid any confusion – or dilution – as to the legal status of occupation.

Obligations with respect to the inhabitants: International humanitarian law

The occupier's obligations with respect to the peoples of the territory arise under a number of treaties, the two most important being the Hague Regulations and Geneva Convention IV articles 47 to 78. The latter is supplemented by Additional Protocol I, 1977 to which Morocco is not a party. Morocco is also a party to the Hague Cultural Property Convention, 1954.

To whom do the laws apply? The Hague Regulations refer generally to 'inhabitants of occupied territory', while Geneva IV applies to protected persons, defined in article 4 as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of ... occupation, in the hands of ... an Occupying Power of which they are not nationals'. Geneva Convention IV, article 47, stipulates that 'Protected persons who are in occupied territory shall not be deprived, in any case

or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, ... nor by any annexation by the latter of the whole or part of the occupied territory'.

Although the occupier does not acquire sovereignty over the territory, it does acquire administrative rights within the restraints of occupation law and obligations. Hague Regulations, article 43, requires the occupier to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. Geneva Convention IV, article 64, largely repeats this 'conservationist' approach whereby the occupying power is not permitted to impose wholesale change or to extend its own laws or structures to the territory.²¹ The rationale is that the legal situation in the territory should be conserved until restoration to the legitimate authority takes place and changes are then carried out by that authority. The occupying power may nevertheless suspend or repeal local laws where it is necessary for the security of its administration or armed forces. It must also maintain public order and security for the inhabitants of the territory and to this end have an effective administrative regime, but one that is separate from that applicable in its own territory (to avoid a creeping unification). The internal division of Western Sahara into four provinces with assigned seats in the Moroccan parliament falls foul of this requirement. The occupier has a substantial discretion in the form of administration, for example whether it is civilian or military, through an imposed system, or through local people.²²

However, it may be that internal change and not conservation is deemed to be in the interests of the international community, as was the case with occupied Germany and Japan. In the case of Iraq (2003-4) Security Council resolution 1483, 22 May 2003

gave wide powers to the CPA 'to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future'. The CPA assumed wide powers. In its Regulation no 1, it vested in itself all legislative, executive and judicial authority necessary to achieve its objectives and thereafter adopted over one hundred Orders and Regulations. These included the disestablishment of the Baathist party, the dissolution of the armed forces, and radical restructuring of financial laws and institutions, the civil service and the media, which went way beyond the restrictions imposed upon occupying powers by the Hague Regulations and Fourth Geneva Convention. Such 'transformative' actions could only be legally justified if authorised by the Security Council. As stated earlier, the Security Council has exercised no such decision-making powers in the case of Western Sahara.

The obligations imposed on the occupier provide for the legal protection of the civil and political rights of occupied people, including procedural guarantees with respect to trials. The Hague Regulations, article 46, requires the occupier to respect family honour and rights, the lives of persons, private property, religious convictions and practice. Geneva Convention IV, article 27, builds on this and also stipulates that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.' There are also positive obligations relating to the provision of education;²³ food and medical supplies to the civilian population;²⁴ maintenance of medical and hospital facilities;²⁵ distribution of books and articles for religious needs.²⁶ Three obligations are especially significant in the case of Western

Sahara. First, is the prohibition of collective punishment;²⁷ second, is the prohibition on exploitation of the economy or resources of the occupied territory for the benefit of the occupier; and third is that the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.²⁸ The Hague Regulations prohibit an occupying power from undertaking permanent changes in the occupied area unless these are the result of military needs in the narrow sense of the term, or unless they are undertaken for the benefit of the local population – population changes through the arrival of settlers are thus prohibited.

The duty on those within the territory to obey an occupying power has been a highly contested issue, not least because of changing notions of the legal nature of occupation. Older texts are likely to assert a duty of obedience because in classical international law, military occupation could lead to the annexation of the territory, a situation which post the United Nations Charter is no longer legally possible. Since sovereignty does not pass, the occupier cannot demand an oath of temporary allegiance from the inhabitants of occupied territory²⁹ and inhabitants cannot be convicted of 'war treason' if they commit hostile acts against the occupant. The occupier cannot force the inhabitants to perform certain acts, for example, to furnish information about the army of the other belligerent, or about its means of defence;³⁰ or to 'compel protected persons to serve in its armed or auxiliary forces', or apply pressure which aims at securing voluntary enlistment, or to compel protected persons 'to undertake any work which would involve them in the obligation of taking part in military operations'.³¹ If the occupier ordered such actions the individual would be entitled to refuse. On the other hand, the occupier is entitled to pass laws and regulations to maintain order and to ensure its own security, and to take action against a person

who fails to comply. Indeed, the implication of Geneva Convention IV, article 68, is that the occupying power may take action against a protected person who does not comply with such requirements. The United Kingdom Ministry of Defence states that:

While the orders of the authorities of an occupying power may be lawful, and while the occupant is entitled to require obedience to lawful orders, it does not necessarily follow that failure to comply with such orders is illegal under the law of armed conflict. However the inhabitants are liable for punishment by the occupying power should they disobey legislation, proclamations, regulations, or orders properly made by that power.³²

Bothe³³ says first that those within the occupied territory owe no duty of obedience to the occupying power, but that the occupying power is allowed to enforce obedience of its orders within the limits of Geneva Convention IV and the Hague Regulations. However, this does not make violations against those orders internationally wrongful acts; *'it only makes non-compliance risky'*.

I described earlier the situation in the Western Sahara as one of prolonged occupation which raises some particular issues. Since Geneva Convention IV essentially envisages a short occupation, it in fact says little that is useful for prolonged occupation, for example with respect to safeguarding economic life or the appropriate or legal standards of treatment of those involved in resistance activities. There is an inherent dilemma in prolonged occupation: the requirements under occupation law that inhibit the occupier from changing law must not be abused so that the occupied territory gets stranded in a form of legal vacuum whereby it becomes socially and economically underdeveloped. Economic development requires more than simple prohibition of exploitation, and indeed the very prolongation of the occupation provides a good basis for saying that occupiers must have wider powers to allow for the development of political and economic

institutions. However, allowing – even requiring – the occupier to undertake development, legal or other social programmes may come too close to annexation. Therefore prolonged occupation may be a basis for limiting – at least legally – the occupier’s powers.³⁴ Richard Falk³⁵ suggested some years ago that a specific convention on prolonged occupation be adopted to fill this gap in the law, including requirements of international supervision and monitoring. Two further concepts are important here. The first is what has been termed humanitarian, or transformative occupation. The second is the role of human rights law. The dilemma may be illustrated by reference to the way Morocco has implicitly attempted to draw upon both concepts in its assertions to the United Nations’ Committee on Economic, Social and Cultural Rights – the monitoring Committee for the Covenant on Economic, Social and Cultural Rights (ICESCR).

Obligations with respect to the inhabitants: Human rights law

First, however, it is desirable to make some more general points about that other body of law that is applicable alongside international humanitarian law in occupied territories – human rights law. The occupier’s need for security and the frustration and bitterness felt by the occupied population (especially in prolonged occupation) make the situation of occupation ripe for resistance, engendering coercive responses and human rights abuses. International humanitarian law incorporates guarantees of human rights, including particularly Additional Protocol I, article 75, which provides a catalogue of fundamental rights (prohibition of violence to the life, health, or physical or mental well-being of persons, in particular: murder; torture; corporal punishment; mutilation; outrages upon personal dignity, hostage taking; collective punishment). There are also provisions relating to trial processes: those charged with an offence have the right to be

informed promptly, in a language he or she understands, of the reasons for the measures; to regular judicial procedures including being informed without delay of the offence alleged and rights and means of defence; not to be accused of a crime that did not exist when it was committed; to be presumed innocent until proved guilty according to law; no trial in absentia; to examine, or have examined, prosecution witnesses; and not to be subject to double jeopardy. This minimum code of conduct on the rights of peoples in occupied territories is almost certainly customary international law.

In addition, although this is a relatively new and controversial issue,³⁶ it is now generally accepted that human rights law is applicable alongside international humanitarian law in armed conflict and occupation. What is less clear is the relationship between human rights law and international humanitarian law in occupied territory. In the *Advisory Opinion on the Legality of Nuclear Weapons* case the ICJ made the famous observation that:

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.³⁷

This wording was repeated in the *Advisory Opinion on the Legality of the Security Wall* case³⁸ with the somewhat unhelpful explanation that there are three possible positions: some matters fall to be determined exclusively by international humanitarian law; some by human rights law; and others as

matters for both branches of law. The ICJ offered no guidance as to how the determination is to be made as to the relevant position in any given case, or how human rights law is to be modified by international humanitarian law when the latter is the *lex specialis*.

Since sovereignty over occupied territory does not pass to the occupier, assertion of the human rights obligations of the occupier requires acceptance of the extra-territorial effect of human rights treaties. This is not made explicit in any of the United Nations' human rights treaties, for example the obligations on a state party under the International Covenant on Civil and Political Rights (ICCPR), article 2, are to respect and ensure the rights to all individuals within the state's territory and subject to its jurisdiction. Extra-territorial application of human rights treaties has been controversial, for example it has been strongly rejected by Israel in the case of the Occupied Palestinian Territories, and by the United States and the United Kingdom in Iraq during the period of occupation (May 2003 – June 2004). The issue has been strongly contested in the United Kingdom's courts. In the case of *Al-Skeini*³⁹ the House of Lords (UK) allowed some limited application of human rights law in occupied territory. Their Lordships held that the human rights guarantees of the European Convention on Human Rights (through the Human Rights Act, 1998) applied only to any Iraqis detained in military custody by United Kingdom forces in Iraq, but not otherwise. The House of Lords made little reference to the sources that uphold the applicability of United Nations' human rights treaties in occupied territories, unless the state has made a derogation in an emergency threatening the life of the nation, as for example under ICCPR, article 4. Thus in the Advisory Opinion on the legality of the construction of the security wall by Israel against the Occupied Palestinian Territories the ICJ considered Israel's obligations under various human rights treaties. The Court

considered the ICCPR, ICESCR and Convention on the Rights of the Child to be applicable in respect of acts done by Israel in the exercise of its jurisdiction outside its own territory, that is, in the territories it occupies. The opinion is especially relevant to the Western Sahara because of the prolonged nature of that occupation. This opinion was repeated in the more recent case between the Democratic Republic of the Congo and Uganda – an instance of a much shorter military occupation by Ugandan forces in the border regions of the Eastern Congo.⁴⁰ The ICJ found the ICCPR to be applicable. It noted that its conclusions on this point were in conformity with those of the United Nations human rights treaty bodies, notably the Human Rights Committee and the Committee against Torture which have also asserted the applicability of the relevant treaties with respect to Israel in the Occupied Palestinian Territories and the United Kingdom and United States with respect to their armed forces abroad in Iraq and Afghanistan. The special rapporteur in the case of another occupation, that of Kuwait by Iraq, concluded that ‘there is consensus within the international community that the fundamental human rights of all persons are to be respected and promoted both in times of peace and during periods of armed conflict’.⁴¹

Morocco is a party to a number of the United Nations human rights treaties: the ICCPR, the ICESCR, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention against Torture, the Convention on the Elimination of all Forms of Discrimination against Women, Convention on the Rights of the Child, and the Migrant Workers Convention, and has made no relevant derogations. Morocco is not a party to the African Charter on Human and People’s Rights. In contrast to their stance towards Israel, the United States and United Kingdom with respect to the applicability of UN human rights treaties in occupied territories, the United Nations human rights treaty bodies to which Morocco is a party have not explicitly affirmed that the

conventions apply in the Western Sahara, and have generally limited their remarks to concern about the lack of progress towards self-determination as required by article 1 of both the ICCPR and ICESCR. However, upon occasion the Committees have appeared to assume that the conventions do apply. For example, in its Concluding Comments to Morocco's 4th Periodic Report the Human Rights Committee stated that it 'remains concerned about the very slow pace of the preparations toward a referendum in Western Sahara on the question of self-determination, and at the lack of information on the implementation of human rights in that region'.⁴² In 2004 the Human Rights Committee recommended that Morocco make every effort to permit the population groups to enjoy fully the Covenant rights. Other United Nations human rights treaty bodies (CAT; CERD; CROC) have not explicitly referred to the point. But the right to self-determination is existential and underpins all other rights within the ICCPR and ICESCR. The 2006 OHCHR Report states that:

The respect of all human rights of the people of Western Sahara must be seen in tandem with this right and a lack of its realisation will inevitably impact on the enjoyment of all other rights guaranteed in the seven core international human rights treaties in force.

This applies to those rights that are of particular importance to the right of self-determination, including freedom of expression, to create associations and to hold assemblies to advance that right. The OHCHR found all such rights to have been violated by Morocco. In 2008 Morocco was subject to Universal Periodic Review by the United Nations Human Rights Council. The comments of the United Nations Human Rights Committee and other relevant comments by United Nations special rapporteurs were noted in the compilation of information for the Council that was prepared by the OHCHR. However, the Human Rights Council made little reference to the situation in Western

Sahara in the Universal Periodic Review process, and only Amnesty International expressed real concern. This is another example of the light touch towards Morocco evinced by the United Nations institutions. It might be noted that Morocco had been a member of the Council until 2007.

The applicability of both human rights law and international humanitarian law is important because while international humanitarian law requires a balance between military necessity and humanitarian objectives, and between the security of occupying forces and the human rights of civilians, human rights law does not. Human rights law applies unconditionally to all people within the territory. International humanitarian law essentially provides for the preservation of minimum humanitarian standards but is procedurally and substantively incomplete with none of the fleshing out of substance and procedure that has taken place in human rights law since 1948. Human rights law also provides for more extensive positive obligations upon the state, such as the obligation to have an independent and effective investigation of civilian deaths. Lord Justice Brooke explained in the Court of Appeal in the case of *Al Skeini*⁴³ that

What is known as international humanitarian law imposes a number of unexceptional moral precepts on occupying forces ... but it imposes none of the positive human rights obligations that are inherent in the European Convention on Human Rights (ECHR). It is a far cry from the complacency of 'You must not kill but need not strive officiously to keep alive' to the obligation imposed ... by the case law on Articles 1 and 2 of the ECHR ('the High Contracting parties shall secure to everyone within their jurisdiction [their] right to life'). While the ECHR is not applicable to Morocco the ICCPR also imposes positive obligations.

The differences between human rights law and international humanitarian law are especially important in the context of detentions and killings. Under human rights law, the right to life is

non-derogable and is applicable to every person. Under international humanitarian law, the right to life depends upon status – the distinction between combatant and the protected status of civilians. This has important implications for the use of force by law enforcement officials who should avoid the use of force, or where practicable restrict force to the minimum necessary for public order, a different standard to that which is acceptable in combat. Internment is permissible under international humanitarian law for imperative reasons of security;⁴⁴ and this branch of the law also provides for the right of appeal and periodical review, if possible every six months, by a competent body set up by the occupying power. These protections fall far short of those required by the right to a trial in ICCPR, article 9.⁴⁵

The dilemma between ensuring progress for the territory while not creating an institutional basis for annexation, is especially pertinent to economic, social and cultural rights. The ICJ explicitly held Israel bound by the ICESCR in the Occupied Palestinian Territories, but did not offer any guidance as to what this entailed. The ICESCR has directed itself to the conditions in Western Sahara. In 2006 it noted with concern, reports of the straitened circumstances endured by people displaced by the conflict in Western Sahara, particularly women and children, who suffer multiple violations of their rights under the Covenant.⁴⁶ In an earlier reporting session, the Committee had induced a lengthy answer when it asked Morocco directly about the factors and difficulties impeding its ability to implement its obligations under the Covenant in Western Sahara. Morocco stressed what it termed 'the special attention' which the Saharan regions had received since 1976 and which is 'reflected in social, economic and cultural programmes geared towards the development of construction works, health and education services, basic infrastructure, the administration, the economy, services, sports and

culture'. Morocco also referred to the Development Agency for Southern Morocco which had an integrated development programme to build up basic infrastructure, expand electricity, drinking water and road networks, make administrative structures more accessible to the public, universalise education, provide decent housing and medical and sports facilities, promote Saharan culture, and organise local festivals to celebrate the region's cultural heritage.

If the occupying power in fact acted in good faith in undertaking these functions it would be acting appropriately under the Covenant. It would, however, at the same time be changing the infrastructure and economic environment of the territory thereby violating occupation law, or transforming it through the application of human rights and thereby incurring the danger of creating facts on the ground. United Nations human rights treaty bodies need to be alert to the different obligations of occupiers under international humanitarian law when scrutinising their human rights records. There is also a need for some separate, rigorous system for monitoring compliance with international humanitarian law, something that it is not adequately provided for in the current state of the law.

Obligations on third parties

The final point I want briefly to consider is the obligations imposed on third parties by the law of occupation. The Security Council has not imposed any specific obligations on third parties with respect to Western Sahara (eg, non-recognition) but in the *Wall* case the ICJ considered the legal consequences for third states of the internationally wrongful acts flowing from Israel's construction of the wall. It noted that some of the violations of international law by Israel were of obligations owed *erga omnes* – the right to self-determination and violations of international humanitarian law. It

recalled its own words in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that ‘a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” ...’,⁴⁷ that they are ‘to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’. It also emphasised that the obligation under Geneva Convention IV, article 1, ‘to respect and to ensure respect for the present Convention in all circumstances’ entails the obligation on every state party to that Convention, whether or not a party to a specific conflict, to ensure that the requirements of the instruments in question are complied with’. Accordingly the court considered that ‘all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, ... an obligation not to render aid or assistance in maintaining the situation created by such construction’.⁴⁸ This obligation not to recognise the illegal situation, replicates that made in the 1970 *Namibia Opinion* and is important with respect to the Western Sahara. Unlike other situations such as the presence of South Africa in South West Africa, the Turkish invasion and establishment of the Turkish Republic of Northern Cyprus, the Security Council has not explicitly called for non-recognition of Morocco’s presence in Western Sahara. This is also the case with the Occupied Territories, and the *Wall* case therefore underscores that the duty of non-recognition is one of customary international law flowing from the obligations of third states with respect to internationally illegal acts.

The ICJ also asserted that all states parties to Geneva Convention IV are under an obligation, ‘while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as

embodied in that Convention'.⁴⁹ Analogous obligations should flow from the illegal occupation of Western Sahara. As the OHCHR has emphasised: realisation of the right to self-determination and thus the end of occupation is the responsibility not only of Morocco but of the international community.

Conclusion

Experience shows that despite the legal regimes of human rights and international humanitarian law, citizens living under military occupation suffer serious, widespread and prolonged abuses of their human rights. As the 2006 OHCHR report testified, Western Sahara is no different. Some ten years ago Walsh and Peleg⁵⁰ argued that these abuses can be traced to several sources: the inherently hostile environment of occupation; the incompleteness and uncertainties of occupation law – especially in the context of prolonged occupations out of the public eye and where there is frustration within the international community at the impasse; and poorly defined and ineffective methods of implementation and monitoring. States party to the Geneva Conventions are required to exercise jurisdiction over grave breaches of the Geneva Conventions (war crimes), but there have been comparatively few instances of such trials. Where acts such as murder, torture, imprisonment in violation of fundamental rules of international law are carried out against the civilian population in a systematic or widespread way, they constitute crimes against humanity. Despite the international moves towards greater transparency and accountability, for example through extension of the concept of universal jurisdiction and the creation of international criminal tribunals, these have had little impact for the people of Western Sahara and the occupier's impunity prevails. In light of failure by states to insist upon Morocco's compliance with international law, pressure from civil society movements to do so must be maintained.

Endnotes

- ¹Knop *Diversity and self determination in international law* (2003) 123.
- ²Castellino 'Modern international legal history of the conflict over the Western Sahara' in *International law and self-determination* (2000); Arts and Pinto Leite *International law and the question of Western Sahara* (2007).
- ³Roberts 'The end of occupation: Iraq 2004' (2005) 54 *International and Comparative Law Quarterly* 27.
- ⁴Roberts 'Prolonged military occupation: The Israeli-occupied territories since 1967' (1990) 84 *American Journal of International Law* 44.
- ⁵Walsh and Peleg 'Human rights under military occupation: The need for expansion' 2 *The International Journal of Human Rights* 62 at 64.
- ⁶Roberts 'What is Military occupation?' (1984) 55 *British Yearbook of International Law* 249 at 280 refers to occupation 'where a colonial power has embarked on withdrawal'.
- ⁷Letter dated 29 January 2002 from the Under Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council 12 February 2002 par 6.
- ⁸SC res 1813 2008.
- ⁹SC res 380 6 November 1975.
- ¹⁰A/5514 Annex III.
- ¹¹*US v List* 15 Ann Dig 632 at 637, a war crimes trial after WW II.
- ¹²Roberts n 4 above at 44.
- ¹³Roberts 'Transformative military occupation: Applying the laws of war and human rights' (2006) 100 *AJIL* 580; Scheffer 'Beyond occupation law' (2003) 97 *AJIL* 842.
- ¹⁴Report of the Secretary-General concerning the Situation in Western Sahara' UN Doc S/2003/565 23 May 2003 par 40.
- ¹⁵Eg, in 5th Periodic Report to the HRC, CCPR/C/MAR/2004/5 11 March 2004.
- ¹⁶Greenwood 'The administration of occupied territory in international law' in *Greenwood Essays on war in international law* (2006) 353.
- ¹⁷Fonteyne 'The Portuguese Timor Gap litigation before the International Court of Justice: A brief appraisal of Australia's position' (1991) 45 *Australian Journal of International Affairs* 171.
- ¹⁸Paragraph 2.
- ¹⁹Shaw *International law* (5 ed 2003) 878.
- ²⁰Milano *Unlawful territorial situations in international law* (2006) 173.
- ²¹Roberts n 13 above at 580.
- ²²*Ibid* and Roberts n 6 above at 249.

²³Geneva Convention IV art 50.

²⁴*Id* art 55.

²⁵*Id* art 56.

²⁶*Id* art 58(2).

²⁷*Id* art 33.

²⁸*Id* art 49.

²⁹Hague Regulations art 45.

³⁰*Id* art 44.

³¹Geneva Convention IV art 51.

³²Ministry of Defence (UK) *The manual of the law of armed conflict* (2004) 281_.

³³Bothe 'Belligerent occupation' in Bernhardt (ed) *Encyclopaedia of public international law* vol 4 at 65.

³⁴Roberts n 4 above at 51-53.

³⁵Falk 'Some legal reflections on prolonged Israeli occupation of Gaza and the West Bank' (1989) 2 *Journal of Refugee Studies*.

³⁶Roberts n 13 above at 589-601.

³⁷1996 ICJ Reports 226, 240 par 25.

³⁸2004 ICJ Reports 136, at 178 par 106.

³⁹*R (Al Skeini) v Secretary of State for Defence* [EWCA] [2006] 3 WLR 508.

⁴⁰*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ Reports 1, 69 pars 216-217.

⁴¹'The question of human rights in occupied Kuwait' Report of the Special Rapporteur UN Doc E/CN 4/1992/31.

⁴²CCPR/C/79/Add113 1 November 1999.

⁴³A case concerning the deaths of Iraqi civilians at the hands of UK forces in Iraq n 39 above. The case was appealed to the House of Lords [2007] 3 WLR 33.

⁴⁴Geneva Convention IV art 78; see also art 43.

⁴⁵Watkin 'Controlling the use of force: A role for human rights norms in contemporary armed conflict' (2004) 98 *American Journal of International Law* 1.

⁴⁶E/C 12/MAR/CO/3, 4 September 2006.

⁴⁷1996 ICJ Reports 226 at 257 par 79.

⁴⁸2004 ICJ Reports 136, 196, par 146.

⁴⁹*Id* at 202 par 163 D.

⁵⁰Walsh and Peleg 'Human Rights under military occupation: The need for expansion' (1998) 2 *International Journal of Human Rights* 62.