

Where International Law fails: the Israel-Palestine Conflict

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Abstract

The paper analyses the implementation and execution of the International Law, and how it has failed to fulfil its inner purpose due to political motives of the participating nations. The paper discusses the various aspects of International Law, and how it has been applied in the dreadful scenario of Israeli and Palestinian Conflict. Be it laws relating to refugees or be it laws relating to occupation, Israel which has the upper hand as against Palestine in the international scenario, mostly due to immense support from powerful countries like the United States of America, Australia, etc. is at most times able to get away with grave violations of International Laws without question. This however, has created a miserable place for the people of Palestine to live in, as there is absolutely no support they can get from outside and the fact that self-sustenance has been made impossible due to constant threat from Israel. Therefore as long as we are able to create a world where adverse political motives don't override the rights of the people, all the International Law, with all its organisations and mechanisms fail to justify their existence, or qualify simply to honorary existence.

Introduction

The relationship between Israel and Palestine is not new to the world and the storytelling of by both the parties has always bewildered anyone who is listening to it, based on their own interpretations of the events that took place, who is telling the story and where they start it from. This not only brought considerable elasticity to the conflict² but also mesmerized the International community which never took too much time to take sides as to whom they thought was correct or from whom did they hear the story. As such the matters soon escalated to the International level, including the United Nations, and the most amusing part in all of this is the fact that the two parties are still not at peace even after so many efforts and interruptions by the UN and other nations. Israel, for instance with the backing of the United States of America, never really cared about the International Law, and even went on to derecognize the jurisdiction of the International Court of Justice in the matter.³ This really puts a question as to whether the International Law, and its applications really matter, and if it does, what happens when a country decides not to follow it.

A Glimpse Into The History

The ongoing conflict between Israel and Palestine began is the mid-20th Century⁴, and has such a wide range that the conflict is often referred to as the world's "most intractable conflict".⁵For the present Article however we will begin with the developments that took place in and around the start of the 21st Century. Following several years of unsuccessful negotiations, the conflict re-erupted as the Second Intifada on September 2000.⁶The violence, escalating into an open conflict between

² NEGAR KATIRAI, *POV*, American Documentary, Inc., December 2001

³ Lapidoth, Ruth. "Jerusalem – Some Legal Issues"(PDF). The Jerusalem Institute for Israel Studies. pp. 21–26.

⁴ "A History of Conflict: Introduction". A History of Conflict. BBC News.

⁵ Chris Rice, quoted in Munayer Salim J, Loden Lisa, *Through My Enemy's Eyes: Envisioning Reconciliation in Israel-Palestine*, quote: "The Palestinian-Israeli divide may be the most intractable conflict of our time."

⁶"History of the Israeli-Palestinian Conflict" (PDF). PBS. December 2001.

the Palestinian National Security Forces and the Israel Defence Forces, lasted until 2004/2005 and led to approximately 130 fatalities. In 2005, Israeli Prime Minister Sharon ordered the removal of Israeli settlers and soldiers from Gaza. Israel and its Supreme Court formally declared an end to occupation, saying it "had no effective control over what occurred" in Gaza.⁷ However, the United Nations, Human Rights Watch and many other international bodies and NGOs continue to consider Israel to be the occupying power of the Gaza Strip as Israel controls Gaza Strip's airspace, territorial waters and controls the movement of people or goods in or out of Gaza by air or sea.⁸

In 2006, Hamas won a plurality of 44% in the Palestinian parliamentary election. Israel responded it would begin economic sanctions unless Hamas agreed to accept prior Israeli-Palestinian agreements, forswear violence, and recognize Israel's right to exist, which Hamas rejected.⁹ After internal Palestinian political struggle between Fatah and Hamas erupted into the Battle of Gaza (2007), Hamas took full control of the area.¹⁰ In 2007, Israel imposed a naval blockade on the Gaza Strip, and cooperation with Egypt allowed a ground blockade of the Egyptian border.

The tensions between Israel and Hamas escalated until late 2008, when Israel launched operation Cast Lead upon Gaza, resulting in thousands of civilian casualties and billions of dollars in damage. By February 2009, a ceasefire was signed with international mediation between the parties, though the occupation and small and sporadic eruptions of violence continued.¹¹

In 2011, a Palestinian Authority attempt to gain UN membership as a fully sovereign state failed. In Hamas-controlled Gaza, sporadic rocket attacks on Israel and Israeli

7 Levs, Josh (6 January 2009). "Is Gaza 'occupied' territory?". CNN.

8 "Human Rights Council Special Session on the Occupied Palestinian Territories" July 6, 2006; Human Rights Watch considers Gaza still occupied.

9 Steven Erlanger, Hamas Leader Faults Israeli Sanction Plan, New York Times, 18 February 2006

10 Oren, Michael B. (2007). *Power, Faith, and Fantasy: America in the Middle East, 1776 to the Present*. W. W. Norton & Company. p. 607. ISBN 9780393058260.

11 "Operation Cast Lead – Gaza Facts". Israel Ministry of Foreign Affairs. Archived from the original on 21 April 2013.

air raids still take place.¹² In November 2012, the representation of Palestine in UN was upgraded to a non-member observer State, and its mission title was changed from "Palestine (represented by PLO)" to "State of Palestine".

The International Law In Question: Sovereignty

In their relations with other peoples and countries during the colonial era the Concert of Europe adopted a fundamental legal principle that the supreme legal authority, or sovereignty, lay outside the indigenous nations. That legal principle resulted in the creation of many dependent states with restricted sovereignty or colonial autonomy. Various terms were used to describe different types of dependent states, such as condominium, mandate, protectorate, colony, and vassal state. After World War II there was strong international pressure to eliminate dependencies associated with colonialism.¹³

The practice of territorial aggrandizement was prohibited by the UN Charter, a multilateral treaty, and the authoritative explanation of its legal principles contained in UN General Assembly resolution 2625 (XXV) of 24 October 1970, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.¹⁴ According to *communis opinio* the obligations imposed by those provisions of the Charter have become part of customary international law and are binding on all States, whether they are members of the United Nations or not.¹⁵

12 Bohn, Lauren E. " Hamas: Rockets will stop when Gaza borders are opened." USA Today. 19 November 2012. 14 March 2013.

13 American Law Encyclopedia Vol 3, Dependent States, The Declaration Regarding Non-Self-Governing Territories, in Chapter XI of the UN Charter, and The Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV)

14 United Nations High Commissioner for Refugees. "Refworld – Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations".

15 The International Law Commission's Draft Articles on State Responsibility: Part 1, Articles 1–35, By United Nations International Law Commission, Compiled by Shabtai Rosenne, Martinus Nijhoff Publishers, 1991, ISBN0-7923-1179-5, p. 189

After World War II, the British government decided to abandon its mandate in Palestine. A United Nations Commission (UNSCOP) was assigned to recommend a solution to the conflict to the General Assembly. The recommendation was a partition plan that would result in an Arab and a Jewish state in the remaining mandate, and Jerusalem under UN rule, was approved by the General Assembly. However, the resolution served partially as a basis for the Declaration of the Establishment of the State of Israel to take effect when Great Britain's mandate expired. Many states granted the State of Israel either *de facto* or *de jure* recognition. Israel was accepted as a sovereign member state in the United Nations and has diplomatic relations with many, but not all, sovereign states.¹⁶ As such, no other Arab state has granted legal recognition of Israel's sovereignty. A formal state of war still exists between Israel and several Arab states, though armistice agreements govern interaction between the states though Several attempts at finalizing the terms for a peace agreement between Israel and the PLO have failed. In 2006 the Palestinians elected Hamas into power, a party that does not recognize Israel as legitimate.

The International Law In Question: War

In the modern-day scenario, Sovereign states have the right to defend themselves against overt external aggression, in the form of an invasion or other attack. Many states assert that this principle extends to the right to launch military actions to reduce a threat, protect vital interests, or pre-empt a possible attack or emerging threat. Security Council resolution 242, emphasized "the inadmissibility of the acquisition of territory by war," setting the stage for controversy on the legal status of areas captured in 1967, and in 1948.

In the present case, two interpretations were drawn by both Israel and Palestine about the said issue. The Israeli position is that: The wars in 1956 and 1967 were waged by Israel to ensure the state's survival. As most hostilities were initiated by

¹⁶ https://en.wikipedia.org/wiki/International_law_and_the_Arab%E2%80%93Israeli_conflict

the Arab side, Israel had to fight and win these wars to ensure the state's sovereignty and safety. Territories captured during those wars are therefore legitimately under Israeli administration for both security reasons and to deter hostile states from belligerence. In the absence of peace treaties between all the parties at war, Israel has under all circumstances the right to maintain control of the captured territories. Their ultimate disposition should be a result of peace treaties, and not a condition for them.

The Arab position is that, the 1956 war came after an Israeli attack on the Gaza strip killing 25 Egyptian soldiers, and was a result of a conspiracy between France, the United Kingdom and Israel in violation of Egypt's sovereignty. Egypt claimed several legal justifications for refusing Israel use of the Suez Canal, including the right of self-defence. The war in 1967 was an unprovoked act of aggression aimed at expanding the boundaries of Israel, and the territories captured during this war are illegally occupied. As a result, the territories must be ceded for peace to be achieved.

The International Law In Question: Occupation

The Geneva Conventions and other international tractates recognize that land a) conquered during a war; and b) the disposition of which is unresolved through subsequent peace treaties is "occupied" and subject to international laws of war and international humanitarian law. This includes special protection of individuals in those territories, limitations on the use of land in those territories, and access by international relief agencies.

Article 49 of the Fourth Geneva Convention states in paragraph 1

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

and states in paragraph 6,

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Arguments supporting the position that establishing, funding, or allowing settlements in the territories is a violation of international law are,

The International Committee of the Red Cross' commentaries to the Geneva Conventions [3] state that Article 49, paragraph 6, "is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories." It further notes "that in this paragraph the meaning of the words 'transfer' and 'deport' is rather different from that in which they are used in the other paragraphs of Article 49 since they do not refer to the movement of protected persons but to that of nationals of the occupying Power". The Committee has on several occasions described the establishment of Israeli settlements in the occupied territories as a violation of the Fourth Geneva Convention.

the International Court of Justice, in paragraph 120 of its advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", asserts that: "That provision [article 49(6)] prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory" and "concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law". The dissenting judge Thomas Buergenthal agreed that "this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6".

Article 8(2)(b)(viii) of the International Criminal Court Rome Statute defines "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" as a war crime. Israel did initially sign the statute, but later declared its intention not to ratify it.

The Security Council has in Resolution 446 determined: "that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity".

Arguments supporting the position that settlement in the territories does not violate international law are, Israel ministry of foreign affairs argues "As the West Bank and Gaza Strip were not under the legitimate and recognized sovereignty of any state prior to the Six Day War, they should not be considered occupied territories."¹⁷ Article 49 of the Fourth Geneva Convention is limited to transfers or deportations into or out of Occupied Territories which are 'forcible'. Article 49 "cannot be viewed as prohibiting the voluntary return of individuals to the towns and villages from which they, or their ancestors, had been ousted" from living, e.g., in Gush Etzion, Jerusalem, or Hebron before 1948. The Palestinians, as part of the Oslo Accords agreed that the issue of settlements in the territories shall fall under the jurisdiction of final status negotiations (Article V, Section 3). Jews have a legal right to settle the areas according to the Mandate for Palestine (specifically Article 6 of the mandate concerning Jewish settlements) and to such documents as the Faisal Weizmann Agreement. The British Mandate (granted by the League of Nations) specifically encouraged "close settlement by Jews on the land."

The International Law In Question: Israeli West Bank Barrier

Israel has completed long stretches of barriers within the West Bank, separating Israel proper, Israeli settlements and large parts of the Palestinian territories from Palestinian cities and population centres.

Those who question the legality of the barrier make the following arguments. The barrier has been found to be illegal by the legal arm of the United Nations (the International Court of Justice). At various locations, the selected route of the barrier required the demolition of homes and the expulsion of the residents of those homes, in violation of Article 49 of the Fourth Geneva Convention. The barrier and Israel's series of checkpoints have made life nearly impossible for residents of the

¹⁷ "DISPUTED TERRITORIES- Forgotten Facts About the West Bank and Gaza Strip".

West Bank, constituting collective punishment. Article 33 of the Fourth Geneva Convention categorize collective punishment in occupied territories as a war crime. At various locations, the selected route of the barrier required the demolition of Palestinian property, in violation of article 53 of the Fourth Geneva Conventions. The barrier is an attempt to establish *de facto* borders between Israel and a future Palestinian state, in effect annexing large parts of West Bank and all East Jerusalem, in violation of numerous United Nations Security Council Resolutions. The barrier attempts to separate Palestinians from their means of livelihood and from interaction with others and it, therefore, qualifies as Apartheid. Apartheid is illegal as per the 2002 Rome Statute of the International Criminal Court and is considered a crime against humanity. The barrier is constructed *inside* of the West Bank, making it completely in violation of international law. The barrier differs from all other protective barriers built by any other state (such as the Berlin Wall, or the US-Mexico border) in that it is not constructed on the border between states but rather crosses the occupied territories in numerous locations, and with existing/expanding settlements, divides the occupied territories into 4 or 5 cantons.

Israel defends the security barrier by arguing that, the barrier and its route are solely security measures that will have no bearing on future peace negotiations. The land is not subject to the Geneva Conventions. The Geneva Conventions explicitly allows structures to be built for purposes of self-defence. The Israeli Supreme Court is reviewing the route on a continuous basis and has forced it to change. StandWithUs, a pro-Israel advocacy organization, defends the security fence by pointing out: Israel did not begin building the fence until 2003 when terrorism reached unprecedented levels. The fence is like barriers that dozens of other democracies have built to keep out terrorists or illegal immigrants, such as the barriers between the United States and Mexico, India and Kashmir, Spain and Morocco, North and South Korea and even the walls within Belfast that separate Protestant and Catholic neighbourhoods. Since construction of the fence began in 2003, the number of completed terrorist attacks has dropped by more than 90%. 97% of the barrier is a chain-link fence like those along the United States' border; only 3% (10 miles) is a

concrete wall, built to prevent sniper shooting prevalent in certain areas. Only 5%–8% of the West Bank and less than 1% of Palestinians will end up on the Israeli side of the fence.¹⁸ Palestinians can bring their specific grievances about the barrier to Israel's Supreme Court, which in several cases has ruled that the fence must be re-routed.¹⁹

In 2004, the United Nations passed many resolutions and the International Court of Justice issued a ruling where judges ruled 14–1 that the portions of the Israeli West Bank barrier that are located within occupied Palestinian territories are illegal under international law. Prior to the ruling, Israel had made the claim that the ICJ lacked standing to rule on the legality of the barrier, which the court unanimously rejected. On July 20, 2004, the United Nations General Assembly passed a resolution demanding that Israel obey the ICJ ruling. A total of 150 nations voted in favour of the resolution, 7 voted against, and 10 abstained.

The International Court Of Justice

In December 2003, the United Nations General Assembly passed a resolution requesting the International Court of Justice (ICJ) to make a non-binding advisory opinion on the "legal consequences arising" from the construction of the barrier.

The hearings began in February 2004. The Palestinian Authority is not a member of the court but could make a submission by being a UN observer and a co-sponsor of the General Assembly resolution. In January 2004, the court also authorized the League of Arab States and the Organisation of the Islamic Conference to make submissions.

Israel initially announced that it would cooperate with the court, while noting that advisory rulings of the ICJ are not binding. Israel later made a written submission to the court rejecting the authority of the court to rule on the case, but announced (on February 12, 2004) that it would not appear at the court to make oral submissions.

18 "Israel's Newly Approved Security Fence Route:".

19 "High Court of Justice rules on security fence around Alfei Menashe". GxMSDev.

On January 30, 2004, Israel announced officially it did not recognize ICJ authority to rule over the barrier issue. Israel also dispatched a 120-page document, elaborating on the security needs to build the "terror prevention fence" and purporting to demonstrate the atrocities committed by Palestinian terrorists. The document also included a judicial part with legal accounts supporting Israel's claim that the issue of the barrier is political and not in the ICJ authority.

On 23, 24, and 25 February 2004 the hearings before the International Court of Justice took place in the Peace Palace at The Hague.

On July 9, 2004, the International Court of Justice issued its opinion against the barrier, calling for it to be removed and the Arab residents to be compensated for any damage done. The Court advised that the United Nations General Assembly, which had asked for the ruling, and the Security Council should act on the issue. The court held,²⁰ "The construction of the wall by the occupying power Israel in the Occupied Palestinian Territory, including around East Jerusalem and its regime are "contrary to international law. Israel is obligated to stop construction of the wall, including around East Jerusalem and to dismantle the structure, and to repeal all legislative and regulatory acts relating to the wall. Israel is obligated to "make reparation for all damages caused" by the wall, including around East Jerusalem". All states are under an obligation not to recognize the illegal wall and "not to render aid or assistance in maintaining the situation", and to "ensure compliance by Israel with international humanitarian law" in accordance with the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War 1949, while "respecting the United Nations Charter and international law, as embodied in that convention. The United Nations General Assembly and the Security Council should consider what further action is required to end the illegal wall and the associated regime."

²⁰Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice Advisory Opinion, July 9, 2004, paragraph 163.

The opinion was accepted by the United Nations General Assembly,²¹ on July 20, 2004, it passed a resolution demanding that Israel obey the ICJ ruling. Israel, the US, Australia, the Federated States of Micronesia, the Marshall Islands, and Palau voted against the resolution, 10 nations abstained, and 150 nations voted in favour. Israel rejected the ICJ ruling and emphasized the barrier's self-defence aspect, and stressed that Israel will continue to build the barrier. The United States also rejected the ruling, declaring that the issue was of political rather than legal nature. Colin Powell stated that barrier was effective against terror, and noted that the ICJ ruling was not binding, but insisted that Israel not use the barrier to predetermine permanent borders.

The International Law In Question: Refugee

The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), which was established prior to the 1951 convention in response to the humanitarian crisis, applies a different definition:

Under UNRWA's operational definition, Palestine refugees are persons whose normal place of residence was Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict. UNRWA's services are available to all those living in its area of operations who meet this definition, who are registered with the Agency and who need assistance. UNRWA's definition of a refugee also covers the descendants of persons who became refugees in 1948.

Palestinian refugees were excluded from the 1951 Convention due to the clause that "This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance." As interpreted by UNHCR, this caused some anomalies, since UNRWA admits some persons as refugees that are not automatically admitted by the Convention, and, conversely, some of the legal protections given to refugees by the Convention were not available to most

21 John Dugard (30 June 2006). *International Law: A South African Perspective*. Kluwer. p. 477. ISBN 978-0-7021-7121-5

Palestinians. In 2002, UNHCR adopted a revised interpretation that fills some of these gaps. The BADIL Resource Centre for Palestinian Residency and Refugee Rights published a critical analysis of UNHCR revised interpretation of the 1951 Refugee Convention.²²

The Conclusion

This very act of carving out a country from an already populated land had created a trouble spot in the Middle East, which continues to fester until today. It is tragic that the horrors perpetrated during the war against the Jewish populations in Europe should be repeated or should be reproduced and replicated in respect of the Palestinians. Thus, it is imperative for international law to permanently end such a situation, which is a despicably aberrant disgrace to mankind.²³

Until the US and Europe formulate a strategy to make Israel's circumstances less desirable than the concessions it would make in a peace agreement, they will shoulder responsibility for the oppressive military regime they continue to preserve and fund. When peaceful opposition to Israel's policies is squelched and those with the capacity to dismantle the occupation don't raise a finger against it, violence invariably becomes more attractive to those who have few other means of upsetting the status quo.

Through pressure on the parties, a peaceful partition of Palestine is achievable. But too many insist on sparing Israelis and Palestinians the pain of outside force, so that they may instead continue to be generous with one another in the suffering they inflict.²⁴

²²"A Critical Analysis of the Revised UNHCR Interpretation". BADIL. November 2002.

²³Nurhalida Mohamed Khalil, <https://goo.gl/GrvpjX>

²⁴ NATHAN THRALL, Israel-Palestine: the real reason there's still no peace, THE GAURDIAN, 16 May 2017