

HOW INTERNATIONAL LAW FAILED THE PALESTINIANS

The nature and essence of conflicts between peoples is in fact conflicts between competing claimants of human rights. This is especially the case of the Palestinians who have been fighting for the past seven decades for their survival as a people. During the same period under the guise of defending and upholding the rights of the people of Israel to their homeland, the Palestinians, as a people, have not only had their lands seized but also have been expelled by the Israelis.

Human rights advocates would do well to be sensitive to this problem of conflicts between competing claimants of rights and very few of them do realize that this problem poses urgent exigencies for the claimants. Certainly, it is clear that this profound inability of the Universal Declaration of Human Rights of 1948 (UDHR) to prevent and resolve conflicts between competing claimants of rights, is a severe hindrance to arguing not only about human rights but also the universality of application of human rights to all peoples, including the Palestinians.

Since the inception of the problem in May 1948 when Israel was established on 78 per cent of what used to be Palestine, the issue of the right of the Palestinians to self-determination and the issue of refugee rights of the Palestinians, among other imperative components of the Palestinian human rights related question (the issue of ethnic majorities ruling people who are not citizens and who do not come under full constitutional protection of the national laws of Israel and, the issue of the construction of a wall in the Occupied Palestinian Territory), continue to bedevil the international community and particularly the members of the United Nations Security Council, despite seven decades of the existence of the UDHR.

In 1517, the Ottoman Turks ruled Palestine. The majority population then were Arab Muslims. When World War 1 broke out in 1914, Britain promised the Arabs, including the Palestinians, independence from Ottoman rule in return for their support in battle against Turkey, an ally of Germany. But the promise of independence did not come.

In 1915, to gain Jewish support for its war, Britain issued the Balfour Declaration which affirmed the British support for the creation of a Jewish 'national home' in Palestine, without violating 'the civil and religious rights of the existing non-Jewish communities'.

After the war, the League of Nations divided the defeated Ottoman Empire into "mandated territories". Palestine then became a mandated British territory. When the League of Nations outlined the mandate for Palestine, it embodied the British government's previously announced policy of facilitating the establishment in Palestine, of a Jewish national home which would involve Jewish immigration from Europe and elsewhere into the territory. The Arabs felt that Britain had betrayed the Palestinians in handing

Palestine over to the Zionists. In the early 1930s, over 100,000 Jewish refugees emigrated to Palestine from Nazi Germany and Poland.

Fearing that this mandate would lead eventually to the establishment of a Jewish State in Palestine, the Arab majority argued that the mandate unconstitutionally violated the Covenant of the League of Nations by frustrating the national independence, which Article 22 of the same Covenant had provisionally recognized, for those who were indigenous inhabitants of Palestine, as of 1919.

However, the British view did not place such emphasis on the legal role of Article 22 or the League of Nations. Lord Balfour, who had been the British Foreign Secretary at the end of the war, concluded that the 'mandates are neither made by the League, nor can they, in substance, be altered by the League.'

The above statement constituted an outright rejection of the Palestinian argument that sovereignty over Palestine, resting no longer in the former Turkish rulers nor in the League of Nations nor the Mandatory power, must have rightfully belonged, as of 1919, to the Arab inhabitants.

In 1939, the British government published a White paper restricting Jewish immigration and offering independence for Palestine within ten years. The Zionists rejected the paper and subsequently, organized a series of bloody terror campaigns against the British and the Palestinians to drive them both out of Palestine and to pave the way for the establishment of the Zionist state.

When the United Nations replaced the League of Nations after World War 2, the Mandate system was replaced by the Trusteeship system. All of the former mandated territories were placed under this system by their Mandatories (who were then appointed by the administering authorities in the same territories) with the exception of certain entities including those territories-Syria, Lebanon and Palestine (now Israel and Jordan) which had become or were soon to become independent.

After World War 2, Jewish survivors of the Nazi Holocaust represented the second wave of exodus back to the region. Aggravated Arab resentment of the Jewish occupation then gave birth to various Palestinian nationalist movements.

In 1947, Great Britain, in its decolonization process, decided to withdraw from Palestine. In the same year, the General Assembly of the United Nations decided to partition the country into a Jewish and an Arab State, with Jerusalem and its environs cordoned off as a separate entity under UN trusteeship.

The legal competence of the General Assembly to establish two independent States in Palestine was questioned on the grounds that the partition plan did not adequately take into account regard to the principle of self-determination.

On the General Assembly's resolution to partition Palestine, Victor Kattan in his article entitled 'The Nationality of Denationalized Palestinians' quoted Henry Cattán, a Palestinian jurist, as noting:

'In terms of population, the Jews in 1947 constituted less than one- third of the inhabitants of Palestine: 608,230 Jews out of a total population of 1,972,560. What is more, only one-tenth of the Jews were original inhabitants; the rest were immigrants originating mostly from Poland, the U.S.S.R., and central Europe. *And only one-third of these immigrants had acquired Palestinian citizenship.* The Jewish community then existing in Palestine was, therefore, composed mainly of foreigners-both by origin *and nationality.* *Nowhere, except in Palestine, have foreign immigrants been allowed to break up the territorial integrity of the country in which they came to live.'* [emphasis added]

The partition plan apparently failed. On the one hand, it was favourable to most Jewish organizations as the plan allowed at last the fulfillment of the dream of a Jewish homeland. On the other hand, it was unfavourable to Palestinians. The Arab states were opposed to the establishment of a Jewish state in a territory where the Arabs were the majority.

The partition plan had led to intense disagreement between member states of the United Nations over the fate of Palestine. In the General Assembly of the United Nations, General Carlos Romulo of the Philippines spoke against the partition plan:

'We hold that the issue is primarily moral. The issue is whether the United Nations should accept responsibility for the enforcement of a policy which, not being mandatory under any specific provision of the Charter nor in accordance with its fundamental principles, is clearly repugnant to the valid nationalist aspirations of the people of Palestine...'

Fighting between the two communities, the Jews and the Palestinians, led to the Second Special Session of the General Assembly in April and May 1948. The General Assembly failed to pass a resolution on the state of its rapidly disintegrating partition plan.

Finally, the General Assembly abandoned Palestine to a military solution, with the first Arab-Israeli war breaking out on 14 May 1948 as the mandate ended.

On May 14, 1948, with the endorsement of the United Nations, the Zionists proclaimed its independent State of Israel. The next day, the armies of Egypt, Transjordan (now Jordan), Syria, Lebanon, and Iraq joined Palestinian and the Arab forces to attack Israel. The Arabs lost the war, and Israel gained further territories.

Wars broke out again in 1956 and 1967. By the end of these wars, Israel further occupied the West Bank, the Sinai Peninsula and the Gaza Strip, then under Egypt, and the Golan Heights under Syria.

The UN Security Council has adopted no fewer than 200 resolutions on the Palestinian issue in the last 50 years. The General Assembly has passed twice as many resolutions as had the Security Council. The Security Council in Resolution 242, after Israel's seizure of the West Bank and Gaza Strip following the 1967 Middle East war, called for the "withdrawal of Israeli's armed forces from territories occupied in the recent conflict". Successive Israeli Governments have ignored many UN resolutions since 242, which calls on Israel to withdraw.

The Rights of Jewish Minorities of Europe to Self-Determination viz-a-viz The Palestinians' Right to Self-Determination

The issue of the rights of Jewish minorities of European States to self-determination albeit the creation of Israel *viz-a-viz* the rights of the Palestinians to self-determination, puts a test to human rights in the sense that the notion of human rights becomes fragile, from the moment one begins to examine the parameters of these norms.

The right of peoples to self-determination has been defined as 'the peoples (who?) shall govern itself (how?) on its territory (where?)'. Against the backdrop of colonization, the objective of promoting the 'self-determination of peoples' was included among the founding purposes of the United Nations Charter in Article 1(2):

'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace'.

However, the relevant Charter provisions merely impose obligations on the states responsible for non-self-governing territories to 'develop self-government' with no mention of independence.

Accordingly, the UDHR does not proclaim the right of peoples to self-determination. Instead, the Declaration endorses the right to self-government, although, self-government is clearly not identical to independence.

Consequently, at the behest of several new states in the General Assembly of the United Nations, in the midst of colonial emancipation, the right of peoples to self-determination was included in Article 1 of the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) respectively.

Article 1 of ICCPR and ICESCR respectively provides :

'1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of substance.

3. The State parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination in conformity with the provisions of the Charter of the United Nations.'

The right of peoples to self-determination sparked off the following questions relating to the parameters of that right: For whom the right of self-determination applies? What constitutes a 'people'? How do the people govern themselves? Where do the peoples govern themselves?

The classic case of oppressed minorities preferring a state of their own than in the protection of international human rights is of course, the State of Israel. The surviving Jewish peoples' overwhelming desire to create a Jewish State, capable of defending the Jews everywhere against oppression reveals that they trusted more to the establishment of a state of their own than to the protection of human rights within other peoples' national states. However, is there a right of minorities to victimize other peoples under the guise of their claim to the right to self-determination?

Article 30 of the UDHR provides that nobody may invoke the rights and freedoms in support of an activity aimed at the destruction of any of the declared rights and freedoms. In short: no freedom for the enemies of freedom. The State of Israel, born on 14 May 1948, was carved out of Palestine, in the midst of mass displacement and expulsion of the primarily but not exclusively Arab population of mandatory Palestine.

The Palestinians' Right to Return

Although the issue of the Palestinian refugees and its resolution is central to a permanent solution of the Israeli-Palestinian conflict, the issue has been marginalized despite the fact that Israel's admission to the United Nations was made contingent on its compliance with the United Nations General Assembly Resolution 194 of December 1948, stating that those 'refugees wishing to return to their homes and live in peace with their neighbours should be permitted to do so at the earliest practicable date'.

The Palestine Liberation Organization (PLO) insisted that Israel comply with what the PLO viewed as Israel's obligation to recognise the nationality of displaced Palestinians and allow them the right to return. The PLO position was supported by the obligation of a State to admit its nationals developed in customary international law and reaffirmed in human rights law. The UDHR which proclaims "Everyone has the right to leave any country, including his own, and to return to his country," is implied to mean prohibition against anyone forced out would immediately be entitled to return. Another preposition in customary international

law is that a national acquires the nationality of the successor state, which is supported by another argument found in international law where there has been an effort to avoid the status of statelessness.

The ICCPR also mandates repatriation, guaranteeing every person a right to 'enter his own country'. The ICCPR uses the phrase 'his own country' instead of 'state of his nationality' precisely to include persons not recognized as nationals though they are entitled to it. To monitor compliance, the ICCPR established a Human Rights Committee that construes 'his own country' broadly to include 'nationals of a country who have been stripped of their nationality in violation of international law' and 'individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied to them'. Under the Committee's construction, the right of entry as guaranteed in the ICCPR applies to Palestinian refugees. The PLO position also found confirmation in international practice.

In 1948, the United Nations General Assembly called on Israel to repatriate the refugees in a resolution reflecting the General Assembly's understanding that international law required repatriation for those refugees. The United Nations Resolution 194 was viewed by the Palestinians as a clear requirement for repatriation as supported by the following arguments :

- that in later resolutions, the General Assembly referred to a Palestinian return as a matter of right e.g. in one resolution, it "reaffirmed also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and called for their return;"
- that the phrase "live in peace" can logically be interpreted in a way that is consistent with return as a right; and
- that the UN Resolution 194 intended that the displaced Palestinians be allowed to return "as soon as practically possible"

In dealing with military conflicts in the Balkans elsewhere, the United Nations Security Council has insisted on the refugees' repatriation and characterized their return as a matter of legal right. This Security Council practice is indicative of a right of return in international law.

Neither demographic balance nor military security affords Israel justification for refusing the right of repatriation. In fact, the practice of the United Nations illustrates that calls on states to repatriate have been made even where the military situation was tenuous and where ethnic conflict had led to a desire to exclude persons of certain groups e.g. The UN High Commissioner for Refugees has urged repatriation in the wake of mass displacement, despite possible security concerns.

Israeli leaders and legal experts do not believe that the 'right of return' for Palestinian has any basis in customary international law and conventional law. The Israeli government which defines Israeli nationals

as excluding displaced Palestinians as well as analysts who adopt its views, have stated that the Palestinian has no right to return because Israel is not his or her own country. Additionally, Israel supports the theory that the right of return exists only for individuals and not large groups on the basis that a right to return for large groups 'is not recognized in human rights instruments such as the Universal Declaration and the ICCPR.' Israel also referred to physical security as a reason for justifying the denial of the Palestinians' right to return.

Israel interprets the repatriation clause of UN resolution 194 as ambiguous and lacking in binding force on the following grounds :

- that it does not recognise a 'right' for the Palestinians to return as the clause states "should be permitted" to return, but it does not mention a 'right' to return;
- that it grants the right of return only to Palestinians who wished to live in peace as the clause calls for the repatriation of displaced Palestinians 'wishing to...live at peace with their neighbours'; and
- that it implies that repatriation is desirable but is not required as a matter of legal obligation as the clause mentions the repatriation should occur 'at the earliest practicable date'.

An argument advanced by Israeli analysts was that the phrase "his own country" in the ICCPR gives a right of entry only to persons recognized by the state in question as its nationals, and therefore the ICCPR does not give Palestinian refugees a right of entry. Israel's nationality legislation extends nationality to the population in the territory in which it established itself in 1948, but specifically excludes persons displaced in 1948.

Internment of Palestinians in Occupied Palestinian Territory

In occupied territories, the internment of persons should be more exceptional than it is inside the territory of the Parties to the conflict. However, in the case of the Occupied Palestinian Territory, the Occupier's control through the security envelope has led not only to the detention of Palestinians without trial, but also to the denial of the Palestinians' freedom of movement and the infliction of serious, mental and physical harm on the Palestinians. Given that in the context of an international armed conflict, including the situation of occupied territories, international humanitarian law fails to elucidate the meaning of 'imperative reasons of security', it is thus left predominantly to the Israeli Occupier to decide the measures of activity prejudicial to its internal and external security.

State Terrorism and Human Rights

Terrorism defies definition. Who exactly is a terrorist? What is a terrorist act? Do terrorists include state actors? There are numerous conventions and other authorities that treat these questions, but none provides a definition of “terrorism” or “terrorist acts.”

Nonetheless, the direct linkage between terrorism and human rights violations was recognized by the World Conference on Human Rights in 1993. The Vienna Declaration and Programme of Action, in its paragraph 17 stipulates :

‘The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments.’

However, there is a need to make a clear distinction between terrorist acts and legitimate struggles of peoples for national liberation from colonial and other forms of alien domination and foreign occupation.

Peoples’ struggle, including armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law, should not be considered a terrorist crime.

It is submitted that the definition of terrorism should exclude the activities carried out in peoples’ struggle for self-determination. If restrictions are imposed on the means and activities of people struggling for self-determination, are they left without any legitimate recourse to what is rightly theirs?

The Israel-Palestinian conflict is reflective of how the exercise of a claim of the Jewish minorities’ right to self-determination, may solve their human rights problems at the expense of the Palestinians’ right to their own homeland.

Since the parameters of the right to self-determination have not been adequately addressed and regulated by rules of international law, it is necessary for any definition of terrorism to exclude activities carried out in the exercise of peoples’ struggle for self-determination.

The Activities Undertaken by the Military Forces acting in Self-Defence

Another international law issue relates to the activities by the military forces of a State acting in self-defence or in accordance with Chapter VII of the Charter of the United Nations.

The armed forces of a State are not permitted to undermine the principles of general international law concerning the prohibition on the use of force and non-interference.

The United Nations Charter provides in article 2(4) that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations'. Whilst Article 51 of the United Nations Charter provides in part that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.'

Although states can resort to the use of force against other States only in self-defence as embodied in article 51 or in accordance with Chapter VII of the United Nations Charter, there are misgivings amongst scholars on the scope of the right of self-defence, and the use of force in international law, particularly in the aftermath of the 9/11 atrocities, on the following questions:

- How much force is necessary for it to amount to an armed attack?
- Whether a claim of a right to self-defence, if an armed attack occurs against a Member of the United Nations under article 51, requires that the perpetrator of such an armed attack to be a State?
- Whether the right of self-defence would be applicable to an Occupier in relation to a territory which is subject to belligerent occupation, particularly if it is prolonged and protracted, as in the case of the Occupied Palestinian Territories (OPT) which is viewed as the longest military occupation in history?

***Jus ad bellum* and *Jus in bello* and International Humanitarian Law (IHL)**

The policy consideration behind IHL is that IHL is not concerned with the entitlement to engage in hostilities (*jus ad bellum*) and that IHL concerns the conduct of hostilities and the treatment of persons in the power of the enemy (*jus in bello*).

The *just ad bellum* conditions concerns the resort to war and are directed to political leaders deciding whether to initiate war or whether to respond to another state's doing so with military force of their own. The *jus in bello* conditions concern the means used to wage war.

It is usually assumed that the two sets of conditions are independent. So a state can be justified in its resort to wage war but violate the *in bello* conditions in how it performs, fights or initiates war unjustly but only uses tactics that are morally allowed. Despite their differences, the various proportionality conditions, *ad*

bellum and *in bello*, all say a war or act is unacceptable if the relevant harm it will cause is out of proportion to its relevant good.

Against this backdrop, an issue arises on how a nation should weigh lives when it kills some enemy citizens in order to save citizens of its own.

The *ad bellum* issue arises when a just cause is claimed for the waging of war to prevent terrorist attacks like those of September 11, 2001.

The *jus in bello* issue becomes relevant where soldiers must often choose between tactics that will cause more or fewer enemy casualties at the cost of more or fewer casualties for themselves. There is obviously no precise formula in making these choices.

More importantly, is the issue whether it is permissible for a state, which is guilty of military aggression on the peoples of occupied territories, to proceed to the *jus in bello* conditions of proportionality, when the *jus ad bellum* issue of such aggression is not adequately addressed by Article 2(4) and 51 of the United Nations Charter.

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 bring to a close such a situation, which is a despicably aberrant disgrace to mankind.

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