

Israel and Palestine: The Role of International Criminal Justice in Ensuring Accountability for the Transfer of Civilians into Occupied Territory

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ABSTRACT

Within international law, there should be a system whereby states as well as individuals breaching norms of international criminal law be punished. This is where the concept of international criminal justice comes, which requires states to ensure accountability for the act committed by individuals under their control. The first section of the essay deals with status of the Israel's occupation of Palestinian territory in accordance with international law and the obligations imposed by international criminal law. The second part of the essay briefly focuses on recognition of Palestine as a permanent state which is relevant for the purpose of ascertaining situation of international armed conflict between Israel and Palestine.

Third section is the most significant part of this essay which deals with the accountability aspect under international criminal law. Focus will be on the international responsibility of states and individuals with respect to international humanitarian law and ICC statute. It will be followed by the legal consequences of such acts and a discussion on the jurisdiction of ICC and other states in light of 'universal jurisdiction'.

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INTRODUCTION

International Law imposes several obligations upon state parties to adhere and respect international standards of conduct to be duly followed by the states. These obligations find their source not only within international treaties and conventions but also derive their legitimacy through the principles of customary law and *jus cogens* as well as judicial decisions and opinion of highly qualified jurists.² Thus, the armed conflict by Israel against Hamas and in the occupied territory of Palestine is governed by international treaties and the rules of customary international law dealing with the international humanitarian law.

It is fundamental for any criminal justice system that rules and obligations must be respected. Unless and until there is respect for such rules and obligations no accountability can be guaranteed for the violations occurred. The notion of respect for international obligations finds expression in the Preamble of Vienna Convention on Law of Treaties.³ The current occupation of the Palestinian territory by the Israel, which originated in 1967 when Israeli Military Forces occupied these territories which were hitherto under the control of States like Jordan and Egypt, has created a situation of international armed conflict. This has raised numerous issues pertaining to violation of International Criminal Law and also 'The Geneva Convention Relative to the Protection of Civilian Persons in Time of War', 1949.⁴ United Nations has declared the occupation of Palestinian territory by Israel as illegal.⁵ Over the period, Israel has illegally transferred over 400,000 Israeli civilians into these occupied territories; have demolished over 8,000 homes and villages in East Jerusalem, the West Bank and Gaza and illegally appropriated over 70 percent of the occupied territories which is grave violation of the 4th Geneva Convention.⁶

PALESTINE STATEHOOD AND OCCUPIED TERRITORY

UN recognises a country as a 'state', eligible for its membership on the decision of the General Assembly.⁷ However, Palestine is not recognised by UN as a permanent state member but only a 'non-member observance state'. This means that Palestine is a *de jure*

² Statute of the International Court of Justice Article 38(1), Oct. 24, 1945.

³ Vienna Convention on the Law of Treaties Preamble, May 23, 1969. 1155 U.N.T.S, 331.

⁴ Hereinafter referred to as '4th Geneva Convention'.

⁵ United Nations Security Resolution 242, Nov. 22, 1967.

⁶ ALLEGRA PACHECO, FLOUTING CONVENTION: THE OSLO AGREEMENTS, IN THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID 181, 184-85 (Roane Carey ed., 2001).

⁷ Charter of the United Nations, art 4, June 26, 1945

state which has a legitimate government and ability to enter into foreign relations but in fact has its territory under the actual control of Israel which has *de facto* authority over its territory. Apart from this, the criteria to determine a nation as a state has been laid down in the Montevideo Convention of 1933. The peculiar feature of this convention is that its application is not restricted to its signatories rather it goes beyond that and also applies to the Palestine.⁸ Recognition of statehood is based on two theories, i.e. declarative and constitutive theory. According to declarative theory, state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.⁹ The essential of permanent population is undisputed. The Palestinian territory is divided into West bank, Gaza and the East Jerusalem which has raised border dispute between Israel and Palestine. This has raised the questions about the territorial integrity of the Palestinian state. However, territorial integrity of Palestine has been recognised and confirmed in UN Security Council resolutions, by the General Assembly and the International Court of Justice.¹⁰ Territorial integrity of Palestine is not be affected by the limited control which it exercises over its territory, in consequence of the illegal occupation by Israel. Furthermore, a border dispute cannot place Palestine on disadvantageous position. If that would have been the case, then same should be applied to Israel as well because its territories are also not defined.¹¹ Palestinians have full and effective control only with respect to parts of its government. But this is not an impediment for its statehood because the term 'government' is not qualified by the adjective 'effective' in the Montevideo Convention. The principles of right to self-determination shall be applied in its place to balance out the lack of effective government. Moreover, Palestine has signed and ratified several international agreements. It is also a party to 4th Geneva Convention and Rome Statute of International Criminal Court¹².

Going under the constitutive theory, the fact that a country meets the requirements of the Montevideo Convention is meaningless if it is not internationally recognised.¹³ Recognition

⁸John V. Whitbeck, *The State of Palestine Exists*, Middle East Policy Council Journal Essay, Vol. XVIII, No. 2, (2011), <http://www.mepc.org/journal/middle-east-policy-archives/state-palestine-exists?print>.

⁹Montevideo Convention on the Rights and Duties of State, art. 1, Dec 26, 1934.

¹⁰Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, page 4, Annex. (2004) ICJ Rep 136. 9th July, 2004.

¹¹Ilona-Margarita Stettner, *Palestinian Statehood According to International Law*, 1(July 18, 2012), <http://www.kas.de/palaestinensische-gebiete/en/pages/11510/>.

¹² Hereinafter referred to as 'ICC Statute'.

¹³*Ibid.* page 2.

by other states is a pre-requisite for the application of constitutive theory of sovereignty. As of 30th October, 2014, 135 member states have recognised Palestine as an independent state. Therefore, be it declaratory or constitutive perspective, Palestine is a State within the meaning of International Law.

The 4th Geneva Convention applies in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties even if the said occupation meets with no armed resistance.¹⁴ The Convention outlines the rights and duties of the occupying power and sets forth minimum standards for the treatment of persons within occupied territories.¹⁵ It thus becomes important to define when a territory can be said to be occupied. In this regard, a territory is considered occupied when it is actually placed under the authority of the hostile army and the occupation extends only to the territory where such authority has been established and can be exercised.¹⁶ This article is the basis for determining the existence of a state of occupation. One must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening state in the area in question.¹⁷ Hence it can be said that in pursuant to the international armed conflict between Israel and Palestine, former has occupied the latter's territory.

ENSURING ACCOUNTABILITY

The purpose of the International Law is not only to impose punishment on war criminals but also the effective and impartial protection of the victims of the armed conflict.¹⁸ The notion of state responsibility is to be distinguished from state accountability, where it is ensured that the states which commit any breaches of international law or the norms of *jus cogens*, or any other acts which violate the international standards of conduct, do not escape such liability imposed with impunity for the grave acts committed. Liabilities under international law falls

¹⁴The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art 2, Aug 12,1949,75 U.N.T.S. 135.

¹⁵ANTONIO CASSESE, POWERS AND DUTIES OF AN OCCUPANT IN RELATION TO LAND AND NATURAL RESOURCES, IN INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 419, 420 (Emma Playfair ed., 1992).

¹⁶Regulations concerning the Laws and Customs of War on Land, Art 42, Oct. 18, 1907.

¹⁷DRC v. Uganda, ICJ reports 2005 pp. 168, 229.

¹⁸ Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 Harv. Int'l L.J. 65, 122, 2003.

upon states as well as individuals.¹⁹ This is because crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the accountability under international law be ensured.²⁰ Obligation arises on individuals with respect to crimes against peace, crimes against humanity and war crimes.²¹ Foundation of the concept of individual responsibility was laid down way back during the formulation of Nuremberg Charter.²² This idea was confirmed by United Nations General Assembly as rules of international law in 1946 resolution.²³

International legal accountability involves legal justification of an international actor's performance vis-a-vis other, the assessment or judgment of that performance against international legal standards and the possible imposition of consequences if the actor fails to live up to the applicable legal standard.²⁴ Article 1 to the Geneva Conventions obliges all states parties to respect and ensure respect for the Convention in all circumstances. The notion of respect is not restricted to refraining from illegal conduct but is extended to take protective 'positive actions' by states to ensure respect for the law.²⁵ The terms 'ensure' and 'secure' have been interpreted to require governments to take "positive action" so that respect actually occurs.²⁶ In this way, the notion of respect can afford genuine legal protection.²⁷

Further, to check that individuals who are actual perpetrators of such acts do not escape liability for their acts, the international criminal law imposes obligations on the states to hold individuals under their control, accountable who are responsible for serious violation of laws of war. This can be inferred from the Article 146 of the Fourth Geneva Convention which lays down obligations on states to take effective measures for suppression of any act contrary

¹⁹MALCOM SHAW, INTERNATIONAL LAW 400 (6th ed, 2008).

²⁰*Id.*

²¹IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 167 (Oxford 1963).

²²Charter of the International Military Tribunal, art 6, Aug 8, 1945.

²³Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal General Assembly United Nations General Assembly Resolution 95(I), Dec 11, 1946.

²⁴Jutta Brunee, *International Legal Accountability Through the Lens of the Law of State Responsibility*, Netherlands Yearbook of International Law, Vol. 36, pp. 3-38, 2005. <http://ssrn.com/abstract=1166222>.

²⁵*Accountability for Violations of International Humanitarian Law: An Introduction to the Legal Consequences Stemming from Violations of International Humanitarian Law*, (October 2013) <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/acountability-for-violations-of-international-law.pdf>.

²⁶LOUISE DOSWALD BECK, 'HUMAN RIGHTS IN TIMES OF ARMED CONFLICT AND TERRORISM' 32 (Oxford University Press; Oxford 2011).

²⁷*Id.* at 31.

to the Convention. In any event, it is clear that this provision places Israel under a legal obligation to enact legislation penalizing the commission of grave breaches and also to track down and bring to trial persons suspected of having committed or ordering the commission of such offences.²⁸ The concept of individual accountability comes into role here. It is well recognised that the transfer of its own civilians by a state into an occupied territory falls within the ambit of 'war crimes' in the international armed conflict.²⁹ Prior to ICC came into force³⁰, it was easy for Israel to settle its own civilians into the Occupied Palestine Territory and establish its colonies in the said territory since it could take the defence of state sovereignty to escape liability. But now ICC can regulate these activities and order investigations if there is any violation of the laws of war. ICC has jurisdiction over natural persons indulging in such acts and to punish them in pursuant to its Statute.³¹

It is pertinent to note that Article 25(3) of the Rome Statute punishes individuals not only for commission of crime but also for participating in any form i.e. ordering, assisting, instigating and aiding, providing for means of its commission, abetting the crime and also an attempt to do it. This four level classification i.e. commission, instigating and ordering, assisting and finally contributing warrants different degree of individual responsibility. Individuals acting in official capacity are very well under the jurisdiction of ICC without any distinction and they cannot claim any exemption or reduction of sentence on the basis of their official capacity.³² Therefore, in this way international criminal law imposes accountability on the individual actor for violation of international law. Concept of Universal Jurisdiction plays an important role in ensuring accountability for breach of international law. Universal Jurisdiction gives authority to the national courts and international tribunals of any state to prosecute individuals for certain crimes, irrespective of where they were committed. The concept behind this is that such crimes are so grave that they are condemned universally and warrant the exercise of any judicial authority, national or international, over those alleged to have committed them, without any regard to the traditional factors of jurisdiction.³³ This concept of universal jurisdiction is implicit in Article 146 of the Fourth Geneva Convention.

²⁸Imseis, *supra* note 17.

²⁹ Rome Statute of the International Criminal Court, art. 8(2)(b)(viii), July 01, 2002

³⁰ ICC Statute came into force on 1st July, 2002.

³¹*Id.* art. 25.

³²*Id.* art. 27.

³³Research in International Law of Harvard Law School, Jurisdiction with Respect to Crime, 29 AM. J. INT'L L., 1-739, 435 (Supp. 1935).

The principle of Universal Jurisdiction received its most significant judicial affirmation by the Supreme Court of Israel in the litigation involving its right to prosecute Nazi war criminal Adolf Eichmann.³⁴ Thus, national courts of Israel or municipal court of any other State can very well exercise their jurisdiction over those involved in transferring Israeli civilians into the Occupied Palestine Territory.

CONCLUSION

This composition has attempted to explicate legal measures available in international criminal law which hold individuals accountable for causing grave violations of International Humanitarian Law. When addressing violations of International Humanitarian Law, it is imperative to ask what the legal consequences are when these important rules are broken. To this end, it has focused on the legal consequences of the transfer by Israel of its own civilians into the Occupied Palestinian Territory. It is imperative to emphasise that the notion of individual responsibility in international criminal law has expanded the scope of accountability under international criminal law.

³⁴Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 304 (S. Ct. 1962) (Isr.)

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