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How to Make International Law Work for Palestinians

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International law is not a self-executing set of rules that automatically brings justice. It is shaped by politics and used for political aims. Used in this way, international law has contributed to the ongoing oppression and fragmentation of the Palestinian people. When combined with the existing Oslo framework, it has been selectively used to pursue an unfair land-for-peace formula while covering up the ongoing Israeli colonization, confiscation and annexation of Palestinian land and oppression of the Palestinian people. It has specifically omitted the right of return of millions of Palestinians living as refugees around the world, and provided the basis of a framework for international aid that only serves to further entrench Israel's prolonged occupation of the West Bank, including East Jerusalem and the Gaza Strip. Yet Palestinians should not turn their back on international law because – if used appropriately – it can serve as an effective tool for the oppressed.

What's Wrong With International Law

An examination of the currently dominant International Humanitarian Law (IHL) shows why it alone is insufficient or even detrimental for a strategy that seeks to overcome Palestinian fragmentation and the lack of accountability to the entire set of Palestinian rights.[1]

- IHL is applicable only to the part of mandate Palestine occupied in 1967, commonly referred to as OPT; it does not protect all Palestinians and is silent on the right to self-determination.

- IHL applies to *temporary*, short-term occupation. Under IHL, such occupation is *legal* as long as the rules of IHL are respected. The occupying power is granted authority to establish a regime that may limit human rights for reasons of military necessity, security and public order.

- Exclusive focus on IHL suggests that Israel's regime in the OPT is a regime of lawful, temporary occupation. This has given rise to an international aid enterprise that mitigates the humanitarian impacts of the Israeli occupation and questions the legality of certain Israeli practices *rather than the occupation itself*. The responsibility to protect the rights of the entire Palestinian people,

[1] IHL defined as the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations) and the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (Fourth Geneva Convention).

in particular the right to self-determination, and to ensure Israeli respect of its international obligations, is relegated to the power politics of United States and European-led peace diplomacy.

The further shortcomings of the dominant political and legal paradigms are manifest in the 20 years of peace diplomacy based on the Oslo framework that was to be valid for only five years. The division of administrative and governmental responsibilities for the OPT into Areas A (Palestinian), B (joint Palestinian-Israeli), and C (Israeli), was a framework that gave license to Israel for the permanent acquisition/annexation and colonization of Palestinian land and the establishment of separate legal regimes for Jewish settlers versus occupied Palestinians in the West Bank.

With UN Security Council Resolution 242 (1967) being the only reference to international law in the framework established for peace negotiations and diplomacy, there is also no legal framework to hold Israel – and other states – accountable to their obligations vis-à-vis the rights of the Palestinian people. The Resolution establishes that the West Bank, including East Jerusalem, and the Gaza Strip, are occupied territory and that they are not – and can never become – Israeli territory, and that Israeli withdrawal was a requirement for peace. However, the Resolution does not even mention the Palestinians and their United Nations-recognized rights under international law.

Peace diplomacy on the basis of UN Resolution 242 is limited solely to the question of the future status of the part of Palestine that was occupied in 1967. It excludes the majority of the Palestinian people living in Israel or as refugees around the world and seeks to obtain bilateral agreements that ignore and violate international law. Palestinian negotiators are expected to terminate all claims against Israel, and to recognize the *status quo* Israel has created in the part of Palestine it conquered in 1948, in exchange for Israeli withdrawal from the territories occupied in 1967 (the so-called land for peace formula). The recent admission of Palestine to the UN as a non-member observer State does not change but rather affirms the Oslo paradigm.[2]

How to Better Apply International Law

The above limitations of IHL and the ways in which international law could be used to guide a new Palestinian strategy were the focus of a major international conference held at the Birzeit University's Institute of Law in May 2013 that brought together more than 300 Palestinian academics, civil society activists and political actors.[3] Based on legal opinions by renowned legal scholars, including John

[2] UNGAR A/67/L.28 of 29 November 2012 admitting Palestine to the United Nations as a non-member observer State "*expresses the urgent need* for the resumption and acceleration of negotiations within the Middle East peace process based on the relevant United Nations resolutions, the terms of reference of the Madrid Conference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water."

[3] See also http://lawcenter.birzeit.edu/iol/en/index.php?action_id=266&id_legal=621&id_type=4, as well as the article by Allegra Pacheco at: http://www.jadaliyya.com/pages/index/11547/expanding-the-legal-paradigm-for-palestine_an-inte

Dugard and Richard Falk, there was consensus that, despite its limitations, IHL is an important tool for the protection of Palestinian civilians living under Israeli occupation, but that additional new legal frameworks are needed to advance the right of all Palestinians to freedom and justice, including refugee return. These frameworks include, in particular, the frameworks of (settler) colonialism, forced population transfer (ethnic cleansing), apartheid, and self-determination.[4] The applicability of these frameworks is grounded in the 2004 ICJ advisory opinion on the Wall and in the reports of UN human rights treaty committees, UN Special Rapporteurs and fact-finding missions.

Colonialism, apartheid and forced population transfer,

- Are legal frameworks which capture Israeli policies and practices and the experience of the entire Palestinian people, past and present. They cannot be applied to the OPT without reference to the discriminatory and oppressive Israeli legal and political regime that pre-dates the 1967 occupation. These frameworks, therefore, transcend the separation between 1948 Palestine and the OPT and help to overcome the fragmentation of the Palestinian people;

- Are defined as racist regimes and policies which are absolutely prohibited in their entirety. Colonialism and apartheid result in special legal responsibility and obligations for all states. Faced with such violations, all States have three duties: to cooperate to end the violation; not to recognize the illegal situation arising from it; and not to render aid or assistance to the State committing it – which stands in stark contrast to the aid provided to Israel by the U.S. and Europe to date.[5] Apartheid and forced population transfer are also criminalized and entail individual responsibility under the Rome Statute of the International Criminal Court (ICC).

- Resonate negatively worldwide and can serve to mobilize public opinion and political support. The language of colonialism resonates in particular with formerly colonized nations in Africa, Latin America and elsewhere. It can be used, for example, with the African Union whose political backing is needed in the UN General Assembly for an advisory opinion by the International Court of Justice (ICJ), should the Palestinians decide to seek a second opinion, and for bringing a case to the ICC. The African Union in particular is likely to offer support due to the perceived bias of the ICC against Africans.

The above has in fact already been adopted by the Palestinian Boycott National Committee (BNC) as the legal framework guiding the Boycott, Divestment and Sanctions (BDS) Campaign. However, the participants at the Birzeit conference highlighted the need for a much broader and longer-term Palestinian strategy on this basis. Participants welcomed proposals for a comprehensive Palestinian

[4] For more on the first three frameworks including their legal definition see, respectively, the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); the human rights dimensions of population transfer, including the implantation of settlers: Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano', UN Doc. E/CN.4/Sub.2/1993/17, 6 July 1993, paras. 15, 17; and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

[5] See, Human Sciences Research Council of South Africa, "Occupation, Colonialism, Apartheid?"(2009). Executive summary at: http://www.alhaq.org/attachments/article/232/occupation-colonialism-apartheid-executive.pdf

anti-colonial, anti-apartheid strategy for liberation that would involve members of the Palestinian human rights, legal and political community within and outside Palestine, provide answers to the important question of how the Palestinian leadership can be influenced and engaged, and garner the support of international legal and political circles and public opinion.

The conference also identified a number of outstanding questions to be resolved by experts. For example, the international law experts participating in the debates were divided over the question of whether legal action focused on the OPT would necessarily sustain or even deepen the current fragmentation of Palestine and the Palestinian people. While some experts argued that it would be best to go to the ICJ with a question about Israeli colonialism and apartheid in the OPT because there was a fair chance that the court would decide that Israel's entire regime of prolonged occupation was illegal, others urged that Palestinians ask the ICJ to determine whether Israel's oppressive regime over the entire Palestinian people since 1948 is a regime of apartheid. Similarly, different opinions were raised in the discussion about the option of bringing a war crime case to the ICC against Israeli officials responsible for the illegal settlements in the OPT.

These and other discussions underscore the importance of informing Palestinians everywhere, in particular civil society activists, university students and politicians, about the legal meaning and implications of the proposed frameworks of apartheid, colonialism and forced population transfer, and about the potential benefits and risks of the ICJ and ICC options. Broad public awareness, engagement and an informed public opinion about if and when Palestinians should approach the ICC and/or ICJ are the primary ingredients of a powerful new Palestinian discourse and strategy.

This commentary is available in Arabic at: http://bit.ly/LaWpL

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