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Education Under Occupation

Legal Framework – International Humanitarian Law

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Abstract: *This article is part of the series Education under Occupation, which explores the legal responsibilities of Israel with respect to the Palestinian population living under the military occupation. This article describes the framework of International Humanitarian Law, including a short tour through its history and applicable normative bodies. This study pertains to the situation in Israel and Palestine, specifically to the military occupation of Palestine by Israeli forces.*

Keywords: *Human Rights, Humanitarian Law, Palestine,*

I. INTRODUCTION

There are a large number of bilateral agreements and customary norms that regulate the behaviour of combatants and armies on the battlefield, restrict the exercise of certain war practices, and limit the equipment and weapons allowed. However, history shows that these norms are consistently transgressed by armies and their leaders. Modern warfare has not been an exception when it comes to violations of these rules and has provoked increased suffering and horror for civilian populations in every corner of the world. Over time customary rules and bilateral agreements have been rearranged in several multilateral normative bodies in the context of Public International Law. This legal system does not prohibit the use of armed force but limits its use to cases of self-defence. Moreover, it explicitly establishes limits to the harm inflicted on both combatants and civilian populations, seeking to reduce the amount and severity of permanent damage caused by armed force.

The Israeli–Palestinian conflict, sadly, represents a good example of the challenges to duly implementing IHL, and in particular the law of occupation, when one of the parties to the conflict wilfully disregards its basic tenets, such as the temporary nature of occupation and the prohibition of transferring sovereign rights onto the Occupying Power. This should be a lesson for the future: ensuring respect and implementation of IHL is paramount in order to preserve the value of the law and its ability to protect civilians and their rights from the effects of armed conflicts (Jabrain, 2013).

II. INTERNATIONAL HUMANITARIAN LAW (IHL)

States and civil society have put great effort into limiting and ordering the behaviour of armed forces during periods of conflict, evolving into a regulatory body in the context of Public International Law. The historical origin of international humanitarian law dates back to moral, religious, political, military, and economic imperatives of ancient civilizations that regulated the conduct of combatants in order to preserve life and guarantee the humane treatment of non-combatants. (ICRC, 2005)

All international agreements state that education must be available to every child regardless of gender, religion, nationality, ethnicity, or any other possible type of discrimination. These agreements also apply to children living in territories subjected to military occupation.

HAGUE CONVENTIONS – 1899 AND 1907

These two conventions focus on warfare practices, defining the rights and obligations of belligerent powers conducting military operations and limiting their means to inflict damage on the enemy (ICRC, 2005). These two bodies define which actors should be considered combatants and what treatment prisoners of war and the wounded should receive. A first definition of "occupied territory" is given in the texts of these conventions, and they describe general obligations for occupying powers.

UNITED NATIONS CHARTER – 1945

Although the Charter is not part of the constellation of bodies that constitute International Humanitarian Law, it declares a series of fundamental ideas that regulate the behaviour of state parties in cases of international controversy.

The theme of peace and security underlays the text and spirit of the Charter, in particular its preamble and first few articles. Article 1.1 is about the purpose of the United Nations and obliges all state parties to "…[m]aintain international peace and security…" taking "…effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace." Moreover, it urges state parties to seek and find peaceful means of resolving any and all international controversies that could lead to a breach of the peace. In other words, the Charter urges state parties to build peace, promote understanding between parties, and to arrive at peaceful solutions to conflict. While the Charter does not include an explicit prohibition of the use of force, articles 2.3 and 2.4 stress that Parties "…shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" and "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."

The content of these articles, despite their non-binding nature, are considered fundamental principles, and non-party states are not exempt from the obligations they set forth.

GENEVA CONVENTIONS – 1949

The terrible aftermath of World War Two led to the revision and expansion of three pre-existing Conventions and the creation and signing of a fourth. These agreements shape and constitute the normative basis of modern International Humanitarian Law:

1. The Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field
2. The Geneva Convention for the amelioration of the condition of wounded sick and shipwrecked members of armed forces at sea.
3. The Geneva Convention relative to the treatment of prisoners of war
4. The Geneva Convention relative to the protection of civilian persons in time of war.

Three additional Protocols were prepared and signed, two in 1977 and the third in 2005:

- Protocol I (1977) relating to the protection of victims of international armed conflicts.
- Protocol II (1977) relating to the protection of victims of non-international armed conflicts.
- Protocol III (2005) relating to the adoption of an additional distinctive emblem (i.e. The protective sign of the red crystal as an alternative to the red cross and/or the red crescent, for medical and religious personnel at times and in places of war).

III. APPLICABILITY OF THE FOURTH GENEVA CONVENTION

Article 4 of the Fourth Geneva Convention defines protected persons as "…those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals…". It further states that those who are nationals of a State "…not bound by the Convention are not protected by it". According to this article, if Palestine is not fully recognized as a State or High Contracting Party (i.e., signatory of the Convention), the Convention would not provide protection to Palestinian civilians. However, Part II of the Convention relates to the general protection of populations, therefore applies more widely. These provisions cover the entire population of countries in conflict, without any type of discrimination "…and are intended to alleviate the sufferings caused by war."

In 1951 the State of Israel ratified the Fourth Geneva Convention and since then has been subject to its international responsibilities and obligations.

Nevertheless, Israeli diplomats and political representatives have consistently rejected the applicability of the Fourth Geneva Convention arguing over the sovereignty of the Palestinian people before the occupation begun. According to Israeli sources, the territories were not occupied, but captured in 1967 as a result of a belligerent action of self-defence and that those territories did not belong to any sovereign state. From that perspective, there is no sovereign state to which the territories should be returned. After the war, Egypt did not claim sovereignty

over the Gaza Strip and the international community did not recognize the Jordanian claim for sovereignty over the West Bank. Article 2 indicates that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply 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."

The official Israeli position rejects the applicability of this article despite the fact that the third paragraph indicates that "[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations." Israel's restricted interpretation of the article has been the target of criticism from academics and Israeli jurists, as well as from specialists abroad.

The controversy on this subject is not just present in international forums: The Israeli Supreme Court considers that "[s]ince 1967, Israel has been holding the areas of Judea and Samaria […]in belligerent occupation" and that the applicable rules are those in the Fourth Geneva Convention.

The UN Security Council, the ICRC, a large number of UN State Parties, and academics have criticized the Israeli position, especially in reference to article 1, which is common to the four Geneva Conventions and requires State Parties to respect and ensure respect in all circumstances. (Anderson, 2016)

The Palestine Liberation Organization was recognized as the Palestinian representative to the UN in 1974, and in 1982 declared its unilateral commitment to the principles and rules of the four Geneva Conventions. However, the Swiss Government, depositary of the instruments of ratification, did not recognize the PLO as a High Contracting Party at that time. The Swiss Government, which became a non-member Observer State at the UN in 2012, only accepted the ratification in 2014. Palestine has also ratified the three Protocol amendments to the Geneva Conventions and a number of other international treaties, many of them related to human rights, including the Convention on the Rights of the Child.

MILITARY OCCUPATION

The meaning of occupied territory has been and remains the focus of extensive debate with complex legal and political arguments. Even the International Court of Justice has faced divided opinions over topics such as the Israeli military occupation, transfer of Israeli civilian population into the occupied territory, and the construction of the segregation wall in the West Bank.

Israel rejects the term military occupation despite clear consensus to the contrary within the international community. In general, the State of Israel maintains political discourse about disputed territories with the Arabs. The occupied territory comprises of the Gaza Strip and the West Bank of the Jordan River. However, as discussed before, the Supreme Court of Israel considers the Gaza Strip and the West Bank as territories under "belligerent occupation". Moreover, after the 1967 war, in which Israel occupied the land in the West Bank beyond the Green

Line of 1949, Israel declared through a military order that the Fourth Geneva Convention would be the applicable norm in the occupied territories. A few months after the end of the war, due to internal political pressure, this military order was amended and the provision was deleted. Since then Israel has not accepted the de jure applicability of the Fourth Geneva Convention and has consistently claimed that the status of the West Bank and Gaza is "unclear". (Kretzmer, 2012)

A large number of resolutions of the UN General Assembly and the UN Security Council ascribe the status of military occupation to the West Bank (including East Jerusalem) and the Gaza Strip, and recognize International Humanitarian Law as wholly and necessarily applicable. This position is backed by numerous longstanding and reputable organizations, such as the ICRC. (Jabrain, 2013)

The UN Security Council resolution 242/67 highlights the inadmissibility of the acquisition of territories by force and calls for the application of the following principles:

- "Withdrawal of Israel armed forces from territories occupied in the recent conflict";
- "Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."

This demand is not exclusive of the Palestinian territories. Israel, as result of the 1967 war, also occupied the Golan Heights (Syria) and the Sinai Peninsula (Egypt).

Article 42 of the Hague Convention of 1907 indicates that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." This concept is expanded in article 2, common to the four Geneva Conventions, stating that International Humanitarian Law will also be applied in cases of total or partial occupation of the territory of a state party even if that occupation faces no military resistance.

According to Ferraro there is no precise definition of the notion of neither occupation, nor clear standards to frame the beginning and the end of an occupation. The definition given in article 42 cited before is vague. Nuances make it difficult or even impossible to find an exact and unique definition of the concept (Ferraro, 2012).

In the case of Palestine, two possible starting points of the Israeli occupation can be identified. The first starting point is immediately after the creation of the state of Israel and its war with neighbouring countries in 1948. Israeli forces took control of part of the territory, while Jordan imposed its administrative and military control on the territory known today as the West Bank. The second possible beginning of the military occupation is after the 1967 war, when Israel took absolute control of the Palestinian territory, displacing the Jordanian forces.

A legal test based on three cumulative conditions can be used to determine whether a certain situation fits or qualifies as military occupation for the purposes of International Humanitarian Law (Ferraro, 2012):

- "The armed forces of a state are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion."
- "The effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence."
- "The foreign forces are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government."

After the invasion in 1967, the territory now called the West Bank was under military and administrative control of the Kingdom of Jordan, while the territory now known as Gaza Strip was under Egyptian control. Neither of the two was officially annexed to the occupying power, meaning Egypt and Jordan did not claim sovereignty over these territories. The control of the Israeli military occurred after a brief armed conflict and the government within these territories was immediately taken over by the new authority. The occupation occurred without the consent of the Egyptian and Jordanian authorities, as it happened by force. Thus, the first of the above conditions is met.

After the war, both territories were under Israeli military and administrative control. The previous governments were rendered incapable of exercising control or authority in the territories. This fulfils the second condition above.

Finally, since the invasion in 1967, Israeli forces have exercised complete control over the West Bank and Gaza Strip. However, this control has evolved over the years. After the formation of the Palestinian National Authority and the Oslo Accords, the territory was subdivided into three major areas known as Areas A, B, and C. Area C, which is comprised of the major part of the West Bank, is under the authority of the Israeli military. Israel has transferred a significant portion of its population in this area. Area A, the smallest part of the West Bank, is under the civilian control of the Palestinian Authority. Finally, the Gaza Strip remained under full Israeli control until 2005. Since then, it is formally under Palestinian control, but subjected to a complete Israeli blockade of all of its borders. Therefore, the third cumulative condition is also met.

VI. CONCLUSION

Considering the historical facts and the arguments and opinions of renowned specialists and academics, the supposed controversy concerning the status of the Palestinian Territories exists in the field of politics and on political and diplomatic agendas. On the basis of facts and law the controversy is easily resolved.

The Palestinian territory is formally under occupation and the Fourth Geneva Convention must be applied to protect the civilian population living in the occupied territory. The Geneva Convention clearly and explicitly states the obligations of the occupying forces with respect to the civilian population and the obligation to respect and ensure respect of its principles and norms, to which the whole international community is obliged.

Also, it must be highlighted that the relevance of any international legal framework is undermined if the parties, both the directly involved in the hostilities and the others, refuse to fully implement the provisions and rules.

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