

A REFLECT OF THE GENERAL CRISIS OF INTERNATIONAL LAW

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It might seem inopportune to mention some general nevertheless important issues when the discussion should be about the urgent ones. It might also appear inopportune to put in doubt the power of the law in a legal expert meeting. However the discussion about the efficacy of international law cannot be postponed if we want to avoid useless debates. There is no use putting all our hopes in international law without analyzing its limitations.

Besides, it might be difficult to say something new regarding the IV Geneva Convention, which seeks to guarantee the protection of civilians in time of war, and its applicability to the occupation in Palestine, since the IV Geneva Convention and the occupation are not new issues. It is difficult in the same way to say something original regarding the implementation of the International Court of Justice (ICJ) Advisory Opinion.²

It is however necessary to repeat, again, some basic premises: the applicability of the IV Geneva Convention as well as human rights law in the Palestinian case³; the duties of Israel as an occupying power and the rights of Palestinians as an occupied people; the necessity of implementing the ICJ Advisory Opinion, and the responsibility of Israel, of other governments and the United Nations of doing so. According to the ICJ, the wall is illegal⁴; as well as the attempts to annex East Jerusalem; Israeli settlements,⁵ and land acquisition by force⁶ among other issues.

After the solid opinion of the highest UN judicial organ, the debate should no longer relate to the applicability of international law in Palestine or the interpretation of the clear conclusions of the ICJ, the debate should be focused on the implementation: how to make the step from the law to the ground.

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² International Court of Justice: *Legal consequences of the construction of the wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004

³ See: Al-Haq: *The applicability of Human Rights Law to Occupied Territories: the case of Occupied Palestinian Territories*, Ramallah, 2003.

⁴ See also, Dugard, John: "Question of the violation of Human Rights in the Occupied Arab Territories, including Palestine" Report of the Special Rapporteur of the Commission on Human Rights. E/CN.4/2004/6, 8 September 2003.

⁵ According to the international law, all the Israeli settlements in Palestine are illegal (article 49 *Fourth Geneva Convention*, 1949) and also a war crime (article 147, *Fourth Geneva Conventions*)

⁶ Article 2, *Charter of the United Nations*, 1945

To answer this question it is necessary to consider at least three problems: 1) the current crisis of international law, 2) the chronic lack of implementation of international law in Palestine, and 3) the acceptance of the facts on the ground by the international community.

1. The current crisis of international law

Despite the steps forward observed in the field of international humanitarian law, its enforcement has not been satisfactory. In addition, the social support for international humanitarian law (IHL) has decreased seriously. The combination of these two trends: impunity and loss of credibility, leads to a crisis of humanitarian law.

The crisis of international law mainly comes from a loss of faith in its power. After September 11 2001, taking the war on terror as a pretext, states – including some members of the Security Council – have shown disregard for international law. It generated a sort of loss of meaning of the Geneva Conventions. Today, international law has the same tools than before September 11 but the social and institutional perception is not the same. This is the crisis mentioned here.

Conflicts such as those affecting Colombia, Palestine, Lebanon, Iraq, Afghanistan, Chechnya, and Sudan show that the effectiveness of these rules, which seek to regulate war, is very restricted.

In Colombia, a domestic law granted amnesty to the paramilitary groups, despite the fact that they perpetrated at least 17,000 crimes of war. In Chechnya 15 percent of the population has been killed since 1996. Besides, the attacks on civilian goods, internally displacement, torture and disappearances are constant. In Sudan, massacres of civilian by militias with the support of the Sudanese government continue, despite the threats of sanctions by the international community. In this three cases the Protocol II additional to the Geneva Conventions and its promise of justice remain unheeded.

Civilians have been particularly and seriously affected by the occupation of Iraq as well as by the last war in Afghanistan. In this two cases, the duty of the occupying powers to respect civilians, two pillars of the Fourth Geneva Conventions, have not been guaranteed.

In Lebanon, the massacres of civilians, the systematic destruction of civilian infrastructure such as bridges and homes, and the discovery of more than 100,000 unexploded cluster bombs demonstrate the reluctance to enforce international law.⁷ According to Jan Egeland, United Nations Undersecretary-General for Humanitarian Affairs, "what's shocking and completely immoral is: 90% of the cluster bomb strikes occurred in the last 72 hours of the

⁷ According to the United Nations Security Council, "The necessary element of intent may be inferred from sufficient facts. In certain cases, there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent..." United Nations, Security Council S/1994/674 - 27 May 1994

conflict, when we knew there would be a resolution”.⁸ In this case, the legal provisions regarding proportionality and weapons restriction were not taken into consideration.

Finally, the treatment given to prisoners of war in Iraq, Afghanistan and Guantánamo represents a fatal blow to the III Geneva Convention. All these different scenarios ruin all legal principles and popular faith in international law.

To answer these critics about the efficacy of international law, it is usually said that the phase of enforcement will be coming one day. In this context, raising theoretical legal arguments in favor of international law seems only intended to avoid an important question: whether the very structure of international humanitarian law contributes to its crisis.

There is a tendency to affirm that the formulation of the law and its enforcement should be distinguished. But if the law itself contributes to its own failure, then the first stage, the formulation, is at least partially responsible of the promised second stage: the implementation. The argument of the academy to escape this debate is also well known, however a law, which does not bring justice, can difficultly receive the label of “law”.

2. The chronic lack of implementation of international law in Palestine

The lack of implementation is not an issue concerning simply the ICJ Advisory Opinion but a constant feature of the conflict, from the Partition Plan (1947) to the Advisory Opinion (2004). As underlined by the Judge Elarby in his separate opinion, “the responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine... this special responsibility was discharged for five decades without proper regard for the rule of law”.⁹

In spite of the IV Geneva Convention and 9 UN Security Council resolutions, which forbid the construction of settlements in the Palestinian territory, the amount of settlers has increased by more than 400,000 since 1967. There are 17 UN Security Council resolutions regarding Israel’s illegal attempt to annex East Jerusalem but, in practice, Israel is progressively annexing the Holy City. The debate is not about the applicability: beside dozens of experts and institutions, as well as the ICJ, between 1967 and 2002, a total of 26 Security Council resolutions have confirmed the applicability of the Geneva Conventions in Palestine. Many other documents reaffirmed the illegality of land acquisition by force, but despite this, the step from the law to the ground remains to be taken.

The right to freedom of movement and the closure policy or the Jews-only road system; control of water resources and the right to water of the Palestinians; Apartheid policies preventing mixed marriages and the international legislation against discrimination; the

⁸ “UN denounces Israel cluster bombs”, BBC, 30 August 2006

⁹ Separate opinion of Judge Elaraby to the Advisory Opinion. See: International Court of Justice: *Legal consequences of the construction of the wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paragraph 1.

policy of home demolitions sometimes justified under military necessity, using the exceptions of the Geneva Conventions; the confiscation of Palestinian land between the wall and the Green Line and the prohibition of land acquisition by force¹⁰; all this clearly amounts to massive violations of international law. Before the last war with Lebanon, Palestinian Israelis could not modify their homes even in order to build bomb shelters. Once the war had ended a new Israeli Law decided that “the Arabs of the Galilee will not even be compensated for the damages of the war by the same sums their Jewish neighbors are entitled to”.¹¹

Regarding the enforcement of international law in so-called “negotiations” and “peace processes”, human rights and international humanitarian law have been excluded from almost all the proposals and agreements. This has been the case in the Oslo Agreements, in the Road Map to Peace.¹² And, last violation but not least: the wall, which the Israeli High Court of Justice has considered legal even for the parts beyond the Green Line.¹³ These crimes committed in the context of the ongoing occupation can be summarized in three words: planned, systematic, and intentional, despite all the international legislation against it.

If the Advisory Opinion is to be added to the long list of international condemnations ignored by Israel, the ICJ will have brought academic and theoretical arguments in support of the Palestinian cause but not justice. It is the case of the Saharan people who also got an Advisory Opinion in its favor in 1975¹⁴ and has been forgotten. Palestinians do not expect nor deserve mere arguments from international law but they deserve justice. In 1974, the General Assembly adopted a resolution denouncing in particular the annexation policy, settlements, home demolitions, land expropriations, deportations, massive arrests, and administrative detentions¹⁵. More than 31 years later, the situation is worse.¹⁶

3. The acceptance of the facts on the ground in Palestine

During the Second *Intifada* the IDF attacked medical personnel, humanitarian organizations and even killed wounded people inside ambulances. The Palestinian Red Crescent could answer only 10% of the calls received.¹⁷ The distinction between civilians and combatants has been regularly ignored by the IDF.¹⁸ The situation of human rights in

¹⁰ Military Order 5764, 2003 regarding the regulation of the security in Judea and Samaria, 2 October 2003

¹¹ Amira Hass: “Can you really not see?” *Haaretz*, August 30, 2006

¹² See, in general: Human Rights Watch: “The ‘Roadmap’ Repeating Oslo’s Human Rights Mistakes”, Washington, 2003; and Mari, Mustafa: “The negotiation process: The Lack of Human Rights Component”, in: *Palestine-Israel Journal* (Vol. 10, Num. 3, 2003), pp. 5-16.

¹³ The Court based its decision on the rights of settlers under Israeli law. See: “High Court: Construction of W. Bank fence is legal” *Haaretz*, September 15 2005

¹⁴ International Court of Justice: Western Sahara, Advisory Opinion of 16 October 1975

¹⁵ United Nations, General Assembly: Resolution A/RES/3240, November 1974

¹⁶ Statement on Gaza by United Nations Humanitarian Agencies working in the occupied Palestinian territory, August 3rd 2006 (OCHA, UNRWA, WFP, WHO, FAO, UNFPA and UNICEF)

¹⁷ International Committee of the Red Cross: *ICRC Annual Report 2002*, Geneva, p. 305

¹⁸ Human Rights Watch” Jenin: IDF Military Operations” May 2002 Vol. 14, No. 3 (E); and Human Rights Watch ” In a dark hour: The use of civilians during IDF arrest operations”, 18 April 2002, Vol. 14, Num. (E)

Palestine is worrying. Murders, tortures, illegal detentions, curfews, sieges, home demolitions, destruction and expropriations are common features of the occupation. Only during the past two months, 224 Palestinians were killed in Gaza and the West Bank.

The exchange of letters between Mr. Bush and Mr. Sharon in April 2004 recognizing the settlements as a part of the natural development of Israel; the support of the international community to this so-called called disengagement plan; and the proposal of Mr. Olmert to define unilaterally the new borders of Israel are all elements indicating this acceptance of the facts on the ground.¹⁹ As Gideon Levy said: "the war against the Palestinians is [therefore] unequivocally, a territorial war, a war for the settlements"²⁰.

During the legal proceedings before the ICJ, most of the States – responsible of ensuring the respect of the Geneva Conventions – took a step back and refused to take part in the public audience in the ICJ. The statement of the European Union was clear: it considered that the wall was a "political" matter rather than legal one.

Such a wide acceptance of war crimes and violations of the basic principles of international law only shows the States and their public opinions have not assimilated that international law as a genuine law. International law is in the best case perceived as a moral proposal and in the worst as an utopia.

There are 191 State parties to the Geneva Conventions and none has reacted to put an end to grave violations of international law, according to their duties. UN member states have to recognize that commercial agreements and diplomatic relations should be conditioned by the respect of international law. This holds true in particular for the Association Agreement between the European Union and Israel and for arms trade.

4. Proposal and debate

The current crisis of international law is partially caused by the lack of proper incorporation of international law in Israeli law. But there is worse: The Israeli legal system has established mechanisms designed to perpetuate the violation of the rights of Palestinians by: a) refusing the applicability of international law in Palestine, b) creating a body of domestic rules "legalizing" the lack of rights of Palestinians, and c) guaranteeing systematic impunity to perpetrators of violations of the Palestinians' rights. Then, we cannot expect justice from Israel's legal system. According to Israeli law the wall is legal as well as the settlements, home demolitions, administrative detentions, and the control of water resources. Between October 2000 and October 2002 more than 60 projects to intensify control over Palestinians were presented before the Israeli parliament.²¹

¹⁹ "There is no doubt that the most dramatic and important step we face is shaping the permanent borders of the state of Israel" Al-Jazeera, January 24 2006

²⁰ LEVY, Gideon: "The Real Estate War" *Haaretz*, August 6, 2006

²¹ Warschawski, Michel: *A tumba abierta*, Icaria, Barcelona, 2004, p. 71

Part of this crisis is also caused by the reluctance of the international community to protect the rights of Palestinians while it has all the necessary legal tools to do so.

And part of the crisis is caused by international law itself because it does not provide for effective enforcement mechanisms. We cannot continue talking about the development in two stages of international law: first, the formulation and secondly, the implementation, as if these two stages were unrelated. Something is wrong if the law has been well formulated but it cannot be implemented. .

A law without real mechanism guaranteeing its implementation is, by definition, not well formulated. We cannot continue talking about the forthcoming implementation of international law as in “Waiting for Godot” play; we cannot continue talking to the Palestinians about the “promised law” as we did with the “promised land”.

Clear examples regarding the lack of implementation of international law around the world have been mentioned; and in the same cases the negative perception of crimes of war as such has decreased. International law needs to be more than a moral proposal to deserve to be called “law” and it needs to answer victims and to prevent the impunity of criminals.

What has been the answer by the academy and intellectuals regarding this loss of meaning of international law? Sometimes quoting the Geneva Conventions themselves or entering in a, sometimes unnecessary, semantic debate about the interpretation of international law, meanwhile the number of victims rises. International law is a tool that belongs to everyone, not only the states and the academics.

Good examples of the current crisis have also been mentioned: 1) there is no universal application of some provisions but two standards of application: one for the Palestinians and another one for Israel and the Security Council permanent members, which produce a crisis of international law; 2) Palestine is a legal no man’s land, where the impunity of crimes of war, the violation of human rights as well as the construction of the wall are continuing, and 3) the international community accepts the fact on the ground, taking side against international law.

What can be done? The mechanism of the International Criminal Court does not bring hope, the International Court of Justice made its best but it is not enough, the Israeli legal system does not offer hope. One possibility is to use the obligations of the state parties to the Geneva Conventions²² as well as the mandate given by the ICJ to the international community²³ but exploring the possibilities of the domestic law of our countries. By the

²² All High Contracting Parties of the Geneva Conventions, including Israel, have the duty to ensure the application of IHL, which states “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. Art. 1, Common to the Geneva Conventions (1949)

²³ The Court also asserted that the implementation of international law not only binds Israel but also other governments and, especially, United Nations (UN). States “are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction”. The ICJ declared that, “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting

way, the ICJ Advisory Opinion was not written to provide Non-Governmental Organizations (NGO) with a new tool for fighting against Israeli occupation; it was decided by the highest tribunal of the United Nations systems in order to be implemented by the states.

What is indeed important, however not urgent for everyone, is to reform international law, making it stronger. What is the concrete proposal? To use existing international mechanisms to convoke an international diplomatic conference in order to discuss seriously and in depth the present and the future of international law, especially the IV Geneva Convention in the Palestinian case. As starting legal proceedings against the wall in the International Court of Justice has been possible, relying on those states really committed to international law, launching a reform process to guarantee adequate enforcement of the IV Geneva Convention is possible.

The International Diplomatic Conference is not a political conference (as Madrid 1991 or London 2005) neither a donor-table in order to pay the reconstruction of the civilian goods destroyed by Israel. It is a legal mechanism out of reach of the USA veto; it is a mechanism that should not necessarily be supported by the Swiss government (the guardian of the Geneva Convention); it is mechanism that could get the support of the Islamic countries, some Arab countries and third-world ones.

Despite the dramas mentioned in Chechnya, Colombia, Sudan, Western Sahara, etc., the international community did not convoke such an international conference to discuss the due protection of the civilians, but they convoked and held, last December, an international conference in order to discuss the modification of the emblem of the Red Cross under pressure of the United States and Israel. Finally, the David Star has become a humanitarian emblem. It seems more important to discuss a symbol than the rights of the victims.

What is the problem with the current mechanisms? An example: the Secretary General proposed the creation of a register of damages caused by the wall.²⁴ It is indeed a recommendation of the ICJ, but the Secretary General avoids the most important issue: the immediate application of the rest of the Advisory Opinion and of all the other recommendations contained in the Resolution that establishes the register of damages.²⁵ To register is necessary but not enough. The United Nations resigns to the role of guardian of international law to become accountant of damages. But even this attempt has failed because Israel has modified its Compensation Law in order to prevent Palestinians from asking for any kind of compensation.²⁶

The international community promises justice with international law, but to promise justice knowing that there are no mechanisms to guarantee the implementation of

from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion". International Court of Justice: *Legal consequences...* paragraph 163

²⁴ United Nations, General Assembly: "Letter dated 11 January 2005 from the Secretary-General to the President of the General Assembly". A/ES-10/294, 13 January 2005

²⁵ United Nations, General Assembly: Resolution A/RES/ES-10/15, 20 July 2004

²⁶ AL-HAQ: "The Legalisation of Human Rights Violations: Israeli Knesset Passes Two Discriminatory Laws in One Day" Press Release, July 28 2005

international law is to take side, by omission, in the situation. It is in fact worse than not promising anything, because these promises generate hope for the Palestinian people, while the international community knows that there is nothing to hope.

The Palestinians should not confirm Kafka's words: "there is hope but not for us". With this landscape, I hope we will not answer just quoting the Geneva Conventions and I hope also that the light at the end of the tunnel would not be just a train.