OCCUPATION, COLONIALISM, APARTHEID?

A RE-ASSESSMENT OF ISRAEL'S PRACTICES IN THE OPT UNDER INTERNATIONAL LAW

PALESTINIAN RED CRESCENT SOCIETY, RAMALLAH, 16 AUGUST 2009

—— **SYMPOSIUM PROCEEDINGS** ——

Locating the Report in an Emergent Environment of 'Lawfare'

Dr. Michael Kearney

In reflecting upon the advocacy strategy which should accompany the publication of the HSRC Report, this presentation will consider recent developments which have seen the use of international law by Palestinians being demonised by pro-Israeli groups and academics. Reacting to a series of universal jurisdiction cases taken against Israeli military and political characters, pro-Israel commentators have taken to portraying human rights NGOs, and international law itself, as being just another weapon of war by 'the terrorists' against Israel and the West. While this is not particularly novel, the concerted accusations against Palestinian NGOs and supporters have been accompanied by a heightened engagement by the Israeli army with international law, and specifically international humanitarian law (IHL). This paper will discuss the consequences of these developments, suggesting that the Report is of particular value since its focus on absolute prohibitions of apartheid and colonialism stands in contrast to the 'grey' areas of IHL such as proportionality and military necessity which the Israeli army has been attempting to exploit as justification for their actions. As David Kennedy has noted, there is little comfort in law being the vernacular for evaluating the legitimacy of war and politics 'where it has done so by itself becoming a strategic instrument of war and the continuation of politics by similar means'.

Law as Resistance

Given the failure of the political process, both national and global, in achieving a just end to the occupation, and Israel's overwhelming military superiority in the OPT, the emergence of Palestinian NGOs seeking to employ international law as a means of securing both a reduction in the violence of the occupation, as well as the attainment of an independent Palestinian state, has been significant. In addition to media work, international advocacy and education, monitoring and recording of violations, etc, an increasing use of national courts in universal jurisdiction and other cases against Israeli military and political leaders, as well as multinational corporations cooperating with the occupying forces, has caused alarm to the Israeli establishment. Examples of such cases include:

- 2001 case v Sharon et al *Belgium*
- 2003 case v Bel Eliezer et al *Swtizerland*
- 2004 Shaul Mofaz *UK*
- 2005 Don Almog *UK*
- 2005 Corrie v Caterpillar, *US*
- 2005 Belhas v Ya'alon *US*

- 2005 Matar v Dichter *US*
- 2006 Saleh Hasan v Sec State & Industry *UK*
- 2006 case v Moshe Ya'alon *NZ*
- 2008 case v Ben Eliezer et al *Spain*
- 2009 Al Haq v Regina *UK*

The increasing reliance of civil society upon law as a site of resistance is not unique to the Palestinians but is part of a global trend towards the judicialisation of politics in light of the changing natures of the sovereign state and of the democratic process in the wake of globalisation. Thus, for example, the Treatment Action Campaign which lobbied successfully for a change in the South African government's retrograde policies on the provision of anti-retro viral drugs to HIV patients relied on a combination of mass street demonstrations and occupations as well as innovative pleadings on economic and social rights before the Constitutional Court to achieve their ends.

Lawfare

Palestinians relying upon law as opposed to violence or terrorism, particularly in the international arena, is a threat to many pro-Israel groups since it affects the effectiveness with which Palestinian demands and claims can be portrayed as the work of the irrational, and easily dismissed. Thus a reaction to the use of international law as the basis for Palestinian rights has emerged. The defining characteristic of this reaction has been the repeated and insistent accusation that Palestinians who use international law are engaging in 'lawfare'.

This concept of lawfare emerged in the context of the war on terror, and was coined by Col. Charles Dunlap in a paper given at the Carr Center in November 2001. He contended that 'the use of law as a weapon of war, is the newest feature of 21st century combat' and is a practice whereby 'the rule of law is […] hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself'. Dunlap was talking about NGO and European criticism, with only a slight nod to actual human rights litigation, in Colombia. He subsequently expanded in the Washington Times in 2007 that lawfare was 'the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting' a superior military power.[1]

US conservatives then ran with the term lawfare to criticise appeals by Guantanamo detainees for recourse to the US courts, and this was sensationalised by the al-Qaida handbook found in Manchester in 2007:

> Al Qaeda, of course, is an experienced lawfare practitioner. Its training manual, seized by British authorities in Manchester, England, openly instructs detained al Qaeda fighters to claim torture and other types of abuse as a means of obtaining a moral advantage over their captors. That advice has been routinely followed by detainees at Guantanamo Bay, who have succeeded in generating incessant demands – from European officials among others – for the base's closure and their own liberation.[2]

But perhaps the moment which spurred the opening of the lawfare front against the Palestinians was the ICJ Advisory Opinion of 2004 which found that Israel's construction of the Wall in the OPT was unlawful under international law. The UN General Assembly's referral of the question to the ICJ was opposed by the UK, USA, and the EU: "The United Kingdom believes that the most important priority in the Middle East is the achievement of a

[1] Charles J Dunlap, 'Lawfare amid warfare', *Washington Times*, 3 August 2007.
[2] David B. Rivkin, jr. and Lee A. Casey, 'Lawfare', *The Wall Street Journal*, 23 February 2007, A11. (Messrs. Rivkin & Casey, who served in the Department of Justice during the Reagan and George H.W. Bush administrations, are writing a book on war's evolving legal architecture.)

negotiated settlement based upon the road map… The United Kingdom and the other States involved in the Quartet have made it clear that they consider that for the Court to give an opinion on this matter would be likely to hinder, rather than assist, the peace process." And Switzerland: "We do not judge it to be appropriate in the current circumstances to bring before a legal body a subject in which highly political implications predominate."

Gerald Steinberg in the Israel Law Review responded to the Advisory Opinion in an article entitled 'War By Other Means', by stating that the pseudo legal system, referred to as international law, lacked the necessary 'legitimacy based on the consent of the governed.'[3] He concluded that the Kantian idealism of international law was being 'exploited routinely as a central part of the conflict itself' in the service of realism's pursuit of power and influence as channelled through 'international institutions, the media, and a very powerful NGO network (largely subsidized by governments and other political bodies to further their goals)' intent on 'delegitimizing the legitimate right to self-defence'.[4]

NGO Monitor in September 2008 published a Report entitled 'NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict'. I'm going to quote a section from the Executive Summary which pretty much sums up how they see lawfare:

> "These legal actions, ostensibly to provide "justice" to "victims," are a form of "lawfare" – a "strategy of using or misusing law as a substitute for traditional military means to achieve military objectives" – intended to punish Israel for anti-terror operations, as well as to block future actions. They are also a means for actors that are not accountable to any form of democratic check to subvert a country's foreign policy and interfere with diplomatic relations […]The strategy to delegitimize Israel using legal frameworks was adopted at the NGO Forum of the 2001 UN World Conference Against Racism held in Durban, South Africa ("WCAR" or "Durban Conference"). The NGO Forum crystallized a plan in which Israel would be singled out as a "racist" and "apartheid" state and isolated internationally through a campaign of boycotts, divestment, and sanctions and explicitly adopted lawfare to advance the political war against Israel. The NGO Forum Declaration called for the "adoption of all measures to ensure [the] enforcement" of international humanitarian law, including "the establishment of a war crimes tribunal to investigate and bring to justice those who may be guilty of war crimes, acts of genocide and ethnic cleansing and the crime of Apartheid . . . perpetrated in Israel and the Occupied Palestinian Territories…
>
> This movement is led by Palestinian NGOs such as Al-Haq, the Palestinian Center for Human Rights (PCHR), and Badil, and aided by international NGOs including Human Rights Watch, Amnesty International, International Federation of Human Rights (France), and the Center for Constitutional Rights (New York). These NGOs are largely supported by European governments and receive funding from prominent foundations. […] As a result of these cases, several countries, notably Belgium and the UK, have amended their laws to prevent future abuse. Such amendments have included denying NGOs the ability to apply to a judge directly for an arrest warrant without consulting any government officials. Yet, these lawsuits continue to have serious political and diplomatic repercussions, including severely limiting the ability of Israeli officials to travel abroad. And the media impact remains an important element in the demonization of Israel. This report also highlights the lack of transparency and accountability of NGOs, and their contribution to diplomatic and political tension, and even greater conflict."

[3] Gerald M Steinberg, The UN, The ICJ and the Separation Barrier: War by Other Means, 38 Isr L Rev 331 (2005) 335.
[4] Steinberg, at 346.

In a November 2008 Wall Street Journal piece, the NGO Monitor Report's author, commenting on PCHR's filing of suit in Spain seeking arrest warrants against Israeli officers in relation to the Shehadada killings, described the lawsuit as 'just the latest front in the anti-Israel 'lawfare' strategy – the frivolous exploitation of Western courts to harass Israeli officials', and to tie Israel's hands against Palestinian terror.[5] Regarding the principle of universal jurisdiction she stated that 'The honourable intent was to provide relief to victims of real mass murderers in countries that *don't respect the rule of law*', again stressing that the lawfare was of enormous 'propaganda impact' against Israel.

In February 2009 Irit Kohn (of the Israeli Ministry of Justice) -- noting that at the outset of Operation Cast Lead 'French pro-Palestinian organizations filed a lawsuit against the Israeli president, foreign minister and defense minister [while] Turkish prosecutors were investigating whether Israeli leaders should be prosecuted for crimes against humanity over Israel's offensive in Gaza' following a suit filed by an 'Islamic-orientated human rights organization', Mazlum-Der[6] -- criticised such abuse of universal jurisdiction by reference to Israel being a democracy with a well-developed judicial system which does conduct investigations into 'illegal firing of weapons'. He cited Kissinger's statement that 'we are witnessing an unprecedented movement to turn international politics into legal proceedings'.[7] Col. Liebman, head of the Israeli military's international law department, also stated that 'war crimes charges brought abroad against Israeli soldiers and officers involved in Operation Cast Lead are nothing but "legal terrorism"'.[8]

In March, Elizabeth Samson published a paper categorising the three categories of lawfare as being 1) the initiation of lawsuits before courts in the international system; 2) the misuse of legal terminology to manipulate international institutions and the public; and 3) the prosecution of foreign nationals in domestic courts for military and civilian action. Her conclusion perhaps best sums up the 'accusation in a mirror' tactic that characterises the reactionary nature of these 'lawfare' protagonists:

> "Lawfare has developed to combat the terrorists' most enigmatic enemy. They are not fighting an occupier or challenging a military incursion – they are fighting the forces of freedom, they are fighting the voice of reason, and they are attacking those who have the liberty to speak and act openly. And the weapon that the enemy is using was created by our own hands – that is the rule of law, a weapon designed to subdue dictators and tyrants is now being misused to empower the very same, and being manipulated to subvert real justice and indisputable truth. That is not the purpose the law is designed to serve."[9]

Exploitation of IHL

Concomitant with these attempts at delegitimizing Palestinian NGOs has been the increasing engagement of the Israeli army with international humanitarian law, a sign surely of the ever-increasing emphasis by the international community on the widespread violations of the Geneva Conventions by the occupying forces throughout the OPT, but also suggesting that rather then simply ignore or dismiss international law as has usually been the case, the Israeli army has decided that it cannot afford to do so any longer but that it can attempt to reclaim international humanitarian law from the Palestinians, a shift which has been facilitated by efforts towards reinterpreting IHL away from a body of law which has been ever developing

[5] Anne Herzberg, 'Lawfare against Israel', *Wall Street Journal Europe*, 5 November 2008.
[6] *Haaretz* reported on 30 April 2009 that the influential Turkish daily newspaper *Hurriyet* stated that the Justice Ministry had denied prosecutors permission to bring charges of genocide and crimes against humanity against several top Israeli officials, including President Shimon Peres and a number of ministers.
[7] Irit Kohn, 'Averting Abuse of Universal Jurisdiction', 570 *Jerusalem Viewpoints* (March-April 2009).
[8] Tomer Zarchin, 'IDF: war crimes charges over Gaza offensive are legal terror', *Haaretz*, 19 February 2009.
[9] Elizabeth Samson, *Lawfare: Abuse of international law as a weapon, Warfare through Misuse of International Law*, BESA Center Perspectives Papers No. 73, 23 March 2009.

to further protection of civilians, to one which instead is being employed to provide lawful justification for the killing of civilians. Eyal Weizman has described this as a means whereby 'the emerging landscape of 'lawfare' allows military operations to remake international law'.

On 28 December 2008, a day into the assault on Gaza, Dore Gold of the Jerusalem Centre for Public Affairs issued a statement entitled 'International Law and the Fighting in Gaza': "The Palestinian-Israeli fighting in Gaza has been characterized by the extensive commission of war crimes, acts of terrorism and acts of genocide by Palestinian fighters. On the other hand, Israeli counter-measures have conformed with the requirements of international law, with the possible exception that Israel may be legally required to cut off aid to the Palestinians. Israel may continue to impose economic sanctions and engage in military strikes including a full-scale assault on the Gaza Strip, as long as it continues to abide by the basic humanitarian rules of distinction and proportionality."

Yotam Feldman and Uri Blau, writing in *Ha'aretz* in January 2009 noted significant comments of members and former members of the Israeli army's International Law Department signifying a greater enthusiasm for engaging with IHL. Col. (res.) Daniel Reisner, who headed the International Law Department until about five years ago, was quoted as saying:

> "'What we are seeing now is a revision of international law. If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries… So there is no connection between the question 'Will it be sanctioned?' and the act's legality. After we bombed the reactor in Iraq, the Security Council condemned Israel and claimed the attack was a violation of international law. The atmosphere was that Israel had committed a crime. Today everyone says it was preventive self-defense. International law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into the legal moulds. Eight years later it is in the center of the bounds of legitimacy."

Similarly, according to Prof. Asa Kasher of Tel Aviv University, an Israel Prize laureate in philosophy: What the Israeli army are doing is becoming the law:

> "The Geneva Conventions are based on hundreds of years of tradition of the fair rules of combat. They were appropriate for classic warfare, where one army fought another. But in our time the whole business of rules of fair combat has been pushed aside. There are international efforts underway to revise the rules to accommodate the war against terrorism. According to the new provisions, there is still a distinction between who can and cannot be hit, but not in the blatant approach which existed in the past. The concept of proportionality has also changed. There is no logic in comparing the number of civilians and armed fighters killed on the Palestinian side, or comparing the number of Israelis killed by Qassam rockets to the number of Palestinians killed in Gaza."

Prof Orna Ben-Naftali commented in the *Ha'aretz* article that:

> "The implication is to validate the use of almost unlimited force in a manner that is totally at odds with the basic goal of humanitarian law. Instead of legal advice and international humanitarian law minimizing suffering, they legitimize the use of force."

A 160 page July 2009 report 'The Operation in Gaza: Factual and Legal Aspects" published on Israel's MFA website, which purports to justify the Israeli actions in Gaza under IHL is indicative of the new approach. According to the executive summary:

> "Reports by non-governmental organisations and others have levelled numerous charges about specific incidents in the Gaza Operation. Israel has not yet fully reviewed those claims, although processes are underway to do that. But because of the rush to judgment and the myriad accusations of legal violations, generally without pause to consider what International Humanitarian Law actually requires, it is important to release this Paper now, to place the Gaza Operation into its proper legal and factual context and to answer propaganda and prejudice with facts and law" (para 20).

Conclusion

The emergence of 'Lawfare' is of two primary significances. In the first instance it sets out to deligitimise Palestinians and to stigmatise those who seek to use peaceful means to resolve the conflict by bringing about an end to the occupation on the basis of international law. In the second, it seeks to neuter criticism, political, moral, and legal, of Israeli violations of IHL from NGOs and the UN by attempting to reshape the laws of armed conflict away from their humanitarian goals to laws which instead provide a legitimate mechanism of permitting whatever the state deems necessary in pursuit of its security, essentially recasting international law as a means of multiplying state power to use violence rather than restricting it. Having noted a general trend in this direction, David Kennedy, as noted earlier, worries that it "is little comfort in knowing that law has become the vernacular for evaluating the legitimacy of war and politics where it has done so by itself becoming a strategic instrument of war and the continuation of politics by other means."

To date, while repeatedly asserting the fundamental right of the Palestinian people to self-determination, in the OPT, NGOs have in the main focused on violations of IHL and of human rights law. This report, by focusing on the prohibitions of apartheid and colonialism under international law, prohibitions which allow for no derogation or reservation, and which are customary prohibitions, provides a basis for the next strategic step for advocates of international law as providing the basis for an end to the occupation. Whereas the 'lawfare' accusations are unlikely to end in the short or medium term, a commitment to rigorous scholarship and continued activism based on humanitarian standards and obligations will be of increasing significance, in a world where consciousness of and attention to the rule of international law is ever growing. But given that Israeli army or political attempts to recast IHL in a manner which justifies the continued killing of Palestinian civilians is only likely to increase, reliance on IHL must remain focused on limiting the violence of the occupation. The norms prohibiting apartheid and colonialism are in essence fundamentally premised on the right to self-determination and by actively seeking to ensure support from the international community and in particular courts, both national and international, for the assertion that Israel is in violation of these prohibitions, a new step in international advocacy and Palestinian strategy will be taken.

--

Dr. Michael Kearney is RCUK Fellow in Law and Human Rights at the University of York, and a lecturer at York's Centre for Applied Human Rights, where he teaches Law & Public Policy, Development & Human Rights, and the Law of Armed Conflict. Michael is a co-author of the HSRC report, 'Occupation, Colonialism, Apartheid?: A re-assessment of Israel's practices in the occupied Palestinian territories under international law'.