United Nations A/HRC/25/NGO/34

General Assembly

Distr.: General
21 February 2014

English only

Human Rights Council
Twenty-fifth session
Agenda item 7
Human rights situation in Palestine and other occupied Arab territories

Written statement* submitted by The European Centre for Law and Justice, Centre Europeen pour le droit, les Justice et les droits de l'homme, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[14 February 2014]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.14-11157

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Implementation of the recommendations contained in the report of the independent international fact-finding mission on the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (A/HRC/22/63)

The European Centre for Law and Justice (ECLJ) wishes to express its appreciation for the opportunity to submit relevant information with citations with respect to the above topic. By way of introduction, the ECLJ is an international, Non-Governmental Organisation dedicated to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007[1]. The ECLJ is concerned that Israel is being wrongly and unfairly singled out for special scrutiny and criticism, despite an immeasurably better record of compliance with international law and its norms than many other states which continually elude the attention of the UNHRC[2].

Introduction:

The ECLJ submits the following to the Council. First, the ECLJ will discuss the basis under international law that permitted, and continues to permit, the establishment of Jewish settlements throughout the territory that comprised the Palestinian Mandate. Second, the ECLJ will show that the language of UN Security Council Resolution 242 and follow-on resolutions anticipated adjustment of the 1949 armistice lines to achieve defensible borders for the State of Israel. Until such adjustment is accomplished, one simply cannot legally, or logically, assert which territory in the West Bank and Gaza Strip "belongs" to a future state of Palestine. Hence, the phrase "occupied Palestinian territory" characterises as fact what its proponents desire to be fact.

Legal Status of Israeli Settlements under International Law:

West Bank Settlements[3]

The issue of Israeli settlements in the West Bank is hardly new—in fact, it is over forty years old. Further, declaring that Israeli settlements are in "occupied Palestinian territory" is factually inaccurate and legally questionable. The main argument repeatedly raised against Israeli "settlements" is that they violate Article 49(6) of the Fourth Geneva Convention of 1949, which states: "The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies"[4]. Yet, the cited provision presupposes the "occupation" of the territory of a High Contracting

[1]NGO Branch, U.N. Dep't of Econ. & Soc. Affairs, Consultative Status for the European Centre for Law and Justice (2007), http://esango.un.org/civilsociety/ (accessed by searching "European Centre for Law and Justice" in the iCSO Database).

[2]Since 2006, for example, the UNHRC has adopted no fewer than forty-three resolutions alleging various violations against Israel. Such anti-Israel bias has even been noted and condemned by two UN Secretaries- General. For example, shortly after the UNHRC's creation, then-UN Secretary-General Kofi Annan complained: "Since the beginning of [the UNHRC's] work, they have focused almost entirely on Israel, and there are other crisis situations, like Sudan, where they have not been able to say a word." Benny Avni, Annan Criticizes Human Rights Council's Resolutions on Israel, Darfur Crisis, N.Y. Sun (29 Nov. 2006), http://www.nysun.com/foreign/annan-criticizes-human-rights-councils/44260/. More recently, UN Secretary General Ban Ki-moon also criticized the UNHRC for singling out Israel: "The Secretary-General is disappointed at the [UNHRC's] decision to single out only one specific regional item, given the range and scope of allegations of human rights violations throughout the world." U.N. Secretary-General, Secretary-General Urges Human Rights Council to Take Responsibilities Seriously, Stresses Importance of Considering All Violations Equally, U.N. Doc. SG/SM/11053 (20 June 2007).

[3]Since Israel has completely withdrawn from the Gaza Strip, the issue of settlements there has become moot. See infra note 13.

[4]Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, para. 6, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. It is also questionable whether Article 49 applies when a government takes no action to move its population, but the population moves itself based on individual choices. The words "deport" and "transfer" imply coercive governmental action, not passive acquiescence or private choices.

Party (a state party to the Convention)[5] whereas the territory in question never has belonged to any state. In the absence of a prior sovereign, the Fourth Convention does not apply to the Israeli presence in the West Bank[6].

Moreover, Israel has legitimate claims to West Bank territory and, thus, is not and cannot be considered an occupier. The most accurate term to describe the status of the West Bank is "disputed territory"—a position Israel has continuously asserted since 1967. The following brief historical analysis buttresses the Israeli position further.

First, one must note that Article 6 of the British Mandate permitted Jewish settlement throughout the territory of the Palestinian Mandate[7], territory that encompassed the current State of Israel, a slice of the Golan Heights (ceded by Great Britain to the French Mandate of Syria in 1923)[8], the West Bank, and the Gaza Strip[9]. The State of Israel was established in 1948 on part of the territory of the Mandate, but, regarding the remainder of the territory, i.e., the West Bank and Gaza Strip, nothing has extinguished the terms of the Mandate for Palestine; its terms are still valid under international law[10] and will remain so until a binding final status arrangement comes into effect. As such, the Jewish population of the Palestinian Mandate (present-day Israelis) have at least as much claim to the remaining unallocated territories as do its Arab residents. Hence, labeling Israel's presence in the West Bank as "occupying" Palestinian (by which is meant Arab) territory is, at best, questionable and, at worst, simply untrue.

Historically, when Great Britain informed the UN in 1947 that it was going to withdraw its forces from Palestine in 1948, the UN General Assembly decided upon a plan to partition Palestine into an Arab state, a Jewish state, and an area under international control[11]. Jewish Palestinians accepted the plan, whereas Arab Palestinians rejected it. Following the British withdrawal in 1948, the newly proclaimed Jewish Palestinian State, called Israel, was immediately attacked by its Arab neighbors. The war continued into 1949, when a series of armistice agreements was signed[12].

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[5]See id. art. 2.

[6]It should be noted, however, that as a matter of domestic legal policy, Israel applies the humanitarian provisions of the Fourth Geneva Convention de facto despite the fact that they do not apply de jure.

[7]Mandate for Palestine, League of Nations Doc. C.529.M.314.1922.VI (1922). The text of Article 6 reads as follows: "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes".

[8]Martin Gilbert, The Routledge Atlas of the Arab-Israeli Conflict 8 (9th ed. 2008).

[9]Trans-Jordan was separated from the Mandate and designated by the British as an exclusively Arab homeland in 1921.

[10]In issuing several decisions and advisory opinions on Namibia, the International Court of Justice declared that a League of Nations Mandate "is a binding international instrument like a Treaty, which continues as a fiduciary obligation of the international community until its terms are fulfilled." Eugene V. Rostow, Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 Yale Stud. World Pub. Order 147, 157 (1979). Specifically, the Court opined that

[T]he League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question where the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 ¶ 55 (21 June 1971). Similarly, "the Palestine Mandate survived the termination of the Mandate administration as a trust under Article 80" of the U.N. Charter. Eugene V. Rostow, Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 Yale Stud. World Pub. Order 147, 158–59 (1979). Article 80 states that "nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties." U.N. Charter art. 80.

[11]G.A. Res. 181(II), U.N. Doc. A/RES/181 (29 Nov. 1947).

[12]General Armistice Agreement art. 5, para. 1, Isr.-Syria, 20 July 1949, 42 U.N.T.S. 327 (noting that the armistice line does not enshrine an "ultimate territorial arrangement[]"); General Armistice Agreement art. 6, para. 9, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303 (noting that the armistice line is "without prejudice to future territorial settlements or boundary lines"); General Armistice Agreement art. 4, para. 2, Isr.-Leb., 23 March 1949, 42 U.N.T.S. 287 (noting that the "basic purpose" of the armistice line is to

The resulting 1949 armistice lines, which delimit the so-called West Bank and Gaza Strip (often referred to as the pre-'67 lines), have never been regarded as international boundaries. In fact, it was at Arab insistence that the 1949 lines be designated as mere armistice lines, not international boundaries, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel. From 1949 until 1967, the portions of Palestine not under the control of Israel remained under military rule by Jordanian and Egyptian armed forces, respectively. No Arab Palestinian state was ever created in the West Bank or Gaza Strip between the 1948–49 and the 1967 Arab-Israeli wars, and no Arab Palestinian state has been created in any territory of Palestine since 1967, although Israeli leaders have expressed support for the position that an Arab Palestinian state may someday be created in parts of the West Bank and Gaza Strip[13] pursuant to direct negotiations between Israel and Palestinian authorities.

Resolution 242 and its Progeny Foresee Adjustment of the 1949 Armistice Lines:

As a result of the 1967 Arab-Israeli war, Egyptian forces withdrew from the Gaza Strip, Jordanian forces withdrew from the West Bank, and Israel acquired control of both territories[14]. Following the 1967 war, the UN Security Council adopted Resolution 242[15]. Note, first, that the language in that Resolution requires that Israel withdraw "from territories"[16] it captured—not from "the" territories or "all the" territories it captured. We know from historical record that these were intentional omissions from the language of the Resolution. Lord Caradon, then Permanent Representative of the United Kingdom to the United Nations and chief drafter of Resolution 242, aptly noted the following:

> Much play has been made of the fact that we didn't say "the" territories or "all the" territories. But that was deliberate. I myself knew very well the 1967 boundaries and if we had put in the "the" or "all the" that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend[17].

Note, second, that the Resolution requires "secure . . . boundaries"[18]—something that did not exist prior to 1967 as evidenced by the persistent attacks mounted against Israel from Arab-controlled territory and would not exist today if the status quo ante were reinstated.

Note, third, that the Resolution calls for the termination of all "states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area . . ."[19]. None of that occurred following the 1967 war, nor has it occurred to this day.

Once Israel acquired political control over the West Bank, it made a policy decision to exercise authority <u>in accordance with</u> the humanitarian provisions of the Fourth Geneva Convention, <u>not pursuant to</u> the Fourth Convention per se, since, under the circumstances, it had no obligation to apply the Fourth Convention at all[20]. Given Resolution

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"delineate the line beyond which the armed forces of the respective Parties shall not move"); General Armistice Agreement art. 5, para. 2, Isr.-Egypt, 24 Feb. 1949, 42 U.N.T.S. 251 (noting that the armistice line is "not to be construed . . . as a political or territorial boundary" and that the line is "delineated without prejudice" to the "ultimate settlement of the Palestine question").

[13]Note that all Israeli armed forces and settlers were removed from the Gaza Strip in 2005. Settlers Protest at Gaza Pullout, BBC (15 Aug. 2005), http://news.bbc.co.uk/2/hi/middle_east/4150028.stm. Hence, the issue of Israeli settlements in the Gaza Strip is now moot.

[14]Israel also acquired control over the Sinai Peninsula and the Golan Heights. Neither the Sinai Peninsula nor the Golan Heights is relevant to this discussion.

[15]S.C. Res. 242, U.N. Doc. S/RES/242 (22 Nov. 1967).

[16]Id. at 1(i).

[17]Yoram Meital, Egypt's Struggle for Peace: Continuity and Change, 1967–1977 49 (1997).

[18]S.C. Res. 242, supra note 15, at 1(ii).

[19]Id. Note also that the language does not refer at all to the Palestinians, since there was no Palestinian "state" at the time, and no Palestinian "state" currently exists.

[20]See, e.g., Avinoam Sharon, Keeping Occupied: The Evolving Law of Occupation, 1 Regent J. L. & Pub. Pol'y 145, 153–54 (2009). Sharon writes:

Upon assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva

242, which foresaw border (and, thus, territorial) adjustments, and legitimate Israeli claims to (at least some) portions of the captured territories, Israel's decision to apply only the humanitarian portions of the Fourth Convention was both logical and reasonable at the time and remains so today.

Following the 1973 Arab-Israeli war, the UN Security Council adopted Resolution 338, which essentially reiterates the call to implement the terms of Resolution 242[21]. Since Resolutions 242 and 338 anticipate negotiated territorial adjustments, it is simply incorrect to conclude that Israel is an occupying power. In short, Israel has an outstanding, valid, internationally-sanctioned claim to (as yet undefined) portions of the so-called "occupied territories". Once the contours of a future Arab Palestinian state are negotiated directly between Israelis and Palestinians, Israeli control and administration of land that ultimately forms the future Palestinian state will cease, and the issue of settlements will be moot.

Conclusion:

In sum, the following must be reiterated. First, the Mandate for Palestine was, and remains, a part of international law. Second, the Mandate expressly permitted Jews to settle throughout Palestine. Third, the Jews continue to possess their right to settle throughout Palestine. Hence, until a final agreement is negotiated between Israelis and Palestinians, the Jewish people have the right to settle throughout the territory of the Palestinian Mandate, including the West Bank and East Jerusalem. To state otherwise is a misrepresentation of international law.

Convention. From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel's control of the West Bank and Gaza did not fall within the definition of "occupation" inasmuch as a fundamental premise of the law of occupation—a prior legitimate sovereign—was lacking.

Israel's argument concerning de jure application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with customary international law and the humanitarian provision of the Fourth Geneva Convention . . . . This intention seems consistent with the view of [Yehuda Z.] Blum:

The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.

Id. (quoting Yehuda Z. Blum, The Missing Reversioner: Reflections on the Status of Judea and Samaria, 3 Is. L. Rev. 279, 294 (1968)).

[21]S.C. Res. 338, ¶ 2, U.N. Doc. S/RES/338 (22 Oct. 1973).