IS ISRAEL OBLIGED TO IMPLEMENT INTERNATIONAL HUMANITARIAN LAW?

Dr Assem Khalil

The International Committee of the Red Cross (ICRC) held a press conference on 18 February 2004 in which it expressed its concern over the serious humanitarian and legal problems related to the West Bank barrier and called on Israel "not to plan, construct or maintain this barrier within occupied territory" since the "measures taken by the Israeli authorities linked to the construction of the barrier in occupied territory go far beyond what is permissible for an occupying power under international humanitarian law."(1)

These findings are based on the "ICRC's monitoring of the living conditions of the Palestinian population and on its analysis of the applicable international humanitarian law provisions," which has found that: "The Palestinian communities situated between the 'Green Line' and the barrier are effectively cut off from the Palestinian society to which they belong," and that "the construction of the West Bank barrier continues to give rise to widespread appropriation of Palestinian property and extensive damage to, or destruction of, buildings and farmland."(2)

Israel considered this declaration political since it was issued just days before the start of relevant hearings in the International Court of Justice (ICJ). In fact, the hearings started on 23 February 2003, albeit with the abstention of Israel, the US and European countries. The ICJ will give an advisory opinion to the question presented by the UN General Assembly (UNGA) about the legal consequences of the wall that Israel is constructing in the occupied Palestinian territories, as provided by resolution ES-10/14.

There are two UNGA resolutions that interest us here: Resolution ES-10/13, adopted on 21 October 2003, which requests Israel to stop the building of the wall in occupied Palestinian territory; and Resolution ES-10/14, adopted on 8 December 2003 in the 23rd meeting of the UNGA's 10th Emergency Special Session. In these two resolutions there is an explicit reference to the fourth Geneva convention, of 1949.

For this reason, it is important to look at international humanitarian law, to clarify the legal status of the Palestinian territories in accordance with international law, to present briefly the system that Israel adopts to apply international law, and to consider the justifications Israel gives for the wall. The last part of the study looks at whether Israel is bound by international humanitarian law.

Definition of international humanitarian law

Since ancient times, there has been a desire to render war more "humane." In around 500 BC, Sun Zi of China wrote The Art of War, in which he recommends that victory over enemies be won in a moral fashion, without harming civilians and their property. This book can be considered an ancient version of what we today call international humanitarian law.(3)

This desire had religious and philosophical origins. Most religions, especially Buddhism, Judaism, Christianity and Islam, impose limits on the use of violence during war against certain groups, such as civilians, and more particularly women, children and the elderly. Philosophers started to focus on human dignity and the gradual limitation of state power in peace time, the motivation being to lessen the suffering of the victims of armed conflicts and populations under occupying powers, to control the use of arms, and to limit the damage of war.

The flourishing of modern international humanitarian law, though, started outside religion and philosophy. This law is based on the principle of "neutrality," since the only thing that it considers is human suffering, independently of what an individual was doing before. An important text in this regard was written by Swiss businessman Henri Dunant, who was deeply moved by the devastating effects of the battle of Solferino (which left 40,000 killed and wounded) to start, in 1863, the Red Cross and the beginning of what is called the "Geneva Law" in 1864.

This Geneva Law accompanied the Hague Law, or

THE WEST BANK BARRIER
Areas enclosed by the wall
Areas between wall and "green line"
Settlements
Mediterranean Sea
Netanya
Kalkiliya
Tel Aviv
Jenin
Tulkarem
Nablus
WEST BANK
Wall already constructed
Ramallah
Jericho
Jerusalem
Abu Dis
"Green Line"
Bethlehem
Hebron
Dead Sea
ISRAEL
Gaza
GAZA STRIP
Wall under construction
0 10 20 km

the "Law of War," which refers to the declaration of St Petersburg in 1868 and the successive agreements and conventions that aimed at limiting the use of certain kinds of arms in international conflicts.

The term "international humanitarian law," or simply "humanitarian law," was first used in 1945 and found its origins in the Geneva and Hague laws. It was not until 1977, though, that this term was officially used in two protocols, which completed the four Geneva conventions of 1949. These new conventions extended the protection to civilians in "internal wars."

The major difference between the Geneva and Hague laws is that the first is interested mainly in the protection of civilians and those no longer able to fight, in any conflict, and is applied to both states and militant groups. The Hague Law, meanwhile, aims to limit the use of certain arms that have devastating and harmful effects on civilian populations.

According to the ICRC, international humanitarian law is "the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva conventions of 1949 and their two additional protocols of 1977 are the principal instruments of humanitarian law."[4]

The legal status of the Palestinian territories

In a letter from Nabil Ramlawi, UN permanent observer for Palestine, to the chairperson of the Commission on Human Rights, dated 30 September 2003, we read: "It is to be recalled that for years Israel has referred to these Occupied Territories as 'Territories,' without any particular specification; a fact contrary to the reality established in the UN Security Council, General Assembly and Commission on Human Rights." He added that this use of wording "constitutes a fabrication by which Israel tries, as has always been the case, to delude and mislead public opinion, to impose before the international community expressions and facts on the ground that are completely in opposition to reality, in order to evade its responsibility as the occupying power, on the one hand, and, on the other hand, to deprive the Palestinian people of the right to recover their territories occupied by Israel through war."[5]

In fact, many UN resolutions confirmed the applicability of the Geneva conventions and the two additional protocols on the occupied Palestinian territories, while the final statement of the "meeting of experts" held in Geneva from 27 to 29 October 1998 discusses the general problems in implementing the fourth Geneva convention.

UNGA resolution 58/97 of 17 December 2003, for example, "reaffirms that the Geneva convention relative to the protection of civilian persons in time of war, of 12 August 1949, is applicable to the occupied Palestinian territories, including East Jerusalem, and other Arab territories occupied by Israel since 1967… [and] demands that Israel accept the de jure applicability of the convention… and that it comply scrupulously with the provisions of the convention."

How Israeli domestic law deals with international law

According to Anis Kassim, Article 35 of Order No 3, issued by the Israeli military governor on 7 June 1967, states that "the Military Court… must apply the provisions of the Geneva conventions dated 12 August 1949 relative to the protection of civilians in time of war with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail." According to Kassim, this article was deleted by virtue of Order No 144 of 22 October 1967, hence stripping the Palestinian population of the protection of the Geneva convention of 1949.[6]

Following the common law tradition, Israeli courts distinguish between customary international law, considered part of domestic law – binding without transformation by statute, unless in conflict with existing statute – and treaty-based law, which has no legal effect unless incorporated by statute. As such, the Hague regulations of 1907 are enforced by the Israeli Supreme Court with respect to governmental action in the occupied territories, whereas the fourth Geneva convention, of 1949, deemed a constitutive treaty, is not enforced by the court. At the same time, Israel's official position of refusal to apply de jure the Hague regulations in the "territories" of 1967 is explained by its assertion that the Israeli presence is not an occupation but an administration in absence of

sovereignty.(7)

Still, the Israeli Supreme Court recognises the necessity to apply de facto the humanitarian provisions of the fourth Geneva convention.(8) The de facto application is different from de jure since there are no possibilities to persecute government violations of these acts judicially. In fact, the international community has through various resolutions and recommendations urged Israel to recognise the de jure applicability of international humanitarian law in the occupied Palestinian territories in line with UNGA resolution 58/97 of 17 December 2003.

According to Eyal Benvenisti, the Israeli Supreme Court's rationale can be found in the same principle as the separation of powers.(9) The decision of the Supreme Court to invoke doctrine with respect to the status of the treaties, rather than with respect to the government's ratification power, is a political decision aimed at granting the government more leeway in the international arena. Benvenisti also notes that the Supreme Court was quite willing in the early days to embrace international norms by adopting a monist approach to international law. Later, though, security considerations came to the fore, altering the court's attitude.(10)

While many treaties are binding only on states that take part, some treaties and conventions are the codification of customary international law (CIL), which is applicable to all states, including those not participating. In other words, the codification of CIL aims to enhance its application rather than to excuse those states not participating. Still, the problem is how to distinguish between regulations that are part of CIL and convention-based regulations. It is of great importance not to leave this task to unilateral decisionmakers in each state but rather to experts on international law.

A (relatively) new phenomenon is the codification of international law in multilateral treaties that helps to spread and to enhance certain international regulations to the point that they are considered binding by almost all states, for a period of time, independent of the treaty. In other words, the codification of international law may include customary international law and may create new laws. This is happening with the application of international humanitarian law on civilians during armed conflicts, and for this reason Israel is bound by international humanitarian law, including the Geneva conventions and their protocols, without necessarily renouncing its dual approach towards international law.

Are there justifications for the Israeli barrier in Palestinian occupied territories?

Israel is an occupation power, according to UNGA and Security Council resolutions, and, as such, international humanitarian law is applicable in the Palestinian territories and for the Palestinian population. The barrier that Israel is constructing contradicts this law. The abstention of European countries from voting on the UNGA resolution requesting from the ICJ its advisory opinion, moreover, has political rather than legal motivations, since the same countries proposed another resolution condemning Israel for the wall and declaring its construction illegal under international law.

The position of Israel supports that of the Arabs since Israel justifies the wall out of a necessity to defend its civilians from suicide attacks. In other words, Israel seems to be saying to the world: We know that international humanitarian law is binding; we know that it is applicable in occupied Palestinian territory; we know that the wall contradicts international law; yet it is necessary for security reasons.

Here I would like to set down three questions and provide three responses. First, is it true that the wall will provide security for Israel? Israeli insecurity is related to occupation; Israel will obtain security with the end of occupation rather than its continuation via the construction of the wall. Second, presuming that the wall is necessary for security, why annex Palestinian lands? If the wall is the best solution, why does it not follow the Green Line? Third, presuming that the wall as it has been planned is necessary for security, does this justify violation of international humanitarian law? Here, the ICRC has expressed its doubts. Although the organisation condemned the suicide attacks in the press release mentioned above, and recognises Israel's right "to take measures to ensure the security of its population," it nevertheless asserts that "these measures must respect the relevant rules of international humanitarian law."(11)

Is Israel bound by international humanitarian law?

Whether or not Israel recognises its status as an occupying power does not effect the legal status of the Palestinians and their territories under international

law. (It is clear that those territories gained in 1967, including Jerusalem, are occupied territories.) Still, this recognition will influence and facilitate the application of the provisions of international humanitarian law (customary or convention-based) on the Palestinian territories. A state's recognition of its status as an occupying power is the first step of the application of the "laws of occupation," to use the terms of Benvenisti, and can be considered a "declaration of good intentions."

The recognition by a state that it is an occupying power is indispensable in this world order and with the existing international institutions. After all, there are no means to apply and render effective international law. The only possibilities that exist (through the Security Council for example) are determined by the national interests of big powers and relations between states rather than by interest in the application of international law, which results in double standards and double measures. This explains the great gap between the decisions of the General Assembly and those of the Security Council, where permanent members can easily veto any resolutions they deem "inappropriate."

The creation of an internationally centralised judiciary system for serious international crimes, the International Criminal Court (ICC), is a relatively new phenomenon related to the development of international humanitarian law. Yet, since the advisory opinion of the ICJ is not binding on Israel, is it possible to consider seriously the possibility of citing Israel in the ICC?

According to the statute of the court, its jurisdiction is limited: in terms of nature of crime (only serious violations of international law as provided by the statute); in time (only crimes committed after 1 July 2002, ie it is not retroactive); and in terms of who can be tried (in fact only members). Israel did not sign or amend the Rome convention, and, as such, the ICC has no jurisdiction over it. (The only Arab state that amended the convention is Jordan.)

Still, there remains one possibility to cite states that are not members in the treaty; when the Security Council refers a case to the ICC. However, since this decision would not be considered procedural, it would need the consent of the council's permanent members, whose relations and interests would inevitably influence whether or not this could occur.

While it is not evident how Israel can be obliged to apply the provisions of international humanitarian law, it is clear that this will not be through actual international institutions. Might we, then, propose some alternatives?

Palestinians (and Arabs in general) should not underestimate the role of Israeli public opinion and its power to exert enormous pressure over the Israeli government and encourage it to apply international humanitarian law and also to end occupation of Palestinian territories. An important role can also be played by the Israeli Supreme Court, which could change its passive position.

It is of extreme importance for Palestinians and Arabs to focus on an organised international "information campaign," for example through mass media, conferences and workshops. These and other initiatives would unmask the real face of occupation and show its realities for civilian Palestinians. This would rouse support from other states' populations (in Europe for example) of legitimate Palestinian aspirations to end occupation and would pressure their governments to take different positions.

In this regard, some Palestinian practices, such as suicide attacks – although the result of, but not necessarily justified by, an occupation that has continued since 1967 – may actually harm Palestinian national interests and have negative effects on the realisation of Palestinians' legitimate aspirations, since they allow Israel to justify its inhumane actions towards Palestinian civilians to the Israeli and international public.

Endnotes:

1- "Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier causes serious humanitarian and legal problems", ICRC press release, ICRCs website: http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList247/F06BB484D900B227C1256E3E00324D96

2- Ibid.

3- Cf. Allend, D., Rials, S, *Dictionnaire de la Culture Juridique*, PUF, 2003, p487

4- Cf. ICRC website

5- The letter is published within the official documents of the 60th session of the UN Commission on Human Rights, 15 March to 23 April 2004, Geneva

6- Cf. Kassim, A., *Legal Systems and Developments in Palestine*, pp29-32; Al-Qasem, *Commentary on*

Draft Basic Law for the Palestinian National Authority in the Transitional Period, pp191-92

7- Cf. Dornier, N, "Audience du 21 Novembre 1988 devant la Haute Cour de Justice de Jérusalem Relatif à la Fermeture de l'Association In'Aash El-Usra", Palestine et Droit, No 3 (1989), pp32-33

8- Benvenisti, E, *The International Law of Occupation*, pp110-11

9- Israel has signed and ratified a number of international human rights instruments:

Human Rights Conventions	Signed	Ratified
1966 Covenant in Civil and Political Rights	19/12/1966	18/8/1991
1979 Covenant on Economic and Social Rights	19/12/1966	18/8/1991
1979 Convention on the Elimination of Discrimination Against Women	17/7/1980	23/7/1991
1984 Convention against Torture	22/10/1986	4/8/1991
1989 Convention on the Rights of the Child	3/7/1990	4/8/1991

Cf. Benvenisti, E, *The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights*, pp207-21

10- Ibid, pp207-21

11- Cf. ICRC website