8th International Conference on Recent Development in Engineering Science, Humanities and Management
The Institutions of Engineers, Delhi State Center (India)
1st October 2017, www.conferenceworld.in
ESHM-17
ISBN: 978-93-86171-67-2

THE ISRAELI SETTLEMENT ROW: LEGALLY MISBEGOTTEN?

Akshra Mehla[1], Robin Sharma[2]

[1] Student, BBA LLB, Symbiosis Law School, Pune (India)
[1] Student, LLB, School of Law,Northcap University, Gurugram, Haryana(India)

ABSTRACT

Being the focal point of conflicting political, social and geographical disputes, Israel is, indubitably, the only State in the world which receives maximum attention from the international community. Owing to the same, it has been wracked by civic unrest and violence. The Israel-Palestine row finds its root in myriad religious disputes, betrayals, refusal to compromise; but the one reason which outshines these all is the ownership of land. The same land is claimed as a matter of right by both the nations; considering it their Holy land. Article 49(6) of the Geneva Convention, 1949 stands as an indispensable provision anent all deliberations of the Palestine-Israel conflict, be it legal or diplomatic. Albeit, the issue of 'settlements' has been brought to the fore umpteen times in the case of Israel, it has never been executed in any such similar business by other countries. This paper pings on the proposition whether the Israeli settlements is the most poignant barrier to the two-state solution and the peace between Israel and Palestine.

Key Words: Geneva Convention, Israeli Settlements, Palestine, two-state solution.

I. INTRODUCTION

In the late 1800s, present-Palestine was under the Ottoman Empire. It was a multicultural land with almost 80% Muslims, 15% Christian and 5% Jews living together harmoniously. There was a movement in Europe in 1800s called political Zionism that developed a wonderful shining slogan – "*a land without people for a people without land*". Political Zionism was the belief that there needed to be a Jewish State and Palestine was chosen owing to the biblical connections from 2000 years back. The slogan sounds all acceptable barring the fact that Palestine was not a land without people, it was fully inhabited by Arabs in majority. Nevertheless, the immigration continued by Zionists to Palestine to create a Jewish state. As is known that indigenous population do not welcome their colonists with open arms, more so, when the colonists increase in number and as it becomes clear that the intention is to dispossess 95% of the people already present. As a result, there was the tragic but predictable violence.

ISBN: 978-93-86171-67-2

II. INTERNATIONAL LAW

Public discussions of Israel's presence in the west bank, its settlements therein is almost always paired with a legal characterization. Before understanding the legal characterization, it is pertinent to unpack what are the sources of law that bear on the legal status of Israel's presence, both in a military and civilian way in the disputed territories.

From the outset, it is imp to mention that not everything that makes a legal claim or is a legal subject is a source of international law. For instance, resolutions of the General Assembly seem to be international as they belong to the UN and make legal claims too. But, it is not a source of international law because the UN and the General Assembly engender from the UN Charter, which is created by a treaty that defines the powers of the General Assembly. They do not have an international law making capacity. International law generally comes from two sources:

a) Treaties – explicit binding commitments undertaken by countries
b) Custom – repeated practice of countries over time almost universal, which can create rules that become general rules applicable to everyone.

III. ISRAEL-PALESTINE CONFLICT: THE START

In the West Asia until 1917, there was no dispute anent the status and borders. The area under present day-Lebanon, Israel, Palestine, West Bank, Gaza was all under the control and sovereignty of the Ottoman Empire. In 1917, the Ottoman Empire, like the Central Powers in the First World War, disintegrated and collapsed after having lost to the British and French. In the wake of WWI, most of the countries of the world including the victorious powers in Turkey, joined and created a new organization by a treaty called the League of Nations. It got its power from a treaty signed by the relevant powers called the League of Nations Charter. The Charter gave the League of Nations myriad functions; one of them was to oversee a system of nation-building in the former colonial territories of Austro-Hungary, Germany, the German empire in Africa and the Ottoman State. So, instead of the victorious powers taking these former territories as their own possessions, they would oversee them in a nation-building process on a road to independence and this was called the mandate system. Consequently, the League of Nations issued a mandate to Britain for Palestine (present-day Israel, Gaza and West Bank). League of Nations mandate provided that this nation-state be used as a national home for the Jewish people. By this mandate, there were no political rights or rights of ruling or controlling Palestine being given by the League of Nations to this national home. They only gave one particular special concession to the Jews which is contained in Article 6 of the mandate that allowed the Jews to move to Palestine. On the other hand, the Ottomans had a very restrictive and prohibitive set of immigration restrictions. They did not let Jewish immigration into Palestine, nor did they let them buy land there. The League of Nations waived those restrictions by asserting that Jews are allowed to immigrate into Palestine and purchase the land there. Ergo, the League of Nations' mandate talks about Jewish settlement in Palestine as a permissive thing which the British were supposed to allow and encourage.

ISBN: 978-93-86171-67-2

The mandate for Palestine was one of the numerous mandates issued by the League of Nations in the West Asia. Instead, the entire modern West Asia arose out of the mandate system. Syria and Lebanon were French mandates; Iraq (Mesopotamia) was another British mandate. The entire area is a result of a simultaneous system of mandates. Interestingly, the Palestine mandate was the least controversial at that time. Article 25 of the Charter talked about the provision of the Palestine mandate. It elucidated that if it turns out to be inconvenient to administer the mandate as described by the League of Nations within this entire territory, the British can partition it and create a different regime on the trans-road side of the Jordan River to create a separate political entity there. The British immediately exercised this power in the mid-1920s by inviting their friends from the Hejaz and the Hashemite family to rule this area and thus creating the Hashemite kingdom of Jordan. Essentially, the question anent the right to exist for any West Asian country finds its answer in Article 25 of the League of Nations mandate. We have accepted the reality as created by the League of Nations mandate as binding and valid into the present day. Subsequently, from 1920s until 1948, the British mandate including the West Bank and the Gaza was mandatory Palestine after the creation of Jordan. The British mandate unilaterally ended in 1948 and Israel declared independence.

In the thick of the above, the question that begs attention is:

As of the moment of independence, what were Israel's borders?? How are the borders to be determined when a new nation is to be created?

Without a clear rule, the creation of a new country would be a recipe for endless war because every possible inch of the borders will be open for de novo review. Ergo, there is a very powerful rule of stability which says that when a new country is created, its borders are the borders of the last geo-political administrative unit in that area. For instance, even for a country which emerged from colonialism, its borders are the borders of the former colony; even though such a border wasn't drawn with the consent of the people or were arbitrary or served principally the economic or political or military interests of the colonial power to divide the tribes. If that is not the rule, everything would be up for grabs. This rule has been applied all the time and also in the mandate context.

Crimea serves as the latest example of the above-mentioned rule. The international community doesn't recognize the Russian claims of sovereignty over Crimea. In 1950s when both Ukraine and Russia were ruled from Kremlin and were simply soviet socialist republic, the then-General Secretary of the Communist party moved the administrative border of Crimea to put it within the territory of Ukraine. Albeit, there was no referendum, but the day Ukraine became independent, Crimea was within the territory of that administration. Similarly, when Israel became independent in 1948, despite the fact that various compromise proposal had been offered by the General Assembly, the borders remained borders of Palestine and was the presumptive sovereign territory of Israel when it became independent.

As soon as Israel became independent, it was invaded by a coalition of Arab armies who were seeking to meet in the middle and divide the portion, they were partially successful in having West Bank and Gaza. The West Bank is simply the farthest extent of the Jordanian Iraqi thrust into the territory of newly independent map of mandatory Palestine. Gaza strip was how far north the Egyptians got and subsequently got pushed back. These

ISBN: 978-93-86171-67-2

lines do not correspond with any pre-existing administrative demographic or topographic lines. There existed an armistice line which is neither a demarcated border, nor a change in sovereign borders. It is simply a temporary break in the fighting that does not change or prejudice actual geo-political borders, as stated by the Egyptian-Israeli armistice agreement and Jordanian armistice agreement.

So what was the status of the West Bank between 1948 and 1967?

There are two points worth mentioning to answer the above quandary:

- It could be said that the West Bank was Israeli territory occupied belligerently by Jordan.
- If that is believed, then arises the quandary as to why did Israel annex it? It is because of the principle of international law mentioned above as it was part of the mandate of Palestine. To establish sovereignty over a territory, you need to have some initial control and because Israel didn't have any initial control over this, it had not perfected sovereignty but rather had a sovereign claim.

There is no distinction between the two points as there exists no precedence in international law in which a newly created mandate territory is immediately occupied by multiple belligerent armies and held in a state of occupation for a period of time. International law is not a dense enough system of regulation to have a pre-packaged answers for such situation but clearly the occupation of Palestinian territory began in 1948 by Jordan. The UN didn't have much to say about it. All this ended in 1967 when Israel in the Six day war, re-took these territories as well as the Sinai Peninsula. So, essentially, Israel took territories which were under belligerent Jordanian occupation without a recognised claim of title and to what Israel already had a claim of title, if not sovereignty.

IV. THE QUESTION OF SETTLEMENTS

Settlements are Jewish civilian presence in the territory occupied by Jordan between 1949 and 1967. The Jordanian occupation of this territory permanently changed its character in such a way as to make any future Jewish civilian presence there an international crime.

The entire discussion of the legality of these civilian communities is based on one sentence in one treaty, which doesn't use the word settlement. Settlement is not an international legal term – it's a colloquial expression. The fourth Geneva Convention is a convention about the treatment of civilians in war-time. Every issue anent Israel-Palestine row revolves around Article 49 clause 6.

Does the Geneva Convention apply?

There are several arguments that Geneva Convention would not apply in Israel-Palestine case.

1. The text of the Geneva Convention says that it is a treaty between countries and not a word of God. It doesn't apply everywhere. As a treaty between countries, it applies to occupation of territories of signatories, the ones which are the high contracting parties. So the question arises if this was the territory of Jordan? It would seem not. Back in 1966, it wasn't Jordanian territory since it was occupied by Jordan.
2. The other school of thought believes that it applies to territories that's not of the sovereign high contracting party because these are liberal good humanitarian rules to be interpreted broadly.

ISBN: 978-93-86171-67-2

3. They also assert that the word 'territory' doesn't mean sovereign territory, it could just mean territory under control. If this argument is considered, then it seems like the Convention does apply as the territory was under the control of Jordan. But there is a catch: by the above-mentioned logic, if the treaty applies owing to Jordan having control, it certainly doesn't apply anymore because Israel signed a peace treaty with Jordan in 1994 and occupation provisions of convention do not survive a peace treaty.

Article 49 clause 6 says that the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies. This is the reason why the word "settlements" is used in general parlance as it raises far fewer questions than if they use the language of the provision and call them Israeli deportation or transfer.

Who does the Geneva Convention regulate? Who does it forbid from engaging in such activities?

Various authorities espy the legality of Israeli settlement differently owing to the disparate interpretation of the Geneva Convention, 1949. From the lens of the Americans, it does not connote to the Settlement activities by Israel, but to the 'forcible deportation' by the Nazis in Eastern Europe. The US ambassador to the UN during Bush administration had elucidated that since he was present during the Nuremberg trials, he is cognisant of the legislative intent behind the Geneva Convention.

Although the obligations under the Geneva Convention are the obligations of the sovereign signatories. The sole thing Geneva Convention does not say is what the way people want to try to read it. It is that the Convention prohibits the occupying power to not deport or transfer parts of its own civilian population; it does not say that the civilian population of the occupying power shall not deport or transfer themselves and shall not be allowed to go in. Geneva Convention is not a prohibition on the civilians of the occupying power, it's a prohibition on certain kinds of organised, collective, demographic actions by the occupying power.

Article 49(1) was based and inspired by the German practice in Eastern Europe in WWII when they kicked out Polish or Ukrainian population and moved in Germans on a huge industrial scale. So the primary prohibition in Article 49 was on the expulsion of the population and Article 49(1) to (5) deal with the issue of ethnic cleansing. Article 49(1) uses the phrase "individual and mass forcible transfers", while Article 49(6) puts prohibition on the transfer of parts of civilian population – large scale demographic movements; it doesn't use the word "individual". There is not any prohibition on individuals moving in this area.

Applying the logic to the Israel's situation, if Israelis wish to buy lands or build houses, there is no prohibition on them. Transfer means taking people and moving them; there needs to be some action of moving. Israel did not transfer people by letting them go, by making it possible by providing these communities with municipal services, water, and security. Even if that's true, it seems to turn Article 49(6) on its head as it prevents certain affirmative actions, it doesn't say if individuals wish to go themselves, make it impossible for them to live there. What the treaty prohibits is imposition of permanent changes in the occupied territory. Also, this prohibition does not apply if the imposition is done by the occupying power for military purpose or benefit of the locals. The occupying State can simply administer the area for the benefit of the local population by maintaining the status quo. The above practice finds a mention in the Statute of the International Criminal Court as a War Crime. Also, unlike other war crimes provisions' language which is taken verbatim from the International Humanitarian

ISBN: 978-93-86171-67-2

Law, the language of Article 49(6) has been incorporated in to the Rome Statute of International Criminal Court to include the words 'directly or indirectly' anent transfer of population.

Also important to mention is the Resolution 242 of the UN Security Council adopted by the Six-Day war in 1967. It stands as the archetype of all the Arab-Israeli peace negotiations. The resolution demanded the withdrawal of Israeli armed forces from territories occupied. What could be interpreted by this phraseology is the next question. Lord Cardon was the then British ambassador to the UN. He threw light on the explanation of the language of Resolution 242. He said that the Security Council could have drafted the resolution as "Israeli withdrawal from [all] the territories; but it deliberately did not. This diplomatic manoeuvre is critical to fathom the settlement issue in Israel as the UN Security Council did not expressly say that Israel ought to withdraw its forces to the 1967 line. Therefore, it does not mean that Israel did not have any right to retain parts of West Bank. Regardless of whether it is legally correct to build settlements or not, the above understanding of Resolution 242 is a must.

There is a school of thought which believes that settlement is the biggest roadblock to peace-keeping in Israel-Palestine row. Owing to the 1978 Camp David Agreement and Egyptian-Israeli Treaty of Peace in 1969, Israel completely withdrew from the occupied Sinai Peninsula region in exchange of peace. Pertinent here to focus is that during that time, there was colossal Israeli settlement in east Sinai, but it did not stand as a roadblock to the peace treaties. On parallel grounds, in 2005, many Israeli residents from the Gaza settlement were removed owing to the Israeli disengagement from the Gaza Strip. Ergo, it cannot be said that settlements act as an obstacle to peace in the region.

V. ARE SETTLEMENTS BY OTHER COUNTRIES TREATED AT PAR?

In the 1993 Oslo Accords, settlements were not defined as violation. West bank was apportioned into Area A, B and C under the Oslo II Interim Agreement. Area A and B were the Palestinian populated areas while Israel exercised its civilian duties for zoning and planning in Area C. Area C also contained the settlements by Israel. West Jerusalem is not considered by the US as a sovereign part of Israel but yet Israel is there. And if the rule about settlements is any movement of civilian people of a country to territory that it does not have sovereignty over is settlement, then why is the Jewish civilian presence in west Jerusalem not considered settlement?

There are plentiful instances wherein States have involved in settlements in violation of Article 49(6), but have never been put under the radar as Israel is put. Since Article 49(6) applies to international armed conflicts which are amongst the High contracting parties, various countries undergoing settlement policies go scot-free. To name a few, Indonesia-East Timur; Morocco-Western Sahara; Egypt and Jordan-Palestine (1949-1967); United States-West Berlin (1945-90); Turkey-Northern Cyprus; Vietnam-Cambodia; Russia-Baltics and many more. All these occupations took place before these countries had signed and ratified the Geneva Convention and ergo, the same does not apply.

Throwing light over the case of Korea, it is apparent that either the North or the South Korea must be occupying the other as the territorial claims of both Koreas are cent percent congruent. They don't say that the North Korea belongs to the north and the South Korea to the south. Both the North and the South Korea say that there is just

ISBN: 978-93-86171-67-2

one Korea and it belongs to us, which means one of them at least must be occupying half the territory of the other and obviously many civilians live there. At the end of the Korean War, both the north and the south held some positions south and north respectively of the 38th parallel. No one has ever suggested that the population movement in the north Korean town which is south of the 38th parallel is illegal settlement in violation of fourth Geneva convention.

This raises a very serious question over the fact that whether this difference in standard is due to an international law-based policy or just double standards.

BIBLIOGRAPHY

[1.] Eugene Kontorovich, Unsettled: A Global Study of Settlements in Occupied Territories, Public Law And Legal Theory Series No. 16-20

[2.] Farah Qutob, An Analysis of Israel's Settlement Policy in the Occupied West Bank after the Six-Day War and its Impact on the Peace-Process (1967-2002)

[3.] Geneva Convention relative to the Protection of civilian Persons in time of War of 12 August 1949 (Fourth Geneva Convention).

[4.] ICRC Customary Law Database, Practice Relating To Rule 130. Transfer Of Own Civilian Population Into Occupied Territory, Parts VI-VII

[5.] Jean-Marie Henckaerts, Deportation and Transfer of Civilians in Time of War, 26 Vand. J. Transnat'l L. 469, 484 (1993).

[6.] Jodi rudoren, "As Syria reels, Israel looks to expand settlements in Golan Heights" New York times, 2 October 2015.

[7.] Malcolm N. Shaw, International Law (7th ed. 2014).

[8.] MARK OSIEL, The End Of Reciprocity: Terror, Torture, And The Law Of War 55 (2009)

[9.] Rome Statute of the International criminal court.