

Institute for **Cultural Relations Policy**



ICRP Research Paper Series

July
2021



Issue #18

The Institute for Cultural Relations Policy publishes online research papers and essays that reflect multidisciplinary fields, contribute to influencing and expanding the body of research on cultural relations policy, and enhance dialogue among researchers, policy makers and the public.

The ICRP Research Paper Series includes working papers, original research studies, reflective essays by authors affiliated with ICRP, and major reports generated by ICRP related research projects. Authors are responsible for the content, and the views and interpretations expressed are not necessarily those of ICRP's research staff and other affiliated researchers. Questions regarding the content of individual ICRP contributions and ICRP research reports should be directed to the authors.

SELF-DEFENCE OR HUMAN RIGHTS ATROCITY: THE CONFLICT BETWEEN ISRAEL AND PALESTINE AND ITS LEGALITY UNDER INTERNATIONAL LAW

Candice Stephens-Mc Nichols

The launching of missiles onto Israeli territory from Palestine on the 10 May 2021 precipitated events which would lead to a spiralling out of control of the age-old conflict between Israel and Palestine. These events led to the declaration by the Israeli leader and Prime Minister Benjamin Netanyahu, that Israel had a right to defend itself based on the principle of International Law and that the Israeli government would not back down from its retaliation against the Palestinian dissidents, the Hamas.

The Israeli government therefore retaliated and continued to protract the conflict by launching projectiles against the Hamas until the ceasefire on the 21st May, 2021. The ceasefire however occurred after several calls from the UN and international community to end the conflict, and in the aftermath of diplomatic negotiations with Egypt. These events however, led to unimagined human loss, injury and suffering including the catastrophic deaths of over 248 innocent civilians in Palestine, 12 in Israel and the loss of 66 innocent children. It also resulted in untold devastation to the natural environment which is already severely impacted by burden of climate change and the release of toxic emissions and chemicals into the atmosphere. It was estimated that the attacks resulted in the damage of 18 buildings, 40 schools and four hospitals. The missiles from Israel also struck the Al-Shati refugee camp killing at least ten persons. The UN also estimated that there were over 94 buildings demolished and over 461 houses and commercial units damaged in Gaza.

What events precipitated this conflict? As in the case of previous times, these events were the result of the central dispute over Israeli-Palestinian territory and the question of ownership. But perhaps, a deeper and underlying issue which has been festering however, is the issue of religious beliefs and culture which may be at the heart of the conflict, but masked during war.

It was noted that the crisis really began since the 6th May when Palestinians began protests in East Jerusalem over the anticipated Supreme Court of Israel's decision on the eviction of Palestinian families in the disputed territory of Sheikh Jarrah. The disputed territory was

recognized within the International community as being part of Palestinian territory, but was subsequently claimed and annexed by Israel. There were also reports proliferated in the media that Israeli citizens were also claiming private properties including the private residences belonging to the Palestinians. These events therefore escalated the conflict and led to violent protests and clashes between Israelis and Palestinians.

Other aggravating factors which led to the downward spiral and to the provocation of the Palestinian dissidents who felt the need to reclaim and take control of their territory was that on the 7th May, the Israeli police were alleged to have stormed the Al Aqsa Mosque which is the third most sacred site in Islam. It was alleged that the police used tear gas, rubber bullets and stun grenades against Palestinians who retaliated by throwing stones. These disputes also arose as a result of perceived disrespect for the Islamic population during their holy month of Ramadan as the violence coincided with their holy Qadr Night in which they believe that Allah had given them the holy Quran and they receive blessings as part of Allah's grace. From the perspective of the Jews however, the violence was juxtaposed with the Jewish celebration of Jerusalem Day which commemorates the reunification of Jerusalem to Israel and the regaining of control over their old Holy city after the war in 1967.

The legality of the conflict

In its justification for its retaliation against the Hamas in Gaza, the Israeli government cited the principle of self-defence as its justification under the rules of International Law. However, it is necessary to examine whether the principle of self-defence is actually justified within International law. This is especially important given the nature of this protracted conflict between Israel and Palestine that keeps resurfacing and threatening the peace, good order, stability and security among nations.

It is important to note the principles governing war or warfare which arose in the aftermath of the Second World War (WWII). Notably, from the aftermath of WWII, the vast majority of states of the world (to date 193 member states) recognize and agreed to the principles of the UN Charter. Article 2(4) of the UN Charter obliges member states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner which is inconsistent with the purposes of the UN.

A state however has an inherent right to defend itself in response to an armed attack based upon Article 51 of the UN Charter. Article 51 provides that "Nothing in the present Charter shall

impair the inherent right of individual or collective defence if an attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Article 51 is therefore an exception to the rule in Article 2 (4) in which States are obliged to refrain from the use of force or the threat of the use of force against another state. It is noteworthy however, that Article 51 prescribes certain limitations to the use of the principle of self-defence, as the attack is pre-supposed to have occurred between one member state or nation against another state or nation, as International Law and International relations are the study of the laws and relations as they pertain to nations.

In the case between Israel and Palestine however, it is questionable whether Palestine can be considered a separate state for the purpose of International law or whether it is actually still very much a part of the territory of Israel, and therefore such conflict is an internal conflict and not really an attack by one state or territory of the UN against another.

According to the 1933 Montevideo Convention which defines what a state is for the purpose of International Law, Article 1 of the 1933 Montevideo convention lists the criteria of what constitutes a state. According to the Montevideo Convention, a state must have a permanent population, a defined territory, a government and the capacity to enter into relations with the other states. Although Palestine has a permanent population, and a government led by the Hamas, it does not possess a clearly defined territory or the capacity to enter into international relations with other states, as it is not recognized by the UN or members of the International community as a State for the purpose of International law and International relations. Further, Palestine is only accorded non-member observer status by the UN. On the other hand, Israel is fully recognized by the International Community and the UN as a state for the purposes of International law and relations and was admitted as a member on the 11th May 1949.

International human rights and humanitarian law, were they breached?

If therefore, Palestine is not a state recognized under International law, the question is whether Israel can therefore legitimately use the principle of self-defence for retaliating against Palestine in the way that it did? And are the actions which they took in retaliation legal within the context of International Law? Further, if these actions can be justified or considered legitimate, another question is whether the measures taken were proportional to the initial attack based upon Article 51 (5) (b) of the Additional Protocol I to the Geneva Conventions. Article 51 (5) (b) prohibits

the launching of an attack which would be excessive in relation to the military advantage anticipated, and where it results in incidental loss to civilian life, injury to civilians or a combination thereof.

Another question would be if these actions which resulted in the egregious loss of civilian lives, including the deaths of countless women and children were not legal, then would these actions be considered war crimes under the Rome Statute of the International Criminal Court and for the purpose of the Geneva Conventions? Notably, Article 8 (2) (a) of the Rome Statute of the ICC delineates that “war crimes mean grave breaches of the Geneva Conventions”. According to Article 8 (b) of the Rome Statute, war crimes also constitute other serious violations of the laws and customs applicable in international armed conflict by any act that intentionally directs attacks against civilian population or against individual citizens. Article 8 (b) (iv) also prescribes that “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life, injury to civilians or damage to civilian objects or widespread long term and severe damaged to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated would also constitute a war crime”.

Therefore, if these criteria are applied to the conflict between Israel and Palestine, can Israel’s justification based on the principle of self-defence be upheld or would the acts taken constitute war crimes against the internal civilians of its own territory? It appears from a literal interpretation of the UN Charter that the principle of self-defence would be vitiated as Palestine is not a state for the purposes of International law against whom Israel could justify its retaliation. It therefore also follows that the atrocities committed against the civilian population of Palestine where Israel knew that such attack could result in loss of life and damage to the environment may actually constitute war crimes for the purpose of Article 8 (b) (iv) of the Rome Statute. This is because such defence was not only illegal but excessive and runs counter to the principle of proportionality.

The only mechanism that would have made the retaliation against the Palestinians justified using the principle of self-defence is if Israel actually previously recognized the right of the Palestinians to self-determination. The principle of self-determination is a legal right which people have to decide their own destiny within the International Community, it is both a right within customary international law and general international law. This principle is one of the core principles of International Law and is embodied in International Treaties such as the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), International

Covenant on Economic, Social and Cultural Rights (ICESCR) and the General Recommendation 21 on the right to Self-determination. For example, Article 1 (3) of the UN Charter encourages states to promote the right of self-determination and to respect that right in conformity with the Charter. Article 1 (1) of the ICESCR also recognizes the rights of all peoples to self-determination and to freely determine their political status and to freely pursue their economic, social and cultural development. If therefore, Israel recognized Palestine's right to self-determination and to become an independent state which subsequently launched an attack against Israel, then they would have been able to use the principle of self-defence as they would have had a right to respond to the attack of another state against their territorial integrity on the basis of Article 51 of the UN Charter. This would also have been viewed as an exception to the use of force under Article 2 (4) of the said Charter.

Moreover, the long-protracted war over territory would also cease if Israel were to recognize the principle of self-determination in relation to Palestinians. As both parties would be able to meet to negotiate which parts of the territory belong legitimately to Israel and which to Palestine and to have boundaries demarcated in International law before the International Community. There would therefore be two separate territories for the purpose of International law and would be able to work towards the progressive future for their individual territories.

Nevertheless, such a philosophy may only exist in utopia, as the parties seem to prefer protracted war over an amicable resolution to an age-old problem on ownership of territory. This is also due in part, to the unwillingness of either parties to concede who owns the legitimate rights to the much-disputed Holy City of Jerusalem. It may therefore be ages before both parties may resolve the underlying conflict which is subconsciously more religious and cultural in nature than political.

Diplomacy and the ceasefire

The egregious human rights violations which were committed against the innocent civilian populations also delineates the importance that diplomacy plays in the context of warfare. In fact, the UN Charter prescribes diplomatic measures as a first measure to dealing with conflict and had this principle been applied it could have averted much of the unnecessary loss of lives and prevented the wanton destruction to the environment. Article 2 (3) of the UN Charter provides that all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

Article 33 (1) on the Pacific Settlement of Disputes of the said Charter also states that parties to any disputes, the continuance of which is likely to endanger the maintenance of International peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resort to international agencies or arrangements of other peaceful means of their own choice. Neither Israel nor Palestine sought to resolve the conflict through diplomatic means. This therefore led to serious human rights atrocities and the mass loss and displacement of human populations as it was reported that over 248 persons died in Palestine, 12 in Israel and over 72000 persons were displaced due to the effects of the war.

It was noted that only after the calls by the UN Secretary General for a ceasefire and also after the diplomatic negotiations between Egypt, Israel and Palestine that there was a ceasefire of operations. This situation therefore highlights the important role that diplomatic mechanisms in dispute resolution can actually play in averting disputes particularly mediation, conciliation or arbitration which are alternative mechanisms for resolving disputes. Unfortunately, rather than Israel and Palestine seeking to resolve their differences through these legally viable and peaceful measures first, they employed it only as a last resort and resorted to war first. They are still more concerned over who won the war than who won the battle for peace.

* * *



Institute for **Cultural Relations Policy**

<http://culturalrelations.org>

institute@culturalrelations.org