THE HEBRON MASSACRE AND INTERNATIONAL LAW

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Since the Gulf crisis, the United States and the European states have sought to promote a Palestinian-Israeli political dynamic based on mutual recognition and the negotiation of interim arrangements that are meant to set the stage for a final resolution of the main outstanding matters of dispute. While concentrating on this objective, the diplomacy of the US and Europe has to an increasing extent ignored the requirements of international humanitarian law. In the aftermath of the Hebron massacre, there is a strong argument to be made against this posture of neglect. European states and the US are not only risking becoming parties to Israel's continuing violation of international humanitarian law but may also be seriously undermining their own declared objective of fostering a speedy and durable peace in the region.

In so far as it relates to territories occupied during the course of war, international humanitarian law has important consequences for dispute settlement as well as for the humanitarian protection of the population of such territories. The law protects the process of reconciliation and peace-making from foundering on the rancour caused by serious human rights abuses, and from impasses created by policies based on conquest and annexation. Rigorous international application of the law could make it easier for the Occupying Power to withstand domestic political pressures from those who would prefer the spoils of conquest over the benefits of a negotiated peace. It would also strengthen the confidence of the occupied population in the peace being negotiated by its political representatives. Conversely, reluctance to insist upon respect for the law can undermine both the will to negotiate and support for the negotiators.

THE GENEVA CONVENTIONS

To do all this, international humanitarian law places the behaviour of all parties to a conflict under international scrutiny and international jurisdiction. It relies on the High Contracting Parties to discharge their role as principal guarantors of the law.

All state parties to the Geneva Conventions of 1949 bound themselves to respect and to ensure respect for the provisions of these conventions in all circumstances (common Article 1). Under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the Palestinians of the occupied territories have the status of "protected persons". The Convention does not allow an Occupying Power to deprive "protected persons" of their rights under the Convention. It does not allow the political representatives of such persons to concede any of those rights; nor does it tolerate the acquiescence of High Contracting Parties to the denial or concession of the rights in question (Articles 1, 8 and 47). The absolute nature of these injunctions reflects very clearly the combined interests of states in creating and maintaining peaceful relations, and in protecting humanity. It was this combination of interests that inspired the drafting and

content of the Conventions at the end of the second world war. By accepting the positive obligation to ensure respect for the Conventions in all circumstances, not merely in conflicts to which they were a party, the body of contracting states recognised for the first time the interests they held, individually and as a community, in the universal and consistent implementation of the principles embodied in international humanitarian law.

In the case of the occupied Palestinian territories, the body of High Contracting Parties to the Geneva Conventions, including all the European Union (EU) member states and the US, have long dismissed the argument made by successive Israeli governments that the Convention does not apply, and have ruled consistently on the illegality of such violations as settlements, deportation, collective punishment and so forth. The role of these "third party" states is most critical when the Occupying Power refuses to apply the Convention, as the main mechanisms of implementation internal to the Convention itself cannot work. Their role is similarly crucial when the Occupying Power seeks acquiescence to persistent violations and the legitimisation of the consequences of these violations. Being bound absolutely to ensure respect for the Convention in all circumstances, third party states are not able to accept or sanction, let along guarantee, any negotiated arrangements which concede the rights protected by the Convention.

So, what does it mean when significant third party states, unwilling to "disturb" ongoing bilateral negotiations between parties to the conflict, fall silent on such matters? In the period after the Madrid conference, the countries of the EU pulled back from moves towards taking action in defence of international law in the occupied Palestinian territories. The Declaration of Principles conceded nothing on the legal status of the settlements, occupied East Jerusalem and other matters clearly governed by international humanitarian law, but neither did it affirm or satisfy any of its main provisions. The justification for this omission appears to be that the matters already decided by international humanitarian law were too politically contentious to address at that juncture.

Given the balance of power, and the fact that significant third party states apparently ceased to make any real effort to require Israel to recognise and comply with its international legal obligations under the Fourth Geneva Convention, Israel was able to force a position where the PLO agreed to postpone such issues until the "final status negotiations" some time down the road. Is this to be used by certain third party states not only to avoid taking action under the responsibilities with which they are themselves charged by humanitarian law (thus tolerating further "creation of facts" in the interim), but to begin a "phased withdrawal", also perhaps by omission, from legal positions they have held consistently since 1967?

RESOLUTION 904: AN OMINOUS OMISSION

Security Council Resolution 904, finally passed on 18 March, while referring to the Fourth Geneva Convention, fails to affirm the illegality of all Israel settlements throughout the occupied territories under that Convention. This point, which establishes the consequent responsibility of successive Israel governments for having sustained the settler presence and granted broad immunity to illegal and violent conduct by settlers, is such an important part

of the context of the Hebron massacre that its omission is ominous. It is made more ominous by the reasons given by the US for its abstention on the preambular paragraph in which the Security Council reaffirmed the applicability of the Fourth Geneva Convention "to the territories occupied by Israel in June 1967, including Jerusalem, and the Israeli responsibilities thereunder". US Ambassador Albright stated in explanation that Jerusalem was one of the most sensitive issues to be addressed in the negotiations; that it was a matter for the parties to decide; and that the text's reference to Jerusalem could prejudice or prejudge the outcome of peace negotiations. Yet two years ago, in Security Council Resolution 799, the Council had reaffirmed the applicability of the Convention "to all the Palestinian territories occupied by Israel since 1967, including Jerusalem". The prohibition on the annexation of territory occupied during the course of international armed conflict is a lynchpin of customary international law.

What implications could all this hold for international law? Those who are committed to the idea of international law as an impartial, objective standard before which all states are equal are confronted as always with the fact that the enforcement of it is almost entirely dependent on the political will of state actors. The massacre in Hebron was at least in part made possible by the fact that, having bound themselves to enforcing a particular, unusual body of law in all circumstances, the most powerful signatories to that law decided that more could get done by not insisting on its enforcement - and this in precisely the circumstances that its potential worth had been demonstrated time and time again.

ISRAEL MAKES NO COMMITMENT

The response of the Israeli government to the massacre has involved no commitment to a law-based standard for its conduct in the occupied Palestinian territories that conforms with its international obligations. It has, not for the first time, made gestures, and indeed these gestures appear somewhat wider than usual. However, they simply do not address the fundamental flaw that will give rise to future serious violations for as long as it continues: the fact that Israel still refuses to be bound by existing applicable law, and indeed that serious violations continue as part of policy. The dozens of Palestinians killed since 25 February were not killed by members of the now banned Kach or Kahane Chai. They were killed by members of the Israeli armed forces accustomed to and sanctioned in the use of excessive force unconstrained by the principles of necessity or proportionality as required by international law.

A constituency subject on a daily basis to this kind of abuse does not provide a stable consensus on which its leadership can rely to negotiate peace. Confidence is not built, nor support for political accommodations generated, by a climate of coercion intensified by a "hands-off-the-law" attitude of third parties supporting the peace process. These are truisms, and part of the reason why the law exists in the first place. It is obvious why the Israel government appeals to the PLO to avoid insisting on "concessions to Palestinian public opinion" in the aftermath of the massacre. It is more serious when third party states also put pressure on the PLO without pausing to address the underlying reasons for the vulnerability of the whole process, and their own law-based role in providing remedy.

The massacre in Hebron and its aftermath has thrown into sharp relief the fact that not only is allowing the law to be ignored a dangerous policy to follow, but that it is also a *non sequitur* in the logic of peace. It has proven once again the disruption that is caused to the prospects for peace by serious violations of applicable international law. On the other hand, European and North American states, independently bound to uphold that law and best placed to do so, appear to be proceeding on the basis that action to enforce the law and thus prevent those violations would disrupt the peace process. They have yet to substantiate this theory, the alternative is already a matter of record.

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