

*This paper was presented during a conference on Palestinian refugees in the Arab World organized by Al Jazeera Center for Studies in collaboration with the Palestinian Return Centre.*

## **Legal Reflections on Count Folke Bernadotte's Proclamation on the Exodus of Palestinian Refugees**

**Basheer Alzoughbi\***

26 April 2012

## I. Introduction

The notion of establishing a Jewish state in Palestine with the existence of an Arab Palestinian majority was neither preferable or desirable, nor was this prospect even convenient for any Jewish government or people. The implicit and explicit ideology that governed and continues to govern pre- and post-Israel times is that Israel would not only be a state, but one with a Jewish majority if not an entirely Jewish population. This ideological objective based on racial discrimination has been implemented through the reduction of the Arab majority and the appropriation of its property alongside simultaneous increase of Jewish immigration to the relatively new state. This is corroborated by Menahem Ussishkin, then a Zionist leader, who stated on 12th June 1938 that "the worst is not that the Arabs would comprise 45 or 50 percent of the population of the new state but that 75 percent of the land is owned by Arabs."<sup>1</sup>

The exodus of Palestinian refugees cannot be separated from the existence of persecution and genuine fear of persecution, as well as serious violations of the laws and customs of war. The persecution and well-founded fear of persecution, as demonstrated across time and space, is based on the perceived Arab race, ethnicity and/or religion for the purpose of expelling and/or eliminating the Arab Palestinian population and appropriating its property. Noting the objective and biased-free premises of the Palestinian refugee, Count Folke Bernadotte, the then United Nations Mediator, documents the historical factors by stating that:

*The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion...There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity.*<sup>2</sup>

The aim of this paper is to examine how serious violation of the international humanitarian laws and customs of war caused and/or contributed to the exodus of Palestinian refugees while attributing violations in question to individual criminal responsibility under intertemporal customary international criminal law. To this end, it will particularly examine Count Folke Bernadotte's documentation and proclamation on the premises of the exodus of Palestinian refugees, namely "rumors concerning real or alleged acts of terrorism, or expulsion," "instances of

<sup>1</sup> Central Zionist Archives (Jerusalem) CZA Executive Proceedings, 12 June 1938. Quoted in Palumbo Michael *The Palestinian Catastrophe: The 1948 Expulsion of a People from their Homeland* London: Faber and Faber Limited, 1987, p. 1.

<sup>2</sup> Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations, UN GAOR, Supp. 11, at 14, UN Doc. A/648 (1948).

destruction of villages without apparent military necessity," and "large-scale looting, pillaging and plundering."

## II. "Rumours Concerning Real or Alleged Acts of Terrorism, or Expulsion"

The prohibition of acts of terrorism against civilian populations is a customary international law principle as per the International Committee of the Red Cross (ICRC) study on customary international humanitarian law. Rule No. 2 provides that "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."<sup>3</sup> Article 51(2) of Additional Protocol I of 1977 states that "the civilian population as such, as well as individual civilians, shall not be the object of attack" and prohibits acts or threats of violence whose objective is to spread terror among civilian populations.<sup>4</sup> It is obvious that this aforesaid principle reflects a genuine codification of customary international law which binds all parties in any international or non-international armed conflict. The United Kingdom stated that "Article 51(2) was a valuable reaffirmation of an existing rule of customary international law."<sup>5</sup>

According to evidence demonstrating the occurrence of atrocities during World War I, the 1919 Report of the Commission on Responsibility defines punishable violations of laws and customs of war, including "systematic terror."<sup>6</sup> In addition, Article 22 in the Hague Rules of Air Warfare provides that "any air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants"<sup>7</sup> is prohibited. The prohibition of air bombardment aiming at terrorising the civilian population is obviously stressed enough under the laws and customs of war on land. Article 33 in the Fourth Geneva Convention states that "collective penalties and likewise all measures of intimidation or of terrorism are prohibited."<sup>8</sup> Furthermore, acts of violence aiming at spreading systematic terror among

<sup>3</sup> Henckaerts Jean-Marie and Doswald-Beck Louise, *Customary International Humanitarian Law – Volume I: Rules* Cambridge: Cambridge University Press, 2005, p.8.

<sup>4</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>5</sup> United Kingdom, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocol. Quoted in Henckaerts and Doswald-Beck, op.cit., (Volume 1) p.8.

<sup>6</sup> (eds) Henckaerts Jean-Marie and Doswald-Beck Louise, *Customary International Humanitarian Law– Volume II: Practice* Cambridge: Cambridge University Press, 2005, p.67.

<sup>7</sup> The Hague Rules of Air Warfare, The Hague, December, 1922-February, 1923.

<sup>8</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

civilians violate the basic customary principles of distinction between civilians and combatants, precaution in attacks and proportionality.

The civilian Arab population was subjected to acts of terrorism and intimidation before during and after the establishment of Israel. A well-known example that culminated in the Deir Yassin massacre on the 9<sup>th</sup> of April 1948 can be a practical epitome of terrorism targeting it. Both Dr. Jacques de Reynier, a Swiss doctor working for the ICRC, and Meir Pa'il, then a Haganah officer, suggested that 250 people were killed in the Deir Yassin massacre.<sup>9</sup> Pa'il stated that "no bayonets or knives were used, the massacre was made with rifles and machine guns only."<sup>10</sup> However, abundant evidence provides a counter argument for many of the victims were found to have been "hacked to death with large knives," probably after his departure.<sup>11</sup> Most, if not all, of the atrocities in Deir Yassin were carried out by the Irgun and Stern.<sup>12</sup> It can be said that the exodus of Palestinian refugees was a corollary of the spread of terror among the civilian population.

Tantura, a coastal village, is but another area whose villagers were exposed to acts of terrorism. On 22<sup>nd</sup> May 1948, it was attacked and subjected to rampage and systematic executions.<sup>13</sup> Between April and October 1948, there were a total of 33 massacres, all governed by the imperative objective of accelerating the Palestinian exodus.<sup>14</sup> Certainly, the massacres of Deir Yassin and other villages are clear examples of real acts of terrorism aiming to intimidate and terrify the civilian population so as to reduce it and appropriate its property. The Commentary on the Fourth Geneva Convention mentions that measures of intimidation or of terrorism as codified in the second line of the first paragraph of Article 33

*are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be.*<sup>15</sup>

<sup>9</sup> Palumbo, op.cit., p. 57.

<sup>10</sup> Ibid, p. 56.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, p.57.

<sup>13</sup> Pappé, Ilan *The Ethnic Cleansing of Palestine*, Oxford: Oneworld Publications Limited, 2006, pp. 135+136.

<sup>14</sup> Abu-Sitta, Salman 'The Feasibility of the Right of Return' Eds. Karmi Ghada & Cotran Eugene. *The Palestinian Exodus 1948-1998 Reading*: Garnet Publishing Limited, 1999, p.173.

<sup>15</sup> Published under the general editorship of Jean S. PICTET, *The Geneva Conventions of 12 August*



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## Palestinian Refugees in the Arab World Reality and Prospects

14-15 April 2012  
Doha Sheraton Hotel

in collaboration with



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The Palestinian Return Centre

The internationally illegal acts of terrorism against the civilian population documented by Count Folke Bernadotte certainly invoked individual criminal responsibility under customary international criminal law under the pretense that acts of terrorism are war crimes. Furthermore, acts of intimidation or terrorism aiming at voluntary killing, serious voluntary suffering, serious bodily injury, and/or victimisation of civilians not taking direct part in hostility the object of an attack are all war crimes and serious violations of the laws and customs of war.<sup>16</sup> Rumours concerning alleged acts of terrorism as observed by Count Folke Bernadotte were also employed before and after the establishment of Israel as part of psychological warfare. During 1947-1949, the Galilee region witnessed tactics of rumours, panic and psychological pressure.<sup>17</sup> The National Committee issued communique stating that false rumours had circulated, thus "[forcing] some Arabs to leave the city...These rumours help the enemy in our midst...The committee...demands of the citizens not to pay attention to the false rumours and to stay in their places."<sup>18</sup> In short, the "rumours concerning real or alleged acts of terrorism, or expulsion" premise that caused and/or contributed to the exodus of Palestinian refugees invoked serious violations of the laws and customs of war and amounted to war crimes.

### III. "Instances of Destruction of Villages without Apparent Military Necessity"

Extensive destruction of villages and property without military necessity is the second premise that caused and/or contributed to the exodus of Palestinian refugees. The purpose and object of such action was manifold: to prevent Palestinian refugees from returning, terrorize the civilian population and increase the Jewish immigration to Palestine. More than 350 villages were totally depopulated and ruined either partially or totally between 1948 and 1949.<sup>19</sup> During the first truce, the Israeli army "...embarked on the massive destruction of a number of expelled villages..."<sup>20</sup> The key operative words here are that the military operations of destruction of Palestinian villages were conducted without "apparent military necessity." The instances of destruction of Palestinian villages

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1949: *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*. International Committee of the Red Cross, Geneva, 1958, p. 226.

<sup>16</sup> See also grave breaches as codified under the Fourth Geneva Convention.

<sup>17</sup> Nazzari, Nafez *Palestinian Exodus from Galilee 1948* Beirut, Lebanon: The Institute for Palestine Studies, 1978, p.105.

<sup>18</sup> 'Daily Monitoring Report, No. 20', undated but referring to 25-26 Apr. 1948, IDFA 4944\49\617. Quoted in Morris, Benny. *The Birth of the Palestinian Refugee Problem Revisited*, Cambridge: Cambridge University Press, 2004, p. 178.

<sup>19</sup> Morris, op.cit.,p.155.

<sup>20</sup> Pappé, op.cit.,p.148.

without military necessity are obviously prohibited under customary international law.

Article 23 in the Hague Regulations of 1899 makes it clear that it is prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."<sup>21</sup> The Hague Regulations had already been set as customary law by the time World War II erupted, and accordingly the International Military Tribunal at Nuremberg identified violations of them as war crimes.<sup>22</sup> The Fourth Geneva Convention also mentions "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as one of the grave breaches of the Convention which certainly is a genuine codification of customary international law. Count Folke Bernadotte further used the specific words of "property wantonly destroyed" to assert that the destruction of the Palestinian property could not be justified by imperative military necessity or necessities of war and emphasise the extensive and widespread nature of the conduct of destruction.

Rule 50 of the ICRC study on customary international humanitarian law states that "the destruction or seizure of the property of an adversary is prohibited, unless required by imperative necessity."<sup>23</sup> The instances of destruction of Palestinian villages without military necessity further violated another international customary principle of distinction between civilian objects and military objectives. The wanton destruction of Palestinian villages did not contribute to a military advantage and hence could not have been a military necessity. The very nature, location and use of the destroyed Palestinian villages could not have provided by any means an effective military contribution or advantage. The St. Petersburg Declaration of 1868 notes "that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."<sup>24</sup> The instances of destruction of Palestinian civilian property without military necessity runs in absolute contrary to the object of war. It goes beyond dispute that the extensive destruction of Palestinian villages without military necessity are war crimes. Indeed, the Charter of the International Military Tribunal of Nuremberg mentions "wanton

<sup>21</sup> Convention with Respect to the Laws and Customs of War on Land (Hague II); July 29, 1899. Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land.

<sup>22</sup> Henckaerts and Doswald-Beck, *op.cit.*, (Volume 1) p.572.

<sup>23</sup> *Ibid*, p. 175.

<sup>24</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November/ 11 December 1868.

destruction of cities, towns or villages, or devastation not justified by military necessity" as war crimes.<sup>25</sup>

According to evidence demonstrating the occurrence of atrocities during World War I, the 1919 Report of the Commission on Responsibility labels "confiscation of property" and "wanton devastation and destruction of property" as punishable violations of the laws and customs of war.<sup>26</sup> Moreover, the instances of destruction of Palestinian villages without military necessity may invoke another customary international law provision i.e. the prohibition of attacking non-defended localities. Article 25 of the Hague Regulations of 1907 clearly indicates that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."<sup>27</sup> Rule 37 of the ICRC study on customary international humanitarian law states that "directing an attack against a non-defended locality is prohibited."<sup>28</sup> Thus, it is obvious that directing an attack against a non-defended locality is prohibited, constituting a customary international law and invoking individual criminal responsibility under the customary list of war crimes. In light of the given information, the instances of destruction of villages without military necessity as documented by Count Folke Bernadotte seriously violated the laws and customs of war and further gave rise to individual criminal responsibility under the list of war crimes.

#### IV. "Large-Scale Looting, Pillaging and Plundering"

Looting, pillaging or plundering become common occurrences in the context of any armed conflict; yet the scale and rate of pillaging may differ from one state and/or territory to another. That being so, the Palestinian inhabitants who fled or were expelled as refugees left behind valuable moveable and immovable property. That which was saved from destruction was not spared from pillaging. Pillaging is prohibited under customary international law as affirmed by Article 28 of the Hague Regulations, which states that "the pillage of a town or place, even when taken by assault, is prohibited."<sup>29</sup> Furthermore, Article 47 provides that "pillage is formally forbidden"<sup>30</sup> as does the Fourth Geneva

<sup>25</sup> Article 6 (b), Charter of the International Military Tribunal, London, 8 August 1945.

<sup>26</sup> Henckaerts and Doswald-Beck, op.cit., (Volume II) p. 1001

<sup>27</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>28</sup> Henckaerts and Doswald-Beck, op.cit., (Volume 1) p.122.

<sup>29</sup> Article 28, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>30</sup> Article 47, ibid.

Convention.<sup>31</sup> The Commentary on the Fourth Geneva Convention mentions the prohibition of "...not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay."<sup>32</sup> Who was pillaging who? Nahmani stated that in Tiberias "groups of dozens of Jews walked about pillaging from the Arab houses and shops...The Haganah people hadn't the strength to control the mob after they themselves had given a bad example..."<sup>33</sup> The fact and/or possibility that other individuals and groups of people were engaged in pillaging is certainly not excluded, as pillaging knows neither restraint nor identity.

The Lieber Code, the Brussels Declaration, and the Oxford Manual identify the prohibition of pillaging as a "long-standing rule of customary international law."<sup>34</sup> Pillaging is thus a serious violation of the laws and customs of war and further constitutes a war crime under international criminal law. (The Charter of the International Military Tribunal of Nuremberg lists "plunder of public or private property" as a war crime<sup>35</sup> as does the Report of the Commission on Responsibility set up after the First World War.<sup>36</sup>) Count Folke Bernadotte used the operative words of "large-scale looting, pillaging and plundering" to denote that pillaging was not just a mere incident but a widespread and systematic practise. In sum, the prohibition of pillaging under customary international law invokes individual criminal responsibility under international criminal law and further demands reparation.

The prohibition of acts of terrorism, destruction of villages or property without military necessity, and pillaging are principles of intertemporal customary international law. In the Island of Palmas (or Miangas) Case, the arbitrator provided that "both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."<sup>37</sup> The legal system of laws and customs of war was not respected even though it

<sup>31</sup> Article 33, Second Paragraph, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>32</sup> Published under the general editorship of Jean S. PICTET, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*. International Committee of the Red Cross, Geneva, 1958, p.226.

<sup>33</sup> Entries for 21 and 22 Apr. 1948, YNF. Tzahar, 'Historians ...', 211. Quoted in Morris, op.cit., p. 185.

<sup>34</sup> Lieber Code, Article 44 ; Brussels Declaration, Article 18 and Article 39; Oxford Manual, Article 32. Quoted in Henckaerts and Doswald-Beck, op.cit., (Volume 1) p.182.

<sup>35</sup> Article 6 (b) Charter of the International Military Tribunal, London, 8 August 1945.

<sup>36</sup> Report of the Commission on Responsibility. Quoted in Henckaerts and Doswald-Beck, op.cit., (Volume 1) p.182.

<sup>37</sup> Island of Palmas Case (US v. Netherlands), The Hague, 4 April 1928, Arbitrator M. Huber.

was in force during the Arab-Israeli conflict and is still in force at the present time as it appears that the objective of reducing the Arab population and appropriating its property could only be implemented through the execution of war crimes. The acts of terrorism, destruction of villages or property without military necessity, and pillaging are certainly violations of the laws and customs of war and war crimes under individual criminal responsibility, and invoke state responsibility law. The key question that concerns international criminal law is whether, to what extent, and under which conditions were the criminally responsible persons for the aforesaid war crimes brought to criminal trial?

## I. Conclusion

Count Folke Bernadotte invoked and spelled out principles of intertemporal customary international law under the laws and customs of war that were gravely violated. The "acts of terrorism, or expulsion," "instances of destruction of villages without apparent military necessity," and "large-scale looting, pillaging and plundering" have caused and contributed significantly both directly and indirectly to the exodus of Palestinian refugees in 1948. The violated customary principles of laws and customs of war were identified not only as serious violations but also as war crimes under individual criminal responsibility without prejudice to the international law on state responsibility. The principles of proportionality, precaution in attacks and distinction between civilians and combatants, and between civilian objects and military objectives were neither respected nor protected. Hence, the establishment of Israel was accompanied by serious violations of the laws and customs of war which amounted to war crimes under customary international criminal law and demands full reparation under the international law of state responsibility. Count Folke Bernadotte was assassinated in Jerusalem on 17 September 1948 but his words on the exodus of Palestinian refugees will never be underestimated as they reflect the historical factors, invoke customary provisions of the laws and customs of war, demonstrate individual criminal responsibility and demand adequate reparation under state responsibility law.

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*\*Basheer Alzoughbi is an academic specializing in international and humanitarian law.*

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