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International Law on State Responsibility and the Exodus of Palestinian Refugees

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The legal consequences of the internationally wrongful acts of terrorism, expulsion, destruction of villages without military necessity and pillaging that were committed against Palestinian civilians and their possessions that were documented by Count Folke Bernadotte in the wake of the exodus of Palestinian refugees do not only invoke individual criminal responsibility but also state responsibility. Individual criminal responsibility does not bar state responsibility and vice versa. The aim of this paper is to identify the responsible state or states responsible for the acts that caused the exodus of Palestinian refugees under the intertemporal customary international law of state responsibility. To this end, it will examine how responsibility for the violations of the laws and customs of war in question could be attributed to Israel and Great Britain under international law and determine the form or forms of due reparation.

I. Principles of Attribution

Article 2 in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DASR) defines the elements of an internationally wrongful act of a state as "conduct consisting of an action or omission [that] (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation."¹ The elements of such an act as codified in the DASR are a genuine expression of customary international law. Article 4 of the DASR provides one of the principles of attribution for the purposes of the international law of state responsibility, stating that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions"² – which also reflects a genuine codification of customary international law. Rule 149 in Volume I of the study on customary international humanitarian law provides that "a State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces."³

One needs to draw a distinction between the internationally wrongful acts that occurred before the official creation of Israel and during the British Mandate and

¹ Art.2, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected. 2008 p. 76.

² Article 4, *ibid.*

³ Henckaerts Jean-Marie and Doswald-Beck Louise, *Customary International Humanitarian Law – Volume I: Rules* Cambridge: Cambridge University Press, 2005, p. 530.



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the acts of terrorism and expulsion that were conducted after the establishment of Israel in terms of state responsibility law. Responsibility for the latter could be attributed to Israel while responsibility for the former could be attributed to more than one state (i.e. Israel and Great Britain) on the following legal basis: the armed forces of Great Britain can be rightly held responsible for its omissions of the Deir Yassin massacre of April 1948. In its capacity as the Mandate for Palestine, Great Britain undertook the legal duty to act and prohibit any acts of terrorism and expulsion against the civilian population. The Second Progress Report of the United Nations Conciliation Commission for Palestine noted that "the Commission was informed that two to three hundred thousand people had fled before the end of the British mandate."⁴ Hence, Palestinian refugees who fled and were expelled as a corollary of acts of terror and intimidation during the era of the British mandate could have done so as a result of Britain's failure to act when it was legally obliged to do so not only under the laws and customs of war but also under customary international human rights laws.

The failure of Great Britain to act constitutes an omission of fulfilling its customary international obligation. As demonstrated in the *British Claims in the Spanish Zone of Morocco* case, any state that proved unable or unwilling to "[prevent] or "[punish] the unlawful actions of armed groups" could be indicted.⁵ In short, responsibility for the acts of terrorism, expulsion and/or destruction of villages without military necessity that were conducted during the era of the Mandate could be attributed to Britain under the intertemporal customary international law of state responsibility. Britain was excreting *de facto* sovereignty over Mandatory Palestine and its armed forces failed to act when it had the legal duty to do so without prejudice to any other customary principles of attribution of responsibility of internationally wrongful acts to it.

The attribution of responsibility for the internationally wrongful acts of terrorism and expulsion that were conducted before the establishment of the state of Israel to Britain do not necessarily free Israel of its own responsibility under the intertemporal customary international law of state responsibility on the following legal basis: the Jewish military movements of Haganah, Irgun and Stern, which launched acts of terrorism and expulsion against the Palestinian civilian population, are but examples of military movements that subsequently formed an executive organ of Israel. At the beginning of the first truce, the foreign

⁴ United Nations Conciliation Commission for Palestine, Second Progress Report, A/838 19 April 1949.

⁵ Arbitral Tribunal, *British Claims in the Spanish Zone of Morocco case (Affaire des biens britanniques au Maroc espagnol)*, Arbitral Award, 1 May 1925, reprinted in *Reports of International Arbitral Awards*, Vol. II, United Nations, New York, 1949, Section III(II), pp. 642–646, §§ 3–6. Quoted in Henckaerts and Doswald-Beck, op.cit., (Volume 1) p. 532.

minister of the provisional government stated that "the Stern group...then existed within Israel only as a political organization, having disbanded itself as a military organization, and its members were being absorbed into the army as individuals."⁶ The first two paragraphs in Article 10 of the DASR provide that

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.⁷

Because Irgun, Stern and Haganah succeeded in establishing a new state, responsibility for the internationally wrongful acts that they committed before the establishment of Israel are also attributed to Israel under international law without prejudice to individual criminal responsibility. The DASR mentions that:

Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims.⁸

In light of the given information, there is a dual state responsibility for the internationally wrongful acts in question. Acts that occurred before the establishment of Israel are the responsibility of Israel (in line with Article 10 of the DASR which reflects intertemporal customary international law) as well as Britain (in line with its armed forces omissions under Article 4 of the DASR which also reflects intertemporal customary international law). Subsequent acts of terrorism, expulsion, destruction of property and villages without military necessity and pillaging that occurred after the establishment of Israeli (and after the termination of the British mandate in Palestine) fall rightly and strictly within the scope of Israel's state responsibility.

II. Reparation

⁶ Cablegram dated 27 September 1948 from Ralph Bunche to the Secretary-General transmitting Report Regarding the Assassination of the United Nations Mediator S/1018 28 September 1948.

⁷ Article 10, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001).

⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. p. 51.

Article 34 of the DASR mentions three available forms of reparation for the injury: "restitution, compensation and satisfaction, either singly or in combination."⁹ These forms are a genuine codification of customary international law. The *Permanent Court of International Justice* (PCIJ) provided in the *Case Concerning the Factory at Chorzów* that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention."¹⁰ Since responsibility for the acts in question have been attributed to more than one state, adequate reparation has to be provided by both states. That being so, the form of the required reparation may differ from one state to another. Israel is under the legal obligation to provide full reparation i.e., restitution, compensation and satisfaction in combination while Great Britain is under the legal obligation to provide adequate reparation in the form of compensation and satisfaction.

i. Restitution

Article 35 in the DASR defines restitution and its conditions as "re-establish[ing] the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."¹¹ Israel is under the legal obligation to restitute the property of Palestinian refugees (the legal owners and/or lawful possessors) in their villages, cities or towns as is recognised under the relevant applicable international law norms and General Assembly (GA) resolution 194. GA resolution 194 "resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date."¹²

Count Folke Bernadotte explicitly maintained that the Provisional Government of Israel is unquestionably liable "to restore private property to its Arab owners."¹³ In addition, the fifth basic premise of his progress report on the right of repatriation mentions that "the right of innocent people, uprooted from their

⁹ Art.34, Draft Articles on State Responsibility for the Internationally Wrongful Acts (2001).

¹⁰ *Factory at Chorzow* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

¹¹ Art.35, Draft Articles on State Responsibility for the Internationally Wrongful Acts (2001).

¹² Para 11, A/RES/194 (III) 11 December 1948.

¹³ *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations* 16 September 1948.

homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return."¹⁴ Moreover, upon realising their right of return, Palestinian refugees have the right to be treated fairly by law and not be subjected to discriminatory acts in public life. He also argued that 'the refugees, on return to their homes, are entitled to adequate safeguards for their personal security, normal facilities for employment, and adequate opportunities to develop within the community without racial, religious or social discrimination."¹⁵ The PCIJ provided in the *Minority Schools in Albania* advisory opinion that "equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations."¹⁶

Israel sought to distort the historical facts that led to the exodus of the Palestinian refugees. The historical distortion can be best portrayed as "the Palestinian Arabs were not forcibly displaced; they fled of their own accord, or at the behest of their leaders. Therefore, they have no right to return."¹⁷ Even if the allegation that the Arab Palestinian refugees fled "at their own accord or at the behest of their leaders" is true in part or whole, it nullifies neither their property rights nor their right of return and compensation because they were forcibly forbidden to return. At any rate, it is obvious that Israel's allegation contravenes the historical factors as documented in Bernadotte's reports. Customary international human rights law affirms the right of persons to freely leave and enter their own countries.¹⁸ In addition, customary international humanitarian law bans the appropriation and destruction of property without military necessity.

The change of sovereignty does not affect private property rights of legal owners or lawful possessors regardless of whether flee forcibly or voluntarily. In the advisory opinion of *Questions relating to Settlers of German Origin in Poland*,

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Minority Schools in Albania*, PCIJ, Ser. A./B., No. 64, 1935.

¹⁷ Statement by the Acting Permanent Observer of the Palestine Liberation Organization at the fifth meeting of the Committee on the Exercise of the Inalienable Rights of the Palestinian People A/AC.183/2 9 March 1976.

¹⁸ See Article 13 of the Universal Declaration of Human Rights (UDHR), 10 December 1948 and Article 12 of the International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

the PCIJ proclaimed that "private rights acquired under existing law do not cease on a change of sovereignty."¹⁹ Hence, the private rights of Palestinian refugees were not terminated as a result of the change of sovereignty in 1948. Count Folke Bernadotte noted unequivocally that "it would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes."²⁰

ii. Compensation

Restitution on its own is insufficient relative to the exodus of Palestinian refugees. In this context, compensation is a necessity, not a luxury, supplements restitution. Article 3 in the Hague Convention (IV) provides that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."²¹ Article 36 of the DASR states that "the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution," and that "compensation shall cover any financially assessable damage including loss of profits."²² The law of compensation is invoked when "the damage is not made good by restitution" which is the case for Palestinian refugees.

General Assembly Resolution 194 asserted the need for compensation. It reads that "compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."²³ Hence, any Palestinian refugee who chooses not to return is *ipso jure* entitled to compensation. In addition, any Palestinian refugee who chooses to return to any damaged or destroyed property of his or her own is also entitled to compensation. The working paper compiled by the Secretariat as an analysis of paragraph 11 of the General Assembly's Resolution of 11 December 1948 provided that "the choice was between repatriation and

¹⁹ Questions relating to Settlers of German Origin in Poland, PCIJ, Ser. B., No. 6, 1925.

²⁰ Progress report of the United Nations Acting Mediator for Palestine submitted to the Secretary-General for transmission to the members of the United Nations in pursuance of paragraph 2, part II, of resolution 186(S-2) of the General Assembly of 14 May 1948 16 September 1948.

²¹ 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.

²² Art.36, Draft Articles on State Responsibility for the Internationally Wrongful Acts (2001).

²³ Para 11, A/RES/194 (III) 11 December 1948.

compensation for damages suffered, on the other hand, or no return and compensation for all property left behind, on the other."²⁴ Still, after being in diaspora for a long period of time, Palestinian refugees who are willing to return are entitled not only to restitution but also to compensation regardless of the status of their property because they were forcibly forbidden to return. Adequate compensation has to be made even after restitution is achieved. The *raison d'être* of compensation comes as a result of the refugees' loss of profits they could have generated from the cultivation of citrus and/or arbor as well as housing property and so on. The longer they are deprived of their property, the more compensation they are entitled to claim.

In addition, Palestinian refugees are entitled to compensation for any pillaging of their property. In fact, it seems that the General Assembly was especially concerned with instances of "looting, pillaging and plundering of private property and destruction of property and villages."²⁵ Compensation claims for pillaging are not limited to immovable property but include moveable property. Furthermore, compensation claims for war damages have to be affected as well. The representative of Guatemala maintained that "the Commission should have nothing to do with war damages," and that "that matter ought to be dealt with in the peace treaty."²⁶ The first paragraph of Article 23 of the 1947 Peace Treaty with Finland provides that Finnish military operations and occupation of a Soviet territory caused losses to the latter and as a corollary, Finland is obliged to compensate it "in the amount of \$300,000,000 payable over eight years from 19 September 1944 in commodities."²⁷

Victims or families of victims of war crimes may also be entitled to compensation. Article 75 of the 1998 ICC Statute provides that "the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."²⁸ Victims should also be able to "bring claims before civil

²⁴ United Nations Conciliation Commission for Palestine, Analysis of paragraph 11 of the General Assembly's Resolution of 11 December 1948 A/AC.25/W/45 15 May 1950.

²⁵ Compensation to Refugees for Loss of or Damage to Property to be Made Good under Principles of International Law or in Equity (Working Paper prepared by the Secretariat) A/AC.25/W/30 31 October 1949.

²⁶ Ibid.

²⁷ Treaty of Peace with Finland, 1947 –Paris.

²⁸ Article 75 (2), The Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

courts."²⁹ The paper prepared by the Secretariat entitled "Compensation to Refugees for Loss of or Damage to Property to be Made Good under Principles of International Law or in Equity" mentions various non-exhaustive types of compensation:

*A. compensation claims for property of refugees not choosing to return; B compensation claims for loss of or damage to property, which, under principles of international law or in equity should be made good; C. compensation claims for ordinary war-damages.*³⁰

In short, there are six available types of compensation that Palestinian refugees in particular and the *de jure* state of Palestine in general must claim under international law: compensation for those refugees who willingly choose not to return, compensation for those refugees who decided to return to their damaged property, compensation for all refugees who choose to return regardless of the status of their property simply because they have been denied the generation of profit and the enjoyment of their property, compensation for pillaging, compensation for war damages and compensation for the victims of war crimes. Israel's obligation to pay compensation is separate from Great Britain's obligation to provide adequate compensation.

iii. Satisfaction

The final step for full reparation for the internationally wrongful acts relating to the exodus of Palestinian refugees which is not mentioned in GA resolution 194 or in Count Folke Bernadotte's reports is satisfaction. Satisfaction can be achieved in different ways including "an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality."³¹ Aside from the restitution and compensation that Palestinian refugees are entitled to, Israel must also provide adequate satisfaction in the form of explicit acknowledgement of the historical factors that led to Palestinian fleeing, uprooting and expulsion, and express profound regret, deliver an official written or oral apology. In addition, Great Britain is under the legal obligation to provide satisfaction to Palestinian refugees and the *de jure* state of Palestine.

III. Conclusion

²⁹ Henckaerts and Doswald-Beck, op.cit.,(Volume 1) p. 555.

³⁰ Compensation to Refugees for Loss of or Damage to Property to be Made Good under Principles of International Law or in Equity (Working Paper prepared by the Secretariat) A/AC.25/W/30 31 October 1949.

³¹ Article 37, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).



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The *de jure* state of Palestine must assert that the internationally wrongful acts that were conducted before the creation of Israel are attributed to Great Britain in its capacity as the Mandate for Palestine, on the one hand, and Israel, on the other, under the intertemporal customary international law of state responsibility. The *de jure* state of Palestine must further assert on the responsibility of Israel for acts committed during and after the establishment of Israel. The *de jure* state of Palestine must demand that Israel provide full reparation i.e. restitution, compensation and satisfaction and demand that Great Britain furnish reparations in the form of compensation and satisfaction in line with customary provisions of intertemporal international law.

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