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Painting the Israel-Palestine Conflict in Colours of Jus in Bello - Military Prosecutor V. Omar Mahmud Kassem and Others

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ABSTRACT

The International Humanitarian Law ("IHL") was carved into the body of International Law (IL) with the primary intent to strike a balance between military necessity and human rights. In pursuit of such vision, this concerned branch of law regulates protection of those who are not participating in the hostilities (the so-called "protected persons"). IHL, within its scheme, tends to protect the prisoners of war ("POWs") as well as consists of clauses pertaining to "hors de combat." The concurrent case is a milestone to be cited in the context of evolution of IHL as it was decided during the budding stage of the blossom (of the IHL). Prior to the signing of Additional Protocol II in 1977, there existed a vacuum in the realm of 'established rules' for the protection of prisoners leading to the widespread uncertainty. The significance of this judgment is engraved in the manuscripts of history as it set a precedent for courts of the Belligerents (here, Israel) to prosecute individual activists of the Occupied State (here, Palestine); oftentimes, considered a blot on implementation and interpretation of IHL. Thus, it may seem in the light of academic perusal that the existing loopholes in the early years of evolution of IHL enabled Belligerent authorities to sustain a hegemonic control over the political system of the Occupied State.

By virtue of this case analysis, the authors attempt to analyze the decision to quench a query regarding Article 4(A)(2) of Geneva Convention III in the context as to whether it can be used to deny POW status to an individual of the Occupied State (Palestine).

Keywords: *International Humanitarian Law, Prisoners of war.*

I. ADMITTED FACTS

The present case germinates by virtue of a firefight between Palestinians and the Israel Military Forces that occurred in 1968, in the aftermath of the Six Days War of 1967³. The Palestinian

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³ Israel was attacked by Jordan, Egypt, Lebanon and Syria; Israel emerged largely victorious and took control over West Bank, which was previously under Jordan, along with annexation of East Jerusalem and the Sinai Peninsula (formerly, under Egypt)

group surreptitiously crossed the Jordanian border, carrying weapons and explosives. Such a group sought allegiance to Popular Front for the Liberation of Palestine (P.F.L.P.)⁴, a faction of the Palestine Liberation Organization (P.L.O.). This group was thereafter caught by the Israel Military Forces, clothed in their uniform, with open arms and ammunitions.

Among such captured group of people, Omar Mahmud Kassem (hereinafter referred to as Kassem) was one of the prime accused in the incident of firefight. He was a Jerusalemite who fled the country after the war⁵. He joined the P.F.L.P. in Jordan after which he went to infiltrate occupied areas and ignite an armed uprising (under the command of leaders of P.F.L.P.).

The P.F.L.P., in relation to the present case, conducted attacks upon civilians, gave effect to murders of civilians in Mahne Yehuda Market, Jerusalem, caused the Night of the Grenades in Jerusalem, placed grenades and destructive charges in Tel Aviv Central Bus Station, etc., targeting Israeli men, women and children who were not lawful military objectives.

II. LEGAL ISSUES

- Whether members of the Popular Front for the Liberation of Palestine (PFLP) can be ascribed the status of prisoners of war (POWs) within the ambit of the Third Geneva Convention?
- Whether there was an international armed conflict that made International Humanitarian Law (IHL) applicable, and who may be construed in this case as high contracting parties?

III. RIVAL CONTENTIONS

It was contended by the defendants that they can claim the status of POWs under Article 4A of Third Geneva Convention⁶. To decide the status of the defendants, the court may consider paragraphs (1), (2), (3), and (6) of Article 4A. Whether this Convention is regarded as an agreement between the Contracting Parties⁷ or as expressive of the position under customary International Law (relating to the treatment of prisoners of war), the court may proceed on the assumption that it applies to the State of Israel and its armed forces.⁸

However, it was refuted on the grounds that the defendants, under paragraph (1)⁹, are neither

⁴The Popular Front for the Liberation of Palestine (PFLP) is a secular Palestinian Marxist-eninist and revolutionary socialist organization founded in 1967 by George Habash.

⁵Six-Day War of June, 1967

⁶ defines all those categories of persons who, having fallen into enemy hands, are regarded as prisoners of war within the meaning of the Convention

⁷ The representatives of states who have signed or ratified a treaty (Here, Jordan and Israel)

⁸ Israel in fact acceded to the Convention on 6 July 1951, Jordan did so on 29 May 1951.

⁹ Article 4A, Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, opened for

'Members of the armed forces of a Party to the conflict' nor 'members of militias or volunteer corps forming part of such armed forces.' This was contended on the grounds of Article 2, which prescribes the scope of application of the Third Geneva Convention.¹⁰

It was argued that the Geneva Convention III, 1949¹¹ applies to relations between States and does not extend to relations between a State and bodies which are neither States nor represent States¹². Hence, in this matter, the Kingdom of Jordan is a party to the armed conflict and not the Organization (Front for the Liberation of Palestine), as it is neither a State nor a Government. Furthermore, it neither bears any allegiance to the regime which existed in the West Bank before the occupation by Israel, nor which exists now within the borders of the Kingdom of Jordan. Hence, the said Organization (P.F.L.P.) should be excluded from the application of the provisions of paragraph (3) of Article 4.

Paragraph (6)¹³ holds no application either, as the defendants are not residents of a non-occupied territory who, spontaneously took to arms in order to resist invading forces (without having time to form themselves into regular armed units) due to the sudden approach of such enemy. Succinctly, the organization¹⁴ that defendants seek allegiance to, fails to answer the most elementary criteria of a *levée en masse*.

Further, the defendants claimed to be recognized as lawful combatants, as the following four prerequisites were met¹⁵: (a) must be under the command of a person responsible for his subordinates; (b) must wear a fixed distinctive badge recognizable at a distance, (c) must carry arms openly; (d) must conduct their operations in accordance with the laws and customs of war.

However, the prosecution challenged the aforementioned claim, stating that the fundamental condition is that the forces must belong to a belligerent party to be recognized as lawful combatants and distinguished from irregular forces. If such condition is not met, then, under current International Law, they do not possess the right to enjoy the status of POW upon

signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('Geneva Convention III')

¹⁰ It applies to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.

¹¹ Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) [hereinafter Geneva Convention III].

¹² Leland Harrison in (Final Report, IIB, p. 12), "The Convention would, therefore, be applicable to all cases of declared or undeclared war between States to the Convention, and to certain armed conflicts within the territory of a State party to the Convention"

¹³ Article 4, Geneva Convention III

¹⁴ Popular Front for the Liberation of Palestine (P.F.L.P.), a faction of the Palestine Liberation Organization (P.L.O.)

¹⁵ Article 4A, paragraph (2) Geneva Convention III

capture.

Further, the prosecution relied upon the fact that none of the governments involved in the war, accepts responsibility for the acts of the P.F.L.P. The organization is neither prepared to take orders from the Jordan Government, nor witnesses the fact that it is illegal in Jordan and, thus, has been repeatedly harassed by the Jordan authorities. The measures that Jordan has adopted against it included the use of arms. Such underground activities are unknown in the international community. If Jordanian authorities look upon P.F.L.P. as an illegal organization, then Israeli Court should not be obliged to regard it as a body to which international rules (relating to lawful bodies) are applicable. Hence the Defendants should not be treated as protected POWs¹⁶.

IV. DECISION ON PERUSAL OF RATIO DECIDENDI

The Military Court ruled that- as the relationship between the Government of Jordan and PFLP was not recognized by Jordanian Authorities thus, PFLP cannot be considered as part of a party to an international armed conflict¹⁷. Thus, IHL should not be applicable to the situation.

The judge ruled that it was because of Kassem's organization (PFLP) that attacks against civilian targets (in other operations) were planned and carried out violating Common Article 2, Geneva Convention 1949, hence Kassem was not eligible for lawful combatant status. The Court reiterated the immunity of civilians from direct attack as one of the basic rules of international humanitarian law. The judge further wrote, "Members of such an organization have no right to claim the status of 'lawful combatant as International law was not written in order to protect terrorists and criminals¹⁸."

This conclusion was the pedestal for the Military Court to conclude that the members of PFLP in question were not entitled to prisoner-of-war status. Hence, Kassem and his co-defendants were awarded life sentences for armed infiltration, possession of firearms, and membership in an illegal organization.

V. CRITICAL ANALYSIS THROUGH THE AUTHORS' LENS

This case is an exemplification of the creative interpretations by Israeli authorities to engender a paradigm shift in the realm of International Law (in this case IHL), to delegitimize the actions

¹⁶ von Glahn (*The Occupation of Enemy Territories*, p. 52) If an armed band operates against the forces of an occupant in disregard of the accepted laws of war ... then common sense and logic should counsel the retention of its illegal status. If an armed band operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory, then no combatant or prisoner-of-war rights can be or should be claimed by its members.

¹⁷ Report: *Law and Courts in the Israel held Areas (Jerusalem, 1970)*, p. 17.

¹⁸ 24 ILR 470, p. 476

of Palestinian forces. The court, in its decision, applied the rules drawn from Common Article 2 of Geneva Convention, 1949, which states that the Non-State Parties to an International Armed Conflict (IAC) can be treated as Prisoner of War (POW) only on the ground of their respect towards the Principle of Distinction¹⁹ between Civilian and Military Targets.

Nevertheless, this case may be alluded to as a glaring example of the Israeli authorities taking advantage of the loopholes in International Law to prosecute Palestinian activists.

The court interpreted Common Article 2²⁰ by classifying PFLP as a terrorist organization and as individuals who do not respect the rule of distinction, which from a critical angle might be termed as a gross misinterpretation of the aforementioned statute. On perusal of such ratio, the concerned Court denied POW status to the detainees. However, it is pertinent to unveil that Common Article 2 neither states nor implies that those involved in armed conflict are required to be part of an Army or States-Party to qualify for protection as POW. Moreover, the Israeli authorities have overused, misused, and abused the article to construct a pedestal to deny the POW status to the Palestinians, even when their membership in an armed organization was beyond questions. In this concurrent case, Kassem's status as a POW was denied because the Israeli authority questioned and disregarded his affiliation (as a member to PFLP).

Unfortunately, this precept of disregarding the established rules and principles of IHL by Israeli Courts has yet not ceased. The UN Human Rights Committee (UNHRC) has repeatedly criticized Israel for applying a double standard to Palestinians.²¹ Further, it also concluded that the Military Court of Appeals incurred failure in recognizing Kassem's status as lawful combatants despite his continuous efforts to prove his affiliation with PFLP and its participation in resistance activity against Israeli forces.

Since there is no majority rule regarding the status of this case, it is hard to predict the destiny of PFLP members as Israel might use other grounds to deny POW status. However, it can be concluded with certainty that this judgment has paved the path by setting a precedent to a land

¹⁹ The principle of distinction was first set out in the Preamble to the St. Petersburg Declaration, which stated that the only legitimate object in war is to weaken the military forces of the enemy. It was subsequently recognised in the Hague Regulations (Hague Regulations, art 25.) and restated in both Additional Protocols of 1977 [Additional Protocol I, art 48; Additional Protocol II, art 13(2)]. It is also a principle of customary international law applicable in both international and non-international conflicts. The International Court of Justice has described it as one of the 'intransgressible principles of international customary law. The principle mandates a distinction in terms of both people (combatants and civilians) and property (military and civilian objects).

²⁰ Article 2(4), Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('[hereinafter Geneva Convention IV], 1949

²¹ For example, in the case *Procal v. Israel* CCPR/C/86/D/1053/2005, the court failed to recognize that combatants are not required to be members of States because IHL does not create a hierarchy between State and Non-State Actors.

wherein members affiliated to Palestinian Organizations may be punished without getting fair trials and due process.

Moreover, this judgment shook the fundamentals of IHL by questioning whether International Law can be abused by the Occupying Power to undermine the cause of the opposition by altering the interpretation of the founding articles.

VI. CONCLUSION

This judgment was one of the first legal instances that contended with the legitimacy of the Palestinian struggle against Israel. It may be construed as a landmark in the history of IHL that laid down the norms by which thousands of Palestinians would be tried in the ensuing course of time. Further, it also defined the way that the Military Law views acts of resistance to any form of Occupation. The opinion of the court subsequently surmounted all such observations that immunity of non-combatants from direct attack is one of the basic rules of the international law of war.
