

UNITED NATIONS INTERNATIONAL MEETING ON THE QUESTION OF PALESTINE

*The question of Palestinian political prisoners in Israeli prisons and detention facilities:
legal and political implications*

Geneva, 3 and 4 April 2012

CHECK AGAINST DELIVERY

PLENARY II

The legal status of Palestinian political prisoners in international law

Paper presented by

Mr. John Dugard

Former Special Rapporteur on the Situation of Human Rights
in the Occupied Palestinian Territory
Commission on Human Rights
Geneva

Professor of International Law
Leiden University
Amsterdam

CPR/IMQP/2012/5

GE.

THE LEGAL STATUS OF PALESTINIAN POLITICAL PRISONERS
IN INTERNATIONAL LAW

WITH SPECIAL REFERENCE TO PRISONER OF WAR STATUS

Professor John Dugard
former Special Rapporteur on the Human Rights Situation
in the Occupied Palestinian Territory

In my address I will pay particular attention to the status of Palestinians who take a direct part in hostilities against the occupying power –Israel – and who therefore qualify as combatants. I will do so with reference to the manner in which South Africa treated its militant political opponents in South Africa itself and in Namibia. This will serve to highlight the similarities between the regimes and to provide a greater understanding of how repressive regimes operating outside the rules of international law treat those who engage in resistance activities.

Israel does not recognise those who engage in resistance activities, either as combatants or as protesters, as “political” prisoners as this would confer legitimacy on the cause that motivates them. Instead they are termed ordinary criminals, security prisoners or, most frequently, “terrorists”. South Africa too sought to denigrate its political prisoners in this way. Nelson Mandela and his fellow political prisoners were castigated as criminals and terrorists by the apartheid regime.

For similar reasons Israel is not prepared to allow its political prisoners who qualify as combatants to be classified as prisoners of war. To confer prisoner of war status would constitute recognition of the fact that there is a conflict between the state of Israel and a people exercising its right to self- determination and statehood. Far better to call those who take up arms in pursuance of the right of self- determination criminals or terrorists!

But what is the law on prisoner of war status?

A prisoner of war is a combatant in an armed conflict who is captured by the enemy. As a legitimate combatant he cannot be prosecuted and punished as an ordinary criminal. Instead he may be detained until the conclusion of hostilities when he is to be released and repatriated.

Under the Third Geneva Convention of 1949 combatants only qualify as prisoners of war if they are members of the armed forces or organized resistance movement of a Party to the conflict. And, as the law stood in 1949, this meant a State Party to the Geneva Conventions¹. Since Palestinian resistance fighters do not belong to any State they do not qualify for prisoner of war status – under the law of 1949. Of course, if Palestine became a party to the Geneva Conventions of 1949 on the ground that it was a State as evidenced by recognition by over 100

¹ Article 2 of the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949.

States and membership of UNESCO, the situation would change and Palestinian resistance fighters would be entitled to POW status under the 1949 Convention. Doubtless this is one of the many reasons why Israel and the United States oppose Palestinian statehood.

But the law has changed since 1949. In terms of Article 1(4) of the First Additional Protocol to the Geneva Conventions of 1949 POW status now extends to members of an organized group fighting “against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” . This means that struggles between national liberation movements, such as the PLO, and States are recognized as international armed conflicts to which the 1949 Geneva Conventions apply. In order to benefit from this new law the national liberation movement must make a declaration undertaking to apply the Geneva Conventions and Protocol I. In 1949 the PLO made such a declaration.

It is clear that the Palestinian people have a right to self-determination. The International Court of Justice has confirmed this². It is also clear that they are subject to alien occupation and possibly colonial domination, as a result of the oppressive presence of some 500,000 settlers in the West Bank and East Jerusalem. It seems that many combatants meet the requirements laid down in Article 43 of Additional Protocol I that they be members of an organized force, under a responsible command structure that complies with the rules of international humanitarian law.

But Israel is not a party to Additional Protocol I and the extension of the benefits of the Geneva Conventions to national liberation movements like the PLO is not binding on her. In this respect Israel resembles apartheid South Africa which likewise refused to sign Protocol I³.

Can it be argued that Article 1(4) of Additional Protocol I is now part of customary international law and that Israel is bound despite the fact that it is not a party to the Protocol? This argument was raised on several occasions before the courts of South Africa and Namibia during the apartheid era⁴. Although the courts rejected the argument that Article 1(4) had become a customary rule, they were prepared in some instances to accept that a belief on the part of a militant that such a rule existed served as a mitigating factor and might provide a reason for not imposing sentence of death. Two comments should be made on these decisions. First, decisions of the courts of apartheid South Africa are not necessarily authoritative. Secondly, these decisions were rendered in the 1980’s when only some 50 States were parties to Additional Protocol I. Today there some 170 States party to this Protocol. It is at least a tenable argument that Article 1(4) reflects customary international law.

Israeli courts have rejected the argument that Palestinian resistance fighters are entitled to POW status. In recent years, however, Israeli courts have preferred to base their decisions on the failure of Palestinian resistance fighters to comply with the laws of armed conflict and not

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136, para 118.

³ South Africa only became a party to this Protocol in 1995, after the fall of apartheid

⁴ See John Dugard *International Law. A South African Perspective* 4th ed (Juta, 2011) 536-7.

on the question whether they are entitled to POW status because they are engaged in a war of self-determination. According to Smadar Ben-Natan:

“This is in line with Israel’s line of argument that emphasizes the Palestinians resorting to attacks on civilians while avoiding the question of the legitimacy of occupation, and portraying the conflict in terms of a ‘war on terror’⁵.

If Palestinian combatants were held as prisoners of war they would be held until the end of the occupation, which could be for many years. They would then be released at the same time as those convicted by Israeli military courts and imprisoned by Israel as criminals.⁶ So the practical implications of prisoner of war status are not significant. It is the symbolic or political implications of this status that are important. Prisoners of war are not treated as criminals but as worthy opponents in a military conflict, as freedom fighters engaged in a war of self-determination whose rights are recognized and determined by international law. It is the denial of this right, which rejects the legitimacy of the struggle of the Palestinian people for self-determination, that angers Palestinian combatants.

An advantage of being tried under the criminal law of the alien occupier or racist regime referred to in Article 1(4) of Additional Protocol I instead of being treated as a prisoner of war is that a combatant may use his trial to confront his opponent and advocate his cause in a political trial. In apartheid South Africa and Namibia militants used the political trial to good effect. Aply defended by competent and sympathetic lawyers in non-military courts open to the public and attended by the press and foreign observers, they exploited the rules of procedure and evidence to the advantage of their political cause. The history of apartheid is replete with political trials that advanced the stature of the defendants and highlighted repression and discrimination.

Political prisoners in Palestine/Israel are denied this opportunity. Although Marwan Barghouti was tried by a civilian, non-military court (because Israel was aware that a military court trial would lack legitimacy) and permitted to politicize his trial⁷, most combatants are tried by military courts despite international humanitarian law’s preference for impartial civilian courts⁸. Such courts, staffed by military judges lacking independence, sit in inaccessible places, sometimes behind closed doors, applying an inaccessible military law with little regard for the

⁵ “Are there Prisoners in this War?” in Abeer Baker and Anat Matar (eds) *Threat. Palestinian Political Prisoners in Israel* (Pluto Press, 2011) 158.

⁶ Article 77 of Fourth Geneva Convention. Although Israel claims that Gaza is no longer occupied territory it has failed to release prisoners from Gaza.

⁷ See Ben-Natan, above note 5 at 157-8.

⁸ In terms of the Fourth Geneva Convention, articles 64 and 66, military courts are intended to be the exception and not the rule. Where they are established they should be properly constituted, non-political, and located in the occupied territory. See further J-M Henckaerts and L Doswald Beck *Customary International Humanitarian Law* vol I Rules (Cambridge University Press, 2005) 356-7.

rules of due process⁹. Palestinian combatants therefore are not given the opportunity to confront the occupying power in open court before impartial judges applying due process of law.

A further transgression of the rules of international humanitarian law governing the imprisonment of Palestinian prisoners relates to their place of imprisonment. In terms of Article 76 of the Fourth Geneva Convention they are to be imprisoned in the occupied territory. In fact most Palestinian prisoners are imprisoned in Israel itself.¹⁰

Another category of political prisoner requires special mention: the administrative detainee. At present there are over 300 Palestinians held without trial and without the status of prisoner of war for six month periods that can be extended indefinitely¹¹. This arbitrary detention, which has recently been highlighted by the case of Hanaa' Shalabi, violates both humanitarian law and human rights law.

Finally there is the question of the killing of political opponents. Those who refuse to accept the comparison of Israel's repressive regime in the OPT to that of apartheid proudly proclaim that at least Palestinian political prisoners are not executed and that Israel is a state that has *de facto* abolished the death penalty. It is true that apartheid South Africa executed political prisoners after trial before civilian, non-military courts applying proper legal procedures¹². But more Palestinians have been killed in targeted assassinations of combatants than were judicially executed in South Africa. Israel is not an abolitionist state. It is a state that practices capital punishment in an arbitrary and capricious manner without a trial. However cruel and inhuman the conditions of Palestinian prisoners, however unfair the trials that sent them to prison, and however demeaning their characterization as "criminals" or "terrorists", we should not forget that Palestinian prisoners are the fortunate ones. For they were not murdered by a regime that murders political opponents under the euphemism of "targeted assassinations".

⁹ See Sharon Weill "Reframing the Legality of the Israeli Military Courts in the West Bank; Military Occupation or Apartheid?" in Baker & Matar *Threat..Political Prisoners in Israel*, above note 5 at 136; The Report of the UN Fact-Finding Mission on the Gaza Conflict UN Doc A/HRC/12/48 (the "Goldstone Report") paras 1438-9, 1521-22

¹⁰ See further Michael Sfard "Devil's Island; the Transfer of Palestinian Detainees into Prisons within Israel" in Baker & Matar above note 5 at 188.

¹¹ See further Tamar Pelleg-Sryck "The Mysteries of Administrative Detention" in Baker & Matat above note 5 at 123.

¹² See "Judicial Executions" in *Report of the Truth and Reconciliation Commission of South Africa* vol 2 (Juta 1998) 170.