

LEGAL STATUS OF RESISTANCE AGAINST OCCUPATION UNDER INTERNATIONAL LAW: CHALLENGES AND CONTOURS

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Abstract

This article focuses on legal status of right to resistance under international law with special reference to resistance against occupation. It is well established that resistance or armed resistance may not be created against States or in times of war. However, other factors are also relevant in a complex phenomenon. In general, resistance in any form is condemned at all levels and is not recognized as right in explicit terms under international law. During occupations, it is difficult to control it if such resistance is meant for liberation or in exercise of self-determination. The question arises that what is its legal status under international law especially against occupation. Do the people in occupied territory have right to resist against the occupying power? If so, they are also obliged to obey the commands of the occupying power. If no, what relevant factors are related for its actual performance against the occupants? What are practices of this right? This article aims to address these questions. Despite International law is designed to protect interests of the people worldwide including the occupied, it analyses the current status of resistance by taking into consideration Israeli-Palestinian conflict as a case study. First, it elaborates the historical background, definition and reasons for resistance; second, it focuses on resistance against occupation and analyses its rules and sources; third, it analyses the right to resistance under international law, in this regard it elaborates the right to self-determination and complexion factors as well; fourth; it explains duties and powers of the occupying powers and finally; it aims to apply preceding rules by taking into consideration Israeli-Palestinian conflict. The argument developed throughout the article is that resistance is a complex phenomenon and it is need of the hour to

elaborate it in explicit terms under international law in the case of occupation. If it links with the right to self-determination, in that situation even armed resistance is not forbidden and justified under principle of self-defense. However, resistance or armed resistance, as the case may be, must comply with the rules of ILOС, IHL and IHRL in all cases and situations.

Keywords: Resistance, armed resistance, occupation, Israeli-Palestinian conflict, right to resistance.

ЮРИДИЧЕСКОЕ СОСТОЯНИЕ СОПРОТИВЛЕНИЯ ПРОТИВ ОККУПАЦИИ В СООТВЕТСТВИИ С МЕЖДУНАРОДНЫМ ПРАВО: ПРОБЛЕМЫ И КОНТУРЫ

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Аннотация: В этой статье основное внимание уделяется правовому статусу права на сопротивление в соответствии с международным правом с удалением особого внимания сопротивлению оккупации. Хорошо известно, что сопротивление или вооруженное сопротивление не могут быть созданы против государств или во время войны. Однако это сложное явление, в котором также актуальны и другие факторы. В целом сопротивление в любой форме осуждается на всех уровнях и не признается в качестве права в явном виде по международному праву. Во

время оккупаций трудно контролировать его, если такое сопротивление предназначено для освобождения или осуществления самоопределения. Возникает вопрос, каков его правовой статус по международному праву, особенно в отношении оккупации?

Имеют ли люди на оккупированной территории право сопротивляться оккупирующей державе? Если это так, они также обязаны подчиняться командам оккупационной власти. Если нет, какие соответствующие факторы связаны с его фактической производительностью против жителей? Какова практика этого права? Эта статья направлена на решение этих вопросов. Несмотря на то, что международное право призвано защищать интересы людей во всем мире, включая оккупированных, оно анализирует нынешний статус сопротивления, принимая во внимание израильско-палестинский конфликт в качестве примера.

Во-первых, он разрабатывает исторический фон, определение и причины сопротивления; во-вторых, основное внимание уделяется сопротивлению оккупации и анализу ее правил и источников; в-третьих, он анализирует право на сопротивление в соответствии с международным правом, в этой связи он также разрабатывает право на самоопределение и факторы комплекс образования; четвёртая; он объясняет обязанности и полномочия оккупирующих держав и, наконец; он направлен на применение предыдущих правил, принимая во внимание израильско-палестинский конфликт. Аргумент, разработанный на протяжении всей статьи, заключается в том, что сопротивление является сложным явлением, и настало время на то, чтобы разработать его в явном виде по международному праву в случае оккупации.

Если это связано с правом на самоопределение, то в этой ситуации даже вооруженное сопротивление не запрещено и оправдано по принципу самообороны. Однако сопротивление или вооруженное сопротивление, в зависимости от обстоятельств, должны соответствовать правилам ILOC, IHL и IHRL во всех случаях и ситуациях.

Ключевые слова: Сопротивление, вооруженное сопротивление, оккупация, израильско-палестинский конфликт, право на сопротивление.

Annotatsiya: Ushbu maqola xalqaro huquq me'yorlari bo'yicha qarshilik ko'rsatish huquqining huquqiy maqomiga, ayniqsa ishg'olga qarshilik ko'rsatishga alohida e'tibor qaratilgan. Davlatga qarshi yoki urush davrida qarshilik yoki qurolli qarshilik yaratish mumkin emasligi yaxshi ma'lum. Biroq, bu boshqa omillar ham ahamiyatga ega bo'lgan murakkab bir hodisa. Umuman olganda, har qanday shaklda qarshilik barcha darajalarda qoralanadi va xalqaro huquqqa muvofiq ochiq tan olinmagan. Ishg'ol paytida, agar bunday qarshilik ozodlik yoki o'z taqdirini hal qilish uchun ishlatilsa, uni nazorat qilish qiyin. Savolga ko'ra, xalqaro huquqda, xususan, ishg'olga qarshi qarshilik huquqiy maqomi nima?

Ishg'ol etilgan hududdagi odamlar ishg'ol etuvchi kuchga qarshilik ko'rsatishga qodirmi? Agar shunday bo'lsa, ular ham ishg'ol etuvchi kuchning buyrug'lariga itoat qilishlari shart. Yo'q bo'lsa, bu huquq amalga oshirilishiga nisbatan qandaydir tegishli omillar bilan bog'liq. Bu huquqning amaliyoti qanday? Ushbu maqola shu savollarga javob berishga qaratilgan. Xalqaro qonunlar butun dunyodagi odamlar manfaatlarini himoya qilish uchun mo'ljallangan bo'lsa-da, Isroil-Falastin mojarosini misol sifatida ko'rib chiqish orqali qarshilikning hozirgi holatini tahlil qiladi.

Birinchi dan, qarama-qarshilikning tarixiy asoslarini, ta'rifini va sabablarini tushuntiradi; Ikkinchi dan, u ish g'olga qarshilik ko'rsatishga qaratilgan va uning qoidalari va manbalarini tahlil qiladi; uchinchi dan, xalqaro huquqqa muvofiq qarshilik huquqini tahlil qiladi, bu borada u o'z taqdirini belgilash va kompleks omillarni aniqlash huquqini ishlab chiqadi; to'rtinchi, ish g'ol etuvchi kuchlarning vazifalari va vakolatlarini tushuntiradi va nihoyat - Isroil-Falastin mojarosini hisobga olgan holda, avvalgi qoidalarni qo'llashga qaratilgan. Maqola bo'yicha ishlab chiqilgan dalil shuki, qarshilik murakkab bir hodisadir va uni xalqaro huquq me'yorlari asosida aniq ifodalash uchun vaqt keldi. Agar u o'z taqdirini o'zi belgilash huquqiga bog'liq bo'lsa, qurolli qarshilik o'z-o'zini himoya qilish printsipiga ko'ra taqiqlangan va qonuniy emas. Biroq, qarama-qarshilik yoki qurolli qarshilik barcha vaziyatlarda ILOC, IHL va IHRL qoidalariga muvofiq bo'lishi kerak.

Kalit so'zlar: qarshilik, qurolli qarshilik, ish g'ol, Isroil-Falastin to'qnashuvi, qarshilik ko'rsatish huquqi.

I. Historical Background

While examining status of resistance under International law, in the beginning, it is necessary to refer excellent book titled: *Jihad, Muzahmat and Baghawat (Jihad, Resistance and Rebellion from the perspective of Islamic and International law)*¹ written by Dr. Muhammad Mushtaq Ahmad which provides a comprehensive review of literature in a specific area of Jihad, Rebellion and Resistance from the perspective of Islamic and International law. The book is an extraordinary contribution of author which provides framework for

¹ Muhammad Mushtaq Ahmad, *Jihad, Resistance and Rebellion from the Perspective of Islamic Law and International Law*, (Gujranwala: Al-Shariah Academy, (2008); Second Edition: (2012).

understanding rebellion and Resistance in systematic and explicit way. The book is helpful for identifying, evaluating and synthesizing the concept of resistance from legal perspective. In fact, it is very specific piece of argumentative writing that relies on legal and academic discourse and indicates current level of thinking on current topic as well as clarifies the nature and scope of Jihad, Rebellion and Resistance from Islamic and International law's perspective in an extensive manner.

History reveals that Spanish as well as Russian civilians stood against the French Army during the Napoleonic wars. Civilians are neither fully organized nor carried open arms. However, in some cases they succeeded for harassing and creating tough times troubles for French Army. Such uprising and activities done by various groups also leads to resistance. Such actions of individuals were illegal according to the manuals of French Army. However, at that time international law is not designed as today. The norms or instructions issued by the occupying powers were the law and actions committed by people against them and resistance are condemned by the occupiers.²

The Lieber Code issued during Civil war had certain provisions which prohibit attacks of guerilla forces or like actors. The code states that such forces that are creating disturbances against soldiers are illegal.³ In terms of occupation, the civilians who do not take part in hostilities or who rose against the occupant were not be recognized as POWS.⁴ There was a need of extensive legal framework for addressing such kind of issues. In this regard, in 1874, significant contribution is of the Brussels Conference,

² G.I.A.D. Draper, "The Status of Combatants and the question of Guerrilla Warfare", *BRITISH Yearbook of International Law*, (1971), p177.

³ George B. Davis, "Doctor Francis Lieber's Instructions for the Government of Armies in the Field", *The American Journal of International Law*, (1907), pp15-18.

⁴ Article 85 of the Instructions for the Government of Armies of the United States in the Field, known as Lieber Code, (1863). .

which was held for ascertain International consensus on what is forbidden or allowed during war.⁵ Twenty-five years later, at the First Hague Conference in 1899, and later, at the Second Hague Conference in 1907, the question of risings was again taken up, but again there was no success in reaching a satisfactory consensus.

The Conference actually began to indicate a return to the position held before the Brussels Conference, that war should be fought by legitimate forces recognized and led by a government, giving no room for smaller bands of individuals without official governmental ties.⁶ However, article 1 of Hague Regulations states the four conditions to be fulfilled by combatants which were enumerated in Article 9 of the Brussels Convention. What is new in the Hague (IV) Convention in relation to the Brussels Convention is the Preamble, known as the Marten clause, which states that “Until a more complete code of the laws of war has been issued, [...] the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience”.

Following texts of Leiber code and Brussels Conference, discussions started and certain resolutions were adopted by states in addition. The important are Hague Regulations of 1899 and 1907 which concerns with the case of occupation. These Regulations are basis of International law of occupation (ILOC). Looking into atrocities of World War-I and World-War II, Geneva Conventions of 1949 and additional protocols of 1977 were also formulated to regulate war and occupations. Today, this body of law is

⁵ I. P. Trainin, “Questions of Guerrilla Warfare in the Law of War”, *The American Journal of International Law*, (1946), p 540.

⁶ L. Nurick & R.W. Barrett, “Legality of Guerrilla Forces Under the Laws of War”, *The American Journal of International Law*, (1946), p568.

known as International Humanitarian Law (IHL). Another law is known as International Human rights law (IHRL) which is in general designed for peace times. However, certain provisions of IHRL remain applicable during war and even occupation because of its universality and applicability to “everyone”. This discussion leads to the examination of definition and reasons for resistance in order to create context for further discussion.

II. Definition and Reasons for Resistance

The term Resistance is not defined in International law in explicit terms. However, in simple words, it means the refusal to accept or comply with something or the use of force or violence to oppose someone or something.⁷ Another definition in the context of occupation may be “The deliberate use of violence by members of the occupied population against occupying forces or officials”.⁸ It can take several forms and include number of activities, such as, armed resistance, violent or non-violent resistance, disturbances, troubles and instabilities so on. However, in times of occupations, non-violent resistance is time effective and imperative.⁹

Resistance may be occurred for number of reasons. The most important are instability, political dislocation, internal or external disturbances, deprivation of rights and harmful action against people or individuals. Resistance has taken numerous and various shapes after 9/11. For example, responses of Taliban in Afghanistan are significant for consideration. People have resisted because of political displacement. Some people supported Taliban against Government and US. Afghanistan has witnessed

⁷ English Oxford Dictionaries, Online available: <https://en.oxforddictionaries.com/definition/resistance>

⁸ PhD Thesis titled Understanding Resistance to Foreign Occupation, submitted by Simon Collard-Wexler in Columbia University, (2013), p31

⁹ Chenoweth, Erica and Maria J. Stephan. “Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict”, New York: Columbia University Press, (2011).

resistance and violence from people in various ways.¹⁰ Other examples include resistance against French Army and resistance of Iraqis against US. It is argued that the rationale behind resistance can be freedom when restricted. The deprivation of rights is one most important factor for resistance. It emerges when there is conflict of interests. It also emerges when relationship of trust is broken between the occupants and the occupied. For example, if the occupying power is not willing to vacate the occupied territory by force or victimizes civilians or treat civilians in harmful manner.

However, another form of resistance known as armed Resistance is dangerous in occupations. As far as occupations are concerned, approximately 300, 000 (even more than that) casualties and fatalities are caused by occupation since 19th century. Under international law, the occupations are temporary and the purpose is to protect rights of individuals worldwide.¹¹ If resistance occurs, is there any legal framework in order to regulate it? In simple words, what are the sources of resistance under international law?

Identifying Sources and rules of right to resist under International law

The rules of right to resist can be deduced from The Hague Regulations, Geneva Conventions and AP-I of 1977. Though Geneva Conventions are clear on combatants and Civilians but initially the people who resist are neither accepted as civilian nor combatant. The definition of combatant was included in Geneva Conventions which also includes in implied terms the people who resist. However, if they fulfill the criteria (mentioned in art 4 of GCIII) of combatant, they would be treated as combatant.

¹⁰ PhD Thesis titled Understanding Resistance to Foreign Occupation, submitted by Simon Collard-Wexler in Columbia University, (2013), p328

¹¹ Ibid; p325

If they do not fulfill criteria, they will be treated as Civilians.¹² The law will apply on them in each case. History reveals that resistance is carried out by resistance movements at national level. However, the UNGA has recognized national movements, and considered such wars against alien domination as IAC. The relevant Resolution on this subject is Resolution 3103 adopted in 1973. It states that: “The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Conventions.”¹³

It means that once they get status of POWs, the Geneva Conventions will apply. Taking into consideration sporadic acts of violence and brutality, later in 1977, the definition of combatant was revised in AP-I which states that: “[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict”.¹⁴ This protocol is supplementary to the Geneva Conventions and is applicable. However, it is criticized by some States which will be discussed in next sections.

III. Resistance against Occupation

For analyzing legal status of right to resist under international law and against occupation, it is necessary to

¹² Adam Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988”, 84 *American Journal of International Law* 44, pp61-70.

¹³ UN GA Res. 3103 (XXVIII) 12 December, (1973).

¹⁴ Article 43 of AP-I, (1977)

examine definition, certain rules of occupation and powers and duties of the occupying powers.

Definition of Occupation

The definition of the occupation is given in Hague Regulations which states that:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”¹⁵

In simple words, it means that occupation is a factual situation and it begins with actual placement of authority. The occupation is linked with effective control established by the occupant in occupied territory.

Rules concerning Occupation

The general rules in relation to occupation are as follows:

- By virtue of actual authority, the occupying powers are not supposed to vest Sovereignty and title in occupied territory. Sovereignty vests in the people under contemporary international law.¹⁶ Thus inalienability of Sovereignty is important.
- The occupying powers are required to manage public order and civil life and administer occupied territory for the time being.
- The nature of occupation is temporary.¹⁷

Thus occupation is also a complex phenomenon especially prolonged occupation. History reveals that humanity suffered a lot because of occupations. Given the temporal nature of occupation, it is argued that

¹⁵ Article 42 of Hague Regulations of (1907)

¹⁶ Eyal Benvenisti, “The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective”, 1 *IDF Law Review* 19, 28 (2003), See also Eyal Benvenisti, *The International Law of Occupation*, Oxford University press, (1993), pp.184-187.

¹⁷ ICJ’s Judgment in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (2004)

international community must focus on removal of the evil of occupation.

Powers and duties of the Occupying Power

The bulk of IHL and ILOC concentrate on rules regarding powers and duties of the occupying powers. It is well established that the occupying powers have temporary administration or control over the occupied territory. The rules allow the occupying powers to exercise their power temporarily during occupations. Under these rules, primary responsibility and concern is of welfare or well-being of the occupied population. The Geneva Conventions put limitations and restrictions in exercise of power in occupied territory.¹⁸

The occupier has certain powers which include; detention of individuals on the basis of genuine security grounds; collection of tax for administration of the territory; legislation where necessary but for temporary period. For instance, under Hague Regulations, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁹

The occupying powers may also subject population to enable the occupying power to function on certain provisions for maintaining government. For instance; the 4th Geneva Convention states that: “The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying

¹⁸ Section III, Article 47-78 of GCIV, (1949) titled: Occupied territories

¹⁹ Article 43 of Hague Regulations of (1907)

forces or administration, and likewise of the establishments and lines of communication used by them.”

Along with powers, certain duties or responsibilities include: duty to respect law in force (article 43 Hague Regulations); restoration of public order and safety; respect for public and private property of the occupied; requisition of civilian resources and services; maintaining law and order; duty to provide supplies to the civilians; humane treatment; protection of women and children in all respects because of their vulnerability; providing facilities regarding education and health. The civilian population of an occupied territory owes no allegiance to the occupying power. However, the occupied are required cooperating and the occupying powers have rights as well in an occupied territory.

IV. Right to resistance under International law

It is important to note that there is no explicit mentioning of right to resistance under international law. However, after the experience of the World War-II, in which resistance to occupation had been widely viewed as legitimate, it was generally accepted that the Martens Clause needed to be supplemented. One response to this problem, leading to a change in the first three 1949 Geneva Conventions only, was enlargement of category of those entitled to prisoner of war status to include:

“Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- a) that of being commanded by a person responsible for his subordinates;

- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war”.²⁰

This is the first explicit mention of “resistance movements” in any international convention on the laws of war.²¹ Taking into consideration actions of resistance movements after world war-II, it is central to discussions of the scholars of the legal arena that what is the legal position on resistance? Although the words “resistance movements” is used in GCIV but explicit mentioning of right to resist is missing. Further, international law is also silent about resistance against the occupant. Is it lawful, legal or unlawful? It is unclear, complex and thus debatable because other factors are also linked, such as, self-determination.

International law is designed to protect interests of states as well as individuals. It has elaborated some general as well as specific rules by taking into consideration situation and circumstances. For instance, during armed conflict, both parties may fight with each other but subject to the rules of IHL. International law condemns war and terrorism but if it occurs (due to any reason), it has formulated rules to be followed by both parties. In general terms, resistance is allowed for both parties but subject to the provisions of International law. In this regard, the parties who participate are known as initially “Belligerents” and now “combatants” and who do not take part are “non-combatants or civilians”. The basic requirements to be recognised as a combatant can be found in article 1 of the Hague Regulations which states

²⁰ Article 4A(2) of GCIV, article 13 of GC-I and Article 13 of GC-II, (1949)

²¹ Adam Roberts, “Resistance to Military Occupation: An Enduring problem in International Law”, *AJIL*, (2017)

that:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- a) To be commanded by a person responsible for his subordinates;
- b) To have a fixed distinctive emblem recognizable at a distance;
- c) To carry arms openly; and
- d) To conduct their operations in accordance with the laws and customs of war.”

Later, this definition was revised and supplemented in Geneva Conventions and additional protocols as already mentioned above. Another relevant provision is also cited in this situation in Article 44(3). It is referred to the situations of resistance movements and liberation. It states that:

“In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he

carries his arms openly: during each military engagement, and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”²²

In the case of occupation, the establishment of actual

²² Article 44 (3) of AP-I of (1977)

authority and effective control is necessary by the occupant under Hague Regulations. Despite occupation is a temporary phenomenon and the occupant is not supposed to exercise powers according to his own wishes even against resistance. However, when authority has been established by the occupying power, the occupied territories armed forces, genuine national liberation movements and resistance movements who are organized may resist the occupation in occupied territory. If they are willing to do so, the requirement is that distinction from the civilian population must be made out and is necessary.

Under AP-I they are supposed to carry arms openly for distinguishing them from others. Civilians who directly participate in such activities may be treated as *protected persons*. If they are *hors de combat* (literally, out of action due to damage or injury), protection is available to them against attacks. The people who indirectly support resistance movements are also civilians and protected against attacks from the occupying power. The indirect support may relate to providing information or supplies. However, if they work against the laws imposed by the occupying power, they may be punished accordingly on security grounds.

The civilians have duty to obey the occupying power in general. However, in all cases, the occupying powers are required not to use force against civilians and occupied. Similarly, the occupied are also required to obey the occupant. If the members of the resistance movements are caught, they are to be treated in accordance with the provisions of international law.²³ It means that the people who resist, if they are captured, the occupying power is required to treat them in humane manner and in accordance with the provisions. However, in practical

²³ Report of ICRC titled Lesson 9: “The Law of armed conflict, Belligerent Occupation”, (2002), p5

terms, it is difficult to put check on the occupying power for exercising this power. It is also a challenge to control resistance creators who fight for their liberation or for the fulfillment of right to self-determination. The right to resistance is linked with right to self-determination and it is its one aspect.

The right of self-determination with linkage to resistance

It is well established that the right to self-determination is recognized in various international instruments, such as, ICCPR and ICESCR. It is accepted by international community, states and scholars as well. For instance, the people of Palestine have right to self-determination is also recognized even by Israel during peace treaties. International law is silent on this aspect that whether or not Palestinians resist or armed resist or even use force for achieving this right? It is unclear though armed struggle is component of various national liberation and freedom movements. In Geneva Conventions, no provision is available for this situation. However, it is covered by Additional protocol which considers these situations as IAC.

Can parties to the conflict use force for achieving self-determination in the name of national struggles or liberation movements? The answer is yes according to the views of scholars. They base their argument on AP-I which consider such movements or struggles and treated it as IAC. For instance, Malcolm Shaw states that:

“The UN Charter neither confirms nor denies a right of rebellion. It is neutral. International law does not forbid rebellion; it leaves it within the purview of domestic law. The General Assembly, however, began adopting resolutions in the 1970s reaffirming the legitimacy of the struggles of peoples for liberation from colonial domination and alien subjugation, ‘by all available means

including armed struggle'. This approach was intensively debated in the process leading to the adoption by the Assembly of the Consensus Definition of Aggression in 1974. In particular, the issue centred upon whether the use of force by peoples entitled to self-determination was legitimate as self-defense against the very existence of colonialism itself, or whether as a response to force utilised to suppress the right of self-determination. The former view was taken by most Third World states and the latter by many Western states. In the event, a rather cumbersome formulation was presented in article 7 of the Definition which referred *inter alia* and in an ambiguous vein to the right of peoples entitled to but forcibly deprived of the right to self-determination, 'to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity' with the 1970 Declaration."²⁴

According to another leading expert, Antonio Cassese:

"[...] self-determination has resulted in granting to liberation movements a legal license to use force for the purpose of reacting to the forcible denial of self-determination by a colonial state, on occupying power, or a state refusing a racial group equal access to government [...]"²⁵

By linking these arguments it is argued that the in the case of Israeli-Palestinian conflict, the Palestinians have right to self-determination which is inherent under IHRL. However, for achieving this right, Palestinians may engage themselves in resistance *subject to the provisions of International law*, provided that if they are deprived of their basic human rights by the occupant. Mere bringing resistance or armed resistance is against the principles of

²⁴ Malcolm M. Shaw, *International Law*, Cambridge University press, (2003) p.39.

²⁵ Antonio Cassese, *International Law*, Oxford University press, (2005) pp.60-64.

International law and is a general rule. The exception to it is that if for instance, the occupying powers threaten the life of the occupied and use unnecessary force then right to resist stem in this situation and the occupied may resist. Their resistance is also justified under principle of self-defense. Another example is of the people of Jammu and Kashmir who are deprived of their right to self-determination. India has denied it by claiming Jammu and Kashmir as integral part. However, still resistance even armed resistance exists because of occupation. By virtue of occupation, the rights of people are taken away. The UN has passed Resolutions for plebiscite but implementation remains big challenge to date. It is further, argued that UN and international community has to play its role in actual and effective terms in order to protect rights of the occupied. Thus, it is concluded that Palestinians and Kashmiris have right to resistance against occupation for achieving their right to self-determination but it must comply the *rules of International law*.

Let us examine the case of Israeli-Palestinian conflict in more detail by examining the facts and responses/arguments. It is important to note that initially the Egyptian and Jordanian forces were the combatants who fought against the Israeli forces. However, peace agreements are concluded between them later on. The question arises here that what is the legal status of participation of Palestinians then and do they have right to resist or armed resistance against Israel?

V. Analysis of Arguments/Responses of Israel

Applicability of Geneva Convention

First, Israel has denied *de jure* applicability of GCIV but has accepted applicability of Hague Regulations during occupation. It is based on: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said

occupation meets with no armed resistance.”²⁶ Israel argues that High Contracting parties are not Egypt and Jordan because West Bank and Gaza is not recognized as their part. The Convention does not apply because of non-recognition of sovereign title of the West Bank and Gaza. Another relevant argument of Israel is that the humanitarian provisions of Convention apply *de facto* in occupied territories.

On the other hand, the counter-argument states that paragraph 1 of Geneva Convention governs this situation which states that: “In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply 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.”²⁷ It is also supported by another article of the Convention which states that: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”²⁸

It is important to note that the affirmative answer to the question of applicability of GCIV is supported and recognized by majority of Scholars, UN bodies, ICRC. Even the ICJ has clarified humanitarian and human rights obligations of Israel.²⁹ The Convention is also referred by Courts in Israel. Further, Israel is acting on established authority which stems from The Hague Regulations and Geneva Conventions to the occupying power and falls within the scope of occupation. As reflected by Supreme

²⁶ Article 2 paragraph 2 of GCIV, (1949).

²⁷ Article 2 paragraph 1 of GCIV, (1949).

²⁸ Article 4 of GCIV, (1949)

²⁹ The Wall’s case (2004)

Court of Israel: “The general point of departure of all parties – which is also our point of departure – is that Israel holds the area in belligerent occupation.”³⁰

Non-ratification of AP-I of 1977

Second, Israel has not ratified the AP-I of 1977 and claims that provisions are not applicable because of the definition of combatant and acceptance of resistance movements within its scope. It is important to consider that AP-I is not ratified by all states including Israel. Total 29 states are against it. Israel did not even sign the Final Act of the Conference.³¹

On the other hand Palestinians argues that UN has recognized right to self-determination and resistance movements. The examples are human rights instruments and UN Resolutions. For instance, Resolution 3314 prohibits states from “any military occupation, however temporary.” It also states: “Nothing in this definition of aggression could in any way prejudice the right to self-determination, freedom and independence of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support.”³² Another supportive argument is UNHRC affirmation which states that: “all member states and relevant bodies of the United Nations system to support and assist the Palestinian people in the early realization of their right to self-determination.”³³

The Organization of Islamic Conference (OIC), an organization of 57 Muslim states, has also recognized it. Convention on Combating International Terrorism of OIC

³⁰ Judgment of Supreme Court of Israel in *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04:

³¹ Official Records of the Geneva Diplomatic Conference (1974-1977), vol. VI, p. 216.

³² UN Resolution No: 3314, (1974)

³³ Report of the UN Commission on Human Rights reaffirmed the Palestinians, (2005)

states that: “Peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.”³⁴

Therefore, the responses of Israel towards non-ratification of instruments, denial of de jure applicability of Geneva Convention and non-implementation of ICJ Judgment in *Wall’s case* are questionable and leads to be hurdles for clarifying the legal position of resistance for Palestinis. However, it is stated that right to self-determination of the Palestinians may be exercised according to law for protection of their rights. The people of Palestine are also under obligations to respect and protect the law.

The challenges in terms of resistance against occupation include:

VI. Challenges: Complicating and Complexing factors

- Legitimacy of resistance and armed resistance under international law
- Individual’s right to participate in hostilities
- Israel’s ambiguity about the applicability of occupation law.
- Existence of expansionist tendencies in Israel
- Palestine Liberation Organisation’s response in pursuit of freedom grounded by self-determination
- Armed attacks and resistance posing threats to Israel
- Emergence of Non-state actors
- Sporadic Violence and Terrorism.

Conclusion

From the preceding discussions, it is concluded that

³⁴ The OIC Convention on Combating International Terrorism of OIC, (1998)

any form of resistance must comply with the provisions of International law. The legal status of right to resistance is governed and grounded by the provisions of Hague Regulations, Geneva Conventions and Additional protocols. Resistance is dangerous in situations of occupations. Even prolonged occupations are condemned at all levels. The term Resistance has different connotations and is linked with other concepts such as self-determination. However, the exercise of Right to resistance in the name of self-determination requires conformity with the norms of international law.

In terms of occupation, Right to resistance against the occupying power has its own merits and limits. Mere resistance against the occupying power is not allowed rather the occupied have duty to obey the occupying power in some situations. Similarly, the occupying powers are under obligations to protect interests of individuals in occupied territory. It revealed that all acts of resistance are prohibited in general but for self-determination or liberation as an exception is allowed but it must also conform to the rules of IHL. Thus all acts must confine within the boundaries of ILOC, IHL and IHRL. The accommodation of the resistance movements in explicit terms within legal framework is need of the hour.

There exist certain challenges which need to be addressed, such as, terrorism, violence on innocents, and protection of civilians and so on. The people of Palestine have right to self-determination on the basis of which they are claiming their independence. It argued that resistance as well as occupation are evils and must be avoided because resistance anywhere is a threat to peace everywhere.