



Extraterritorial Obligations of the State to Uphold Economic, Social and Cultural Rights

Middle East Quarter Sanctions regime on the Gaza Strip, Palestine¹

Country of victims: Palestine

Source: Élin Wrzoncki, Fédération Internationale des ligues des Droit de l'Homme (FIDH) and Joseph Schechla, Housing and Land Rights network – Habitat international Coalition (HIC-HLRN).

States breaching their ETO: United States of America, European Union, Russian Federation and the United Nations Organization.

Signature: Type of ETO issue: 2. Development assistance

2. Development assistance: The ET fulfill-bound obligation in the developmental context;
3. International organizations; Trade and investment (multilateral);
4. TNCs, private actors and their regulation;

Description:

The Middle East Quartet is a diplomatic bloc formed under an initiative of the United States to help implement U.S. President George W. Bush's "vision" of an independent Palestinian State. It was also the Quartet which adopted and promoted the three-phase Road Map which originally was supposed to lead to a Palestinian state with provisional borders and a seat in the United Nations by the end of 2003, and a solution of all outstanding issues by 2005.

The Quartet collectively had announced that the "the establishment of a state of Palestine in the West Bank and Gaza in which the Palestinian people can determine their own destiny is in the fundamental interests of the international community."

Formal Bases for the Cut in Aid:

The Quartet's ban on assistance to the Palestinian Authority has a quasilegal basis in European and U.S. policy positions barring aid to Hamas. That condition became the lowest common denominator driving Quartet policy, perforce applying to the Russian Federation and United Nations Organization. The formal basis for the U.S. ban is Executive Order 13224, which President George Bush signed on 23 September

¹ The ETO Consortium coordination omitted this case from the ETO Casebook. Therefore, it does not bear a case number.

2001. The European Council ban derives from a “conclusion” of the European ministers on 11 April 2006.²

On 30 January 2006, Quartet representatives called upon Hamas to recognize Israeli sovereignty, renounce violence and agree to accept previous agreements between Israel and the Palestinians as preconditions for any resumption of aid.³ However, it made no corresponding and reciprocal demand on Israel to recognize and respect Palestinian sovereignty (e.g., while Israel continues to confiscate and destroy Palestinian land, resources and economy).

In its bias, the Quartet position likewise does not take account of the Israel's consistent breach of the laws of war and other legal norms by its conduct of extrajudicial killings and targeting of civilian objects long before and during its blockade of, and assault on Gaza since 2002. Respect for previously concluded agreements includes the over-riding pledge in the Oslo Accords for each party not to take any actions or measures taken to alter the legal status and the demographic composition of the occupied territory, the resolution is conspicuously silent of the fact of Israel's continuous population transfer and implantation of settler colonies, concomitant with the confiscation and destruction of Palestinian public and private property through the occupied Palestinian territory.

In FY2006, the US Congress had appropriated \$150 million for USAID's West Bank and Gaza program, though much of that was suspended. In the same period, the EU has delivered \$143 million in emergency assistance, and the United States has pledged \$300 million in humanitarian relief, all of which was intended to bypass the Hamas-led government. H.R. 5522, the US Foreign Operations Appropriations bill for FY2007, included no appropriation for Economic Support Fund (ESF) programs in the West Bank and Gaza territories.

Consequences:

Since 1994, the occupied Palestinian territory (oPt) has become heavily dependent upon foreign aid. Both the West Bank and Gaza have come impoverished as a result of Israel's unlawful withholding of Palestinian tax revenues and the Quartet's decision to withhold aid. Consequently the withholding of aid, coupled with the prohibition on the transfer of money to the Palestinian Authority, its agencies and its projects, imposed by the US-controlled international banking system, effectively amount to economic sanctions. This constitutes the first time in history that an occupied people has been subjected to economic sanction, despite provisions of the Fourth Geneva Conventions supposedly protecting the economic welfare of the civilian population. The severe impact of non-payment of government salaries, for example, has denied the social and economic rights of over one million of Palestine's 3.5 million population. In addition, the private sector has also suffered. Unemployment and poverty are consequently have increase dramatically.⁴ Other consequences include

² "Council conclusions on Middle East peace process," Council of the European Union, [2723rd External Relations Council Meeting], 11 April 2006, at:

<http://domino.un.org/UNISPAL.NSF/d80185e9f0c69a7b85256cbf005afeac/b3370281a6d033308525714d006939ae!OpenDocument>.

³ Jeremy M. Sharp and Christopher M. Blanchard, "U.S. Foreign Aid to the Palestinians" (Washington: Congressional Research Service, The Library of Congress, 27 June 2006), p. 1, at: <http://fpc.state.gov/documents/organization/68794.pdf>.

⁴ John Dugard, Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory (OPT), Statement to the Special Session of the Human Rights Council, 5 July 2006, p. 1.

deprivation of multiple economic, social and cultural rights, in addition to conflict (see below).

Jurisdiction:

Palestine, an emerging state with dubious jurisdictions, has no available legal mechanism or international standing to assert control over external actors that refrain from assisting its government. As a nonstate, Palestine is not a party to any multilateral treaties in common with the European states, the Russian Federation or the United States, the group of state parties that, together with the United Nations Organization, form the Middle East Quartet. Palestine's only recourse to a cut in aid could be diplomatic and moral suasion, involving a diverse-but-narrow set of options, ranging from negotiations to a Hamas-government refusal to recognize EU member or other state representations within its functional jurisdiction. However, that latter option would deliver no foreseeable advantage, especially in the long-term.

The EU and the other states, as members of the Quartet, do exercise jurisdiction and sovereignty in their own decision making on international affairs, while the EU as a whole strives to achieve a common foreign policy. However, EU, Russian and US sovereignties do not extend beyond the member states and, therefore, the political basis for rejecting the sovereignty of a people, or the legitimacy of its elected government falls far beyond their sovereign prerogative. Therefore, their extraterritorial behavior should be guided, rather, by the international norms mentioned in the case description that follows.

State responsibility:

The deliberate withholding of international cooperation and assistance with foreseeable consequences could fall within the realm of state responsibility, particularly if viewed within the frame of "international cooperation," as provided in the UN Charter and the human rights Covenants. However, legal specificity on the meaning and nature of obligations arising from *international cooperation* remain elusive without a General Comment or other declaratory instrument of international law.

The intent to cause harm as an act of state could be determined, but a lower standard of proof applies here such that the perpetrators (EU, Russian, UN and US officials) could be liable for violations if they had, or should have had knowledge of the harmful consequences of their commission or omission. The fact of such foreknowledge is most clear so far in the position of the United States, whose Quartet representative reportedly has expressed his and his government's intent to create deprivation and foment civil war in Gaza by stating "I like this violence,"⁵ in response to the already-manifest consequences of the Quartet aid withdrawal.

Despite such clarity of nefarious purpose, the fact of Palestine's status as not yet constituting a state and its own dependence on the designated perpetrators foreclose any state-to-state claims by Palestine that would invoke the Articles on State Responsibility.

⁵ Alvaro de Soto, "End of Mission Report," (May 2007), p. 21. The source does not identify the speaker by name, but is presumed to be the official US delegate to the Quartet, Assistant Secretary of State for Near East Affairs David Welch.

Remedies and Accountability Mechanisms:

While this case appears to be an example of extreme and deliberate malice in international relations, the violations by EU and the other Quartet members are breaches of norms and general principles so fundamental and broad (self-determination, sovereignty, international cooperation) that, ironically, few detailed, declaratory instruments guide remedies in such a situation. The most-appropriate legal tool may be CESCR's General Comment No. 8 "The relationship between economic sanctions and respect for economic, social and cultural rights" (1990).

CESCR has determined that "Just as the international community insists that any [sanctions]-targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State."⁶ (The rather exclusive term "state" here does not appear to mean foreclosing ESC rights enjoyment to stateless persons or inhabitants of nonself-governing territories, as the Committee has clarified elsewhere the universal and "human" nature of ESC rights, including the need for states party to give priority to respecting, protecting and fulfilling the ESC rights of those who, by nature and definition, are particularly vulnerable, including stateless persons.)

The Committee provides guidance in GC 8 such that states party to ICESCR logically understand their international obligation to ensure ESC rights are not violated, and that states parties ensure that, in turn, affected states meet their core obligations, while implementing any sanctions regime by implementing the following three basic measures:

1. Taking ESC rights into account when designing an appropriate sanctions regime;
2. Effective monitoring, as always required under the terms of the Covenant;
3. Fulfilling the obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical" in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.⁷

Legalistically speaking, the EU and other state partners to the Quartet sanctions regime on the Gaza Strip may have withheld aid to Palestine within their sovereign state rights, as long as the above-cited safeguards are in place. However, those rights, as forming part of the general principles of public international law, could have been ensured with such a sanctions regime, were it not for the foreseeable—or even intended—consequences of their abrupt action, which coincided with Israel's hermetic blockade of the Gaza Strip.

However, the United Nations, while not a sovereign state, surely did not operate according to its own legal framework. International sanctions are legal and legitimate when called for under Chapter VII of the UN Charter. Without such a condition, the UN, through the office of the Secretary-General, probably joined a sanctions regime by *ultra vires* action.

⁶ CESCR, General Comment No. 8 "The relationship between economic sanctions and respect for economic, social and cultural rights." para. 7.

⁷ *Ibid.*, paras. 12–14.

The CESCR General Comment No. 8 was drafted with the assumption that it was addressing legal sanctions determined through the charter-based process of the UN's Security Council. It contains special reference to the duties of the permanent members, four of which are parties to the Quartet and its sanctions regime. One of those permanent Security Council members (United States) remains outside of ICESCR.

The UN Human Rights Council's Special Rapporteur on the oPt has pointed out the general lawlessness of the Quartet in that it has applied no relevant law in its approach to the region and, for example, has issued no statement referring to the ICJ Advisory Opinion on the illegality of Israel's Separation Wall. Instead, he has noted that,

the General Assembly has by an overwhelming majority repeatedly given its approval to the [ICJ] Opinion. This means that it is now part of the law of the United Nations. As such the representative of the United Nations in the Quartet—the Secretary-General or his representative—is in law obliged to be guided by the Opinion and to endeavour in good faith to do his or her best to ensure compliance with the Opinion. If the Secretary-General (or his representative) is politically unable to do so, he has two choices: either to withdraw from the Quartet or to explain to his constituency—"we the peoples of the United Nations," in the language of the Charter—why he is unable to do so and how he justifies remaining in the Quartet in the light of its refusal to be guided by the law of the United Nations. The first course is possibly unwise at this time as this would deprive the United Nations of a role in the peace process. This makes the second course essential."⁸

If the European Union, Russian Federation and United States were to apply the common standard of public international law, including the human rights obligations of states, they, too, would withdraw from the Quartet and/or alter its legally wayward course.

This contradiction calls for a discussion of remedial options. Given the broad nature of the EU violations and the lack of sufficiently specific legal guidance on the overriding human rights principle of *international cooperation*, little recourse can be found in tribunals with domestic, foreign, regional, international or universal jurisdictions.

UN Human Rights bodies and functions:

Other potential forms of recourse in this case may be available within the UN system, including the Human Rights System. Some of those options, such as treaty bodies and intergovernmental bodies with periodic meeting schedules, would serve long-term goals. However, others may serve more immediate purposes, such as the Special Rapporteurs and Independent Experts with advocacy mandates. Based on the soft law instruments of CESCR and the advice commissioned by the Human Rights Council, cooperating with and lobbying the following UN mechanisms and functions may be available to rehabilitate the rule of public international law in harmony with the responsible states' human rights obligations:

I. Factual mechanisms:

- A. Special Rapporteurs on the right to food, right to health, right to water, adequate housing, the situation of human rights in the Palestinian territories occupied since 1967, right to education, violence against women; others;

⁸ "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard" A/HRC/7/17, 21 January 2008, para. 53.

- B. Working Group on Indigenous Peoples;
- C. Sub-Commission (successor);

II. Political mechanisms:

- A. Human Rights Council,
- B. UNSCO;

III. Legal mechanisms:

- A. CESCRC,
- B. CERD,
- C. CaT,
- D. CEDaW,
- E. CRC,
- F. International Law Commission.