

A commentary by Richard Falk* on the legal and human rights implications of Shir Hever's analysis of Palestinian aid that ends up in the Israeli economy

October 2015

Aid Watch Palestine: Briefly, what are your overall reactions to Shir's report and its findings?

Richard Falk: Shir Hever's report is detailed and convincing and addresses a serious problem that is not given much attention. What he describes in terms of diverting donor assistance intended to help Palestinians cope with the rigors of occupation and even more so with the aftermath of massive attacks of the sort that have occurred three times in the last six years is quite shocking but not altogether surprising. Israel has sought in every context to shift the economic burdens associated with its prolonged occupation of Palestine to the international community. The question posed here is whether donor policies and Israeli diversions of aid in various ways make these aid-giving governments legally accountable due to their complicity with Israel's criminal violations of its obligations as Occupying Power, as well as whether the international community is not itself negligent or complicit by its failure to place such international aid in a regulatory framework that imposes legal duties of responsibility on donor governments, Israel as the occupying power, and on the recipient and administrators of the aid.

Aid Watch Palestine: Hever's research suggests that Israel should not profit from international aid intended for Palestinians, which is different from his previous work that suggested that Israel should not profit from Israeli occupation. Is this an important distinction?

Richard Falk: It can be an important distinction. Israel's commercial gains from the occupation include revenues derived from having the benefit of Palestine as a captive market, plus profitable commercial operations associated with the unlawful settlements that engage in productive activities, and illegal appropriation of Palestine's natural resources, among others. The profits from international aid comes from diversion of funds intended to alleviate Palestinian suffering and hardships, particularly in the aftermath of massive attacks that violate fundamental principles of international law. Donors should be especially troubled by Israel's profits derived from foreign aid as Israel is not expected to benefit from such aid either directly or indirectly.

Aid Watch Palestine: Shir's study is about "aid subversion," which he says is when Palestinians benefit from aid, but Israel also benefits because Palestine is a captive market. He estimates that 18-31% of the costs of the occupation are paid by Palestinian aid that is subverted to Israel. This puts some substance behind the accusation that international donors are subsidizing the occupation, doesn't it?

* Richard Falk, author of *Palestine: The Legitimacy of Hope and Chaos and Counterrevolution: After the Arab Spring*, is a renowned international law and international relations scholar who recently completed a six-year term as UN Special Rapporteur on Human Rights in Occupied Palestine. Falk is Professor Emeritus of International Law and Practice at Princeton University where he taught for forty years. He currently directs the "Global Climate Change, Human Security, and Democracy" project at the Orfalea Center of Global Studies at the University of California, Santa Barbara, and also directs the "POMEAS Project on Politics in the Middle East after the Arab Spring," at the Istanbul Policy Center, Sanbaci University.

Richard Falk: Yes, there is no doubt that by reducing the costs of occupation as a result of international aid funds, there is an economic benefit to Israel that can be expressed as a partial subsidy of the occupation. I am not sure whether the best way to understand this kind of effect is as one of defraying Israel's costs or as a subsidy intended to lessen Israel's occupation burden. In either instance, Israel's incentives to end the occupation are reduced, Palestinian suffering prolonged, and a situation over time develops that converts 'unlawful' facts into 'irreversible' realities as with the settlement blocs, and conditions of 'annexation' and 'apartheid' intensify the hardships and exploitation associated with Israeli occupation.

To make it legally relevant to charges of complicity, however, would require a demonstration of criminal intent on the part of the donor governments. Perhaps, such intent could be inferred from the fact that the leading donor governments represent those states that have most consistently supported Israel's occupation policies, including those aspects that violate IHL often in flagrant, systematic, and repeated forms. Unfortunately, in international criminal law, judicial bodies are hesitant to hold governments of sovereign states legally accountable without direct evidence of a specific criminal intent. Indirect or circumstantial evidence is not normally sufficient, although it is readily accepted as legally relevant by civil society tribunals such as the Russell Tribunal on Palestine, which did explore some of these issues, and set forth well reasoned analysis to show the culpability of donor governments given the available evidence.

Aid Watch Palestine: There is strong law and guidance about diversion of aid including anti-bribery, anti-corruption, anti-terrorism, anti-fraud and anti-money laundering legislation and policy. What's common in all these frameworks is the intention that aid reaches its intended beneficiaries. Do any of these frameworks have legal or conceptual relevance to the question of Israeli subversion or diversion of Palestinian aid?

Richard Falk: These frameworks addressing diversion of aid seem to be focused on the obligations owed to the donor, but depend on the donor's vigilance in complaining about the abuse of funds donated. It is not clear that the recipient has any legal rights. Palestinians can point out that these practices violate proper behavior, and by making these diversion public exert pressure on donors to take action to protect the integrity of aid flows.

What seems most desirable, and indeed necessary, would be a new and separate Geneva Protocol that would set forth the obligations of both the occupying power and the donor governments with respect to non-military and military economic assistance. However, the length of time needed to bring such an international instrument into force and the almost certain lack of political will by relevant governments to extend IHL to donor relations with an occupying power and an occupied people makes this proposal almost certain to be impossible to get off the ground.

Aid Watch Palestine: We understand that in situations of occupation, the obligation of occupying authorities to facilitate and cooperate with relief schemes is "unconditional." How much extra cost can Israel impose on aid before the cost would be considered an impediment to or obstruction of humanitarian assistance (which is quite a serious violation, isn't it)?

Richard Falk: Yes, the question posed here is whether a mechanism for implementation exists within the framework of the Geneva Convention that has the authority to interpret Israel's interference with relief arrangements and thus to insist on Israel's obligation to facilitate and cooperate. There is also the problem of interpreting when Israel's practices with respect to charges for the transmission of assistance funds crosses the threshold of unreasonableness.

There is Article 8(2)(b) of the Rome Statute governing the activities of the International Criminal Court that makes it a crime against humanity for there to be a willful blockage of aid to a people or society that has suffered from an unlawful and sustained siege. There is no doubt that Gaza has been under such an unlawful siege since at least mid-2007 when Israel imposed its comprehensive blockade of goods entering and leaving Gaza, disallowing many items necessary for maintenance of a normal civilian life. [It may be possible under these circumstances to seek an Advisory Opinion from the International Court of Justice as to whether this diversion and blockage of aid is a violation of the Rome Statute, which has treaty status.

Aid Watch Palestine: Even if Israel is considered an occupying power within a legal framework, aren't they also, especially in Gaza, considered a belligerent party to a conflict? In that case, doesn't aid subverted or diverted to Israel have to be compared to situations like when Al-Shabab interfered with aid delivery to civilians in Somalia?

Richard Falk: It is possible to make a journalistic argument to this effect, but it would be difficult to challenge Israel's behavior in this way unless the argument is mounted by a donor government. As long as the donors are not complaining it is difficult to make any legal case against Israel. For this reason it is very important to publicize the study of Shiv Hever with the explicit hope of inducing donors to insist on Israeli compliance with reasonable expectations. Of course, for some donors, aligned with Israel, the diversion of funds is not regarded as objectionable, is accepted as a contribution to lessen the Israeli burdens of occupation, and has long been well understood without provoking an adverse reaction.

Aid Watch Palestine: How might these legal concepts be applied to the Gaza Reconstruction Mechanism? Can we think about the GRM as an illegal obstruction of aid rather than how the parties present it as a legal facilitation of aid?

Richard Falk: I don't know enough about the GRM operates to give an intelligent response. Much depends on whether the GRM has any procedures for dispute settlement or monitoring compliance with reasonable aid expectations.

Aid Watch Palestine: Doesn't it make sense to apply more stringent criteria here because of the long duration of the occupation? Do we get any insight about this situation by looking at other long occupations, such as the US occupation of Iraq or other colonial situations (I don't know, Puerto Rico)? [perhaps here comes your very important idea of aid perversion – aid to Palestinians that actually harms Palestinians, because aid is provided as compensation for lack of political will]

Richard Falk: This is an interesting, and fundamental issue, which in a way applies to the whole reality of aid, and not just to its diversion. Of course, to the extent that Palestinian political will is undermined by forms of economic and political cooption as practiced by the Palestinian Authority there is a tendency to normalize the occupation, and aid is a means used by Israel and donor countries to maintain stability. There should be international law limits placed on the allowable time of belligerent occupation, but none now exist. I tried to encourage the Human Rights Council and the International Committee of the Red Cross to create a legal regime for prolonged occupation as a necessary extension of international humanitarian law, but I had no success in promoting such a project beyond an acknowledgement that the gap in the law existed. Palestine is not the only instance of prolonged occupation. Three other prominent examples are Kashmir, co-occupied by India

and Pakistan, Western Sahara, occupied by Morocco, and Northern Cyprus occupied by Turkey. It would be useful to examine the economic relationships between third party donors and the occupied people in each of these instances. There are many additional cases with varying features including those mentioned in the question.

Aid Watch Palestine: It makes sense that if donors know that Israel is diverting aid and they allow it, they might be legally complicit in that unlawful act, but it also makes sense that if donors know Israel is diverting aid, then it isn't diversion at all. What applies in this situation? And if donors are knowingly allowing Israel to capture excessive amounts of Palestinian aid (again, don't know where the threshold is), then might the donors be accused of *knowingly* funding the occupation?¹

There is no doubt that the recipients of aid cannot divert funds without incurring potential obligations. What is less clear is whether donors have any obligation to make sure that their aid is being directed to its supposed beneficiaries in a reasonable manner. The donor officials responsible for administering transfer of aid funds may have some kind of responsibility to their own governments to ensure that aid funds are not being wrongfully or unreasonably appropriated by Israel, acting as intermediary because of the occupation.

What becomes evident is that international law needs to be clarified to be relevant to any effort to impose legal responsibility on donor governments. It is possible by way of the Russell Tribunal type of initiative to support a *symbolic* argument that donor governments are legally responsible for the diversion of aid given the conditions that exist, but such governments would surely ignore such a decision and there are no means by which it can be enforced except by further citizen action taking the form of boycott or public pressure. In other words there is legal vacuum when it comes to the legal responsibility of donor governments to see that their economic assistance is not being used to facilitate unlawful policies to the detriment of a people already burdened by occupation.

Aid Watch Palestine: Separate from Israel's diversion of aid, might aid actors be guilty of "diverting" aid themselves if they, over long periods, pay themselves high salaries and high administrative costs using aid to Palestine?

Richard Falk: Such issues are partly contractual, and depend on whether donors were aware and accepted these conditions, and have no accountability to their own governments. Taxpayers expect in a country such as the US that public funds will be used in the manner that was justified when appropriation made. Unreasonable deviations would not normally be tolerated, and only here, with the so-called 'Special Relationship' with Israel might an exception exist. There might even be some possibilities of legal actions in the national courts of donor countries. I do not know anything about the specific opportunities here, but it does make it very helpful to have the benefit of Shir's study, and it makes tactical sense to place opinion pieces by respected writers in newspapers of donor countries. There might also be

¹ Possibly illegal: "In sum, there is no doubt that the illegal diversion of resources received by international assistance violates the obligations arising from Article 2(1) IJESCR. In order to make effective use of the funds allocated to international assistance and cooperation, states parties must take all necessary measures to increase transparency and accountability during the formulation and implementation phases of international assistance and cooperation programmes, including taking legal action against those responsible for acts of corruption." P. 96, Carmona, "Obligations of international assistance and cooperation under the ICESCR."

possibilities of TV access via Al Jazeera and elsewhere.

Aid Watch Palestine: Are there any mechanisms that Palestinians might use to recover aid that was diverted?

Richard Falk: In my understanding, the best approach for the Palestinians would be to explore the possibilities of legal action via courts in donor countries. There might also be the possibility of encouraging investigation in the European Parliament, and the encouragement of hearings before the legislative branches of governments in leading donor countries. Any form of consciousness raising that creates support for Shir Hever's assessments would likely influence public opinion in donor governments, and possibly the policies of the governments themselves.

Aid Watch Palestine: In what ways does international law fail us in analyzing and addressing this situation and can we appeal to other (not necessarily legal) human rights concepts to frame this discussion?

Richard Falk: As earlier responses emphasize, international humanitarian law does not address the situation confronting the Palestinians of what I call 'prolonged occupation.' There is also the case for a special convention governing belligerent occupation that would provide for international monitoring and disclosure of unreasonable diversions of economic assistance of the sort that Israel has been responsible for. There is a need to separate concerns about the diversion of aid, helping the Occupier and depriving the Occupied society, from the subversion of political will to find a means to end the occupation rather than subsidizing its normalization, especially when accompanied by unlawful policies to achieve permanent transformations as via settlements, wall, apartheid structures, residency manipulations.

Furthermore, unlike the legal argument against the separation wall that rested on the rather compelling legal ground that an Occupying Power cannot alter the nature of the Occupied Society, and that constructing a wall *within* occupied Palestine was such an encroachment. In contrast, the issues surrounding international economic assistance seems to challenge two traditional prerogatives of sovereign states: first, the discretionary nature of international economic assistance, including transfer arrangements, and secondly, the wide latitude given to an occupying power to invoke security as a justification and explanation for restricting the flow of such aid and imposing administrative charges and taxes. It is possible that such a legal argument could be made persuasively, given the prolonged occupation and the acute suffering inflicted on the Palestinian civilian population, as well as the excessive diversion and the unreasonable burdens imposed by Israel, but it is far less legally persuasive than was the legal argument against the wall. At the same time, it may be morally more persuasive, given the effects of Israel's interference with aid flows.

Aid Watch Palestine: Considering the above, what policy recommendations do you have for donors, international NGOs, the Palestinian Authority, Palestinian civil society, or others?

Richard Falk: As indicated, donors should be encouraged to be more vigilant and aware of these realities, and pressure exerted through exposure of Israeli practices in the media to the extent possible. The PA should also give emphasis to these abuses in its compilation of grievances about the occupation. International NGOs should join in these efforts, explore the existence of remedies. A further consideration is whether exposure might lead to withholding

of aid that is needed to sustain Palestinians living under harsh conditions as in Gaza, especially since closure of tunnels. It is important to weigh the benefits of aid even as constrained by Israeli manipulations, and maybe make some distinctions between Gaza and the West Bank, or between types of aid. There are political and moral choices to be made as well as the economic and legal considerations explored here.

In light of this analysis it seems that it is extremely difficult to find support for legally challenging the role of donor governments with respect to their economic assistance policies supposedly being undertaken for the humanitarian and conflict-resolving benefit of the Palestinian people by invoking the norms, mechanisms, and procedures of international law or the UN System. It still seems important to demonstrate the moral and political grounds for believing that donor complicity of a persistent character that has for many years been perversely stabilizing the Israeli occupation and working against the realization of the fundamental rights of the Palestinian people, including the right of self-determination. In effect, an argument that international humanitarian law is deficient to the extent that it does not provide a framework to govern international economic assistance would be valuable, and should be disseminated to donor governments, to the ICRC, and to human rights and civil society NGOs. Such a presentation could also be useful to reinforce the claims of the BDS Campaign that pressures must be exerted because of the victimization of the Palestinian people and the deficiencies of international law given its tendency to defer to the sovereign states, especially in the domain of security policy and economic assistance arrangements. Raising consciousness about the shocking extent of this pattern of aid subversion could have the positive effect of embarrassing donor governments sufficiently to make them insist that a greater proportion of funds donated be used for the benefit of the Palestinian people.