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Self-defence and the right to resist in Palestine

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Ian Sinclair speaks to legal expert MARJORIE COHN about what international law says in regard to Israel's right to self-defence, and Israeli actions against Palestinians more generally.

"ISRAEL has a right to defend herself." This supposed moral truism has been repeated incessantly, by public figures on the right and left, since the Hamas terror attacks on October 7.

Marjorie Cohn, professor emerita at Thomas Jefferson School of Law in San Diego and a former president of the US National Lawyers Guild, has a different view.

There is a consensus across most of the political spectrum in the US and Britain that, in the words of British Labour Party leader Keir Starmer, "Israel has a right to defend herself" following the Hamas attacks on October 7. What does international law say about this?

The UN charter requires all states to settle their international disputes peacefully so as not to endanger international peace and security. That doesn't just apply to states, but also to the settlement of any international disputes.

The charter says no state can use military force against the territorial integrity or political independence of another state "or in any other manner inconsistent with the Purposes of the UN."

Although Israel denies that Palestine is a state, the Israeli Supreme Court in the Targeted Killings case recognised the dispute between Israel and the Palestinians to be of an international character. Israel cannot use the Palestinians' lack of statehood to justify its use of military force.

The only two exceptions to the prohibition on the use of force are when a state acts in self-defence or the [UN] security council authorises force. A state may use military force in self-defence under Article 51 of the charter "if an armed attack occurs" against a state. The use of armed force for reprisal or retaliation is prohibited.

For an armed attack to give rise to the right of self-defence, it must be directed from outside the territory under the control of the defending state. A state cannot invoke the right of self-defence to defend against an attack which originates inside a territory it occupies. Because Israel has continued to occupy Gaza, it has relinquished its right to claim self-defence in response to the Palestinian attacks.

In its 2004 advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice (ICJ) established the non-applicability of “self-defence” under Article 51 in the situation between Israel and the Occupied Palestinian Territory.

Israel remains an occupying power in Gaza despite its unilateral removal of settlements. After the 2006 election of Hamas, Israel imposed a blockade against Gaza which is specifically listed as an act of aggression under UN general assembly resolution 3314.

An occupying force has a duty to protect the people it occupies; it cannot claim self-defence against the occupied. Actions taken by Palestinians to resist the blockade are not “acts of aggression” so they do not allow Israel to claim it is acting in self-defence.

Aside from the illegality of targeting and killing civilians, what does international law say about Palestinians resisting the occupation, including with armed force?

Whether the use of force in the first instance is lawful is a separate question from how that force is carried out. For targeting and killing civilians and taking hostages, Hamas leaders can be charged with war crimes.

The Palestinians, however, have the right to self-determination and the right to resist Israel’s occupation of their territory, including through armed struggle.

In 1983, the UN general assembly reaffirmed “the legitimacy of the struggle of peoples for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle.”

Gaza, together with the West Bank, including East Jerusalem, is part of the Palestinian territory occupied by Israel since 1967. The Occupied Palestinian Territory is a single territorial unit over which the Palestinian people’s right to self-determination is enshrined in international law, according to the ICJ’s Wall decision.

The legal test for occupation is “effective control,” which exists if the military forces of the adversary could assume physical control of any part of the country at any time.

By declaring that “Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip,” Israel’s 2005 “disengagement plan” reveals Israel’s intention to maintain effective control over Gaza.

Israel continues to exert military control over Gaza through a continuous flow of military operations in and against Gaza. Israel exerts administrative control over the population of Gaza through the exclusive control over the movement of goods and people, the civil population registry, and the tax and revenue system.

Israel continuously maintains control over Gaza's borders, sea and air space, water, electricity, sewage and telecommunication systems. UN security council resolution 1860 issued in 2009 states that "the Gaza Strip constitutes an integral part of the territory occupied in 1967."

Gaza and its inhabitants remain under Israeli effective control and are, therefore, occupied. The Palestinians have the right to use military force to resist Israel's occupation.

Since October 7, the US and Britain have made public statements in support of Israel as it pummels Gaza, continues to provide huge amounts of arms to Israel, and has protected Israel from censure at the UN. Does the support the US and Britain are giving Israel contravene international law?

The Rome Statute [which established the International Criminal Court] provides that an individual can be prosecuted in the International Criminal Court if he or she "aids, abets or otherwise assists" the commission or attempted commission of genocide, war crimes, or crimes against humanity. This includes "providing the means for its commission," with knowledge of the illegal purpose.

In addition to the \$3.8 billion a year the US furnishes Israel for military assistance, the Biden administration is sending overwhelming firepower and providing diplomatic and political cover for Israel's war on the Palestinian people. Congress is on the verge of appropriating billions of dollars more in aid to Israel.

The US vetoed a UN security council resolution that would have called for a ceasefire and urged Israel to rescind its order to 1.1 million Gazans to leave their homes and move to southern Gaza.

Britain supplies the Israeli air force and provides components for the F-35 stealth combat aircraft that Israel is using to bomb Gaza. The Campaign Against Arms Trade estimates this trade is worth £336 million since 2016.

US and British leaders can be prosecuted for aiding and abetting Israel's genocide, war crimes and crimes against humanity in Gaza.

How do you think Israel should have responded to the October 7 attacks?

The only path to safety and security is through international law, not vengeance and retaliation. Israel should have heeded the UN charter's command to settle its disputes peacefully and, for the first time, engaged in real peace talks with the Palestinians.

If Israel really wanted peace, it would end its occupation and blockade of Gaza, its state and colonial violence, and ethnic cleansing of the Palestinians. It would end its system of settler colonialism and apartheid and it would dismantle the Jewish settlements on Palestinian land.

And it would allow Palestinian refugees to return to their homes with full compensation, as

required by international law. Israel must release all Palestinian prisoners and end its use of torture and administrative detention.

There are currently approximately 5,250 Palestinian prisoners (including 39 women and 170 children) in Israeli jails, including nearly 1,350 jailed without charge or trial under illegal arbitrary and administrative detention.

If Israel truly wanted peace with the Palestinians, it would not work to undermine the boycott, divestment and sanctions (BDS) movement. In 2005, 170 Palestinian civil society organisations called for boycott, divestment and sanctions.

They described BDS as “non-violent punitive measures” that would last until Israel fully complies with international law by first ending its occupation and colonisation of all Arab lands and dismantling its barrier wall; secondly recognising the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and finally respecting, protecting and promoting the rights of Palestinian refugees to return to their land as stipulated in UN general assembly resolution 194.

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