

## Self Defense and the Right of Resistance in Palestine

By Marjorie Cohn

I'm going to discuss the provisions of the UN Charter that govern the use of force, self-defense, and aggression. Then I will apply them to Hamas's attacks in Israel and Israel's war on the Palestinians in Gaza.

There are 2 different issues here. The first is whether the use of force is lawful in the first instance. That's called *jus ad bellum*. And second, once force is being used, what are the limitations on that use of force? That's called *jus in bello*, or international humanitarian law.

### Is the use of force by Hamas lawful?

The Palestinians 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, are 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 2004 advisory opinion of the International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as well as General Assembly Resolution 58/163 in 2003. The ICJ (or the World Court) is the legal arm of the UN system.

Israel claims that its unilateral disengagement from the Gaza Strip in 2005 relinquished its effective control over that part of the OPT, and thus the Gaza Strip is no longer occupied, effectively relieving Israel of its obligations under international humanitarian law as the Occupying Power.

However, the very text of the 'Disengagement Plan' itself, coupled with Israel's subsequent practices, makes clear that the Gaza Strip remains under Israeli occupation. Article 42 of the Hague Regulations of 1907 provides that, "territory is considered occupied when it is actually placed under the authority of the hostile army."

The legal test for occupation is "effective control," which exists if the military forces of the adversary could, "at any time they desired assume physical control of any part of the country." This test has been reiterated by various international courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia, which ruled that one of the guidelines

for determining occupation was whether “the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.”

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,” the text of the ‘Disengagement Plan’ itself reveals Israel’s intention to maintain effective control over the Gaza Strip.

Furthermore, despite its unilateral withdrawal of stationed troops and settlers, Israel continues to exert military control over the Gaza Strip through a continuous flow of military operations in and against Gaza. In addition to military control, Israel also 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. Thus, Gaza remains occupied territory. UN Security Council resolution 1860 issued in 2009 states that: "the Gaza Strip constitutes an integral part of the territory occupied in 1967."

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

### *Is the use of force by Israel lawful?*

Israel’s attacks in Gaza which have killed more than 9,000 Palestinians do not constitute lawful self-defense

Israel is claiming that its military operations in Gaza constitute self-defense against Hamas under Article 51 of the UN Charter.

Article 2(3) of the Charter requires all states to settle their international disputes by peaceful means so as not to endanger international peace and security. This doesn’t just apply to states, but also applies the settlement of international disputes.

Article 2(4) says that no state can use or threaten to use military force against the territorial integrity or political independence of another state, “or in any other manner inconsistent with the Purposes of the United Nations.”

Although Israel denies that Palestine is a state, the Israeli Supreme Court in the Targeted Killings case recognized the dispute between Israel and the Palestinians to be of an

international character. Thus, Israel cannot use the Palestinians' lack of statehood to justify its use of force.

Chapter VI of the Charter (in Articles 33-38) sets for the mechanisms, with S.C. or G.A. assistance, by which states may peacefully settle disputes. They include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Israel has not engaged in negotiations with the Palestinians.

The only two exceptions to the prohibition on the use or threat of force are when a state acts in self-defense or when the Security Council authorizes the use of force. A state may use military force in individual or collective self-defense under Article 51 of the Charter "if an armed attack occurs" against a state. The use of armed force for reprisal or preemptive or retaliatory purposes is prohibited by the Charter.

For an armed attack to give rise to the right of self-defense, it must be directed from outside the territory under the control of the defending state. Therefore, a state should not be allowed to invoke the right of self-defense to defend against an attack which originates inside a territory it occupies. Because Israel has continued to occupy Gaza it has given up its right to claim that it is acting in Article 51 sanctioned self-defense in response to the attacks by the Palestinians.

Israel remains an occupying power in Gaza despite its unilateral removal of settlements. Since the election of Hamas, Israel has imposed a blockade against Gaza which is specifically listed as an act of aggression under General Assembly Resolution 3314. Actions taken by Hamas or any other Palestinians to resist the blockade are not "acts of aggression" so they do not allow Israel to claim it is acting in self-defense.

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

Noura Erakat, a human rights attorney and associate professor at Rutgers University, [wrote](#) in *Jadaliyya*, "A state cannot simultaneously exercise control over territory it occupies and militarily attack that territory on the claim that it is 'foreign' and poses an exogenous national security threat. In doing precisely that, Israel is asserting rights that may be consistent with colonial domination but simply do not exist under international law."

A state's use of military force that is not conducted in self-defense or with the blessing of the Security Council constitutes aggression.

[Israel is Mounting a War of Aggression Against the Palestinians](#)

Israel has not sought a peaceful resolution of the crisis and its use of military force in Gaza constitutes illegal aggression.

The definition of aggression appears in UN General Assembly Resolution 3314 of 1974. Aggression is defined as “the first use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” This definition of aggression has also been adopted by the Rome Statute for the International Criminal Court.

Article 7 of General Assembly Resolution 3314 recognizes the right of people to fight for self-determination from colonial and racist regimes or other forms of alien domination. In affirming that the definition of aggression does not prejudice the right of people to struggle for self-determination, the resolution specifically exempts from the definition of aggression actions taken in furtherance of the right to self-determination.

While Resolution 3314 defines aggression as actions between states, the rule of interpretation found in Article 8 of the Resolution would ensure that acts of aggression against an occupied area would still be aggression, while military actions by an occupied people to promote the right to self-determination are not considered aggression. Under these circumstances there can be no armed attack by Gaza against Israel from which the right of Israel to act in self-defense would arise.

In addition, the prohibition against waging wars of aggression has achieved the status of a “peremptory norm” of international law, also known as *jus cogens*. A peremptory norm does not allow any exemptions and it cannot be modified by law, according to Article 53 of the Vienna Convention of the Laws of Treaties. Article 53 says, “A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Article 27 of the Fourth Geneva Convention requires that occupied people “shall at all times be humanely treated, and shall be protected especially against all acts of violence.”

Moreover, under Article 55 of the Fourth Geneva Convention, Israel as the occupying power has the duty to ensure the food and medical supplies of the occupied people and it must bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. Article 59 requires the occupying power to facilitate free passage of humanitarian relief into the occupied territory.

Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by willfully impeding relief supplies, is a war crime under the Rome Statute, Article 8 (2) (b)).

Protocol I Articles 15, 21, 54 (1,2) and Article 70 require promotion of humanitarian access, and prohibit starvation of the civilian population as an allowable method of warfare. Israel is permitting only a trickle of relief into Gaza. Oxfam, the international disaster relief organization, [said](#) it had never seen a humanitarian crisis “like the one in Gaza.” Israel’s illegal actions against the occupied Palestinian territories reflect the types of reprisals prevalent in the of the pre-Charter period.

### *Are Hamas and Israel Complying with International Humanitarian Law?*

The laws of war are set forth in the Geneva Conventions, the Hague Regulations, and customary international law.

### Israel is Using Disproportionate Force Against the Palestinians

Disproportionate use of force is illegal whether or not the war itself is illegal. The proportionality principle addresses whether civilian injuries/deaths are excessive in relation to anticipated military advantage gained in the attack.

In retaliation against the Palestinians in Gaza for Hamas’s October 7 killing of hundreds of Israelis, Israel has intensified its 16-year siege of Gaza to a “complete siege.” Israel is slaughtering civilians, cutting off their food, water, electricity and fuel, ordering more than 1 million of them to leave their homes and then bombing their evacuation routes, and trapping them with nowhere to escape.

Israeli forces have killed more than 9,000 Palestinians, more than one-third of them children. Over 42% of Palestinian homes have been destroyed and more than one million Gazans (half the population of Gaza) have been displaced. Israel continues to viciously bombard Gaza, reducing much of it to rubble.

Israel is violating the proportionality principle.

### Israel is Violating the Principle of Distinction

Israel must, at all times, distinguish between the civilian population and combatants, and between civilian objects and military objectives.

Protocol I to the Geneva Convention states that civilians must not be the object of attack. Intentionally directing attacks against the civilian population or against individual civilians not taking a direct part in hostilities is a war crime under Article 8 (2) (b) (I) of the Rome Statute.

Article 52 of Protocol I prohibits deliberate attacks on civilian targets and defines the difference between military and civilian targets. Military targets are defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and

whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." All other targets are civilian targets.

Pursuant to Article 52(3) of Protocol I, if it is unclear whether a target is military or civilian, it is presumed not to be a military object, and it is presumed to be a civilian object. The presence of non-civilians in a civilian area does not change the civilian character of the area.

Israeli forces are bombing refugee camps in Gaza, causing 50,000 square feet of damage and killing untold numbers of civilians. Israel is targeting homes, schools, mosques, churches, hospitals, ambulances and UN shelters.

Israeli forces refuse to distinguish between civilian and military objectives during its attacks and there is a clear lack of proportionality between the death and injury of civilians, destruction of civilian property and the concrete military advantage from such attacks.

Indiscriminate and disproportionate attacks constitute war crimes, and where they result in wilful killing and extensive unlawful destruction of property, such attacks may amount to grave breaches of the Fourth Geneva Convention, entailing individual criminal liability for those who planned, ordered or executed such operations.

To the extent Hamas failed to distinguish between combatants and civilians on October 7, it violated international humanitarian law, which also prohibits the taking of hostages.

The Israeli government ordered more than 1 million Gazans to leave their homes and then bombed their evacuation routes, and trapped them with nowhere to escape. According to a leaked document from the Israeli Ministry of Intelligence to an Israeli news site, Israel is planning to permanently transfer all of the Palestinians in Gaza to Egypt's Sinai desert.

Forcible transfer or deportation when committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" is a crime against humanity under the Rome Statute. Israel's ethnic cleansing of Palestinians from Gaza meets this test.

Moreover, some of Israel's bombs contain [white phosphorus](#), which burns to the bone and cannot be extinguished with water. It is prohibited by Protocol III of the Convention on Conventional Weapons.

### The Security Council and the General Assembly and the Maintenance of International Peace and Security

The Security Council is charged in the UN Charter with the maintenance and restoration of international peace and security. The Council must determine whether there is a threat to the peace, breach of the peace, or act of aggression. But the Security Council has failed to act to stop the slaughter of the Palestinians in Gaza, due to the United States' exercise of the veto.

This is an example of the U.S. consistently providing Israel with political and diplomatic cover for its atrocity crimes. The U.S. also furnishes Israel with billions of dollars in military aid and heavy weaponry to use against the Palestinians.

Under the Uniting for Peace Resolution, when the Security Council is unable to act due to the lack of unanimity of its five permanent members, the General Assembly can take up the matter and recommend how to restore international peace and security.

The International Court of Justice held in the *Wall* case that the General Assembly can take up a matter which the Security is seized of, with or without invoking the Uniting for Peace Resolution.

On October 26, more than 2/3 of the members of the General Assembly passed a resolution calling for an immediate and sustained humanitarian truce leading to a cessation of hostilities, and demanding the unhindered provision of essential aid to civilians throughout the Gaza Strip. It also firmly rejected any attempts at the forced transfer of the Palestinian civilian population.

And the Resolution called for “respect and protection, consistent with international humanitarian law, of all civilian and humanitarian facilities, including hospitals and other medical facilities, as well as their means of transport and equipment, schools, places of worship and United Nations facilities, as well as all of humanitarian and medical personnel and journalists, media professionals and associated personnel, in armed conflict in the region.”

The vote was 121 in favor, 14 against, and 44 abstentions. An amendment to unequivocally reject and condemn the attacks by Hamas that took place in Israel starting on 7 October failed to get 2/3 support, which is required for a General Assembly resolution to restore international peace and security.

### The Responsibility to Protect

The U.S wars in Vietnam, Kosovo, Iraq and Afghanistan were not conducted in self-defense and thus violated the UN Charter. The US-led NATO attack on Kosovo was rationalized as “humanitarian intervention.”

Canadian law professor Michael Mandel argues in his book, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity*, that the bombing of Kosovo in 1999 set the precedent for the United States’ wars in Afghanistan and Iraq, and Israel’s war on the Palestinians. “It broke a fundamental legal and psychological barrier. When Pentagon guru Richard Perle ‘thanked God’ for the death of the UN,” writes Mandel, “the first precedent he could cite in justification of overthrowing the Security Council’s legal supremacy in matters of war and peace was Kosovo.”

The Nuremberg Tribunal found the greatest sin to be the waging of aggressive war, or war as an instrument of national policy. The U.S. wars on Yugoslavia, Afghanistan and Iraq, and Israel's war on the Palestinians were and are wars of aggression. "Humanitarian intervention is forever doomed to be an 'asymmetrical right, the right of the powerful to intervene in the affairs of the weak and not vice versa,'" according to Mandel.

The UN Charter does not permit the use of military force for humanitarian interventions. The military invasions of Libya and Ivory Coast in 2011 were justified by reference to the Responsibility to Protect doctrine. But those attacks violated the UN Charter.

Responsibility to Protect is contained in the General Assembly's Outcome Document of the 2005 World Summit. It is not enshrined in an international treaty nor has it ripened into a norm of customary international law. Paragraph 138 of the document says that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Paragraph 139 adds that the international community, through the United Nations, also has "the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

Chapter VI of the Charter requires parties to a dispute likely to endanger the maintenance of international peace and security to "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Chapter VIII governs "regional arrangements," such as NATO, the Arab League, and the African Union. The chapter specifies that regional arrangements "shall make every effort to achieve pacific settlement of local disputes through such regional arrangements . . ."

It is only when peaceful means have been tried and proved inadequate that the Security Council can authorize action under Chapter VII of the Charter. That action includes boycotts, embargoes, severance of diplomatic relations, and even blockades or operations by air, sea or land. It can also include authorization of the use of military force in self-defense.

The Responsibility to Protect doctrine grew out of frustration with the failure to take action to prevent the genocide in Rwanda, where a few hundred troops could have saved myriad lives. But the doctrine has never been implemented to stop Israel from periodically slaughtering Palestinians in Gaza.

In 2011, the United States, France and Britain invaded Libya with cruise missiles, stealth bombers, fighter jets and attack jets. Although NATO took over the military operation, US President Barack Obama bombed Libya with Hellfire missiles from unmanned Predator drones. This military campaign was ostensibly launched to enforce UN Security Council Resolution 1973 in order to protect civilians in Libya.



Resolution 1973 began with the call for “the immediate establishment of a ceasefire.” It reiterated “the responsibility of the Libyan authorities to protect the Libyan population” and reaffirmed that “parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians. The resolution authorizes UN Member States ‘to take all necessary measures . . . to protect civilians and civilian populated areas’ of Libya.”

But instead of pursuing an immediate ceasefire, immediate military action was taken instead. The military force exceeded the bounds of the “all necessary measures” authorization. “All necessary measures” should first have been peaceful measures to settle the conflict. Yet peaceful means were not exhausted before the military invasion began.

A high-level international team – with representatives from the Arab League, the African Union, and the UN Secretary General – should have been dispatched to Tripoli to attempt to negotiate a real cease-fire, and set up a mechanism for elections and for protecting civilians. Moreover, after the passage of the resolution, Libya immediately offered to accept international monitors and Libyan leader Muammar Qaddafi offered to step down and leave Libya. These offers were immediately rejected by the opposition.

Although Resolution 1973 didn’t authorize forcible regime change, which violates international law, Qaddafi was brutally murdered and a new government installed in Libya.

Also in 2011, UN and French forces bombed the Ivory Coast to protect civilians against violence by Laurent Gbagbo, who refused to cede power to the newly elected president after a disputed election. UN Secretary Ban Ki-Moon insisted that the United Nations was “not a party to the conflict.” France, the former colonial ruler of Ivory Coast, had over 1,500 troops stationed there. Ivory Coast was the world’s second largest coffee grower and biggest producer of cocoa. The bombing of Ivory Coast was undertaken to enforce Security Council Resolution 1975 to protect civilians there.

Security Council Resolution 1975 regarding Ivory Coast is similar to resolution 1973 regarding Libya. The former authorized the use of “all necessary means to . . . protect civilians under imminent threat of physical violence” in Ivory Coast. It reaffirmed “the primary responsibility of each State to protect civilians” and reiterated that “parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians.”

The United States, France and Britain in Libya, and France and the UN in Ivory Coast, did not act in self-defense. Humanitarian concerns do not constitute lawful self-defense under the UN Charter.

When Obama defended his military actions in Libya, he said “Some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different.” Two weeks later, the Arab League asked the Security Council to consider imposing a no-fly-zone over the Gaza Strip in order to protect civilians from Israeli air strikes. But the United States, an

uncritical ally of Israel, would never allow the passage of such a resolution, regardless of the number of Palestinian civilians Israel kills. This is a double standard.

The military actions in Libya and Ivory Coast set a dangerous precedent of attacking countries where the leadership does not favor the pro-U.S. or pro-European Union countries. What will prevent the United States from stage-managing some protests, magnifying them in the corporate media as mass actions, and then bombing or attacking Venezuela, Cuba, Iran, or North Korea? Recall that during the Bush administration, Washington leveled baseless allegations to justify its illegal invasion of Iraq.

During a discussion of the Responsibility to Protect in the General Assembly on July 23, 2009, the Cuban government raised some provocative questions: “Who is to decide if there is an urgent need for an intervention in a given State, according to what criteria, in what framework, and on the basis of what conditions? Who decides it is evident the authorities of a State do not protect their people, and how is it decided? Who determines peaceful means are not adequate in a certain situation, and on what criteria? Do small States have also the right and the actual prospect of interfering in the affairs of larger States? Would any developed country allow, either in principle or in practice, humanitarian intervention in its own territory? How and where do we draw the line between an intervention under the Responsibility to Protect and an intervention for political or strategic purposes, and when do political considerations prevail over humanitarian concerns?”

The key is to enforce the UN Charter, not assert Responsibility to Protect as a means for the countries of the north to impose their will on the global south.

### The Right to Peace

Each successive U.S. presidential administration has used military force in violation of the U.N. Charter. Bill Clinton bombed Kosovo and Iraq. George W. Bush invaded Afghanistan and Iraq. Barack Obama continued Bush’s wars and used drones in seven countries. Donald Trump continued the wars and drone bombings and bombed Syria. And now Joe Biden is aiding and abetting Israel’s genocide and ethnic cleansing of the Palestinians in Gaza.

Peace is not simply the absence of war. Peace requires that all states refrain from interfering in the internal affairs of other states, settle their disputes through negotiations, and create conditions necessary to eliminate the causes of international conflict, including an end to the arms race. The right to peace is inherent in the very fabric of the U.N. Charter. Through the Charter and subsequent U.N. resolutions, the human right to peace is ripening into a norm of international law.

GA Resolution 33/73, promulgated in 1978, states, “Every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to live in peace.” In 1984, during the Cold War when the danger of nuclear war was ubiquitous, the GA adopted

Resolution 39/11, which “solemnly proclaims . . . a sacred right to peace” whose realization constitutes “a fundamental obligation of each state.” To ensure the right to peace, state policies must “be directed towards the elimination of the threat of war, particularly nuclear war,” according to that Resolution.

The United Nations has not saved succeeding generations from the scourge of war. But as the world watches the heartbreaking images from Gaza, masses of people are taking to the streets around the globe to call for a ceasefire and support the Palestinian struggle against occupation, ethnic cleansing and genocide. I hope our People’s Academy helps the Palestinian people and all people struggling for self-determination.