



The international law of self-determination and the use of force requires an immediate end to the occupation of the Palestinian West Bank and Gaza

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Executive Summary

This policy brief explains the relevance of international law to the question of whether and when the Israeli occupation of the Palestinian West Bank and Gaza – the occupied Palestinian territories (oPt) – should end. It explains that international law requires an immediate end to the occupation.

The Palestinian people have the right of external self-determination in international law, a right which forms part of international human rights law. According to this right, the occupation should end. There is a widespread misconception that as far as international law is concerned, the realization of this – when it happens, and on what basis – depends on a peace agreement being reached between the Israelis and the Palestinians. The only other significance of international law in the interim is a concern with how ostensibly ‘humane’ Israel’s treatment of the Palestinian people under the occupation is. This is mistaken.

The duration, and end, of the occupation is also a matter of the international law of self-determination, taken together with the international law on the use of force. The right of self-determination of the Palestinian people requires the occupation to end immediately. The only exception to this is if Israel has a right to conduct a military occupation in the oPt as a form of self-defence under the international law on the use of force. Israel has no such right. In consequence, the occupation is existentially illegitimate, and the position in international law is that the requirement for its termination is immediate, and does not depend on the adoption of a peace agreement.

All actors – states, officials of international organizations, NGOs – concerned with the compatibility of the occupation with international law generally, and international human rights law in particular (since self-determination forms part of this area of international law) need to move beyond addressing merely how ‘humane’ the conduct of the occupation is, and making a generalized affirmation of self-determination for the Palestinian people. They should affirm the position that the continuation of the occupation is in and of itself a violation of the international law of self-determination and the international law on the use of force. As such, international law requires that the occupation of the West Bank and Gaza end now.

Introduction

The relevance of international law to ending the occupation of the West Bank and Gaza

It is widely, and correctly, recognized that, as a matter of international law, the Palestinian people have the right of external self-determination.

This has two consequences:

1. Realizing this right necessarily means ending the occupation of the West Bank and Gaza. Thus the position in international law is that the occupation must end.
2. Any or all parts of the West Bank, including East Jerusalem, cannot be lawfully annexed by Israel. Insofar as Israel has purported to do this in East Jerusalem, it has not been legally effective. East Jerusalem, then, has not been/is not 'annexed'. It has been/is unlawfully-purportedly-annexed. In terms of sovereignty in international law, it is, like the rest of the West Bank, not part of Israel. Similarly, any extension of Israeli national law to apply to other parts of the West Bank does not alter the non-sovereign nature of Israel's legal position with respect to the territory affected.

This policy brief concerns the crucial issue raised by point (1): if the occupation must end, then when and on what basis? There is a widespread failure to appreciate, acknowledge, and adopt policy positions regarding the end of the occupation that reflect the correct position in international law.

Common and mistaken view:

A common and mistaken view is that the question of when the occupation should end is a matter of politics only, not also international law. According to this view, ending the occupation can and will only happen when there is a peace agreement between the Israelis and the Palestinians, because there is no international law rule requiring Israel to terminate the occupation irrespective of whether a peace agreement providing for this has been adopted. So in the absence of an agreement, Israel is somehow entitled to maintain control (although, as mentioned, cannot annex any of the territory). And during this period of continued occupation, the supposed utility of international law is only to serve as a basis for addressing particular alleged incidents of violations of individual and collective rights by Israel – essentially, how ostensibly 'humane' things are under conditions of occupation – using the rules of international humanitarian law/the law of armed conflict (IHL), including occupation law, international human rights law, international criminal law (covering war crimes and crimes against humanity), and the prohibition of apartheid. And, as a mentioned, to prohibit Israel from using its exercise of control to annex any part of the territory affected. Commentators do not tend to invoke international law to address the existence of the authority to occupy itself.

Why this is wrong, and the correct view:

This is an entirely mistaken view of international law. It ignores the international legal position that a state is only entitled to control territory that is not its own sovereign territory (as here), and which is the territory of a population grouping who have the right of external self-determination (as here), on the basis of the self-defence component of the international law on the use of force (or if it has been given authority to do this by the UN Security Council, irrelevant here). As the test in the international law on the use of force is not met in this instance, the exercise of control – the existence of the occupation itself, not merely how it is conducted – is illegal. The existential legitimacy of the Israeli occupation of the West Bank and Gaza is, then, a matter of international law. Specifically, the international law of self-determination, and the international law on the use of force.

External self-determination in international law

Meaning and application of self-determination to the Palestinian people:

- The international law of external self-determination concerns the right of a population grouping to decide their 'international' status, for example to constitute themselves as an independent state. And to be self-governing on this basis, free from the control of (an)other state or states. Many groups around the world assert this right. But in international law, only a narrow sub-set possess it as a legal entitlement.
- The Palestinian people are universally accepted to fall within this narrow group, because of their previous subjection to colonial rule by the Ottoman and British empires, and the continued denial of their ability to exercise self-determination since the creation of Israel in 1948, and the occupation of the West Bank and Gaza since 1967.

Significance of self-determination for the existence of the occupation of the West Bank and Gaza—it is illegitimate, and should end:

- The anti-colonial form of external self-determination adopted in international law in the second half of the 20th century that is applicable to the Palestinian people was a repudiation of the concept of 'trusteeship over people'. According to this concept, people were, ostensibly, potentially to be granted their freedom by colonial authorities if and when they were deemed 'ready' by those authorities. The anti-colonial self-determination rule, which was the international legal basis for recognizing decolonization, scrapped this approach in favour of an automatic right. The new rule was rooted in the basic entitlement of people to freedom, not 'readiness'. And the right operates regardless of whether the authority depriving the people of their ability to exercise self-rule agrees to relinquish control. Necessarily, then, this form of 'freedom' – the end of external control – is to be realized immediately.
- In consequence, the Palestinian people are supposed to be immediately freed of the occupation. The occupation is supposed to end straight away, because it has no valid legal basis to exist. Put differently, its very existence is illegal.
- However: there is an exception – a military occupation as a lawful use of force in international law.
- Israel's use of force in militarily occupying the West Bank and Gaza, which prevents the self-determination right from being exercised, can be permitted if it is justified according to the international law on the use of force, specifically concerning self-defence. If the occupation were justified on this basis, it would not violate the law of self-determination. And it could be lawfully maintained on this basis. In consequence, the occupation would not be illegal, and would not need to be immediately terminated. However, as will be explained, no justification under the law on the use of force is available.

The occupation of the Palestinian West Bank and Gaza is an illegal use of force

The Israeli occupation of the Palestinian West Bank and Gaza is a military occupation. As such it is, to use the language of international law, a 'use of force'. In international law, 'use of force' is a euphemism for war, including military occupation.

A use of force is only legally permitted in self-defence (or if authorized by the UN Security Council, which is not relevant to the occupation of the West Bank and Gaza). And the use of force in self-defence is only legally permitted if there is an actual or imminent threat, and the use of force involved – here, a full military occupation – is necessary and proportionate to that threat. The occupation of the West Bank and Gaza is manifestly outside the scope of what is legally permitted. In consequence, it is an unlawful use of force – an aggression. (This is the same violation of international law committed by Russia in Ukraine in 2022.) And it is an egregious violation, given its 55+ year duration.

What this means is that the very exercise of authority and control by Israel in the West Bank – including East Jerusalem – and Gaza, is in and of itself illegitimate. It is illegal. In other words, Israel has no right to exercise authority there at all. So the way that Israel then exercises this authority – its treatment of the Palestinian people, covered by the other rules of international law mentioned earlier (e.g. IHL) – is in one important sense a secondary matter, because the authority is itself illegal.

Case study: the killing of Shirin Abu Aqleh in Jenin, and the attack by Israeli soldiers on the pallbearers of her coffin at St Joseph hospital in Sheikh Jarrah, Jerusalem, Palestine, in May 2022

The common approach taken by many – particularly international – observers, of the killing of Shirin Abu Aqleh and the attack on the pallbearers of her coffin is to analyse these particular incidents in terms of whether or not, in each case, the force used was justified, including in international law. So with the killing it was asked whether it is permissible to target journalists or whether somehow the killing might have been permissible as collateral damage. And in the violence against the pallbearers, it was asked whether there was a legitimate security concern in that situation and whether, if so, the response was necessary and proportionate. In both cases, observers applied the tests from the laws of war and international human rights law.

The suggested conclusion was that the killing, and the attack, were unjustified and unlawful – journalists cannot be targeted; there was no security need in St Joseph hospital in the first place that required the soldiers to respond, let alone respond in the way that they did, in the violence against the pallbearers.

While this may well be the case, focusing only at this level of analysis ignores the more fundamental issue, which Diana Buttu highlighted when commenting on the killing on Al Jazeera: that it was only possible because Israeli soldiers were in Jenin in the first place.

This broader context – the occupation itself – and understanding it as in and of itself a form of oppression and an act of violence – is also a matter of international law. Actually, the very presence of the soldiers in Jenin and Sheikh Jarrah, and their exercise of authority, was and is in and of itself unlawful in international law as a general matter, regardless of how they exercise(d) this authority. They had and have no right to be in these places in the first place, since Israel has no right to exercise its authority in the West Bank in general, and East Jerusalem in particular, at all.

When such incidents are only scrutinized in terms of how unreasonable or unjustified or, indeed, barbaric, the actions of the soldiers are, the more fundamental question of the legitimacy of Israel's presence itself is not merely ignored; there is also a risk that it is actually validated. Such an approach to scrutiny operates on an assumption corresponding to the position taken by Israel – that Israel's right to exercise authority in these places is not to be questioned – to only enquire into whether the particular action was reasonable or not.

In order also to speak to the fundamental question of the legitimacy of the occupation itself, it is necessary to engage not with the laws of war, including occupation law, but with the law of self-determination and the use of force. This leads to the conclusion of illegitimacy. The occupation is an unlawful use of force – an aggression – and violation of self-determination, like the Russian aggression in Crimea.

Recommendations

How to address the existential legitimacy of the occupation in international law

To address the question of whether and when the Israeli occupation of the West Bank and Gaza should end as a matter of international law, it is necessary to move beyond the typical exclusive focus on the laws of war/international humanitarian law, including the law of occupation, international criminal law, most of human rights law, the prohibition of apartheid, and the question of annexation.

Instead, the focus needs also to be on the law of self-determination, and the law on the use of force.

Self-determination in international human rights law

The right of self-determination, including the right of external self-determination, is part of international human rights law. Indeed, it is set out in common Article 1 of the two main international human rights treaties: the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Many states are parties to one or both treaties; Israel and Palestine are parties to both.

This right of self-determination is fundamentally different from the other rights in human rights law. It concerns the existential legitimacy of the state's exercise of authority in and of itself – in this case, Israel's right to exercise authority over the West Bank and Gaza. All other rights are concerned with the relatively second-order matter of how state authority is exercised, and more broadly the quality of life under such authority. Despite this fundamental difference from all other areas of human rights law, self-determination is part of the applicable legal framework.

In consequence:

- Any consideration of whether the situation in the oPt is compliant with international human rights law must consider whether the existence of the occupation in and of itself is compliant with the self-determination component of this area of law.
- All those concerned with international human rights law compliance in the oPt must ask this existential question if they are to comprehensively address the legal framework applicable to their concern.

The use of force in international law

A different area of international law – the law on the use of force – can permit a military occupation which of its nature limits the exercise of external self-determination, with the legal effect that such an occupation does not constitute a violation of the legal right of external self-determination.

In consequence:

- Any consideration of whether the occupation of the West Bank and Gaza is a violation of the Palestinian people's legal right of external self-determination requires taking a position on the international law on the use of force.
- All those concerned with international human rights law compliance in the oPt need to move beyond an exclusive focus on the rules of human rights law in order to be able to establish the correct position on what human rights law requires in this context.

Self-determination as an *erga omnes* obligation

Self-determination in international law has a special status, as the subject of ‘community obligations’ or obligations ‘*erga omnes*’ – operating with respect to all. What this means is that any particular instance of the right being violated – here by Israel – is not only a matter for those whose rights are directly affected – here the Palestinian people. Also, all other states, and the United Nations as the institutional manifestation of the ‘international community’, have a legitimate interest in the matter. In consequence, they have a right to raise it as a concern. Indeed, according to the UN International Court of Justice Advisory Opinion issued to the General Assembly on the legal consequences of the construction of the Wall by Israel in the oPt, states have a positive obligation here. Having affirmed the *erga omnes* status of self-determination, and finding that the construction of the Wall impeded the exercise of this right, the Court held that ‘it is for all States... to see to it that any impediment’ to the right resulting from the construction of the Wall ‘is brought to an end’ (para. 159).

In consequence:

- States have a positive obligation to do what they can to bring to an end the impediment to the exercise of self-determination caused by the occupation of the West Bank and Gaza. At a bare minimum, this means:
 - States must publicly acknowledge, and raise as a matter of international diplomatic concern, the existentially illegal character of the occupation.
 - States must call on Israel to end the occupation immediately, in order to end this unlawful situation.
- Taking a position on the existence of the occupation as a violation of the international law of self-determination is, and should be, not only, then, a necessary consequence of being concerned with the question of compliance with international law in general, and international human rights law in particular, where the occupation is concerned. Also, it is a legal requirement arising out of the special status that self-determination has in international law.

Conclusion

All actors – states, officials of international organizations generally, the UN in particular, including the two international UN Committees set up to monitor the implementation of the human rights Covenants, other UN human rights institutions including Human Rights Council Special Procedures mandate-holders, human rights NGOs, and other interested parties – concerned with the compatibility of the occupation with international law generally, and international human rights law in particular, need to move beyond addressing merely how ‘humane’ the conduct of the occupation is, and making a generalized affirmation of self-determination for the Palestinian people. They should affirm the position that the continuation of the occupation is in and of itself a violation of the international law of self-determination and the international law on the use of force. On this basis, international law requires that the occupation end now. Every day that the occupation continues, regardless of how ‘humane’ its conduct, involves a violation of international law by Israel.

