

# Finkelstein on Israel's 'right to defend'

## 1. Introduction

A fundamentally related question to the above is, Does Gaza have the right to defend itself? This takes us to the heart of the legal and historical aspects that form the context for critiquing the notion 'Israel's right to defend itself'.

Finkelstein made these comments in his book, '[Gaza – An inquest into its Martyrdom](#)', published in 2018, after Israel's 'Operation Protective Edge', and specifically referring to that operation.

Finkelstein recorded that Israel initiated the armed hostilities that preceded Operation Protective Edge. Hamas acted in self defence. He noted that international law prohibits an occupying power from using force to suppress a struggle for self-determination, and it does not debar a people struggling for self-determination from using armed force.

It might be argued that insofar as the self determination has been unfolding within the framework of a belligerent occupation the occupying power has the legal right to enforce the occupation as long as it endures.

However, the International Court of Justice (ICJ), drawing on the precedent of its advisory opinion with respect to South Africa's occupation of Namibia, ruled that failure to carry out *good faith negotiations* to end the occupation delegitimized the occupation as well.

The deeper, implicit question therefore is Does Israel have the right to perpetuate an illegal occupation? Clearly, the answer is No.

## 2. Question of Hamas' war crimes

A related question is that even given that Palestinians can legally resort to force, doesn't Hamas' use of indiscriminate projectiles targeting Israeli civilians not still constitute war crimes?

Finkelstein argued that this is an equivocal situation because what constituted a war crime and 'indiscriminate' wasn't clear, while the implicit standard wasn't just. The civilian population of a party, even when subject to relentless attack, does not have the legal right to carry out belligerent reprisals targeting civilians of the other party. However, being capable of targeting only permissible military targets assumes a level of technological development absent, meaning an underdeveloped popular militia engaging in a war of self defence/determination cannot prevail except by breaching the laws of war, negating a *raison d'être* of the law by enshrining *might over right*.

The ultimate question is Do Palestinians have the right to symbolically resist slow death, punctuated by periodic massacres, or is it incumbent upon them to lie down and die?

### 3. *Is Israel's occupation legal?*

#### 3.1 Legal and illegal occupations

Under international law an occupation is a temporary situation. Inasmuch as the acquisition of territory by war is illegal under international law, an occupation that morphs into an irreversible annexation must also be illegal.

Israel has contended that its occupation is legal because it sprang from a defensive war<sup>1</sup> and that this right persisted until it signed a peace treaty. But how the occupation started is irrelevant to the question of the legality of the occupation. According to Israel this occupation could continue and have legal status until an alternative political (i.e. peace treaties) or military solutions.

But the question arises if Israel balked at withdrawal even after Arab states recognised it, would the continuing occupation still be legal? Following the 1967 occupation of the Sinai, despite Egypt's agreeing to a full peace treaty, Israel refused to withdraw because it did not agree to the terms. Under these conditions the occupation of the Sinai became illegal and Israel became a recalcitrant occupier.

The key point is that an occupier must conduct negotiations in *good faith* for a peaceful solution to end its rule. Failing this its occupation will become illegal. This was the ruling of the ICJ on the status of South Africa's occupation of Namibia.

#### 3.2 Historical, political and legal contexts of Namibia and Palestine

Both situations:

- emerged from the Mandates System of the League of Nations (without being converted to UN Trusteeship).
- are governed by the foundational legal principles of 'sacred trust' (for the benefit of the inhabitants) and 'non-annexation'.
- fall within the integral political and legal paradigms of decolonization and self determination.

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<sup>1</sup> Cf. 'Gaza – An inquest into its martyrdom', footnote 5, page 168. There is considerable evidence that undermines the narrative that Egypt had already launched an attack or that an Egyptian attack was imminent in June 1967. Nevertheless, United Nations (UN) Security Council Resolution 242 made Israeli withdrawal conditional on termination of all claims or states of belligerency by neighbouring Arab counties.

But does the Israeli occupation of Palestine reach the Namibian threshold of illegality?

### 3.3 The illegality of Israeli occupation practices

Finkelstein noted that there has been a tendency to separate the illegality of Israel's *practices* from the illegality of the occupation *qua* occupation. But it is precisely through these practices that we need to assess Israel's good faith as an occupier, and therefore the legality of its occupation. These practices include (but are not necessarily limited to) the separation barrier on Palestinian territory, initiating and expanding Jewish settlements on the West Bank, and annexation of East Jerusalem. He noted the following practices that taken together constitute an illegal occupation because Israel had:

- consistently breached international law as ruled by the ICJ in respect of the separation barrier; and, political organs of the UN, respected legal commentators and reputable human rights organisations had repeatedly deplored Israel's excessive/disproportionate use of force, targeting of civilians, torture, settlement construction and collective punishment.
- imposed an *apartheid* regime in the occupied territories, thereby violating international human rights law, as attested to by eight reputable human rights and scholarly reports published between 2004 and 2022<sup>2</sup> as well as reported on (between 2002 and 2013) by 11 eminent people in the fields of statecraft, international law and

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<sup>2</sup> Cf. B'Tselem, [Forbidden Roads: Israel's discriminatory road regime in the West Bank](#), August 2004; Association for Civil Rights in Israel, [The State of Human Rights in Israel and the Occupied Territories](#), 2008 Report page 17; Human Sciences Research Council (HSRC), 2009 [Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories \(OPTs\) Under International Law](#), A report of the Middle East Project in the Democracy and Governance Programme of the Human Sciences Research Council, Cape Town; UN Economic and Social Commission for Western Asia (ESCWA), 2017 [Israeli Practices towards the Palestinian People and the Question of Apartheid](#); B'Tselem report, [This is apartheid – a regime of Jewish supremacy from the Jordan River to the Mediterranean Sea](#), 12 January 2021; HRW Report, [A Threshold Crossed – Israeli Authorities and the Crimes of Apartheid and Persecution](#) – 27 April 2021; Amnesty Report, [Israel's Apartheid against Palestinians – A look into decades of oppression and domination](#) - 1 February 2022; and, Al Haq Report, [Israeli Apartheid: Tool of Zionist Settler Colonialism](#), 29 November 2022.

journalism,<sup>3</sup> which challenges Justice Goldstone's<sup>4</sup> claims that Israel had no intention to implement an apartheid system.

- Failed to negotiate in good faith under the Oslo peace process, whereas Palestinian negotiators consistently embraced international law which Israel rejected as a basis for negotiations. 'I was the Minister of Justice. I am a lawyer,' Foreign Minister Tzipi Livni told her Palestinian interlocutors during a critical round of the peace process in 2007, 'but I am against law – international law in particular'.<sup>5</sup>

The historical record shows Israel's bad faith in entering negotiations allegedly to arrive at agreement. Instead, Israel has thwarted progress towards its legally mandated obligation to withdraw from the occupied Palestinian territories.

#### *4. Is UN General Assembly (GA) competent to declare Israeli occupation illegal?*

The UN GA is competent given its charter mandates and historical supervisory practices in fleshing out rules and principles of the decolonization process. UN GA decisions would be legally binding because the territory is an international responsibility, dating from the mandates system and no sovereign state intervenes between the GA and the territory. There is precedent for this in that after its creation Israel described the GA partition resolution (181 of 1947) as the 'only internationally valid adjudication on the question of the future government of Palestine'.<sup>6</sup> Then Israeli representative Abba Eban boasted that Israel 'possesses the only international birth certificate in a world of unproven

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<sup>3</sup> Michael Ben Yair, [The War's Seventh Day](#), Haaretz, 2 March 2002; Meron Benvenisti, [Founding a Binational State](#), Haaretz, 22 April 2004; Roe Nahmias, [Israeli Terror is Worse](#), Ynetnews.com, 29 July 2005 (about Shulamit Aloni); Jimmy Carter, [Palestine Peace Not Apartheid](#), New York 2006; Shulamit Aloni, [Indeed, There is Apartheid in Israel](#), ynet.co.il, 5 January 2006; Chris McGreal, [Worlds Apart: Israel, Palestine and apartheid](#) 6 February 2006, and, [Brothers in Arms: Israel's secret pact with Pretoria](#), 7 February 2006; Dinah A Spritzer, [British Zionists drop Haaretz Columnist](#), Jewish Telegraph Agency, 8 August 2007; Ezra HaLevi, [Haaretz Editor Refuses to Retract Israel Apartheid Statements](#), israelnationalnews.com, 5 September 2007; Haaretz, [Where is the occupation](#), 7 October 2007; Haaretz, [Our debt to Jimmy Carter](#), 15 April 2008; Yossi Sarid, [Yes It is Apartheid](#), Haaretz, 24 April 2008; Amos Schocken, [Citizenship Law Makes Israel an Apartheid State](#), Haaretz, 27 June 2008; John Dugard, [Apartheid and Occupation under International Law](#), Hisham B Sharabi Memorial Lecture, 30 March 2009; Haaretz, [The Price of Deception and Apartheid](#), 27 November 2013; and, Times of Israel, [Meridor Compares Likud Policies to Apartheid](#), 19 November 2013.

<sup>4</sup> Goldstone had headed a fact-finding mission into Operation Cast Lead, Israel's 2008/09 attack on Gaza, which concluded that both Hamas and the Israel Defence Force committed war crimes. Under pressure from local Zionists in South Africa, Goldstone then published a retraction of these claims in respect of Israel.

<sup>5</sup> Palestine Papers, Minutes from 8<sup>th</sup> Negotiation Team Meeting, 13 November 2007, as reported in [Al Jazeera](#).

<sup>6</sup> Cf. A Rigo Sureda, [The Evolution of the Right of Self Determination: A study of United Nations practice](#), Leiden 1973, pp. 39-40; 45; 47-48.

virtue' and that this 'juridical status ... arises out of the action of the General Assembly'.

## **5. Conclusion**

Finkelstein concluded that on the same juridical basis that it issued Israel's 'birth certificate' the GA was empowered to issue simultaneously a death certificate for Israel's occupation and a birth certificate for Palestine. He reflected that there could also be an ICJ advisory opinion on legal consequences of an occupying power's failure to negotiate in good faith on the basis of international law, to end the occupation. A GA resolution and a ICJ opinion would constitute formidable weapons to win over public opinion, and thereby delegitimise the occupation.