

Legal Opinion

**The Palestinian People Have the
Right to Resistance by All Means
Available at their Disposal**



By: Dr. Shahd Hammouri



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means available at their disposal**

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Abstract

Resistance by the Palestinian people by all means available at their disposal against an illegal occupying power is a legitimate act. To deprive peoples of such a right is to deny their right to equality and human dignity in contravention of the UN Charter. The legitimacy of resistance is prompted by the gravity of the illegality at hand, the absence of political will to seize the international community on the matter, and the asymmetrical position in which the subjugated people are placed. The legitimacy of such resistance has been ascertained in different sources of international law. The ascertainment of such legitimacy is clear when sources are read with just consideration for the positions of states and scholars of the global south in the making of international law.

Such resistance is not inconsistent with the prohibition on the use of force, as it is a form of collective self-defence by peoples. Neither is such resistance prohibited by International Humanitarian Law, under which people are not under an obligation of allegiance to the occupying power and are subsequently allowed recourse to arms in their resistance against an illegal occupying power.

As a consequence, third states are under the obligation to recognize the legitimacy of the Palestinian people's resistance, and the State of Israel is under the obligation to refrain from persecuting Palestinians for legitimate resistance. Further, Israel may not invoke self-defence against such forms of resistance as grounds necessitating or justifying violations of international law.

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Introduction

Resistance by the Palestinian people against an illegal occupying power by all means available at their disposal is a legitimate act. To deprive peoples of such a right is to deny their right to equality and human dignity in contravention to the UN Charter. The legitimacy of resistance is prompted by the gravity of the illegality at hand, the absence of political will to seize the international community on the matter, and the asymmetrical position in which the subjugated peoples are placed. Such legitimacy has been ascertained in different sources of international law. The ascertainment of such legitimacy is clear when sources are read with just consideration for the positions of states and scholars of the global south in the making of international law.

Such legitimacy rests on the conclusion that the Palestinian people are subjects of international law by virtue of their right to self-determination (Section 1) whose struggle for independence from an occupying power is a legitimate act in pursuit of, and exercise of, that right (Section 2). Such resistance is not inconsistent with the prohibition on the use of force, as it is a form of collective self defence by people (Section 3). Neither is such resistance prohibited by International Humanitarian Law, under which people are not under an obligation of allegiance to the occupying power and are subsequently allowed to resist against an illegal occupying power (Section 4).

As a consequence, third states are under the obligation to recognize the legitimacy of the Palestinian people's resistance, and the State of Israel is under the obligation to refrain from persecuting Palestinians for legitimate resistance. Further, Israel may not invoke self-defence against such forms of resistance as grounds necessitating or justifying violations of international law (Section 5).

The Israeli occupation of Palestine is illegal. The premises of this illegality are multifaceted. First, it is a form of alien domination and subjugation, otherwise referred to as colonisation. While there are no clear criteria for what alien domination and

subjugation entails, elements of systemic exploitation,¹ dispossession,² fragmentation,³ inhumane acts,⁴ and discrimination are common indicators.⁵ The

¹ For example, Israel's persistent and deliberate denial of Palestinian access to and control over natural resources in Area C was estimated in 2013 to amount to an annual loss to the Palestinian economy of approximately \$2.2 billion. World Bank 'Area C and the Future of the Palestinian Economy' (2014) para. Vi; As to exploitation of workers, the ILO has warned against the excessive exploitation of Palestinian workers. ILO, 'The situation of workers of the occupied Arab territories Report of the Director-General – Appendix' (2022) UN. Doc ILC.110/DG/APP, paras. 16, 91. As to exploitation of water sources, the HRC has warned against unequal exploitation of water resources by Israeli authorities for the primary Benefit of Jewish settlers and Israeli Citizens. HRC 'The allocation of water resources in the Occupied Palestinian Territory, including East Jerusalem' UN Doc. A/HRC/48/43 para.26

² Israel maintains a policy of uprooting and dispossessing Palestinians by denying their residency, return, and land rights while encouraging and supporting Jewish settlement with the intention of permanently changing the demographic structure. As noted by the Committee on the Exercise of the Inalienable Rights of the Palestinian People in 1981, underlying this policy is an intention to change the demographic structure of the occupied Palestinian territories. Settlements/Mattityahu Drobless plan/Settlements by Israel in the illegally occupied Arab territories – Letter from CEIRPP Acting Chairman 'Letter dated 19 June 1981 from the Acting Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People to the Secretary-General' (1981) <https://www.un.org/unispal/document/auto-insert-186771/> accessed 19 June 2023. Further review: HRC, 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem' UN Doc. A/HRC/22/63

³ The appropriation of land fragments the Palestinian community. Further, Palestinian movement across regions is severely limited by a complex system of permits, and the 'separation policy' between Gaza and the West Bank which displace Palestinians while denying their right of return, movement, and family reunification in West Bank, Gaza and Jerusalem. The difficulty of movement is further exacerbated with the excessive usage of checkpoints, where average Palestinians spend hours in undignified conditions each day. Review: Letter from Civil Administration to HaMoked, 15 April 2008. Available at: <http://www.hamoked.org.il/items/110360.pdf> (Hebrew only). Also review: Norwegian Refugee Council 'Legal Memo: Movement between the West Bank and the Gaza Strip' (December 2016)[https://www.nrc.no/globalassets/pdf/legal-](https://www.nrc.no/globalassets/pdf/legal-opinions/legal_memo_movement_between_wb_gaza.pdf)

[opinions/legal_memo_movement_between_wb_gaza.pdf](https://www.nrc.no/globalassets/pdf/legal-opinions/legal_memo_movement_between_wb_gaza.pdf) accessed 24 May 2023. Gisha 'Position Paper: What is the "separation policy"?' (June 2012)<https://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf> last accessed 24 May 2023. OCHA, 'Permanently Staffed Israeli Checkpoints and Crossings in the West Bank– OCHA map' (As of May 2010) <https://www.un.org/unispal/document/auto-insert-205346/> accessed 26 June 2023; 'Israeli checkpoints continue restricting Palestinian movement – UN report' (UN News, 27 May 2009) <https://news.un.org/en/story/2009/05/301362> 26 June 2023 accessed 4 July 2023.

⁴ For example, Since Israel's imposition of the closure of the Gaza Strip, there are four notable escalations of hostilities that resulted in an exceptional rise of casualties. According to the Gaza based civil society actor Al-Mezan, the Israeli Defence Forces have directly killed an approximate of 5,201 Palestinians, including 1,208 children, over a period of 13 years (2008-21) in the Gaza strip Al Mezan, 'The Gaza Bantustan—Israeli Apartheid in the Gaza Strip' (2021); In another example, accounts of extrajudicial killing by Israel have been consistently reported by UN officials over many years. Special Rapporteur on the Human Rights Situation in the Palestinian Territories Occupied Since 1967, Report of the Special Rapporteur, UN. Doc, E/CN.4/1994/14 (1994), para. 35.

⁵ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, (Separate Opinion of Judge Robinson), para. 23: apartheid and alien domination and subjugation both entail a systemic policy of domination and subjugation targeting a specific group which results in inhuman acts: "Alien subjugation, alien domination and alien exploitation are the classic features of colonialism... Exploitation is at the epicentre of colonialism. It was a political and economic system of governance that was wholly exploitative of dependent peoples". Further review: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, (Separate Opinion of Judge Cançado Trindade). Further practices of apartheid intersect with practices of alien domination and subjugation, review some acts associated with apartheid listed in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16 (ICJ), para.130.

existence of such systemic practices in the current situation is widely documented and reported.⁶ This status was initially recognised in UNGA resolutions,⁷ but a change in the language was prompted after the Oslo Accords (1993) and parallel Israeli efforts to shed away the colonialisation narrative. More recently, the recognition of this status has been reaffirmed by the UN Rapporteur on the Occupied Palestinian Territories, Francesca Albanese.⁸

Colonialisation is illegal. In the *Chagos case*, the ICJ observed that the wording of the Declaration on the Granting of Independence to Colonial Countries and Peoples, where colonialization was deemed illegal, has normative character.⁹ The court found that the resolution 'represents a defining moment in the consolidation of State practice on decolonization.'¹⁰

Other scholars approach the subject matter of the illegality of occupation from the other end by arguing that the end of the Israeli occupation of Palestine is a condition for the realisation of the Palestinian right of self-determination, a *jus cogens* right with *erga omnes* effects.¹¹ Furthermore, the continuation of the occupation facilitates a wide range of illegalities such as apartheid, and *de facto* annexation, alongside violations of rules on the conduct of hostilities, sovereignty over natural resources, and

⁶ Review for example: Richard Falk and Virginia Tilly, 'Israeli Practices towards the Palestinian People and the Question of Apartheid Palestine and the Israeli Occupation, Issue No. 1', (2017), UN Doc. E/ESCWA/ECRI/2017/1 https://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1013&context=ps_pubs accessed 22 June 2023, at 37-84; ESCWA, 'Report on Apartheid' (2022), UN Doc.A/77/356; Al Haq, BADIL, Palestinian Center for Human Rights, Al Mezan Center for Human Rights, Addameer, Civic Coalition for Palestinian Rights in Jerusalem, Cairo Institute for Human Rights Studies, Habitat International Coalition – Housing and Land Rights Network, 'Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports' (2019), https://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19th-periodic-reports-10-november-2019-final-1573563352.pdf accessed 4 July 2023; HRC 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) UN Doc. A/HRC/12/48.

⁷ "Condemns all Governments which do not recognize the right to self-determination and independence of peoples, notably the peoples of Africa still under colonial domination and the Palestinian people" UNGA Resolution 3070 (XXVII) (1973) para.6.

⁸ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese UN Doc. A/77/356 (21 September 2022).

⁹ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. Gen. List 169, paras.150-153 (Feb. 25) [hereinafter ICJ Chagos] para.153

¹⁰ Chagos case para. 150

¹¹ Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020' (2020) 31 European Journal of International Law 1055.

a wide range of human rights treaties and norms. It is arguable that such illegal acts render the occupation itself illegal. Approached from another perspective, others have sought to contest the legality of prolonged occupation, establishing a test for when an occupation becomes illegal.¹²

Despite this apparent illegality which has lasted for over 56 years, the international community is not seized on the matter. Most states, particularly states of the global north, have not fulfilled their duties not to recognise the illegality or cooperate in its maintenance.

1. The Palestinian people as subjects of international law for the purpose of resistance

The Palestinian people are subjects of international law in so far as the functionality of expressing and practicing the right of self-determination as a collective,¹³ and this status imbues them with legitimacy in resisting an occupying state in pursuit of that right. In the *Wall* advisory opinion, the Palestinian people were recognized as a people for the purpose of practicing the right of self-determination.¹⁴ Such recognition was also repeatedly expressed by the UN General Assembly.¹⁵ In the *Reparation* case that,

¹² Committee on the Exercise of the inalienable rights of the Palestinian People ‘Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, Including East Jerusalem’ (30 August 2023) <https://www.un.org/unispal/document/ceirpp-legal-study2023/> last accessed 6 October 2023; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk (2017) UN Doc. A/72/43106; Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017).

¹³ This position is derived from the court’s position in the *Reparation case*, where it recognized the international legal personality of non-state actors within their specific functionality. A subject of international law, once created for certain rights and obligations, "must be deemed to have those powers ... conferred upon it by necessary implication as being essential to the performance of its duties." *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, paras. 182,184. IO Kresina and OV Kresin, ‘The People as a Subject of International Law Notes and Comments’ (2018) 3 *Jus Gentium: Journal of International Legal History* 573.

¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2005] ICJ Rep 136 (ICJ), para. 153: “as regards the principle of the right of peoples to self-determination, the court observes that the existence of a ‘Palestinian people’ is no longer an issue”.

¹⁵ Further, the UN has recognized the right of self-determination of the Palestinian people in numerous resolutions, including: UNGA Resolution 2672 (1970), 8 December 1970, UN Doc. A/RES/2672(XXV); UNGA Resolution 3236 (XXIX) (1974), 22 Nov 1974, UN Doc. A/RES/3236(XXIX); UNGA Resolution 146 (2012), 29 March 2012, UN Doc. A/RES/66/146; UNGA, Resolution 158 (2013), 26 February 2013, UN Doc. A/RES/67/158.

the ICJ found that, in relation to the recognition of the personality of non-state actors, a subject of international law “must be deemed to have those powers ... conferred upon it by necessary implication as being essential to the performance of its duties”.¹⁶ In this case, the exercise of resistance in the pursuit of the right of self-determination which, as noted in the separate opinion of Judge Ammoun in the *Namibia* case, is an exercise of the international personality of a people through the struggle for freedom.¹⁷ As a people, the Palestinian people are also holders of rights under the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial People, and the Declaration on the Principles of Friendly Relations among others.

There is no established legal test to determine who is to practice the rights of a people on their behalf in the context of an illegal occupation. Such practice may be taken up collectively by those who have associated themselves with resistance in the exercise of their right to self-determination. For example, in the context of Apartheid South Africa, actions recognised by the UN General Assembly to be legitimate expressions of the right were undertaken:

by trade unions, student associations, women’s organizations in South Africa that have associated themselves with the struggle of the people for the elimination of apartheid in the face of the onslaught by the regime.¹⁸

Further, the establishment of the State of Palestine does not preclude the legitimacy of the collective acts of the people in pursuit of the right to self-determination. In the context of the illegality at hand, the State of Palestine is under foreign occupation, and

¹⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174, paras. 182, 184; Kresina and Kresin, ‘The People as a Subject of International Law Notes and Comments’ (2018) 3 *Jus Gentium: Journal of International Legal History* 573.

¹⁷ In his separate opinion on the *Namibia* case, Judge Ammoun found that acts of resistance by the Namibian people reasserted their international legal personality as people “ But the Namibian people, whose existence and unity the Court has, in its turn, recognized in the present Advisory Opinion, has itself asserted its international personality by taking up the struggle for freedom”: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion (Separate Opinion of Judge Ammoun) [1971] ICJ Rep 16 (ICJ), at 69.

¹⁸ Resolution 41/35 (1986), 10 November 1986, UN Doc. A/RES/41/35, PARA. 3:

the international community is not seized of the matter. Article 9 of the ILC Draft Articles on State Responsibility recognizes that persons can undertake acts usually undertaken by states "in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority."¹⁹ The ILC further elaborated on the meaning of 'in circumstances such as to call for' in the commentary, stating that:

Such cases occur only rarely, such as during revolution, armed conflict or *foreign occupation*, where the regular authorities dissolve, are dis-integrating, have been suppressed or are for the time being inoperative (emphasis added).²⁰

Moreover, international law recognises that legitimate pursuits of the right of self-determination may be undertaken by collectives of people pursuing the right to self-determination as against an occupying state. In the context of delineating the categories eligible for the classification of prisoners of war, Article 4(1) of the Third Geneva Convention delineates, "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." Concurrently, in the subsequent paragraph, Article 4(2) expounds upon "Members of other militias and members of other volunteer corps, including those of organized resistance movements."²¹ This distinction underscores that these individuals and entities do not pertain to the formalized armed forces but rather constitute "other militias" and "other volunteer corps," comprising individuals residing under occupation.

¹⁹ INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, ADOPTED AT ITS FIFTY-THIRD SESSION, IN YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (2001) VOL. II, PART TWO, UN DOC. A/CN.4/SER.A/2001/Add.1 (Part 2), Article 9; see also, Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict', (2004) 47 *German Yearbook of International Law*.

²⁰ INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, ADOPTED AT ITS FIFTY-THIRD SESSION, IN YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (2001) VOL. II, PART TWO, UN DOC. A/CN.4/SER.A/2001/Add.1 (Part 2), AT 109.

²¹ Article 4(2) Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.

2. Arguments for the necessity of recognising legitimate resistance

In cases of a grave illegality when the international community is not seized on the matter. To practice their right of self-determination, the people have no other option but to resort to force in pursuance of rights enshrined in the UN Charter. The recognition of the legitimacy of such resistance is necessary to enable subjugated peoples to defend themselves in the absence of political will. Otherwise, the international legal community is normalising the subjugation of people's othered by the international community.

Numerous UNGA resolutions, statements by state officials as well as the First Protocol of the Geneva Conventions recognize the legitimacy of the peoples struggle by all legitimate means at their disposal including armed struggle in exercise of self-determination. As noted by the court in the *Western Sahara* case, UNGA resolutions can provide an indication of state practice and *opinio juris*.²² Further, given its institutional structure, UNGA resolutions provided a space for the ascertainment of historically side-lined positions of states of the global south.²³ This legitimacy is further recognized by judicial opinions and the teachings of some of most highly qualified publicists.

2.a. The people's acts of resistance against a grave illegality are not contrary to the principles of UN Charter

Alien domination and subjugation in all its forms including apartheid and other forms of racism impede on international peace in contravention to the UN Charter. This position was generally affirmed in the UN Declaration on the Granting of Independence to Colonial Countries and People,²⁴ as well as the Declaration on the Principles of

²² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 3, at 254-255, para. 70.

²³ In the *Barcelona Traction Case*, Judge Ammoun advocated for categorising UNGA resolutions as a subsidiary source of International law. *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) [1970] ICJ Rep 1 (separate opinion of Judge Ammoun) at 302.

²⁴ 'Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace' The Declaration on the Granting of Independence to Colonial Countries and Peoples. UN Doc. A/RES/1514(XV) (14 December 1960)

Friendly Relations.²⁵ It was further acknowledged in subsequent resolutions. Notably, in Resolution 1654 (XVI) of 1961 the UNGA established that it was 'convinced that further delay in the application of the declaration [on the granting of independence] is a continuing source of international conflict and disharmony, seriously impedes international co-operation, and is creating an increasingly dangerous situation in many parts of the world which may threaten peace and security.' In Resolution 3103(XXVIII) of 1973, it reaffirmed 'that the continuation of colonialism in all its forms and manifestations as noted in the General Assembly resolution 2621 (XXV) of 12 October 1970, is a crime'.²⁶

The recognition of the grave illegality of alien domination and subjugation, implies that people have the right to resist it.²⁷ The Universal Declaration of Human Rights stresses in its preamble that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". The wording of the preamble indicates that 'resort to rebellion against tyranny and oppression' is a predictable position when human rights are not protected by the rule of law.²⁸

This reasoning deems such situations an exception, which demands a different set of rules. Herein, an exceptional outlook, which legitimises purposeful recourse to force,

²⁵ 'Convinced that the subjugation of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security' UNGA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc. A/RES/2625(XXV).

²⁶ UNGA Res. 3103(XXVIII) (1973) 'Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights' preamble

²⁷ Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press 2012). 2; "Self-defense against colonial domination' invoked by those suffering that domination is rhetoric, not international law, and the law of the Charter, surely, does not forbid a people to liberate itself from colonial yoke." Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 *American International Law Journal* (1971) 546, 545-546.

²⁸ The preamble is also making an implicit reference to the role of people's resistance in the evolution of the human rights framework. In the words of Judge Ammoun in his separate concurring opinion on the Namibia case "Indeed one is bound to recognize that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity": *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion (Separate Opinion of Judge Ammoun) [1971] ICJ Rep 16 (ICJ) at 70.

is mandated by the grave illegality. A similar logic is mirrored in the work of Cassese who argues that a forcible re-acquisition of territory is lawful if “all possible means for a peaceful settlement of the dispute have been used before resorting to armed violence”.²⁹ Furthermore, this logic echoes the Roman legal principle *vim vi repellere licet* (“it is permitted to repel force by force”).

Furthermore, underlying this position is a recognition that the denial of the people’s right of self-determination will, inevitably, generate grievance among the dominated people, eventually sustaining a conflict prone environment.³⁰ In the Declaration on the Granting of Independence to Peoples, the UNGA noted that it is

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples [peoples under foreign subjugation, domination and exploitation], which constitute a serious threat to world peace.³¹

Herein, the legitimacy of the people’s resistance by all legitimate means at their disposal is implicit in the gravity of the illegality. In such a context, the people’s resistance against an illegality has the ability to circumvent some of the adverse effective of the illegality in absence of political will.³²

Such resistance is concurrently in pursuance of rights enshrined in the UN Charter, particularly those enriched with the principle of equality.³³ For example, in the case of

²⁹ Antonio Cassese, ‘Legal Considerations on the International Status of Jerusalem’, (1986) 3 *Palestine Yearbook of International Law* 13, at 24.

³⁰ See, for e.g., Resolution 41/35 (1986), 10 November 1986, UN Doc. A/RES/41/35, PREAMBLE: Policies of apartheid of the Government of South Africa, perceived acts of resistance as reactionary to the policies of the regime. This argument is stressed in Richard Falk and Burns Weston ‘The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defence of the Intifada’ (1991) 32 (1) *Harvard International Law Journal* 129, at 133.

³¹ UNGA Resolution 1514 (1960), 14 December 1960, UN Doc. A/RES/1514(XV).

³² The Rwanda Patriotic Front, whose defeat of the Rwandan government and assorted militias effectively put an end to the Rwandan genocide. A similar argument could be made about the role that the Bosnian-Croat federation had in finally putting an end to ethnic cleansing: Frédéric Mégret, ‘Grandeur Et Declin De L’Idée De Resistance a L’Occupation: Reflexions a Propos de la Legitimite des ‘Insurges’ (2009) *Revue Belge de Droit International*.

³³ “The equality demanded by the Namibians and by other peoples of every colour, the right to which is the outcome of prolonged struggles to make it a reality, is something of vital interest to us here, on the one hand because it is the foundation of other human rights which are no more than its corollaries and, on the other, because it naturally rules out racial discrimination and apartheid, which are the gravest of the facts with which South Africa, as also other States, stands charged”: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (Separate Opinion of Judge Ammoun) [1971] ICJ Rep 16 (ICJ), at 76.

the South African occupation of Namibia, the Security Council Resolution 282 (1970) recognized:

the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their *human and political rights* as set forth in the Charter of the United Nations and [in] the Universal Declaration of Human Rights (emphasis added).³⁴

Likewise, in UNGA Resolution 2396 (XXIII) (1968), which was adopted unanimously but for the votes of South Africa and Portugal, the Assembly reaffirmed “its recognition of the legitimacy of the struggle of the peoples of South Africa for all human rights.”³⁵

Commenting on this resolution Judge Amoun, then the vice president of the ICJ, proclaimed in his concurring opinion on the *Namibia* case that it:

demonstrates that the international community as a whole deems it legitimate to defend human rights by force of arms; it thus considers them to be preemptory rights endowed with effective sanction, or in other words that they are part and parcel of positive international law.³⁶

2.b. Resistance is a legitimate act in exercise of self-determination

The recognition of the people’s right of self-determination against colonisation in the mid-20th Century was accompanied by the ascertainment of the legitimacy of the people’s struggle against foreign domination and subjugation to restore their rights.

The ICJ previously held that: “The right to self-determination under customary international law does not impose a specific mechanism for its implementation in all instances.”³⁷ It has been argued that the ‘struggle’ against foreign domination in the

³⁴ UNSC Resolution 282 (1970), 23 July 1970, UN Doc. S/RES/282 regarding an embargo on the shipment of arms to South Africa.

³⁵ UNGA Resolution 2396 (XXIII) (1968), 2 December 1968, UN Doc. A/RES/2396(XXIII).

³⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (Separate Opinion of Judge Amoun) [1971] ICJ Rep 16 (ICJ), at 76.

³⁷ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95 (ICJ), para.158.

form of resistance in pursuit of self-determination and human rights is legitimate, which leaves open the question of whether armed resistance can be considered legitimate. In giving further content to the notion of 'struggle', the UNGA has repeatedly acknowledged the legitimacy of the people's struggle '*by all legitimate means available at their disposal*'.³⁸ It is arguable that the 'means' referenced include various expressions of self-determination including both freedom of speech and political expression, and armed resistance.

Protected expressions of self-determination include those forms protected and recognized as fundamental political rights under the right of freedom of speech ensured by both Article 19 of the ICCPR and Article (5)(d)(viii) of ICERD, to which both Palestine and Israel are members.³⁹ Such forms of expression include peaceful protest,⁴⁰ research, advocacy and dissemination by human rights defenders and academics.⁴¹ Another form of protected expression includes the right to strike in Article 8(D) of the ICESCR, to which both Palestine and Israel are parties.⁴²

³⁸ This is the most generic formulation. There are various formulations which do not have a significant different in meaning 'all necessary means' 'all available means' 'all appropriate ways' sometimes an explicit reference to the UN Charter is made, at times the assembly just used the notion of 'legitimate': UNGA Resolution 2621(XXV) (1970), 12 October 1970, UN Doc. A/RES/2621(XXV), para.2; UNGA Resolution 2627(XXV) (1970), 24 October 1970, UN Doc. A/RES/2627(XXV), para.6; UNGA Resolution 2787(XXVI) (1971), 6 December 1971, UN Doc. A/RES/2787(XXVI), para.1; UNGA Resolution 2649(XXV) (1970), 30 November 1970, UN Doc. A/RES/2649, para.1; UNGA Resolution 3070(XXVIII) (1973), 30 November 1973, UN Doc. A/RES/3070, para.2; UNGA Resolution 3236(XXIX) (1974), 22 Nov 1974, UN Doc. A/RES/3236(XXIX); para.5; UNGA Resolution 32/14 (1977), 7 November 1977, UN Doc. A/RES/32/14, para. 2; UNGA Resolution 35/35 (1980), 14 November 1980, UN Doc. A/RES/35/35. para.2; UNGA Resolution 38/17 (1983), 22 November 1983, UN Doc. A/RES/38/17, para.2.

³⁹ The ICERD provides that States Parties have the duty to undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, notably in the enjoyment of the right to freedom of opinion and expression.

⁴⁰ ICCPR, Article 19. A notable example in the case of Palestine is The Great March of Return in Gaza, where a young Palestinian Poet and Journalist suggested the idea of "a non-violent march at the separation fence, to draw attention to UNGA resolution 194 and to the dire humanitarian situation in Gaza: HRC, 'Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory' (2019), UN Doc. A/HRC/40/74, para. 22.

⁴¹ One notable example is the prosecution of human rights defenders under the banner of terrorism. In 2021, Israel sought to shut down the offices of six well reputed human rights non-governmental institutions. An action strongly and unequivocally condemned by UN Human Rights experts. UNHRC, 'UN experts condemn Israel's designation of Palestinian human rights defenders as terrorist organisations' (press release, 25 October 2021), <https://www.ohchr.org/en/press-releases/2021/10/un-experts-condemn-israels-designation-palestinian-human-rights-defenders> accessed 7 July 2023.

⁴² ICESCR, Article 8, paragraph D. For example, Palestinian organizations and parties called for general strike on 18 May 2021 across the West Bank, as well as in Arab communities in Israel, to protest the Israeli attacks on Gaza which led to high fatalities, as well as attacks against Palestinians in the West Bank, including the Sheikh Jarrah

Another form of legitimate resistance against an illegal occupying power is armed resistance in pursuit of self-determination. One well-known example of such armed resistance, which was perceived as a legitimate form of resistance, was the Palestinian popular uprising, 'the intifada', of 1988. The recognition of the legitimacy of this uprising by the UNGA is indirectly expressed through its condemnation of retaliatory measures by Israel, and its call for solidarity with the Palestinian people.⁴³ Similarly, the Economic and Social Council condemned the oppressive Israeli measures against the intifada and stressed 'the consequent suffering experience by Palestinian women and their families in the Occupied Palestinian territories'.⁴⁴

In the *Western Sahara* case, the ICJ interpreted acts of resistance by the tribes of Western Sahara as an expression of self-determination.⁴⁵ The absence of condemnation connotes the ICJ's position that such armed acts of resistance against foreign domination in expression of self-determination are legitimate.

Similar recognition has been repeatedly reaffirmed by the UN General Assembly.⁴⁶ In Resolution 2649 (XXV) (1970), the UNGA affirmed "the legitimacy of the struggle of

neighbourhood of East Jerusalem, and in "mixed communities" in Israel. United Nations Office for the Coordination of Humanitarian Affairs, 'Escalation in the Gaza Strip, the West Bank and Israel | Flash Update #8 as of 12:00, 18 May 2021', <https://www.ochaopt.org/content/escalation-gaza-strip-west-bank-and-israel-flash-update-8-1200-18-may-2021> accessed 16 May 2023.

⁴³ UNGA Resolution 43/21 (1988), 3 November 1988, para. 1: titled 'The uprising (intifadah) of the Palestinian people'. See also, UNGA Resolution 44/235 (1989), 22 December 1989: regarding: "Assistance to the Palestinian People", 'taking into account the intifadah of the Palestinian people in the occupied Palestinian territory against the Israeli occupation, including Israeli economic and social policies and practices." Further review: Richard Falk, 'International Law and the Al-Aqsa Intifada' [2000] *Middle East Report* 16.

⁴⁴ ECOSOC Res. 1: E/RES/1990/11 (24 May 1990).

⁴⁵ *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 (ICJ), para. 104: "Furthermore, the information before the Court appears to confirm that the expeditions of Sultan Hassan to the south in 1882 and 1886 both had objects specifically directed to the Souss and the Noun and, in fact, did not go beyond the Noun; so that they did not reach even as far as the Dra'a, still less Western Sahara. Nor does the material furnished lead the Court to conclude that *the alleged acts of resistance* in Western Sahara to foreign penetration could be considered as acts of the Moroccan State. Similarly, the despatch of arms by the Sultan to Ma ul-'Aineen and others to encourage their resistance"

⁴⁶ Commenting on some of these UNGA Resolutions in his separate concurring opinion on the *Namibia* case, Judge Ammoun noted: "Since South Africa has opposed the achievement of the objects of the Mandate and blocked Namibia's path to independence and the enjoyment of its full sovereignty, Namibia has decided to fight. The legitimacy of the Namibian national struggle has been recognized in four resolutions of the UNGA and in Security Council resolution 269 (1969). This struggle, by analogy, continues the line of those waged by other members of the international community, during the First World War, such as the Polish, Czech and Slovak peoples; or of the French national movement ' at the time when France was under the domination of Nazi Germany": *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (Separate Opinion of Judge Ammoun) [1971] ICJ Rep 16 (ICJ), at 70.

peoples under colonial and foreign domination recognized as being entitled to the right of self-determination to restore to themselves that right *by any means at their disposal*' (emphasis added).⁴⁷ Likewise, Resolution 3070 (XXVII)

Reaffirms the legitimacy of the people's struggle for liberation from colonial and foreign domination and foreign subjugation *by all available means, including armed struggle* (emphasis added).⁴⁸

In UNGA Resolution 32/14, with respect to Zimbabwe, Namibia, Djibouti, the Comoros and Palestine, it was stressed that self-determination is to be implemented "by all available means, including armed struggle."⁴⁹ Finally, in Resolution 34/92 on the Question of the South African occupation of Namibia, the General Assembly supported the exercise of self-determination by the Namibian people "by all means at their disposal, including armed struggle."⁵⁰

In Resolution 2105 (1964), UNGA member states recognized "the legitimacy of the struggle of peoples under colonial rule to exercise their right of self-determination and independence".⁵¹ During the plenary session on the resolution, the notion 'struggle' was associated with 'liberation struggle' and 'struggles for independence'.⁵² As such the notion of 'struggle' can be inferred to acts in the pursuit of independence or liberation, connotating acts in resistance against the dominating power. Similarly, UNGA Resolution 2787 (XXVI) (1971):

⁴⁷ UNGA Resolution 2649(XXV) (1970), 30 November 1970, UN Doc. A/RES/2649, para 1: "The Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights".

⁴⁸ UNGA Resolution 3070(XXVIII) (1973), 30 November 1973, UN Doc. A/RES/3070, para. 2.

⁴⁹ UNGA Resolution 32/14 (1977), 7 November 1977, UN Doc. A/RES/32/14, para. 2.

⁵⁰ UNGA Resolution 34/92 (1979), 12 December 1979, UN Doc. A/RES/34/92 A-E, para.12: "Supports the armed struggle of the Namibian people, led by the South West Africa People's Organisation, to achieve self-determination"; UNGA Resolution 38/36 (1983), 1 December 1983, UN Doc. A/RES/38/36A-E, para. 4: "reaffirms the legitimacy of their [Namibia's] struggle by all the means at their disposal, including armed struggle, against the illegal occupation of their territory by South Africa".

⁵¹ UNGA Resolution 2105(XX) (1965), 20 December 1965, UN Doc. A/RES/2105(XX), para. 10: "Recognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence – and invites all states to provide material and moral assistance to the national liberation movements in colonial territories."

⁵² General Assembly, 20th session : 1405th plenary meeting, (20 December 1965) paras. 139, 238, 256.

Confirms the legality of the people's struggle for self-determination and liberation from colonial and foreign domination and foreign subjugation, notably in southern Africa and in particular that of the peoples of Zimbabwe, [...] as well as of the Palestinian people by all available means consistent with the Charter of the United Nations.⁵³

A similar interpretation of the notion 'struggle' can be drawn here through its association with the end goal of liberation throughout the discussion.⁵⁴

2.c. Resistance is necessitated by the asymmetrical position of the subjugated people's in the absence of political will

In Judge Robinson's separate concurring opinion on the *Chagos* case, he reaffirmed that international law has evolved to recognise the asymmetry in the position of subjugated people. In the course of his comment on paragraph 4 of the Declaration on the Granting of Independence, which calls for the cessation of 'All armed action or repressive measures of all kinds directed against dependent peoples', he noted that:

*This paragraph shows a sensitivity on the part of the General Assembly to the imbalance in the power relationship between a colonial administration and a dependent people (emphasis added).*⁵⁵

The same asymmetry of power is observable in the power relationship between the Israeli occupying power and the Palestinian people. The UNGA asserted such asymmetry in Resolution 35/35 which strongly reaffirmed the Palestinian right to self-determination and considered

⁵³ UNGA Resolution 2787 (XXVI) (1971), 6 December 1971, UN Doc. A/RES/2787(XXVI), para. 1.

⁵⁴ General Assembly, 26th session : 2001st plenary meeting, (6 December 1971) para. 62.

⁵⁵ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Separate Opinion of Judge Robinson, [2019] ICJ Rep 95 (ICJ), p.210, para.29.

that the activities of Israel, in particular the denial to the Palestinian people of their right to self-determination and independence, constitute a serious and increasing threat to international peace and security.⁵⁶

The second paragraph then continues to endorse

the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation *by all available means, including armed struggle* (emphasis added).⁵⁷

Similar wording is then recalled in UNGA Resolution 38/17.⁵⁸

Such recognition is necessary if we are to uphold a realistic outlook to the political nature of international legal theory and practice. As stressed by Judge Alvarez in his dissenting opinion on the Anglo-Iranian Oil case: “states follow above all, their own interests and feelings with one another”.⁵⁹ In this context, if leveraged states do not have an interest in supporting the subjugated people’s then they are entrapped in a paradoxical situation, as those with power and privilege often lack any interest in changing the structure, and those the Palestinian have minimal capacity without recourse to force.⁶⁰ In this context, the protection of their right to resistance enables acts of agency, widening their capacity to pursue their will.

3. Resistance is not inconsistent with the prohibition on the use of force

3.a. The prohibition against the use of force does not apply to ‘people’

The Friendly Relations Declaration stipulates that:

⁵⁶ UNGA Res.35/35 (1980), 14 November 1980.

⁵⁷ UNGA Resolution 35/35 (1980), 14 November 1980, UN Doc. A/RES/35/35.

⁵⁸ UNGA Resolution 38/17 (1983), 22 November 1983, UN Doc. A/RES/38/17, paras. 2 and 3.

⁵⁹ Anglo-Iranian Oil Co. case (United Kingdom v. Iran) (Preliminary objections) [1952] ICJ Rep 2 (Dissenting Opinion of Judge Alvarez) 126.

⁶⁰ Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011). 148. Also generally review Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (2015).

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, *such forcible action in pursuit of the exercise of their right to self-determination*, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.⁶¹

Commenting on the Declaration on Friendly Relations, George Abi-Saab notes that:

it clearly states that the 'forcible action' or force which is prohibited by Article 2, paragraph 4, of the Charter is not that used by peoples struggling for self-determination but that which is resorted to by the colonial or foreign governments to deny them self-determination.

(b) Conversely, armed resistance to forcible denial of self-determination – by imposing or maintain by force colonial or foreign domination – is legitimate under the Charter, according to the declaration.⁶²

This statement of Abi Saab echoes the reasoning of Oppenheim, who noted that

since International Law is a law between States only and exclusively, no rules of International Law can exist to prohibit private individuals from taking up arms, and committing hostilities against the enemy.⁶³

Abi-Saab then continues to demonstrate that

the forcible denial of self-determination, constitutes a violation of the Charter which justifies circumscribing the neutrality of the other member states, without engaging their international responsibility vis-à-vis that government.⁶⁴

⁶¹ UNGA Resolution 2625 (1970), 24 October 1970, UN Doc. A/RES/2625(XXV).

⁶² George Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' Collected Courses of the Hague Academy of International Law (Vol.165) (1979), at 371, 372.

⁶³ Lassa Francis Lawrence Oppenheim and Hersch Lauterpacht, *International Law, a Treatise* (1940), at 254.

⁶⁴ Ibid.

Judge Ammoun, in his separate opinion on the *Namibia* case, stipulated, in keeping with the reasoning of *Abi Saab*, that

Article 51 only authorizes self-defence [légitime défense] or legitimate struggle in cases of response to armed attack [agression armée].⁶⁵

Here again, legitimate struggle connotes resistance.

3.b. Resistance is a form of collective self-defence

Resistance against an illegal occupation is also an expression of the collective right of self-defence under Article 51 of the UN Charter, which states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The choice of words indicates that such self-defence need not necessarily occur through the mechanism of a state but can be undertaken by individuals and collectives affected by aggression within a member state.

Further, the people's right of self-defence against foreign domination is found in the work of Pufendorf, who claimed that the native peoples of America had the right to self-defence against European conquerors.⁶⁶ The *travaux préparatoires* of the Friendly Relations Declaration demonstrate that, according to some states, the legal basis for the forcible exercise of self-determination against foreign domination was "a right of self-defence."⁶⁷ Between 1967-1970, the issue was intensely discussed within the

⁶⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (Separate Opinion of Judge Ammoun) [1971] ICJ Rep 16 (ICJ), at 90.

⁶⁶ See Morin 'L'usurpation de la souveraineté autochtone. Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord' (Boreal, 1996) 52–55.

⁶⁷ Many States proposed a right of self-defence against colonial domination, such as Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, The United Arab Republic and Yugoslavia. 1957 Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, 64TH Meeting, UN Doc. A/AC.125 /SR.65 (1967), 4 December 1967.

Sixth Committee. During the Committee's 65th meeting, for instance, Yugoslavia was of the view that

[t]he right of self defence of peoples under colonial domination constituted an exception to the prohibition of the use of force, which for the Yugoslav delegation was the universal and absolute rule.⁶⁸

In the words of the UN Special Rapporteur Aureliu Cristescu on the right to self-determination, the extremity of the force of coercion, 'leaves them [people under colonial domination] with no alternative" than to defend their national identity.⁶⁹

Judge Ammoun endorsed such position in his separate opinion on the *Namibia* case, where he states:

In law, the legitimacy of the peoples' struggle cannot be in any doubt, for it follows from the right of self-defence, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter. It is also an accepted principle that self-defence may be collective; thus we see the other peoples of Africa, members of the Organization of African Unity, associated with the Namibians in their fight for freedom.⁷⁰

⁶⁸ The relationship between self-defense and self-determination was summarized by Yugoslavia's delegate in 1967 "The right of self-defence of peoples under colonial domination constituted an exception to the prohibition of the use of force, which for the Yugoslav delegation was the universal and absolute rule. The exception applied only in the event of repressive measures being taken by a colonial power against a people aspiring to SD.": UN Doc. A/AC.125 /SR.65 (Dec. 4, 1967), at 14.

⁶⁹ Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The Right to Self-Determination-Historical and Current Development on the Basis of United Nations Instruments' (1981), UN Doc. E/CN.4/Sub.2/404/Rev. 1, para. 207-208.

⁷⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion (Separate Opinion of Judge Ammoun) [1971] ICJ Rep 16 (ICJ), at 70. Affirming this position John Dugard cites the arguments put forth by the South West Africa People's Organization (SWAPO) presented to the Dakar conference in January 1976 in defense of their military action against South Africa. In the submitted a paper titled 'Namibia and the International Rule of Law', SWAPO argue that the people have the right to defend themselves, wherein "A people's liberation war can be clearly identified as defensive action within the meaning of the Charter". Cited in John Dugard, 'SWAPO: The Jus ad Bellum and the Jus in Bello' (1976), 93 *South African law journal* 144, at 145.

3.c. This exception to the prohibition against the use of force has been affirmed in state practice

Furthermore, the Friendly Relations Declaration which confers this right has normative status. In their joint concurring declaration in the *Chagos* case, Judges Cançado Trindade and Robison stressed the normative value of both the Friendly Relations Declaration and the Declaration on the Granting of Independence which confer this legitimacy, emphasizing that they ‘demonstrate the continuing development of the *opinion juris communis* in customary international law’.⁷¹ The importance of this development must not be underestimated, as it is representative of the position of states and peoples whose legal positions were disregarded for the majority of international legal history.⁷²

Looking at the conditions of the adoption of the Friendly Relations Declaration, it is notable that it was adopted without a vote. The Declaration’s recognition of the legitimacy of resistance was further affirmed in the UNGA’s declaration on the Occasion of the 25th anniversary of the United Nations where member states recognized “the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal” and emphasized “that these countries and peoples are entitled, in their just struggle, to seek and to receive all necessary moral and material help in accordance with the purposes and principles of the Charter”.⁷³

4. Resistance is not Prohibited by International Humanitarian Law

International Humanitarian Law directly acknowledges the people’s right of resistance against colonial domination and alien occupation and against racist regimes. This right

⁷¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, (Joint Declaration of Judges Cançado Trindade and Robinson) [2019] ICJ Rep 95 (ICJ), at 260.

⁷² *Ibid*, at 258, para. 2. see also, Jochen von Bernstorff and Philipp Dann, *The Battle for International Law: South-North Perspectives on the Decolonization Era* (University Press 2019). Luis Eslava, Michael Fakhri and Vasuki Nesiiah, *Bandung, Global History, and International Law: Critical Past and Pending Futures* (Cambridge University Press, 2017).

⁷³ UNGA Resolution 2627(XXV) (1970), 24 October 1970, UN Doc. A/RES/2627 (XXV).

follows from the principles of occupation law and resonates in different sources of international law.

Article 1 of the First Protocol Additional to the Geneva Conventions (1977) elaborates on the Protocol's general principles and scope of application. Its fourth paragraph stipulates:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁷⁴

This Article, whose incorporation was hard-won by states of the global south,⁷⁵ distinctly acknowledges the legitimacy of the people's resistance in exercise of their right of self-determination. The UNGA has previously ascertained the applicability of the First Additional Protocol to the occupied Palestinian territories in its request for an advisory opinion on the legal consequences arising from the construction of the wall being built by Israel.⁷⁶ Palestine signed the First Additional Protocol in 2014.

Baxter recognized the inevitability of civilian resistance against foreign domination in cases where such domination lacks a valid legal premises.⁷⁷ He ascertained the particularity of the situation with reference to two elements: firstly, civilians are not under a duty of obedience to the occupying forces.⁷⁸ Article 67 of the Hague regulations enjoins occupying courts to "take into consideration the fact that the accused is not a

⁷⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3.

⁷⁵ Georges Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols* (M Nijhoff 1981).

⁷⁶ 'Reaffirming the applicability of the Fourth Geneva Convention' as well as Additional Protocol 1 to the Geneva Conventions to the Occupied Palestinian Territory, including East Jerusalem' UNGA Resolution ES-10/14 (2003) 12 December 2003, preamble.

⁷⁷ Richard Baxter 'The Duty of Obedience to the Billigerent Occupant' (1950) 23 *British Yearbook of International Law* 252, at 258.

⁷⁸ *Ibid.*

national of the Occupying Power”. This provision must be read in conjunction with Article 68, which states that “The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly drawn to the fact that the accused, not being a national of the Occupying Power, is not bound to it by any duty of fidelity”. These articles implicitly justify the people’s resistance against an occupation, by recognising that there is not assumption or requirement of allegiance from the occupied population. It is notable that Israel consistently penalises Palestinians for not showing allegiance to Israel.⁷⁹

Secondly, Baxter notes that the emphasis of the law of occupation must be on “the protection of all the inhabitants of the occupied territory, including those whose conduct is prejudicial to the occupant, against unwarranted severity in the occupant’s rule”.⁸⁰ His recognition of such particularity is premised on contextualized reading which reflects upon the asymmetrical relation between the dominating power and the peoples.⁸¹ As such, it would be unreasonable and unjust to sanction people for resisting an occupation.

Similarly, in the *Hans Albin Rauter* case, the Special Court of the Hague noted that “The occupying Power only exercises a factual and not a legitimate authority, so that the population of the occupied territory are in general neither ethically nor juridically obliged to obey it as such; it follows from this that *resistance to the enemy in the occupied territory can be a permissible weapon*” (emphasis added).⁸² Likewise, in the case of the South African occupation of Namibia, the General Assembly reaffirmed “the

⁷⁹ Military orders excessively penalize Palestinians for not demonstrating loyalty to the state of Israel, which is in contravention of the Hague Regulations, and for practicing their right of resistance. Annual reports by The Prisoners Support and Human Rights Association (Adameer) available at: <https://www.addameer.org/publications/annual-violations-reports> accessed 22 June 2023.

⁸⁰ Ibid, 259.

⁸¹ Ibid, 258.

⁸² Special Court at the Hague, Special Court of Cassation ‘Hans Albin Rauter case’ (12 January 1949) 127. see also, Case No.36, Trial of Gerhard Friedrich Ernst Flesch, ss obe sturbannführer, oberregierungsrat frostating lagmannsrett (1946) and supreme court of Norway (february, 1948) p.115 Where the court noted that guerilla fighting is not against international law.

legitimacy of their struggle by all means against *the illegal occupation* of their country by South Africa” (emphasis added).⁸³

In the meantime, the British delegate to the Hague Conference insisted on “the right belonging to the population of countries subjected to invasion to do their duty - to show the interventionists the most energetic patriotic opposition with all permissible means.”⁸⁴ While a Belgian diplomat later expressed that:

if citizens are to be punished for the sole reason that, in risking their life, they wished to defend their country, on the post where they are to be shot they should find the article of the treaty, signed by their government, condemning them to death in advance.⁸⁵

At the conference leading up to the adoption of the Geneva Conventions, the Danish delegate demanded that the official report of Special Committee II (which dealt with the question of prisoner-of-war status) should mention the fact that Article 4 “should not be interpreted in such a way as to deprive *persons* not covered by the provisions of... their right of self-defense against illegal acts”.⁸⁶ An amendment was even tabled to confer prisoner of war status on civilians acting in self-defence, or participating in the defence of their homeland against illegal aggression or occupation.⁸⁷

State practice affirms the legitimacy of such resistance in the face of foreign domination which lacks a valid legal basis. This is evident in state response to the Soviet occupation of Baltic states (1944-1956), which was largely perceived as illegal.⁸⁸

The European parliament recognized ‘the eight-year long struggle and armed

⁸³ UNGA Resolution 3111 (1973), 12 December 1973, UN Doc. A/RES/3111, para. 1.

⁸⁴ James Brown Scott and Carnegie Endowment for International Peace, Division of International Law, *The Proceedings of the Hague Peace Conferences: Translation of the Original Texts* (Oxford University Press, 1920), at 550; Quoted in Frédéric Mégret, ‘Grandeur Et Declin De L’Idee De Resistance a L’Occupation: Reflexions a Propos de la Legitimite des ‘Insurges’ (2009) *Revue Belge de Droit International*.

⁸⁵ Quoted in *ibid.* Mégret.

⁸⁶ Jean Pictet, ‘Les conventions de Genève du 12 août 1949. Commentary’ (Geneva, International Committee of the Red Cross, 1952). Emphasis added.

⁸⁷ *Ibid.*

⁸⁸ On 22 August 1996 the Latvian Parliament adopted the Declaration on the Occupation of Latvia. The declaration described the annexation of Latvian territory by the USSR in 1940 as a “military occupation” and an “illegal incorporation”. ECHR, ‘case of Kononov v. Latvia’ (Application no. 36376/04)

resistance of Estonians, Latvians and Lithuanians fighting for their freedom’⁸⁹ Likewise, the state of Poland commemorates the Warsaw Ghetto Uprising every year on 19 April, where the Jewish community collectively resisted the German occupation forces in Poland.⁹⁰

5. The legal consequences of recognizing the legitimacy of the Palestinian people’s resistance against an illegal occupying power

Israel and third states are under the obligation not to persecute Palestinians for legitimate resistance, and to protect the Palestinian right of resistance. To reiterate, in the Friendly Relations Declaration, states ascertained that

every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principles of equal rights and self-determination of their right to self-determination and freedom and independence.⁹¹

Similarly, UNGA Resolution 30/30

Calls upon all States, in conformity with the Charter of the United Nations and with relevant resolutions of the United Nations, to recognize the right of all peoples to self-determination and independence and to offer moral, material and any other assistance to all peoples struggling for the full exercise of their inalienable right to self-determination and independence.⁹²

With special reference to Palestine, the UNGA in 1960 stated that it “*Condemns* all Governments which do not recognize the right to self-determination and independence of peoples, notably the peoples of Africa still under colonial

⁸⁹ 1982-1983 European Parliament Doc. (No. 7.908) 432-33 (1983).

⁹⁰ CERD Committee, Concluding Observations (3 September 2019), UN Doc. CERD/C/SR.2742, para. 2; Commission on Human Rights, 808th meeting, 14 May 1964, UN Doc. E/CN.4/SR.808, at 5.

⁹¹ UNGA Resolution 2625(XXV) (1970), 24 October 1970, UN Doc. A/RES/2625(XXV).

⁹² UNGA Resolution 3070(XXVIII) (1973), 30 November 1973, UN Doc. A/RES/3070.

domination and the Palestinian people”.⁹³ This position was further affirmed in 1977 in Resolution 32/14 which it the UNGA:

Strongly condemns all Governments which do not recognize the right to self-determination and independence of all peoples still under colonial and foreign domination and foreign subjugation, notably the peoples of Africa and *the Palestinian people* (emphasis added).⁹⁴

5.a. Third state duty to protect lawful expression of self-determination by Palestinians

For third states, this further stresses the international duty to protect the right of lawful freedom of expression by Palestinian peoples, and allies calling for the Palestinian right of self-determination.⁹⁵ Furthermore, it implies an active duty to condone racist policies weaponized by the occupying state to delegitimize the people’s claim for self-determination.

One such misappropriation has been through the adoption of the International Holocaust Remembrance Alliance’s (IHRA) definition of Anti-Semitism, which extends the notion of Anti-Semitism to include any critique of the State of Israel.⁹⁶ As stressed by the UN Rapporteur against contemporary forms of racism, this definition has been misappropriated as means to persecute legitimate expression of Palestinian self-

⁹³ UNGA Resolution 45/130 (1990), 14 December 1990, UN Doc. A/RES/45/130, para. 6: ‘Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights’.

⁹⁴ UNGA Resolution 32/14 (1977), 7 November 1977, UN Doc. A/RES/32/14, para. 8: “Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights”.

⁹⁵ In this respect, many states have repressed lawful demonstrations calling for the application of international law and the respect of the Palestinian people’s right of self-determination. Examples include France, Germany and the United States.

⁹⁶ “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” “To guide IHRA in its work, the following examples may serve as illustrations: Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.” The definition continues to give eleven examples of antisemitism, seven of which relate to the state of Israel.

determination.⁹⁷ Underlying the politically motivated conflation between legitimate resistance against an illegal occupation and acts of antisemitism is a dehumanisation of the Palestinian people.

5.b. The duty of Israel not to suppress or persecute lawful expressions of self-determination

For Israel, the recognition of the legitimacy Palestinian people's resistance by all means available at their disposal imposes a duty not to suppress lawful expressions of self-determination, and not to persecute Palestinian for such expression by means of extrajudicial killing, or imprisonment, or forceful displacement, or collective punishments among other means. Any acts of resistance, including strikes, peaceful protests and armed resistance, must be contextually assessed within the larger collective claim to self-determination in a court which upholds the rule of law.

The occupying power is forbidden from the persecution of nationals of the occupied state for mere resistance or lack of loyalty.⁹⁸ UNGA Resolution 3314 (XXIX) on the Definition of Aggression, member states expressed "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity".⁹⁹ Additionally, in the Declaration on the Granting of Independence it was noted that

All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.¹⁰⁰

⁹⁷ UNGA Resolution 512 (2022), 7 October 2022, UN Doc. A/77/512 (2022), paras. 71-79.

⁹⁸ Hague Regulations Respecting the Laws and Customs of War on Land (1907), Article 45.

⁹⁹ UNGA Resolution 3314 (XXIX) (1974), 14 December 1974, UN Doc. A/RES/3314(XXIX), para. 6.

¹⁰⁰ UNGA Resolution 1514 (1960), 14 December 1960, UN Doc. A/RES/1514(XV).

Likewise the General Assembly's 1970 Declaration on the Strengthening of International Security, called

upon all States to desist from any forcible or other action which deprives peoples, in particular those still under colonial or any other form of external domination, of their inalienable right to self-determination, freedom and independence and to refrain from military and repressive measures aimed at preventing the attainment of independence by all dependent peoples in accordance with the Charter and in furtherance of the objectives of General Assembly resolution 1514 (XV) of 14 December 1960, and under assistance to the United Nations and, in accordance with the Charter, to the oppressed peoples in their legitimate struggle in order to bring about the speedy elimination of colonialism or any other form of external domination¹⁰¹

This obligation has been stressed in the convention against Apartheid which states that one crime of Apartheid is the "Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."¹⁰²

5.c. Israel cannot invoke self-defence against people's legitimate resistance in expression of self-determination as grounds necessitating or justifying its wrongdoing in violation of international law

It has been established that Israel has systemically breached its duty to respect expressions of self-determination by the Palestinian people, resorting to military repression where the violations prompting the acts of resistance are further intensified. Prominent examples include the violent repression of the first intifada

¹⁰¹ UNGA resolution 2734 (XXV) (1970), 16 December 1970, UN Doc. A/RES/2734(XXV).

¹⁰² Apartheid Convention, Article II(f).

(1987-1993),¹⁰³ the second intifada (2000-2005),¹⁰⁴ the Great March of Return in Gaza (2018-2019),¹⁰⁵ and, most recently, the May uprisings of 2021.¹⁰⁶ Other established forms of repression have included illegal retaliatory measures of forced displacement and imprisonment.¹⁰⁷

The right of self-defence cannot be invoked in the context of an illegal occupation against the people's legitimate resistance in expression of self-determination. This position was affirmed by the ICJ in the *Wall* Advisory Opinion where it declared that

The Court also recalls that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory.¹⁰⁸

As such, Article 51 cannot be invoked when the threat emanates from within the occupied territory.

6. Conclusion

The principles of international law enshrine the equality and human dignity of all peoples. When faced with a grave illegality where the international community is not

¹⁰³ Human Rights Watch, 'The Israeli Army and the Intifada Policies that Contribute to the Killings' (1990), <https://www.hrw.org/legacy/campaigns/israel/intifada-intro.htm> accessed 7 May 2023.

¹⁰⁴ Adalah, 'Israeli Abuses in the OPT during the Second Intifada' (2002), <https://www.adalah.org/en/content/view/7854> accessed 7 May 2023.

¹⁰⁵ The independent international commission of inquiry on the protests in the Occupied Palestinian Territory found that Israel had responded disproportionately in a manner which breached the right of life and right of freedom expression for Palestinians: HRC, 'Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory' (2019), UN Doc. A/HRC/40/74, paras. 93-101.

¹⁰⁶ Amnesty International, 'Israeli police targeted Palestinians with Discriminatory Arrests, Torture and Unlawful Force' (2021), <https://www.amnesty.org/en/latest/press-release/2021/06/israeli-police-targeted-palestinians-with-discriminatory-arrests-torture-and-unlawful-force/> accessed 7 May 2023.

¹⁰⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949) 75 UNTS 287, Article 33 which prohibits the use of collective punishment or any other measure of intimidation. Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, Article 20 and Article 51(6); ICRC, Rule 146 of Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule146 accessed 5 July 2023; OHCHR, 'Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism' (2014), <http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf> accessed 5 July 2023.

¹⁰⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2005] ICJ Rep 136 (ICJ), at 139.

seized, it is only reasonable that the people will resist. States and scholars of the global south have sought to ascertain this right in the past century, arguing that self-determination and resistance are two sides of the same coin.

Having lived under alien domination and subjugation for over 75 years, resistance has become an integral part of the Palestinian identity. Following the Oslo peace accords, now commonly considered invalid,¹⁰⁹ the Palestinian question was slowly divorced from self-determination and framed as a humanitarian issue. Within this framing, acts of resistance were detached from their context and misrepresented, eventually denying Palestinians their right to seek equality and human dignity considering apparent international reluctance. Such reluctance reflects third state interest and facilitates the prolongation of illegality, eventually denying Palestinians their right to equality and human dignity.

¹⁰⁹ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese UN Doc. A/77/356 (21 September 2022)