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# War and Self-Defense: Some Reflections on the War on Gaza

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**Abstract:** This paper reflects on the current war on Gaza in 2024 that followed the Hamas attack on October 7th 2023, reading the events in a wider historical context. The paper has three main parts. In the first part, the paper argues against the fragmentation of the question of Palestine historically and geographically, arguing instead for the importance of the overall context of the conflict. The second part considers the issue of Palestinian resistance. How can the Palestinians resist occupation? This part is mainly descriptive and indicates the impasse that the Palestinians found themselves in it after the Oslo accords in 1993. The third and last part moves to normative questions regarding the question of self-defense both on the part of the Palestinians and on the part of Israel and tries to outline the ways these arguments can develop.

**Keywords:** Gaza; just war theory; self-defense; Palestine; Israel; self-determination

## 1 Introduction

This is an attempt to reflect on the tortured reality of a destructive war of annihilation by Israel following a brutal attack by Hamas. The paper tries to reconstruct a Palestinian narrative that can make sense even for those who don't agree with it. I am writing as a Palestinian and as a citizen of Israel who witnessed at second hand the events of 7th October that took the life of about 1500 soldiers and citizens, and I have been following closely the ensuing war that continues to this day and that at the time of writing has taken more than 34,000 Palestinian lives, injured more than 50,000 and destroyed hundreds of thousands of houses. The paper attempts to read both events within one frame. But while the paper tries to bring to the fore a Palestinian point of view, it also tries to offer something beyond this particular point of view and to reach out for a conversation that allows new discourse to emerge, a discourse whose grammar is, however, still missing.

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The paper has three main parts. In the first part, the paper argues against the fragmentation of the question of Palestine historically and geographically, arguing instead for the importance of the overall context of the conflict. Context is necessary for understanding events, but it can never explain them in full. The second part considers the issue of Palestinian resistance. How can the Palestinians resist occupation? This part is mainly descriptive. The third and last part moves to normative questions regarding the question of self-defense both on the part of the Palestinians and on the part of Israel and tries to outline the ways these arguments can develop. But the paper wants to end by opening the way to think beyond justice. Justice is very important and crucial, but it is not the only concept to work with.

## 2 Where and When Should the Story About the War on Gaza Begin? Against Fragmentation

When I ask the question of ‘When?’ I am concerned with the point in time that we start to tell the story. For there is always a story to tell, and it is important, and indeed unavoidable, to choose when to start; and without telling the story there is always something missing in abstract analysis.<sup>1</sup> One way to tell the story is to commence the narrative on the 7th October as if there was nothing before that date. But one can also choose to go further back in time: Shall we begin with the disengagement plan in 2005? Or with the Oslo accords? Or with the occupation of 1967? Or with the Nakba in 1948? Or with the Balfour Declaration and the beginning of the British mandate (1917 and 1922 respectively). I want to argue that there is no way to understand the historical process without going back one hundred years ago, with the British Mandate over Palestine. But why to go back that far? Because this was the moment that Jewish presence in Palestine was both articulated in national terms and backed up by colonial powers – i.e., the moment in which Jews became nationalist-settlers, and because this same process, in different manifestations and with different dynamics, is still ongoing.

There have been so many crucial crossroads along the way, turning points, mistakes made, and crimes committed on both sides, but there remains an overall trajectory, one in which Zionism – backed up by Western powers (British first, then French for a short period and finally the Americans) – is taking over Palestine from Palestinians and giving it away as a homeland for Jews, thus fulfilling

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<sup>1</sup> The literature on storytelling as a vital tool in the discourse on justice is vast. For a good treatment of the subject, see Disch 1994.

the old dictum of a ‘people without land to land without people.’<sup>2</sup> When things are viewed through historical lenses the story is one of turning the Jews – the ultimate victim of Europe and the eternal refugee – into people with a homeland and turning the Palestinians into a homeless people in the worst case, under occupation in a second formulation, and second-class citizens in a third one. Missing this overall historical framework condemns the Palestinians to being mute, for there is something that cannot be told and cannot be understood unless one views things through this historical lens; it is only through this lens that one can see what has been lost.

The other fragmentation is a spatial one. Progressively, the Palestinians are being fragmented in terms of their geographical location. Those inside Israel constitute one group of second-class citizens, living in a state that blatantly defines itself as being not theirs,<sup>3</sup> without any constitutional guarantee of equality, with their land confiscated and their villages and towns completely underdeveloped, and their socio-economic situation worse than the Jewish majority. The second group is comprised by the Palestinians in the West Bank, but these themselves are divided across three different groups: those that are within areas A, B or C following the Oslo accords.<sup>4</sup> Those in Area A are supposedly under the control of the PA for all civil and security purposes, while Area B is under Israeli control for security purposes but under civil control of the PA, while Area C is under the full control of Israel.

This creates different regimes of control, movement, laws of building and planning, regulations of residency etc.<sup>5</sup> The third group is those Palestinians who are residents of East Jerusalem – who do not enjoy the status of Israeli citizens despite the fact that Israel has annexed East Jerusalem, *de facto* and *de jure*.<sup>6</sup> These residents are under ongoing threat of losing their status as residents, and they are subject to endless laws that threaten their right to continue living in Jerusalem – even short periods of absence from the city can result in the loss of their legal status as residents. Gaza, on the other hand is a totally different story that we will expand on later. In addition to these different groups, there are also the Palestinian refugees outside historic Palestine in Syria, Lebanon, and Jordan.

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2 For many Europeans, this amounts to a moral imperative in the wake of what European states did to the Jews during the nineteenth and twentieth centuries, culminating in the Holocaust; thus, Palestine is presented as a gift to the Jewish people to compensate for European crimes.

3 I refer here to the 2018 Nation-State Law. For a review of the law and its impact see Zreik 2020a, Hassan and Bishara 2019, Dubnov 2018, and Jamal and Kensicki 2020.

4 On Oslo and the fragmentation of the Palestinian territories, see Hilal 2018.

5 On the different regimes of control, see B’Tselem 2017.

6 On the status of East Jerusalem see Hareuveni 2020 and Stein 1997.

This fragmentation is problematic for the Palestinian cause and for the ability of the Palestinians to argue their case. Their case or their question is being fragmented into a series of smaller and smaller questions that seem to be unrelated to each other. In the absence of the full picture, and without taking the overall loss into account, each case becomes subject to some isolated internal logic intrinsic to itself. Let me give some examples. Take the status of the Palestinian citizens of Israel and their demand for equality, and their demand that the state becomes a state of all its citizens. When the debate and the discussion is limited to the static frame of a group of citizens asking for equal rights and kept within the confines of citizenship discourse, then one might find several arguments on the part of the state and Jewish majority that can make sense (though they must be rejected) – such as those arguments that stress issues of security, or the fact that the youngest Jews do serve in the army and they are entitled to be compensated for that. If one loses sight of the historical context of the overall Palestinian story, one will overlook the fact that those citizens of Israel have already paid the price for the establishment of the state.

First of all, they were a majority living in their homeland that was turned into a minority. They lost the possibility of enjoying the right to self-determination, they lost most of their lands, and they were separated from the rest of their people. If the point of departure for the conversation is post 1948, i.e., the citizenship frame, then their loss will go unnoticed. But when the loss is accounted for – when we are able to imagine a different future for Palestine and the Palestinians had there been no Zionist project – then it will become clear how big the price was that they had already paid. We will then see that equality for the Palestinian citizens in Israel is not merely a demand, in fact it is a compromise. Without this historical framing of the question, the loss is erased, and their situation will merely resemble the demands of an immigrant group who are struggling for inclusion and improvement of their social-economic status.

The same holds for the Palestinians in the West Bank who are under occupation, mediated through the PA as a subcontractor for Israeli occupation. When these Palestinians demand their right for self-determination in their Palestinian state, it should be always remembered that the Palestinians had already given up on the rest of Palestine and that they are nevertheless willing to accept that their state should be established only on twenty-two percent of their homeland.<sup>7</sup> Viewed in this way, a Palestinian state within these territories is not the ceiling of their demands but

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<sup>7</sup> I am fully aware that this argument – that the Palestinians already gave up 78 % of their homeland – is not accepted by most Zionists, who might think that the fact there was a Jewish existence in Palestine two thousand years ago establishes a right to the land regardless of the fact that there is another nation living and cultivating the land.

rather a historic compromise, the same way as equality is a historic compromise for Palestinians in Israel within the frame of Israeli citizenship.

If the Palestinians lose these historic lenses and limit their political imagination and political discourse to the question of occupation that started in 1967, then they might find themselves unable to articulate all sorts of fundamental arguments, and getting drawn into endless discussions of Israel security needs, and endless questions as to whether these territories are occupied or not – given that Palestine was not a state before 1967 (and that the territories were not under the sovereignty of any recognized state). Indeed, one of the traps of the Oslo process is the fact that it had formulated the questions in terms of the 1967 occupation and the West Bank as a disputed territory. Within this frame, the Palestinians can easily come across as too stubborn and even radical if they insist on getting back all of these lost territories, including East Jerusalem: if the territories are in fact disputed, then the Palestinians should be more moderate and accept some middle ground, and should accept that some Israeli settlements be retained. Their failure to do so thus demonstrates that they are radicals and uncompromising. Again, when the historical frame is abandoned, there is enough internal logic to argue against the specific Palestinian demand for statehood in the West Bank and Gaza.

The fragmentation of Palestine in terms of space and geography parallels an analytical fragmentation that views each separate group within the limits of a certain discursive frame that has its own internal grammar and that decides what counts as a valid argument and what does not. This limitation makes it difficult for the Palestinians to tell the bigger story and to give account of what they have been deprived of. Something gets lost when the Palestinians' time and space gets fragmented. Let me explain this by giving an imaginary example. Consider the case of Palestinians in Israel being brought before one jury; the Palestinians in Jerusalem demanding full Israeli citizenship (or full Israeli withdrawal) before another jury; the Palestinians in refugee camps in Lebanon demanding the right of return to their home town inside Israel before a third jury; the demand of people in Gaza that the blockade on Gaza be lifted being heard before a fourth jury; and the demand of Palestinians in the West Bank for full self-determination in their own state, including the removal of all settlements, being heard before of a fifth jury etc.

I can imagine a situation whereby, given the limited nature of the claims in each case, the Palestinians will lose all five cases before five different juries, say, by vote of seven to five. But I am inclined to think that if all five cases were tried in front of one and the same jury, as if they were part and parcel of the same big story, then it would be more difficult to see the Palestinians lose their case on all five fronts. When each jury sits separately, they can bracket or ignore the rest of the demands in other cases, but when faced with the totality of the story, the jury faces the Palestinian loss head on. Facing it as a whole makes it difficult to imagine

that the Palestinians will lose on all fronts. The loss of one demand radiates onto others and the loss is accounted for. I thus want you, the reader, to face the story as a totality head on, to consider the overall historic picture, and to see the loss as a whole. Stories capture something that arguments may overlook.

### 3 Palestinians and the Difficulty to Resist

There is a consensus in international law that the West Bank is under occupation, and the existence of the PA as subcontractor for the occupation is not able to change that fact. When it comes to the Gaza Strip it might be argued that Israel has left Gaza, and that the occupation has ended. Some Israelis do argue that way,<sup>8</sup> but many others argue that Gaza is still under occupation given the full control that Israel holds over air space, territorial waters, electricity and water resources, cellular systems of communication etc. (see Darcy and Reynolds 2010). Still a third attitude will opt for a functional approach that does not treat the situation as either/or, but rather as a matter of degree. Thus, instead of conceptual analysis they suggest an analysis that describes in full detail the different modes of control that Israel practices over Gaza. In these terms, there are some senses in which Israel is clearly still an occupying force: for instance, it controls the amount of food by restricting it to the bare minimum, and controls the coastal waters of Gaza, limiting the fishermen to a highly restricted area where they can fish. On the other hand, Israel does not control the education system, for example, or the laws of construction and planning.<sup>9</sup>

This debate is important because it sheds light on the right of resistance of the Palestinians. People under occupation have the right to resist in their struggle for national self-determination. Nations under colonial rule were often considered nations in retrospect. This implies that, at the time of their colonization, they should have been recognized as nations, even if they were not acknowledged as such in international law at that time, i.e., when colonization took place. As a recent commentator puts it: “Liberation movements were thus fighting a war of self-defense against the metropole on behalf of a nation that pre-existed colonial rule” (Von Bernstorff 2019, 54). The act of colonization was considered an act of aggression that entitled the people subject to it to resist it. This move began in the early 1970s with the amendment of the First Additional Protocol of the Geneva Convention, adding article 1(4) making wars of liberation against the colonial powers an international conflict and not merely an internal affair, or civil war as the

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<sup>8</sup> Yuval Shani for example, see 2005.

<sup>9</sup> For such a functional analysis, see Gross 2023.

Western colonial powers tried to maintain.<sup>10</sup> The amendment opened the door to other UN declarations supporting the right of colonized people to resist.<sup>11</sup> For this reason, the question of whether the Gaza strip is still under occupation is a highly relevant question for purposes of the right to resist.

I tend to think that the Gaza strip is still under occupation, though I agree that things in this regard are not fully black and white. Gaza is akin to an enormous prison, and the fact that the prisoners can run their internal affairs does not and cannot change the fact that they do not hold the keys to their prison. Israel dictates the amount of food each citizen in Gaza can have calculated by calories (see Gross 2023). While clearly there are different degrees of occupation, and I do think that a functional realistic approach is valuable in describing the complexity of the situation in Gaza, the fact is that sufficient control is exerted by Israel to entitle the people of Gaza to resist it. In this regard, as long as the people of Gaza are unable to exercise their right to self-determination, including control over their air space, territorial waters, and their borders, they should be considered to be under occupation. Occupation ends when self-determination is achieved.

Yet, I think that the value this kind of discussion is somewhat overestimated. That is, I think that this debate is being conducted under the umbrella of fragmentation that I have just explained above. Why should we treat the Gaza Strip as if it were a separate entity subject to separate rules? Gaza is part of Palestine, and the people of Gaza are part of the Palestinian people as a whole. I want to argue that the right question is whether the Palestinian people writ large have good reason to resist Israel's occupation or not, and that this question should not be limited to Gaza.

Israel is still an occupying force in the West Bank and Gaza;<sup>12</sup> it continues to deny the right of the Palestinians to their self-determination,<sup>13</sup> continues to build illegal settlements in the West Bank, continues to assassinate Palestinian activists,<sup>14</sup> and continues to pursue its policy of house demolition in the West Bank (mainly in Area C and East Jerusalem).<sup>15</sup> In short, Israel is not compliant with most of the

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**10** For the Article 1(4) of the Geneva protocol, see Abi-Saab 1979. Abi Saab was a leading figure pushing for the amendment.

**11** In this regard, see United Nations (General Assembly) 1965, which recognizes the “legitimacy of the struggle by people under colonial rule to exercise their right to self-determination.” See also the Friendly Relation Declaration that was adopted in 1970, United Nations 1970.

**12** See the advisory decision on the Wall by the ICJ: International Court of Justice 2004.

**13** See the report by Albanese 2022.

**14** In the last two years before the event of October 7, Israel killed 507 Palestinians in the West Bank, (see Amnesty International, 2024).

**15** For house demolition policy, see B’Tselem (2004). [https://www.btselem.org/publications/summaries/200411\\_punitive\\_house\\_demolitions](https://www.btselem.org/publications/summaries/200411_punitive_house_demolitions) (accessed 12 April 2024).

UN resolutions concerning Palestine for the last 75 years and continues to deny the Palestinians their basic rights according to international law.<sup>16</sup> This may establish *prima facie* a right to resist (see Falk 2002).

Thus, in principle, I want to argue that the right to resist – if such a right exists for the Palestinians – should be extended to the people of Gaza as well, even if their situation differs slightly from their sisters and brothers in the West Bank. All international documents and resolutions treat these two areas (Gaza and the West Bank) as constituting a single geo-political unit; all UN resolutions, including 242, 338, and the resolutions regarding the right of Palestinians to self-determination, and other political plans for the region, consider them as one unit and their fate to be tied together.<sup>17</sup> For this reason, it does not make sense to argue that if Israel decides to withdraw from this or that Palestinian village, while continuing to occupy the neighboring village, that the inhabitants of the first village do not have the right to resist the ongoing occupation. After all, the right to resist the occupation is a right that is derivative from the right to self-determination, and the right of self-determination is a right that is held by the group as a group, by the people as a whole, as a collectivity. The group itself is the bearer of the right as an entity and each individual member of the group can thus act on behalf of the group as a whole. There is no reason to accept the fragmentation that Israel is imposing on the Palestinians in this regard.

Looked at from this perspective, one should view the attacks on Al-Aqsa Mosque, the continuation of the settlements, and the brutal attacks on the towns and cities in the West Bank in the last two years as attacks against the Palestinians writ large. The rights that the people in the West Bank have the same rights to resist that the people of Gaza have. This leaves a number of valid questions unanswered: What does the right to resist entail, and when does it arise? Does it include the right to use force? What kind of force and under what circumstances? Yet beyond the question of whether such a right exists, there is an even more important question as to the wisdom of using the right – that is, of its efficacy. Does it get the Palestinian people closer to their goal or does the opposite occur when they resort to violence?

There is good reason to think that the right to resist might include the use of force but, as we shall see, this right is limited under international law and norms.

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<sup>16</sup> See Amnesty 2024.

<sup>17</sup> See UN Resolutions 242 and 338, which treat both as if they were one. See United Nations (Security Council) 1967 and United Nations (Security Council) 1973. This is also true of the other plans for solving the Palestine issue such as the Road Map that was issued by George Bush in 2002, the Trump plan of 2020, the Oslo accords of 1993, the Camp David summit in 2000, and the Olmert plan of 2008. Each of these treats both areas as one.



First, the deployment of force must be the last resort, and second, it should be subject to basic norms in international law and morality. The right to resist is not a *carte blanche* to kill indiscriminately.

First let us deal with the issue of last resort. I do tend to think that the Palestinians had met this condition in this regard. The Palestinian authority has been negotiating with Israel for the last three decades since the Oslo agreement in 1993. The PLO recognized Israel and even deleted those articles in its charter denying recognition of Israel already in 1996.<sup>18</sup> Every year, the Palestinian president Abbas travels all the way to the UN and begs the international community to intervene in order to stop the expansion of the Israeli settlements in the West Bank and to implement the vision of the two-state solution.<sup>19</sup> Indeed, not only were the Palestinians ready to compromise on a Palestinian state existing alongside Israel but the whole Arab world was ready for peace and normalization with Israel on the condition of establishing a Palestinian state (Friedman 2002). More recently, all of the Islamic countries including Iran have been ready to accept the same initiative involving recognition of Israel and normalization of relations with it in exchange of an independent Palestinian state.<sup>20</sup> Despite the many resolutions by the UN, and ongoing talks mediated by the US and the Quartet, nothing has come out of these negotiations, and the settlements have continued to spread in the West Bank without any serious attempt to stop them.

More importantly, for several reasons it is becoming more and more difficult for the Palestinians to resist Israeli policy and practices. The first reason is that following the Oslo Accords, Israel had substituted direct control with indirect control over the Palestinians. Thus, for example, up until the First Intifada Israel had controlled everything in the lives of Palestinian inhabitants, with a full presence of Israeli soldiers in the towns and the villages. Furthermore, Israel had also controlled their civic life, including issues of taxation, education, and the management of their daily affairs. This situation allowed the Palestinians to resist without even resorting to armed struggle. It was enough to refuse to pay taxes as a mode of resistance or to refuse to comply with the instructions of the officials in charge of education. Even when the Palestinians wanted to resist more actively, they resorted to throwing stones at Israeli soldiers. This mode of resistance proved to be effective, and it was in fact due to it that Israel reached the conclusion that it must evacuate the city centers and sign the Oslo accords.

But resistance has become far more difficult now that the Israeli occupation has shifted to more indirect control through local subcontractors. This might also

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18 On the amendment of the PLO charter in 1996, see Zreik 2003, especially 43.

19 See Mahmoud Abbas' 2018 speech at the UN (Abbas 2018).

20 The Islamic and Arab Summit in November 2023. See Yaakoubi and Abdallah 2023.

explain the different perception of the Second Intifada compared the First Intifada. Where the main image of the First Intifada was of children throwing stones at soldiers as symbols of occupation, in the Second Intifada – mainly in its later phases – the dominant image was one of explosives used against civilians in Tel Aviv.

What made the situation even worse is the fact that official Israeli policy has categorized any kind of Palestinian resistance or protest as constituting a terrorist act. Thus, Israel described the PA attempt to bring Israel before the ICJ as being a form of diplomatic terror, and calls for a peaceful boycott of Israel cultural events as cultural terrorism.<sup>21</sup> Not only this, but the former Israel government lead by Ganz and Bennet decided to close down and to outlaw the few prominent human rights organizations active in the West Bank, banning them under an unfounded accusation of terrorism.<sup>22</sup> Furthermore, as to the question of peaceful resistance, in 2018 a series of peaceful demonstrations were organized along the border with Gaza under the title of the 'March of Return'. It is beyond doubt that these demonstrations posed no security threat to Israeli civilians or soldiers. What was the reaction of the Israeli security forces? They shot hundreds dead and injured thousands more.<sup>23</sup> Under these circumstances there was no possible avenue for the Palestinians to resist the occupation. They were faced with very difficult options: either simply to surrender and accept the occupation and the continuation of the expansion of settlements and land grabs by Israel and settlers, or to resort to forms of armed struggle that might go beyond what is allowed under international law.

## 4 Self-Defense and the Two-Level Argument

While the Palestinians have the right to self-defense and to resist the ongoing occupation and continuation of settlement expansion, it is clear that self-defense in international law does not include the right to attack and kill unarmed civilians indiscriminately. No right of self-defense can extend to include such acts. If Hamas wants to benefit from the norms of international law, it should thus expect to be held responsible to these norms. This is not to mention the fact that such acts are far from being effective in terms of achieving Palestinians goals.

But things become complicated when we start to consider the Israeli reaction to the attack. This brings to the surface more complicated questions. According to the

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21 For examples of this accusation, see Zreik 2020b. See mainly 515 and the footnotes there, in particular footnotes 71–72.

22 Israel raided and shut down the offices of seven NGOs in 2022. See The New Arab Staff and Agencies 2022.

23 For details on the March of Return and Israeli violence, see United Nations (Human Rights Council) 2019.

Israeli story,<sup>24</sup> Hamas simply launched an attack against Israel (hardly mentioning that the attack was in part against active soldiers) and unarmed civilians, in what was thus purely a case of brutal aggression against Israel sovereignty and its citizens.<sup>25</sup> The background that I have just outline above is not mentioned, and the right of Palestinians to resist is not acknowledged in the first place. The attack against innocent Israelis was a purely villainous act, without qualification. The attack might be compared to the one Russia launched against Ukraine (though clearly some will argue that Russia did not simply attack Ukraine but did so under threat from NATO. For the sake of our discussion let's ignore this Russian argument.) If the argument is made in this way, then it seems clear that Israel has the right to defend itself, though it is not clear what this right includes.<sup>26</sup> But given the frame that I have been suggesting, the Palestinians do have a right to resist in principle, though they clearly went beyond what is permissible legally and morally in their attack on 7th October. But does that mean that Israel has a right to defend itself the same way as Ukraine does? And if the fact that Palestinians have a right in principle to resist and that their ongoing war against Israel is a just one overall as a war of liberation, does this make any difference whatsoever when it comes to Israel's right to react or defend itself?

Let me give an example from private law theory in cases of property. Let us assume that I own a piece of land, and someone tries to trespass on my land. In

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24 I refer mainly to the version presented at the Hauge before the ICJ. See International Court of Justice 2024.

25 A question could be raised as to how far, in what sense, to what extent Hamas represents the Palestinians? There is no clear-cut answer to this question and for several reasons. First of all, the concept of representation could mean many different things. It could mean representing the 'will' of a certain group by act of choice, thus my lawyer represents me because I hired him, or the UK Parliament represents the will of the British people given that it was elected by them. Representation can mean representation of the interests of a people, regardless of the will of those represented. Thus, for example, one can argue that Edward Said represented the voice and interests of Palestinians in the US, although clearly no one elected him for this mission, or a parent might represent the interests of their children without being elected to do so. It is hard to say that Hamas represents the will of the Palestinian people, given that it has not been elected. But at some level, Hamas might be said to represent the Palestinian interest in resisting Israeli occupation and in its struggle for self-determination. But this does not mean in any way that Hamas does represent Palestinian interests as a matter of fact. I believe that there are many examples in which it has not done so. There are also examples – at least from my point of view – where it has acted contrary to the general Palestinian interest.

26 In fact, most of the debate revolves around this question. Does the right to self-defense include the right to destroy Hamas and topple it? Is the Israeli response proportionate? Is Israel acting within its right to self-defense while targeting civilians, civil institutions like schools and hospitals etc.? Does the right of self-defense justify a war of annihilation? Can Israel use the weapons of starvation? These are crucial questions that have I decided not to deal with in this paper, instead I address the question of the right to self-defense in the most basic sense.

this case, it is clear that I do have the right to use self-help and prevent the trespasser from entering that land, including the use of force. This is indeed what the law says.<sup>27</sup> Legally, I do have the right to self-help, and to use force in order to expel the intruder from my land. The logic here is one of self-defense: it is not reasonable to wait for the court procedures to defend my property. As such, the use of force is permitted, and I enjoy immunity against criminal or civil charges. Does the trespasser have a right to defend himself against my use of force against him under such circumstances? The answer seems to be in the negative, otherwise my right to self-help is meaningless. Logically, there should be no right of self-defense against self-defense. Now, the law also states that such a use of force is legitimate only as long as the trespass is fresh, by which we mean 30 days. After the passing of the 30 days, then, the trespass ceases to be fresh, and I am no longer allowed to use force to defend my property. If I do use such force after the passing of 50 days, for example, it is clear I am acting outside my right to self-help. Assuming that I do indeed do so, the question arises: does the trespasser have a right to defend himself against my use of force to defend my property?<sup>28</sup>

So we are back to the main question: does the trespasser have the right to defend himself against the threat I pose to him while defending my property *illegally*?

Here is the dilemma. Denying him the right to self-defense is akin to completely ignoring the rules that defines the condition under which the right to use self-help is available. What is the point of limiting the right to self-help if we don't plan to hold these limits and enforce them? Isn't that a kind of *carte blanche* to use force without any limits?

On the other hand, let us assume that we grant the trespasser the right to self-defense. Assume that the trespasser is far stronger than I am, which guarantees he will prevail. He will take over the land – my land. Is that a reasonable conclusion? Is this not a case where might will create right? Is this not this kind of a prize given to the trespasser?

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27 While the example I am giving is meant to be hypothetical, it is worth to mention that this is the case according to Israeli law. See Israel. Land Law 1969, Article 18.

28 One might immediately object that the comparison is not relevant. Hamas is not simply late by 20 days. Hamas committed a clear massacre against civilians. This is indeed a valid objection, but we should remember that the deficiency in the comparison could be claimed by the Palestinians as well. They argue that we are not talking about simply a trespassing of land, but of ongoing dispossession of a whole homeland, expelling hundreds of thousands of people from their homes, further hundreds of thousands of people being killed in a long-lasting conflict, hundreds of thousands imprisoned, and other hundreds of thousands losing their homes and homeland and being turning into refugees. So, the basic normative issue is whether the landowner defending his legitimate ownership can be allowed to deploy unacceptable means to defend it.

To defend the second option, a discerning reader might argue that the second option is a better one for the simple reason is that the trespasser will not prevail for good, but merely for the time being, until the court decides on the merits of the case as to whom the land belongs and who the real owner is. But for this argument to hold in matters of international law as opposed to national law, we have to assume that there is a valid international forum that can adjudicate such disputes and enforce its judgements, that the trespasser is ready to submit to its final verdicts, willing to admit that the solution regarding the possession of the land is only temporary possession, and that he has no claims to title. I will say more on this below.

Based on the land example above, I think it is useful to distinguish – when we talk about justice – between two levels of argument. On one level there is the dispute about the title – the ownership – of the piece of land. Settling this issue is supposed to finish all disputes between the parties. Let us call this level the ‘original title’ dispute. But beyond the issue of the ownership, there is another level of conflict or dispute: there is a level of dispute regarding the right to hold and use the land in the meantime, and the ways we should behave until there is a permanent solution to the ‘original title’ dispute. Among the issues that should be dealt with here are those of possession, use of force or self-help, management of the property, etc. Let us call these rules ‘rules of engagement’. Now, decisions related to ‘rules of engagement’ are by their nature provisional ones. They aim to adjudicate the dispute ‘in the meantime’. On the other hand, rules regarding the issue of ‘original title’ are meant to solve the overall dispute and deliver a more or less final decision.

The logic of making this distinction is understandable. There is an independent logic regarding the holding of possession, regardless of the issue of ownership, so that we can ‘bracket’ the question of ownership temporarily while we deal with issues of temporary possession *per se* and the management of the conflict. Thus, we separate *for a moment* between questions of possession and those of ownership, between management of the conflict and the question of who should get the land at the end of the day.<sup>29</sup> We shall refer to the first mode of argument (rules of engagement) as involving arguments at the ‘first level’ and the second mode (original title) as arguments at the ‘second level’.

Something of a similar nature takes place in the laws of war: there is a distinction between just war and justice in war or what is known as the distinction between *jus ad bellum* and *jus in bellum*. Issues of just war bear some analogy to issues of ‘original title’ while issues of justice in war bear some analogy to ‘rules

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<sup>29</sup> On the rationale to defend possession *per se* regardless of ownership, see Gordely and Mattaei 1996. More on the concept of self-help see Badawi 2012 and Epstein 2005.

of engagement'. According to the basic rules of war, the fact that you are conducting a just war does not mean that you are entitled to use unjust means – targeting civilians for example. On the other hand, those soldiers that are fighting what is seemingly an unjust war are positioned in a symmetrical position to those soldiers who are fighting a just war.<sup>30</sup> To make the analogy complete: the fact that you are the owner of the property does not mean that you are entitled automatically to use self-help in order to get back possession of your property, and the fact that you are conducting a just war does not mean that you are entitled to target civilians. In both cases, there is a relative autonomy of the rationale or principles that lie behind the 'rules of engagement' from those that bear on the dispute concerning the 'original entitlements'. Walzer parses this distinction elegantly, claiming that there are two different kinds of judgements:

The first kind of judgement is adjectival in character: We say that a particular war is just or unjust. The second is adverbial: we say that the war is being fought justly or unjustly [...] The two sorts of judgement are logically independent. (Walzer 2006, 21)

This does not mean that the rationale in the case of property disputes is identical to that in the case of war; while there are similarities in the justification for the separation, they are not one and the same. I think that this separation, or relative autonomy, is an important achievement, for it allows us to avoid collapsing different and separate judgements into one overarching judgment. Let's call this attitude that separates between these two levels of argument the 'independence thesis'. We call it the independence thesis because it claims that the arguments at the first level have an independent and autonomous nature in relation to the second level, and that arguments of first level therefore cannot simply be derived from the arguments at the second level.

But now that we have established the distinction between these two levels, we want to ask a further question: What is the nature of their relation? While there is a relative autonomy, there should not be absolute autonomy between the two levels of discourse. Both in property law and in the laws of war there is a link that is retained despite the distinction. Thus, for example, in Israeli land law the court can in fact join the legal proceedings relating to the issue of possession – i.e., 'rules of engagement' – to the issue of 'original title' and deal with both questions within the same hearing. The simple logic behind this is that while it is not acceptable that the owner use force to evict a trespasser, it is not fair that the trespasser can sit on the land – which seems to belong to another person for a long period of time awaiting

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<sup>30</sup> See, for example, a good explication of this distinction in Walzer 2006. See for a recent defense of the distinction, Meisels 2014.

the court to decide on the issue of ownership.<sup>31</sup> Thus, while there is a relative autonomy for issues of possession and rules of engagement, they are still adjudicated in the shadow of the ownership dispute.

In the field of just war, there are some voices who question the sharp dichotomy between just war and justice in war, arguing that there is in fact no sense in which an unjust war can be conducted in a just way. They thus instead attempt to establish an intimate relationship between these two levels.<sup>32</sup> We might refer to this approach as the ‘dependence thesis’ or the ‘revisionist thesis’, given that it revises the more classical thesis of independence. The idea here again is that there is a need to view the issues of justice in war, i.e., ‘rules of engagement’ in the light of just war theory, i.e., ‘original entitlements’, and that there is good reason not to separate fully between the two levels.

The strength and the weakness of such approach is that it wants to ‘color’ the justness of conduct during the war with the color of justness of initiating the war, i.e., to color *in bellum* with the colors of *ad bellum*, to judge the first in the light of the second. This can mean two things at the same time. It can mean that behavior of soldiers during the war that complies with laws of *in bellum* might be viewed to be criminal in case they are conducting an unjust war at the level of *ad bellum*. But on the other hand, it might invite us to view what is seemingly unjust conduct during the war – targeting civilians for example – to be just if it is being conducted for a just cause in the service of *ad bellum*. This would mean breaking the symmetry that existed according to the independence thesis between the soldiers on the field in such a way that those fighting for a good cause have more immunity and those fighting for a bad cause for less immunity. This is not an easy conclusion to accept, yet it is not easy to dismiss.

In the case of Israel-Palestine, Palestinians cling – though not exclusively – to arguments of ‘original title’ by asserting that Israel is occupying their land (referring to the lands of 1967). They argue that they are the legal-historical owners of these lands, that this land is occupied and in terms of ‘original title’, that they have a valid claim to the land, and that they have a right to resist the attempts to deny them that right and following that they are – writ large – conducting a just war against Israel occupation. Most mainstream Israelis (if we put aside those who believe that the West Bank and Gaza belong to the people of Israel by divine right – and these are neither marginal nor insignificant) would argue that they are subject to security threats from the Palestinians and that they have the right to defend themselves. Indeed, this was the Israeli defense in the case brought to the

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<sup>31</sup> See Israel Land Law 1969, Article. 19.

<sup>32</sup> See, e.g., McMahan 2004, 2006, 2008, and 2009. I also benefited from the debates and discussion of the revisionist view, as presented in chapters 5 and 6 of Frowe 2016. See also Haque 2017.

ICJ case on the construction of a wall on occupied Palestinian territory, and many other cases as well. The Israeli argument here could go like this: I have the right to hit you back because you hit me first, I have the right to attack you because you attacked me – regardless of the question of whether this land is yours or mine. (This argument could be easily upgraded given that the Hamas attack went beyond what is allowed by international law.) The deployment of the argument of self-defense in this sense has always been a dominant mode of argumentation throughout Israel's seventy-six-year history, which is based on the persistence of security threats.

#### 4.1 Can Israel Claim the Right to Defend Itself?

In a lengthy paper on self-defense, Thompson (1991) begins with the example of a villainous aggressor driving his truck toward you, intending to kill you. You try to run away or avoid him, but it is impossible. You have a gun, and the only way to save your life would be to shoot and kill the driver. Thompson argues that this is a clear case of self-defense. Later in the paper, she adds further detail:

Consider Villainous Aggressor for example. You have an antitank gun and it is permissible for you to blow up the truck. What if the villainous driver has his own antitank gun, and can use it on you so that you cannot use your antitank gun on him? Is it permissible for him to do this? I should think it obviously impermissible for him to do this even if it is the case (since he will continue to drive toward you in his truck) that you will shoot him unless he shoots you. (Thompson 1991, 304)

In the same way, those who advocate the dependence-revisionist thesis argue that the mere fact that you are under real and serious threat does not automatically trigger the right to deploy the argument of self-defense, though as a matter of fact you really are in a situation of self-defense. We first have to ask ourselves whether the threat you are under is a legitimate threat. Not all threats do create a right to self-defense, rather they must be illegitimate threats, for if they were legitimate ones, then you would not be entitled to deploy arguments of self-defense, as Rodin and Shue put it:

Simply posing a threat to another person is not sufficient to generate liability to harm or attack. This is because the threat may itself be entirely morally justified, as in the case of police officer or prison guard using justifiable force in the course of their duties. Such persons are not morally liable to attack. (Rodin and Shue 2008, 4)

Before we turn to the case of Palestine-Israel, it is important to notice the guiding logic, which bears some resemblance to the one I just described. What is common to both is the need to look at the wider picture, and to not limit oneself to the moment when the aggressor is in a state of self-defense, but rather to the overall situation.



The aggressor has willingly<sup>33</sup> put himself in a situation where he is factually in a position of self-defense. But the question is whether we should recognize his right to self-defense under this situation. The dominant view both in morality and law is to deny him the right to claim self-defense. If you were acting in self-defense in the first place against the aggressor, there is no legitimate self-defense against this self-defense, otherwise your right to self-defense in the first place is completely empty and meaningless.

Over and above this, legal theory in criminal law has developed a doctrine (*actio libera in causa*) that denies the right to claim self-defense even if the aggressor did not pause the original threat but simply put himself willingly in a situation of self-defense. Assume that I know that you have a paranoid fear of clowns and that in the past you have shot one. I dress like a clown and enter your house knowing that this might trigger a violent action on your part. If I do that, and you raise your gun to shoot me, it seems that I will not be entitled to claim self-defense if I shoot you. I put myself freely in a situation of self-defense where I seem to be unfree, but I could have avoided the whole situation from the start.<sup>34</sup>

## 4.2 But Why and How is that Relevant to Israel Palestine?

Well, it is relevant in part. If someone wants to dispute the example brought by Thompson above, they might argue that it is not the case that Israel is the Villain Aggressor driving a truck to kill Palestinians and as such the analogy does not hold. Instead, they will stress the fact that in this round at least it is Israel who was under brutal attack. They will also stress that Israel is not one hundred percent an occupying force in Gaza and not even in the West Bank and will stress further that Israel tried to reach a solution in Oslo but that it did not work. They will continue to argue that while the case of the Villain Aggressor is a clear-cut case, the case of Israel Palestine is more complicated. One must admit that the case of Israel is not the exact case that Thompson presents, and that it also differs from the one presented by Rodin and Shue.

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<sup>33</sup> Clearly, this would be a contested point in the debate. Many might argue that Israel simply 'found' itself occupying the territories in 1967 and that the war was a preventive war of self-defense. I don't accept that, but even if we grant that the war was one of self-defense, Israel still continues to hold the territories 57 years after their occupation, and this is sufficient to demonstrate the existence of a will to continue to hold these territories. So this line is not convincing. The other and more promising argument on the part of Israel would be that it did whatever we can to offer the Palestinians a decent deal at the Camp David summit and they refused the offer. I don't accept this argument either, but I can't address it here.

<sup>34</sup> For the doctrine itself, its meaning and application, see Katz 2013, and Dimock 2013.

Nevertheless, there are some basic analogies that while not fully relevant, do remain not fully irrelevant. Israel has been violating Palestinian rights for the last seven decades,<sup>35</sup> including denying the right of self-determination, and has continued unabated its program of settlements, land confiscation, deportation, house demolitions, etc. This in and of itself constitutes an ongoing attack on the Palestinian people as a people and as individuals, which thus entitles them to act in self-defense; and there is no self-defense against self-defense. Furthermore, Israel ‘chose’ to be in a situation of self-defense, and it could have taken measures that would have allowed it to avoid being in such situation, that is to say, it put itself in a position where self-defense is inevitable. This is the logic that has brought some authors and international lawyers to argue that in the case of Israel-Palestine, Israel does not have the right to defend itself<sup>36</sup> and it is the logic that the ICJ itself brought to bear in its ruling on the wall case.<sup>37</sup>

But what does this really mean? Does it mean that Israel should sit and watch its citizens being killed in cold blood without reacting to such a brutal attack, and to such a breach of international law and the laws of armed conflict, as well as of the demands of morality? It could be argued that even if the Palestinians were entitled to resist, it is clear that this case went far beyond the right to resist – the attack constitutes a war crime in itself, and no country would allow war crimes committed against its citizens pass without reaction. To prohibit Israel from reacting to such an attack, on this view, amounts to nothing less than giving a prize to Hamas. Furthermore, the argument can proceed, there is something lacking in a theory that denies someone the right to self-defense when their life is at stake, here and now, simply because of a previous act that they wrongly committed years ago, and which brought both antagonists to the current reality. There is something counter-intuitive to telling someone under immediate threat that they have no right to defend themselves.

These are strong arguments. I must admit that the legal discussion can become too narrow, and that there are good arguments on both sides on the issue of self-defense. There is a clear difficulty to telling someone being attacked on 7th October

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35 It is worthwhile here to review the South Africa case and the background that it gave in the recent litigation in the ICJ. See International Court of Justice 2023. See also Falk 2002.

36 This is the position taken even before the war on Gaza by Noura Erikat: see Erikat 2020. Ralph Wide recently made this argument: Wide 2023. The Wide post represents just one pole in the debate. For a response to Wide, see Milanovic 2023. See also Akande 2014.

37 In its decision regarding the wall, the ICJ expressed in a brief passage without much discussion the idea that Israel does not have the right to self-defense in order to justify the building of the wall: “The court concluded that Israel could not rely on a right of self-defense or on state of necessity in order to preclude the wrongfulness of the construction of the wall, and that construction and its associated regime were accordingly contrary to international law.” (Abi-Saab 1979)

and who feels that they might be killed soon that they are not acting in self-defense if they react and shoot back. To refer them back to events of years ago that constitute the historical frame for debating issues of justice would seem beside the point at that moment. But on the other hand, we should not let history disappear or make the issue of title irrelevant. It is not easy to develop a conceptual frame that incorporates both impulses. So, here are some comments that are meant to clarify the debate and keep it going.

First, I want to address the question regarding the nature of the 'self' when we talk about the right of Israel to defend 'itself'. Israel is many things, among them citizens and civilians, but Israel is also an ongoing project of settlement, expansion, and of ongoing violent dispossession of Palestinians from their land on daily basis. What does Israel mean exactly when it claims the right to defend itself – what self is it defending? If the defense means the conservation of the status quo of ongoing dispossession, then that right is not taken for granted. If Israel wants to claim its right to live within secure borders and to defend those citizens that were under attack on the 7th October, that is one thing, but to perpetuate occupation is another. If Israel wants to claim the right to defend its borders it must adhere to the international borders recognized by international law and withhold its ongoing breach of Palestinian rights.

But the philosophical point that we should explore goes further. Most of the time we assume that the actor, or the self, precedes the act, as if this self exists ontologically prior to its action. But since Nietzsche we have known that it is the deed that comes first, and that as he puts it the "doer is merely a fiction added to the deed – the deed is everything."<sup>38</sup> What I mean here is that the so called 'self' – the Israeli self – is a self that has emerged from and has been constituted and reconstituted by an ongoing discourse of self-defense after the 1967 war and the settlement project. The more the occupation and the dispossession continue, the more these actions face Palestinian resistance. This resistance meets an Israeli reaction in the mode of self-defense discourse, but it is precisely this discourse that constitutes the Israeli self that is understood to need defending. That is to say, average Israeli citizens confuse themselves with the settlers, and think that the continuation of the occupation and the continuation of their existence are one and the same.

But beyond that I believe that there should be some relation between the 'original title' arguments and the 'rules of engagement' argument, between the two levels of arguments, without fully adopting the dependence revisionist thesis. For Israel to legitimately argue for the right to defend itself as a matter of rules of engagement (I attack you because you attack me regardless of the question whose

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<sup>38</sup> Nietzsche 2000. The quote is from Section Thirteen of the First Essay in *On the Genealogy of Morals*.

land is this), it must at the same time offer a solution in good faith on the level of 'original title' – that is, offer the Palestinians a solution based on their recognized rights to liberation and self-determination. If it fails to do so, there will be an inevitable sense of bad faith to the argument of self-defense. The observer may argue that Israel is invested in the continuation of the conflict for it allows it to continue to deploy arguments of self-defense, while it is Israel itself that is responsible for the continuation of the conflict in the first place. Israel should not benefit from arguments emanating from the continuation of states of conflict – like those of self-defense – as long no serious effort is made to end the conflict.

But could it be the case that Hamas gets away with 7th October? If we stick to international legality, the way to move ahead would be to bring those responsible for the attack on civilians on the 7th October to international criminal justice. On the other hand, Israel's right to defend itself should be tied and subject to issues of 'original entitlement', and Israel must first try to exhaust avenues other than military ones to rescue those were kidnapped. Like what? Here my answer will doubtless sound crazy, given that we are entrenched within the rules of engagement, of action and reaction, and have forgotten to think in terms of original entitlements and far-reaching solutions. So, what I will suggest aims to open minds to another mode of thinking, such as offering to release Palestinian prisoners and even to withdraw from some parts of the West Bank, and ending the embargo over Gaza in return for the release of the Israeli hostages. But this, I have suggested, sounds crazy and seems to involve a complete capitulation to Hamas. How one can expect that from any country? This is indeed something very difficult to imagine these days, but we have to remember that to withdraw from the West Bank would be to surrender to international law and international legality rather than to surrender to Hamas. Without linking the two levels of the debate together, both parties will not be able to find their way out. This would mean for Hamas that 'original title' is not the only relevant game in town, and for Israel this would mean that it can't simply hide forever behind self-defense and rules of engagement to justify this war of annihilation.

In the end, I must say that for all the arguments brought in this paper that are based on legal and moral language of rights and justifications, I think that there is a clear limit to this language and its ability to move us forward given the amount of death and destruction of the past few months. In front of death, it is not only the language of justice that can open a path forward, but the language of life. The language of life starts from the future and from our duty to live, and hopefully to live well. It starts from an attempt first and foremost to try to understand why things happened the way they did, in order to make sure that the future is better than the past. But I will have to all that leave to some other paper.

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