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Occupation and the Just War

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Abstract

Just war theorists have had difficulty assessing the moral character of occupations, since they often fail to engage with the broader mechanisms and ethical issues of control and power inherent to that state of conflict. These challenges, however, cut to the heart of many of the just war tradition's assumptions, requiring new conceptualizations of its principles and rules for appropriate conduct. This article takes a first step in that direction, recasting the tradition to encompass a wider view of threat and violence in military occupations, using the Israel–Palestine conflict as an illustrative case.

Keywords: *Israel, just war theory, jus post bellum, occupation, Palestine, West Bank/ Gaza Strip*

Introduction

US military action in Iraq and Afghanistan has prompted renewed interest in occupations, particularly in delineating the boundaries of acceptable moral and military conduct. The US army has recently released a new field manual on counterinsurgency – the first in 20 years – recognizing the political, even ideological, nature of conflict within occupation. It asserts that ‘Political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate.’¹ The local population’s belief in the justice and legitimacy of an occupying force’s actions is a critical factor in the success or failure of an occupation.

However, the predominant ethical framework for judging military action – the just war tradition – has largely not engaged with the practical ramifications and moral challenges of occupation. Some theorists have assessed more limited issues like the right of resistance or, increasingly, *jus post bellum* (just outcomes or justice following a war). However, few have examined the full range of mechanisms for political and military control available to occupying forces, and how this fundamentally redefines the just war principles. The theories typically miss three critical elements about occupations. First, as has been demonstrated most recently in Iraq and Afghanistan, success requires not only military superiority, but an effective ideological campaign to win the ‘hearts and minds’ of the local people. Second, occupation creates new channels of influence and control through the occupier’s administrative apparatus, which often has a critical, if not predominant, military purpose. As



recognized by the US military, establishing an effective political, economic, and social bureaucracy is often more important than conventional military power in quelling the population, co-opting insurgents, and fulfilling war aims. Finally the occupier's civilian administrators can pursue a variety of projects, including some potentially inimical to the local population's interests, through these institutions and under cover of noncombatant immunity. However, there have been few attempts to systematically delineate the ethical boundaries for these activities, and what legitimate actions the occupied people can take against them.

This article aims to extend just war theory – and specifically the ‘legalist paradigm’ – to address these challenges and develop new moral tests for military conduct in occupation. This piece will begin by exploring the current moral framework for occupation, detailing just war analyses of the situation. This will also be supplemented by inquiry into international law, which reflects the tradition's thoughts on morality and foreign control on this subject. Taken together, the two complementary bodies establish foundational duties and rights for both occupying forces and the local population. However, the shortcomings of this approach will then be examined by focused inquiry into Israel's control of the Occupied Territories (encompassing the West Bank, East Jerusalem, the Golan Heights, and – until August 2005 – the Gaza Strip). This occupation serves as a fruitful case study because Israel, very much to its credit, largely resorts to international norms as a guide for action. It presents some compelling moral and legal justifications for its conduct, although not without significant and disturbing violations of international norms. The situation also demonstrates, however, why the conceptions of force embodied within the just war tradition need to be reframed, particularly when examined through the rubric of peace research, notably Johann Galtung's theory of structural violence. Occupations fall between interstate war and domestic civil unrest, where both military and police power are necessary for security. The occupier's war aims are more often pursued through its bureaucratic administration of the captured territory than down the barrel of a gun. For the just war tradition to provide effective moral guidance amidst this extraordinarily taxing military, political, and ethical situation, its theorists need to grapple with the unique nature of occupation and establish rules that can capture its complexities of force and power.

The just war principles and occupation

The just war lexicon is the moral language of war, striking a balance between militarism and pacifism. It shares with the latter a strong, though not complete, desire to limit violence by subjecting both the decision to go to war (*ius ad bellum*) and its prosecution (*ius in bello*) to specific principles of conduct. In addition, the most influential strain of current just war thinking – the legalist paradigm developed by Michael Walzer – specifically casts aggressive war as an aberration in the ordered international system. As articulated in Walzer's seminal book, *Just and Unjust Wars*, states form a stable community of sorts and possess particular rights, chief

among them territorial integrity and political sovereignty. Violations of these rights should be treated in much the same way that individual communities treat crime: by determining guilt, punishing perpetrators, and seeking to redress harms to victims. '[T]he world of states takes on the shape of a political society the character of which is entirely accessible through such notions as crime and punishment, self-defense, law enforcement, and so on.'² The legalist paradigm shares significant positions with international legal frameworks on state behavior, particularly on issues of national sovereignty and military occupation. As such, and because of its dominance of the field, this article will take Walzer's legalist paradigm as the definitive conception of contemporary just war thought.

Under this conception, war may only be undertaken by a legitimate authority: typically a state endowed with the moral authority to declare and wage war, with the responsibility to protect the people under its jurisdiction, and supported by public resources, funding, and manpower. In addition, under the principle of just cause, the just war is fundamentally a reactive one. States may go to war only in response to the aggressive actions of another state, and therefore two just causes cannot lead to or emerge in a conflict. Moreover, this criterion establishes the parameters of legitimate military objectives: once the harm is redressed, hostilities should cease, and ulterior designs cannot be slipped in without violating the principle. In addition, the harm caused must be severe enough to warrant war as an appropriate response (proportionality), and war should only be considered after all other reasonable means of resolving the dispute have been attempted (last resort). For *jus in bello*, discrimination is the foremost principle, holding that states and their authorized combatants may not attack and kill civilians, who possess noncombatant immunity. Also, proportionality *in bello* asserts that the benefits of taking a particular military action must outweigh the costs associated with it. An action must in some way contribute to the overall goals established by the just cause, restricting wanton and purposeless violence. Finally, running through both *jus ad bellum* and *in bello*, the principle of right intention holds that combatants and political leaders must seek morally sanctioned war aims and goals.

While these principles have provided an effective ethical framework to analyze many aspects of war, the tradition remains fairly light in its analysis of military occupations. These are typically conceived as short-term obligations where the initiating party must restore civil order, can punish the guilty, and deters future threats of aggression. There is an inherent reluctance or even hostility in the legalist paradigm toward occupation. In this conception, the just war is reactive: it responds to the hostile actions of others and seeks the redress of harm. Occupations, in contrast, impose a unilaterally mandated administrative system and proactively intrude upon an occupied population. It is itself in some respects a form of aggression, a violation of the inhabitants' rights to bring about a return to peace and fulfill legal and ethical duties. As such, just war theory has generally addressed more limited questions on the nature of authority in occupation, the right of resistance, and the ends of peace (oftentimes bracketed under *jus post bellum*). Somewhat similarly, the international law on occupation – principally the Hague Regulations of 1907 and the Fourth Geneva

Convention – builds upon the tradition’s precepts to establish baseline duties and protection for the occupier and the occupied. Taken together, the just war tradition and corresponding law form the predominant ethical framework governing occupations, and it is important to outline its contours, both to establish the scope of existing thought and identify further areas of inquiry.

Authority and resistance

Many just war analyses of occupation center on questions of legitimate authority. In both the tradition and international law, the local population constitutes the sovereign in captured land. Consequently, while the occupier possesses wide powers to administer the territory:

Even if the military administration continues for an indefinite period, the occupant may not treat the territories as its own, let alone acquire sovereignty over it. Indeed, the very notion of ‘belligerent occupant’ has been introduced in international law to delegitimize the acquisition of territories (annexation).³

In accordance with this, the Geneva Convention prohibits the occupying power from transferring its citizens to occupied areas and holds that administrative measures must be tied to military needs or the occupier’s humanitarian responsibilities. Occupying forces can legitimately enact fundamental political transformations – including secession, as in East Timor or Bangladesh – but their actions are bound to norms of human rights, and popular, or ideally democratic, acceptance. Indeed, the approval of the occupied of any territorial or governmental changes is a key determinant of the legality and justice of an occupation. As Walzer sums up, ‘What do the inhabitants want? The land follows the people. The decision as to whose sovereignty was legitimate ... belonged by right to the men and women who lived on the land in dispute.’⁴

However, this understanding of sovereignty can create deep difficulties for just war analyses of occupations, particularly regarding the concept of a right of resistance. For if the local people are sovereign, it follows that they have some moral standing to authorize military action, including against their occupiers. This is especially the case when the local population believes that the occupier is pursuing actions inimical and threatening to their core political interests and sovereignty. In such a situation of popular discontent and unrest:

the war rights the people would have were they to rise *en masse* are passed on to the irregular fighters they support and protect – assuming that the support, at least, is voluntary. For soldiers acquire war rights not as individual warriors but as political instruments, servants of a community that in turn provides services for its soldiers.⁵

As a result, irregular fighters can acquire authority and even just cause from the public’s support; indeed, they could not exist without this assistance. In the absence

of resources from a regular government and economy, guerillas must instead rely upon the local population. This creates an immediate, direct relationship of dependency for material and, even more important, ideological support. It also adds a critical political dimension to occupations. '[I]n conventional war one assumes the hostility of "enemy civilians," while in guerrilla struggle one must seek their sympathy and support.'⁶ Irregulars seek to win the occupied population to their cause, to garner material and popular support for their actions, and 'to place the onus of indiscriminate warfare on the opposing army'⁷ In this way, they attempt to delegitimize the position of occupying forces, such that the occupier 'may be at war ... with a substantial section of the people subjected to its rule ... so that its exercise of force is wholly without public sanction or authority'⁸ By the same token, occupying militaries are keen to prevent this ideological mass mobilization, suppressing leaders who can inspire and marshal the public. In addition, they too can benefit from public approval of their actions, in the form of intelligence and easier administration of the territory.⁹

Consequently, winning this 'hearts and minds' campaign forms perhaps the most important objective within an occupation, as will be borne out by the Israeli case. As Mervyn Frost puts it:

The aim of speaking and fighting in these wars is to win the argument, rather than to win the war through a decisive victory of the kind that can be achieved in conventional wars ... One might say that *this kind of war is ethical argument with a military dimension*.¹⁰

The key difficulty for the tradition (to say nothing of international law and politics) is determining whether and when insurgent groups attain that authority and under what territorial and political limitations. Very rarely are there clear political tests (such as transparent elections or reliable public opinion polling) that can be used to ascertain the local population's feelings. At this juncture, Walzer makes an important contribution. He advocates a 'self-help' test to determine when resistance fighters gain legitimate representation of the occupied population. Internal rebellion or insurgency does not necessarily strike at the legitimacy of the occupier's actions. 'But as soon as the insurgents establish control over some substantial portion of the territory and population of the state, they acquire belligerent rights and an equality of status with the government.'¹¹ While certainly an imprecise solution, it nevertheless has important implications for the prospects for peace, as will be explored later.

Administrative control and jus post bellum

Under international law, occupiers gain broad powers to administer and control the territory they capture, and can use that territory to achieve a number of legitimate war aims: redress wrongs committed by an aggressor, use the resources or deny them to the opposing state, or force the enemy to capitulate. Nevertheless, both the Hague Regulations and the Fourth Geneva Convention recognize an intrinsic tension between the two sides, such that:

at the heart of all occupations exists a potential – if not an inherent – conflict of interest between occupant and occupied. This special situation is the result of the administration of the affairs of a country by an entity that is not its sovereign government.¹²

As such, the law of occupation places additional demands on occupying forces, requiring that their actions aim directly at present defense needs, the fulfillment of humanitarian provisions, or the restoration and possibly even improvement of orderly life in occupied areas. There is ‘a heavy burden upon an occupying power to connect its use of force and other suppressive policies with the requirements of occupation *per se*’.¹³ The fear is that, lacking this injunction, occupying forces would violate local sovereignty by seeking to annex territory or pursue other illegal aims. It is imperative that the occupier’s ‘powers are not used to perpetuate the occupation so as to prejudice any political solution – to further the political, social and economic interests (as distinguished from the military) of the occupant and its civilian population’.¹⁴ The normal bounds of proportionality *in bello* are replaced instead by stricter guidelines governing the occupier’s intentions under international law.

Moreover, the Geneva Convention delineates further responsibilities to mitigate the disruptions caused by occupation. While the local population must adapt to the political, economic, and social changes resulting from military control, the law also requires occupiers to ‘take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.¹⁵ The Convention also attempts to provide a more explicit balance between military necessity and the rights of the local people, articulating humanitarian provisions which must be upheld for the lawful administration of captured land. Among these are the maintenance of noncombatant immunity and regulations securing labor conditions, adequate medical treatment, and children’s education. The law also outlines some restrictions on imposing penal codes, but the occupier is generally free to change laws or impose its own.

The just war tradition may go even further than international law in prescribing the bounds of appropriate conduct under occupation, particularly through the concept of *jus post bellum*. While this remains a new element in the tradition, several just war theorists have attempted to assess the morality of occupation based on the peace that results, its success at preventing future wars, and meeting the occupied population’s needs. For example, Walzer claims that:

what determines the overall justice of a military occupation is less its planning or its length than its political direction and the distribution of the benefits it provides. If its steady tendency is to empower the locals and if its benefits are widely distributed, the occupying power can plausibly be called just.¹⁶

Himes contends that the scope of the responsibilities of the occupier depends partly on *ad bellum* considerations.¹⁷ If the goal is to repel aggression, then steps like regime change are perhaps unnecessary or disproportionate outcomes for war.

If, on the other hand, the goal is humanitarian intervention, Himes advocates, at a minimum, a 'principle of restoration' to remove the instruments and scars of war. Orend and Elshtain go even further, arguing that the victims of aggression must 'be reestablished as a political community or state with all the objects of the state rights to which it is entitled'.¹⁸ This injunction is not to renew the institutions and conditions that originally led to conflict. Rather, it argues that an occupied population should not be thrown into an unsustainable peace: they should possess functioning political, economic, and social institutions following military disengagement. Each of these just war approaches pushes for more robust normative principles to govern the actions of the occupier than found under international law. As explored in the Israeli case, there are important practical implications for long-term peace-making by going beyond the existing legal frameworks.

Theoretical implications of the Israeli occupation

While just war theory and international law provide some guidance in analyzing the justness of occupation, they both miss several important characteristics of the situation. The most prominent of these is the transformative nature of foreign control, which introduces new political, economic, and social channels with which to pursue military aims. Furthermore, occupations straddle the space between interstate war and domestic disturbances, but are qualitatively and morally different from either. They entail opportunities for new forms of influence and expressions of power, and the impact of these omissions on just war assessments of occupation will be clarified by looking at Israeli and Palestinian actions in the Occupied Territories. To start with, the West Bank is (as the Gaza Strip was until 2005) formally under the administration of the Israel Defense Force (IDF), which considers the situation an 'armed conflict short of war' – a categorization which reflects Israel's legal equivocation over the Territories. While claiming to follow the prescriptions of the relevant international law, Israel nevertheless refuses to categorize the conflict as a formal occupation, which gives it greater latitude for its treatment and policies toward the occupied Palestinians. However, this imprecise definition also creates a legal and moral hole: the Palestinians are undefined individuals who fall between civilian and combatant categories, but with shifting guidelines on their treatment by the IDF.

The dual nature of occupations

There is a certain logic to Israel's position, as occupation requires both military force to combat resistance fighters and a police force to quell the local population, maintain public order, and see to humanitarian provisions. This is most evident in the nature of resistance and the Israeli response to it in the Territories. A significant portion of Palestinian resistance is conducted by a variety of paramilitary groups that launch guerrilla or terror strikes against the IDF and Israeli civilians. While numbers differ widely between organizations, the IDF claims that 323 members of

the security forces and 761 Israeli civilians were killed by Palestinian attacks between 2000 and 2006, most through nonconventional means.¹⁹ But perhaps more important to Palestinian resistance is nonmilitary confrontation, as tellingly displayed in the first Intifada. 'Most of the directives issued by the [Intifada leadership] advocated civil disobedience and called for action of a nonviolent character.'²⁰ This included large public demonstrations, labor strikes, prayer, and fasting, and also tactics to 'disengage' from Israel, such as widespread boycotts and withholding taxes:

It was not an armed rebellion but a massive, persistent campaign of civil resistance, with strikes and commercial shutdowns, accompanied by violent (though unarmed) demonstrations against the occupying forces. The stone and, occasionally, the Molotov cocktail and knife were its symbols and weapons, not guns and bombs.²¹

Similarly, during the second Intifada, IDF Col. Daniel Reisner reported that 73 percent of incidents between Israeli forces and resisters did not involve Palestinian gunfire.²²

However, the questions surrounding Palestinian legal status greatly complicate the parameters on the use of force. The IDF is fully within the law in employing military power against insurgents. At the same time, the Israeli usage of riot control, searches, and interrogations are all legitimate police and occupier powers, but these are fundamentally different from war-fighting. These practices maintain innocence before guilt, involving tactics impractical on a conventional battlefield. This includes firing warning shots; seeking to incapacitate, not kill, protesters and even rioters; capturing and arresting suspected individuals; and avoiding collective punishments. Shifting between military tactics and the procedures used in domestic disturbances can strain the best of armies. The Israeli human rights group B'Tselem continues to note cases of indiscriminate IDF fire, including the use of live metal rounds while dispersing protests, with some bullets wounding journalists, medical teams, and bystanders far removed from these disturbances.²³ In addition, while just over 20 Palestinian security personnel were killed between 1987 and 2003, approximately 3400 civilians were killed during that same period.²⁴ These are disturbing violations of noncombatant immunity. As Walzer argues:

We must imagine a domestic state of emergency and ask how the police might legitimately respond to such hostility. Soldiers can do no more when what they are doing is police work, for the status of the hostile civilians is no different.²⁵

But because of the lack of clear rules of engagement, the IDF has often violated these just war norms. And as a result:

The IDF's inability to suppress the uprising by using acceptable means as well as its need to introduce such measures as the wide use of batons, shooting with rubber and plastic bullets, prolonged curfews and collective punishments, led to the severe criticism of the army and its commanders.²⁶

This has crippled the 'hearts and minds' campaign in the Occupied Territories. The appropriate use of force in occupation defies the boundaries of conventional warfare, contingent instead upon the context of each engagement. This requires precise differentiation between the zones of police and military action, and the IDF has had difficulty making this ethical distinction.

The impact of administrative controls

The occupier's administrative controls also enlarge the scope of force and the arena of conflict in occupation. Inevitably occupiers impose their own bureaucratic systems on the occupied land and its inhabitants to maintain order and fulfill the Fourth Geneva Convention's humanitarian provisions – and in fact they are required to do so. Granting these parameters and the inalienability of sovereignty, however, the law says little about what constitutes inappropriate or illegal political and economic changes, or what the occupied population can do to respond to perceived injustices. Moreover, despite the law's implicit desire to minimize changes of lifestyle, occupiers cannot realistically be expected to compromise their self-defense needs. Opposing claims between the groups are inevitably settled to the advantage of the occupier. As Meron Benvenisti contends, the 'social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants. Often these outcomes proved detrimental to the occupied country.'²⁷ As Crawford and North have separately argued, specific social norms are embedded and enforced through public institutions,²⁸ and the occupying military will naturally pursue its war aims through these institutions, at the very least seeking to win the local population's support for their actions. Similarly, the US military recognizes that effective counterinsurgency requires that military force be 'integrated into a comprehensive strategy employing all instruments of national power'. This includes '[p]olitical, social, and economic programs [which] are usually more valuable than conventional military operations in addressing the root causes of conflict and undermining an insurgency'.²⁹

All this can entail drastic changes to the territory's judicial, political, economic, and social structures, and it makes access to the occupier's decision-making institutions imperative for the occupied population. This imposition of foreign administrative systems can potentially create forms of Galtung's indirect, structural violence, which is of a wholly different variety from the direct, physical attack of conventional war. Harm to occupied interests is caused not by a distinct actor, but rather 'Indirect violence comes from the social structure itself', from the political, legal, and economic bodies which institutionalize 'inequality, above all in the distribution of power'.³⁰ Through the administrative bureaucracy, the occupying state gains wide powers to effect changes without great regard for the local population's interests. It also introduces new political actors to the conflict (civil servants, legislative decision-makers, even regular citizens in certain cases) and fundamentally expands the avenues of threat and force against the occupied people.

The use of administrative systems to pursue military or political aims beyond humanitarian requirements is clearly demonstrated in the Occupied Territories. Before

going too far, it is important to stress that many Israeli actions are undoubtedly and laudably in keeping with the responsibilities of an occupier under international law. For example, the state has steadily integrated the Occupied Territories into its own economy, initially increasing income in line with – although never reaching – its own standards. This travels well beyond the Fourth Geneva Convention's provisions and, at least superficially, aims at more actively improving the well-being of the Territories' inhabitants. The danger lies in the additional side effects of these policies and in less well-intentioned projects, which can run against the local people's interests. For example, Israel's economic policies have also created troubling Palestinian employment and consumer dependencies:

Prior to the Intifada, nearly 85% of all West Bank/Gaza imports came from Israel; 3% came from other Arab countries, and about 9% came from the United States and the EU. About 94% of West Bank/Gaza exports went to Israel and only 5% to Arab countries.³¹

Moreover, the average poverty rate from 2000 to 2003 was 40.5 percent, while unemployment hovered around 24 percent. GDP and GNI growth were both negative for that period, and despite the dependency on Israel's economy, West Bank/Gaza's GDP per capita is only around 6–10 percent of Israel's.³² As Tessler has argued, 'The deformation and dependence of the West Bank and Gaza economies are the result of Israeli occupation.'³³ All this has bred suspicion of Israeli motives and created particular problems for final status negotiations, since any future Palestinian state will be heavily dependent on Israel for economic survival. The political and economic stalemate in the Gaza Strip further reinforces this view.

Israel also has difficulties controlling its internal radical elements, and these problems demonstrate how occupation can introduce a variety of new political actors and expose the local population to the occupier's internal political competition. This is especially striking with regard to the evolution of Israel's settlement policy. Immediately following the 1967 war, settlements were established according to the unofficial Allon Plan, temporarily holding the land in anticipation of a comprehensive peace accord. They were built to serve IDF security needs along the Jordan River and avoided the heavily Palestinian-populated areas of the West Bank. A year later, however, private Israeli citizens began establishing unauthorized settlements near these population centers, supported in great measure by the National Religious Party (NRP) and, later, Gush Emunim.³⁴ As detailed in the Karp Report, right-wing parties and organizations have shielded these individuals from full prosecution under Israeli law and provided substantial political and financial backing.³⁵ Moreover, the rise of the Likud Party in 1977 further bolstered the construction of these nonmilitary enclaves. West Bank settlements more than doubled in number by 1980, with 7500 more settlers moving in (up from 5000 in 1977). Even accounting for the Gaza withdrawal, the CIA estimated that around 381,000 settlers were living in the Occupied Territories as recently as 2005.³⁶ In addition, Israel's Military Administration has

often supported the seizure of disputed territory by Israeli civilians. For example, in 1979, it claimed all unregistered land in the Occupied Territories through dubious legal procedures. Following that:

Questionable land seizures [by Israeli civilians] and unauthorized settlements were approved retroactively; IDF soldiers were sent to protect the settlers who, on their own initiative, occupied buildings in Hebron and Nablus, thus signaling to the local Palestinian population that the breaches of law had the backing of the Israeli authorities.³⁷

Consequently, Palestinian residents have been forced to defend their interests against these antagonistic economic and territorial goals. They are thrust, as Roland Paris describes it, into the multivariate ‘conflict’ of Israeli politics.³⁸ Clearly, focusing only on military engagement is inadequate when assessing the totality of tools for control by the occupier and therefore an occupation’s morality. More importantly, it is critical for just war theorists to consider whether the projects an occupier pursues through its administrative apparatus are morally appropriate, and, if not, what implications this has for the actions of resistance forces and *jus in bello*.

Authority and leadership

Finally, Israeli methods have had an indelible impact on the prospects for peace, and they demonstrate how the just war divisions between cause, conduct, and resolution influence each other in occupation. Palestinian terror attacks are an especially vivid demonstration that certain segments of the local population are not interested in compromise. To halt these attacks and blunt the Palestinian resistance movement, the IDF has employed a number of different policies. These have included political measures such as censoring newspapers, imposing extensive curfews, and restricting nonviolent protests. ‘[These Palestinian actions] were regarded as part of an effort to mobilize support for the intifada, and they were thus intolerable from the viewpoint of the Israeli government.’³⁹ These steps are also a clear demonstration of the importance of the ‘hearts and minds’ campaign in occupation – waging an ideological battle to persuade the local population of the justice of an army’s actions and cause.

However, the IDF has also used deportations and housing demolitions to quell the population. These measures have undermined the Palestinian Authority’s (PA) scope for political compromise and its ability to be a legitimate ‘partner for peace’ that will respect Israel’s right to exist in stability and security. Moreover, the targeted assassination of prominent Palestinians has particularly inhibited continuous and effective PA leadership.⁴⁰ This policy has had a more pernicious effect, since it relies upon a wide collaboration network (anywhere between 40,000 to 120,000 people) that breeds mistrust in the Palestinian community. This has led to cycles of revenge killings against suspected informants and spurred additional Palestinian attacks. ‘Its effects, fed by moral indignation on both sides, are insidious, corrosive

and widespread, and obstruct the road to peace.⁴¹ Between 2000 and 2006, 204 people died in targeted killings. However, 116 others were killed by Palestinians who suspected them of being Israeli collaborators.⁴² While seeking to deter future guerrilla and terror attacks, these assassinations incite social instability and distrust, disrupting the emergence of unified and respected Palestinian leadership at both the 'national' and grassroots levels.⁴³

Partly because of this, resistance and political authority in the Occupied Territories are very fragmented. Naturally, infighting between Palestinian leaders plays a significant part in this. As Tessler highlights, 'the groups brought together within the framework of the PLO were a heterogeneous lot with respect to size, ideology, and source of support'.⁴⁴ However, the jailing and assassination of Palestinian leaders also contributes to this fragmentation, and the situation overall facilitates the emergence of 'shadow states'. In the absence of strong authority, sub-state organizations can establish independent funding sources and patronage networks, and provide social services and jobs, gaining a measure of political freedom and local loyalty to pursue agendas separate from the standing government and severely complicating disengagement.⁴⁵ Israel and Fatah have both had to walk a tight line between maintaining their respective interests in security and political power, often blaming each other for failures in the peace process and the deteriorating conditions within the Occupied Territories. Israel occasionally restricts the flow of foreign remittances and tax revenues, impairing the PA's ability to pay salaries and manage public works. Meanwhile, Fatah's competing security services have at times eaten up to 60 percent of the PA's budget, to the detriment of adequately providing important social services.⁴⁶ Into this political stalemate, Hamas and Islamic Jihad – with support from Syria and Iran – have assaulted Israeli military installations and civilians in defiance of negotiated ceasefires. Indeed, the PA's inability to control these groups has been a defining obstacle to the implementation of the Camp David accords and the 'Road Map' for peace. Even more critically, these groups have established effective social services and provided jobs. Hamas swept to victory in the 2006 Palestinian general election based on the popular support generated by these activities. As the Council on Foreign Relations found:

Palestinian voters were sick of the corruption and incompetence of Fatah, which has run the PA for the decade since it was founded ... Hamas, on the other hand, has steadily built a reputation as a clean, non-corrupt party that could deliver results. Its network of hospitals and schools provides social services to Palestinians that the PA did not, and a string of victories in local municipalities in 2005 showed Hamas members to be more effective administrators than the Fatah old guard.⁴⁷

The group's takeover of the Gaza Strip in June 2007 is further evidence of the danger of contributing to the fragmentation of the political structure of the occupied while searching for a peaceful resolution to the conflict.

The just war revisited

Taken together, these issues – the dual nature of force (police and military), the impact of administrative controls, and the fragmentation of authority – inherently complicate the tactics and strategies of war by adding new political and ideological dimensions to the occupation. This creates a unique situation where the occupied people must make decisions and seek control over their lives through foreign institutions which pursue, through myriad avenues and projects, goals potentially inimical to their own. The just war tradition must be adapted to these conditions in order to delineate a just occupation.

We can chart some basic ethical parameters to govern occupations from the existing legal and normative framework. First, as recognized in both the Geneva Conventions and the just war tradition, the occupied population retains sovereignty over their land. Their feelings are a significant – perhaps even paramount – consideration for the final status of occupied territory and an ethical resolution to war. Second, occupations require asymmetric responsibilities from the occupier and occupied. The former constitutes a temporary, though not sovereign, government for the captured area. It is responsible not only for the conduct of its own military personnel and civilians, but also the well-being of the occupied population. By the same principle, occupying soldiers have a special duty to tailor their use of force to the situation at hand. Irregular combatants, equipped with modern weaponry and attacking strategic locations or, worse, civilians, should be confronted with military power. Particularly against suicide bombing, safe capture and arrest may simply be impossible – no other means are available to prevent harm to civilians. Protesters, however, still possess noncombatant immunity, and using such measures against them is clearly disproportionate and violates the principles of discrimination. According to UN principles, ‘Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.’⁴⁸ Third and finally, in occupations, force and control can take on political, economic, and social dimensions, as the local people live under and contend with the occupier’s administrative systems. With these baseline points established, we can start considering how occupation fundamentally complicates just war theory and challenges the assumptions upon which the tradition is founded.

Legitimacy and the dead end of occupation

Legitimate authority is perhaps the key principle being fought over in occupations. Denying legitimacy to the enemy is critical to winning the ideological campaign – convincing the local population that their interests are best served by cooperating with one side and withholding their support from the other. In addition, as the Israeli occupation clearly shows, the ability of occupying forces to carry out their humanitarian responsibilities and achieve their wider war aims depends in large part on the quiescence, if not approval, of the local population. This fact has been recognized

within just war theory, and various theorists have pointed to the danger of losing this ideological battle. Excessive behavior by occupying forces can turn the public against them, providing moral and political legitimacy to resistance. And if resistance forces can command significant public support, if they can translate that support into a continuous and prolonged resistance movement (violent or otherwise), then they can effectively strip an occupying government of its legitimacy. At that point:

The war cannot be won, and it should not be won. It cannot be won, because the only available strategy involves a war against civilians; and it should not be won, because the degree of civilian support ... also makes the guerrillas the legitimate rulers of the country. The struggle against them is an unjust struggle as well as one that can only be carried out unjustly. Fought by foreigners, it is a war of aggression.⁴⁹

In this way, *jus in bello* considerations of fighting well – or, more importantly, of fighting poorly – can feed back and affect the overall rationale and legitimacy of occupation. Along the same lines, Regan adds that prolonged improper conduct under occupation can eventually negate a just cause, an issue explored in the next section. As a result, the just war principles begin to bleed and influence one another. Walzer recognizes this by stating:

In the theory of war, as we have seen, considerations of *jus ad bellum* and *jus in bello* are logically independent, and the judgments we make in terms of one and the other are not necessarily the same. But here they come together.⁵⁰

The conduct of occupation can threaten the cause and legitimacy of military action.

At the opposite end of the tradition, it is important to consider how combatant behavior and policies can affect *jus post bellum*. As a practical matter, the possibilities for longer-term peace-making turn upon the occupied people having a post-occupation state with, at a minimum, viable institutions to govern the territory. Failure to establish these structures can endanger the search for peace, as:

Leaving a chaotic place with no one to hand the keys to can be very dangerous. In Vietnam, the result was victory for the North; in Afghanistan, the emergence of the Taliban regime; in Lebanon, the strengthening of Hezbollah; in Gaza, the domination of Hamas.⁵¹

Gaining widespread local support is critical to preventing this outcome, as the post-occupation government requires widely respected and capable political leaders. The problem, however, is that the occupier's immediate interests in suppressing dissent and denying support to insurgents can conflict with these longer-term goals, potentially leading to the military, political, and ethical 'dead end' of occupations. To meet security demands, the occupier may need to undercut local leaders to quell the population. However, these methods generally weaken negotiating partners,

engender greater resistance, and create an unsustainable peace or, worse, a return to war. As Falk and Weston contend:

Israeli occupation, by its substantial violation of Palestinian rights, has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability which in turn provokes the Palestinians even more.⁵²

As discussed earlier, the Israeli assassination policy has substantially inhibited the emergence of effective Palestinian leadership. Moreover, as the Israelis have sought to support certain Palestinian negotiating partners, their support has bred suspicion of these figures. For example, one factor in Hamas's 2006 electoral success is that Fatah was perceived as being too close to Israel and even the United States, to the detriment of Palestinian interests.⁵³ The occupying power is caught between its own immediate security needs and the demand for a sustainable and equitable resolution. Coupled with the loss of legitimate authority, this is an unviable moral, military, and political degeneration, revealing the inherent risks of occupation as well as the importance of legitimate authority. 'It sometimes turns out that occupying is harder than fighting.'⁵⁴

Moral symmetry and just cause

Returning to Regan's point, when the occupied people gain coherent authority and confer combatant rights on insurgent fighters, this redefines the bounds of just cause. As mentioned, the tradition typically holds that there can only be one just cause in any conflict. However, as seen in the Israeli–Palestinian case, occupation complicates this picture, lending justice to both sides' cause, and several theorists have attempted to reconcile this issue with the just war tradition. In his legal and moral defense of the Israeli occupation, O'Brien recognizes that the Palestinians may have some legitimate self-determination concerns. However, he introduces the notion of 'comparative justice' to answer the question 'What will happen to the political society contemplating a just war if it is defeated?' First, he argues 'that the Israeli polity is a good society, eminently worth defending and preserving'.⁵⁵ In contrast, he contends that the record of PLO governance in Jordan and Lebanon is rife with abuse and corruption, and that fulfilling the stated aims of the PLO would entail grossly negative consequences for the Israelis. Second, and complementing this, O'Brien holds self-defense as the highest moral cause, such that positive legal rights, such as self-determination, take a subordinate position to this value.⁵⁶ 'No one has sorted out the practical and moral criteria whereby claims of self-determination are to be judged and priorities assigned.'⁵⁷ He draws these two points together to assert that Palestinian success in this conflict would result in a 'net' immorality: the ethical Israeli society would be displaced by an immoral *potential* Palestinian state. Thus he argues that Israel's just cause of self-defense trumps Palestinian self-determination. However, O'Brien's argument misses two key points. First,

international law does indeed designate a judge for claims between self-determination and self-defense: the occupied population. They retain sovereignty and, ultimately, the legal and moral authority to judge the actions of the occupier. Second, from the point of view of the occupied people, self-determination can *be* self-defense against structural forms of control, threat, and force. O'Brien only arrives at his view by making a political judgment about the relative worth of Israel versus the possible character of a Palestinian state, not the claim of self-determination itself.

Coates attempts to smooth over the problem of just cause by arguing that it must be assessed bilaterally, examining the merits of argument on both sides to find a mere preponderance of justice to one party. '[I]n the imperfect world to which just war considerations apply, unilateral or absolute justice simply does not exist, just as unilateral or absolute injustice does not exist.'⁵⁸ However, both theorists – and indeed just war theories more generally – are constrained by a desire to see only one side as having just cause. This is not reflective of the realities of occupation. Clearly, Israel possesses a compelling just cause of self-defense, particularly against terror attacks in its own territory and against its own people. However, Israeli actions are at least partly responsible for creating a Palestinian just cause of self-determination. Palestinians are concerned that Israeli bureaucracy and military and government policies fundamentally threaten their existence as a coherent political community. In this situation, finding a mere preponderance of justice for one party misses the point that occupations can be morally symmetrical: even if the occupier waged war for good reason, both sides can nevertheless have just causes. 'Resistance is legitimate, and the punishment of resistance is legitimate. That may seem like a simple standoff and an abdication of ethical judgment. It is actually a precise reflection of the moral realities.'⁵⁹

More problematically, the values being fought over often cannot or will not be traded, and herein lies the heart of the ethical challenge of occupation. The Palestinians feel that their political community and territorial integrity are fundamentally threatened by certain Israeli projects and policies. Self-determination for them is implicitly self-defense against the disintegration of their society through political and economic measures implemented through the occupation's bureaucracy. Quite naturally, the Israelis feel threatened by terrorist attacks and the sense that a future Palestinian state may not abide by its security promises. The conflict is, in some sense, self-defense versus self-defense, a situation not envisioned by the tradition. Moreover, the extreme expressions of these values lend themselves to totalizing moralities: Israel's self-defense too easily falls into an unlimited prerogative of security, while Palestinian self-determination does the same. Thus, the challenge for just war theory is to find some means to halt this escalation into total war, which will be attempted in the next section. For now, a more balanced view recognizes that occupation radically redefines the just cause of self-defense, establishing a new moral framework to complement a new stage of hostilities. 'Both sides, as [Benny Morris] puts it so well, are "righteous victims"'. In this morally symmetrical conflict, confined to a tiny geographical area that must eventually accommodate two peoples, the solution involves translating these categorical positions into material terms, which may not be possible.'⁶⁰

Boundaries and structural violence

Resistance fighters have too often used the value of self-defense or self-determination to justify a totalizing logic of violence – that all combatants and civilians, whether supporting or objecting to the occupation, are responsible for the conflict simply through membership of a certain group. Groups like Hamas and Hezbollah argue that all Israelis support the occupation, either indirectly through tax revenue that enables the government to maintain its administration of the territories, for example, or more directly through universal mandatory conscription into the IDF. This view grants almost unlimited license to kill, destroying discrimination and creating a total war. And if the preceding arguments have viewed certain Israeli projects and tactics negatively, Palestinian attacks against Israeli civilians are equally reprehensible for their violation of discrimination. The targeting of civilians and the reliance on terror tactics are all egregious transgressions of this principle, as are reports that certain paramilitary groups use children to commit suicide bombings.⁶¹ These violations are especially glaring considering that the responsibilities of Palestinian resistance fighters are comparatively lighter than those of the Israelis. For the occupied people, the choices of action are simpler and in keeping with the asymmetric moral nature of occupation. They do not exercise administrative controls against the occupier, and so the limits on their use of military force are established by traditional, clear-cut, and internationally accepted articulations of proportionality and discrimination. Palestinian organizations raise various defenses for the deliberate targeting and killing of Israeli civilians, but ‘The main argument is that “all means are appropriate in fighting against a foreign occupation and to attain independence”.’⁶² This is exactly the argument that the just war is meant to restrain: the escalation of military conflict into total war.

While the principle of discrimination is clear on this point, just war theories have largely failed to delineate the limits of legitimate occupier behavior, or to define appropriate insurgent action. Palestinian fighters are to some extent correct in claiming that certain civilians, acting either as representatives of the Israeli government or as private individuals, are pursuing projects through the IDF administration that fundamentally threaten the sovereign rights of the Palestinian people. In these cases, the cover of noncombatant immunity is being used to protect civilians, even while they implement immoral projects and pursue ‘aims which often foster a limited but very enduring violence’.⁶³ This situation echoes an important debate within the tradition on discrimination: specifically what separates combatants from noncombatants. Koontz aligns the principle purely on the capacity for causing direct harm, advocating an inviolate conception of immunity.⁶⁴ Noncombatants are therefore innocent, ‘in this context mean[ing] “harmless” rather than “blameless”’.⁶⁵ Teichman eschews this, pointing to the contradiction between those who can fight and those who are responsible. ‘Soldiers carry arms, they are therefore dangerous. Shall we say that innocent just means *harmless*, and guilty or non-innocent, just means *dangerous*? ... We seem to have lost the ideas of justice and injustice.’⁶⁶ Coates concurs, recognizing that ‘those who are not engaged in war-making may well be guiltier, in a personal moral sense, than those who do the fighting’.⁶⁷ Reflecting

this, many just war theorists allow that high-level politicians can be targeted, since they are the most culpable of prosecuting the war, and their decisions threaten the lives of far more people than the individual soldier.

Complicating the question further, Buzan, Primoratz, and Fullinwider all contend that many, if not most, citizens in a democracy are responsible for the actions and policies of their elected politicians. In situations where there is a close connection between the will of the people and the actions of the state, the public 'deserves its government' and may bear a certain degree of moral responsibility for the decisions of their political leaders.⁶⁸ This connection may be even stronger under occupation, as the use of administrative power expands the avenues for occupier control, as well as the channels for citizen input on these issues. However, Walzer argues that there is a 'moral difference between aiming and not aiming – or, more accurately, between aiming at particular people because of things they have done or are doing, and aiming at whole groups of people, indiscriminately, because of who they are'.⁶⁹ The justifications provided by Hamas and Islamic Jihad fall into the latter category, and the indiscriminate nature of their actions mark them as clearly immoral. But these groups do have a point that certain Israeli actions violate proportionality in occupation, as they are not directly tied to security or humanitarian provisions. In addition, a strict focus on direct, physical harm will do nothing to address the issues that give rise to the self-defense just cause. If, under the cover of noncombatant immunity, civilians are pursuing projects which fundamentally threaten local sovereignty, exclusively attacking soldiers may be ineffective in halting or redressing the harms caused.

Occupations therefore require new litmus tests to balance the claims of proportionality and discrimination: prohibiting the grossly detrimental and harmful actions of occupiers (and civilians under their government), but without sanctioning purposeless violence against the innocent. First, the occupier's civilians must be engaged in projects that fail the proportionality test, where their actions entail effects harmful to the local population's sovereignty and cannot be tied to direct security or humanitarian needs. A limiting case is that of Israel's economic policies, which may simultaneously support greater political aspirations for the Territories, but are nevertheless essential to fulfilling Geneva Convention duties. A conflict of interest may still exist between the goals of occupier and occupied, but targeting civilians requires explicit and egregious violations of the norms of occupation. The harm caused must emanate from more than just the side effects of legitimate occupier action, and in developing moral rules to govern and judge the situation it is necessary to target as precisely as possible the individuals responsible. It is their specific subversion of noncombatant immunity and their pursuit of projects that violate occupied sovereignty which open them up to attack. Consequently, indiscriminate attacks on civilians because of membership of a political group is still prohibited. Second, the targeted individuals must be aware of the negative impact of their actions to avoid cases of misunderstanding. As O'Donovan has argued, the critical distinction dividing what can and cannot be attacked is intention: that an actor should have 'direct material co-operation in the doing of wrong'.⁷⁰ A critical corollary

test would require that violence be a last resort – political and legal arbitration, where available, must first be exhausted. Finally, fair warning of attack should be given to allow civilians an opportunity to halt their activities. These tests are at least a first attempt at delineating the scope of inappropriate occupier action, and laying out the moral boundaries of insurgent responses to them. Through this rule, projects which violate responsibilities and privileges accorded to occupiers under international law, or which have no legal justification, should also be considered immoral and, more importantly, can be legitimately targeted by insurgent fighters.

These tests can provide a just war assessment of several Israeli occupation policies, starting with the religiously founded West Bank settlements. Settlers directly harm the Palestinians' rights, pre-empting a just political resolution by creating a territorial *fait accompli* in anticipation of final status negotiations. As expounded in the Elon Moreh decision, private settlements were declared to serve no pressing security purposes.⁷¹ Supported variously by Likud, NRP, Gush Emunim, and other groups, however, settlers continued to violate Israeli and international law with minimal punishment, and it can be safely assumed that they recognize the negative consequences of their actions on local sovereignty. Palestinian fighters are therefore correct in viewing them as a threat, and lacking any effective legal or political means to challenge them, recourse to violence is justified.⁷² Walzer comes close to this assessment, stating that:

the settler movement is the functional equivalent of the terrorist organizations. I hasten to add that it is *not the moral equivalent* ... But the message of settler activity to the Palestinians is very much like the message of terrorism to the Israelis: we want you to leave ... or we want you to accept a radically subordinate position in your own country.⁷³

Similarly, the separation barrier fails to meet this test. The Israeli government maintains that the barrier is needed for security reasons, even when it encroaches upon Palestinian territory. However, the International Court of Justice advised that:

it considers that the construction of the wall and its associated régime 'create a *fait accompli*' on the ground that could well become permanent, in which case ... [the construction of the wall] would be tantamount to *de facto* annexation.⁷⁴

Even the Israeli High Court found that 'The fence's current path would generally burden the entire way of life in petitioners' villages',⁷⁵ and that it fails to adequately balance security and humanitarian considerations. Therefore, construction efforts which encroach upon Palestinian territory within the West Bank also constitute a legitimate target. Both these measures have been widely seen as illegal. In this analysis, they are also deeply unethical, violating proportionality, discrimination, and the parameters of just cause.

Note, however, that this rule governs structural violence, not conventional military force, which is still governed by traditional norms of *jus in bello*. The key point is that

Palestinian attacks on settlements result from the deliberate violation of sovereign rights by Israeli civilians, because the Israeli government cannot or will not take effective measures to halt them, and that the Palestinians have exhausted alternative means and provided fair warning (something not usually done in warfare). Just as there is a high burden for the occupier to connect its actions within occupied territory to the inhabitants' well-being, so too must irregulars take extra steps to justify attacking these projects. Traditional physical confrontation, on the other hand, is covered under discrimination and proportionality, with the key question concerning whether the military or the police force is morally appropriate for the situation. Israel's assassination policy, for example, may still be morally sound, provided that it aims directly toward self-defense and seeks to minimize civilian casualties. 'The rationale behind targeted killings is the ticking bomb. If there is an impending terror attack and there is no other way to stop it with arrests or any other action, the IDF will take him [the terrorist] out.'⁷⁶ However, from a wider just war perspective, it may not be advisable given the impact it can have in weakening a negotiating partner. The IDF appears to recognize this: asked about the Israeli assassination policy in the aftermath of Hamas's 2006 electoral victory, IDF Brigadier-General Michael Herzog stated, 'I expect Israel will be more careful about individuals in government and concentrate on [militant] activists.'⁷⁷

Conclusion

This just war analysis deplores both Palestinian and Israeli tactics as failing *jus in bello*, as well as complicating and possibly jeopardizing *jus post bellum*. Indiscriminate Palestinian attacks against Israeli civilians are exceedingly immoral and rest on rickety ethical justifications. The IDF and some Israeli civilians violate the *jus in bello* principles through the inappropriate use of military force against protesting civilians, as well as when using their administrative apparatus to pursue projects which curtail Palestinian territorial and sovereign rights. Moreover, the sum of these tactics can be the normative and military dead end of occupation, with security requiring ever more oppressive measures but peace the exact opposite. Both sides are locked into the conflict by moral and material necessity, but both fight for just causes by unjust means.

This article's prescriptions for the conflict are not new. The Palestinians must clamp down firmly on terror attacks and halt the totalizing and brutal consequences of an extreme conception of collective Israeli responsibility. The Israelis have perhaps a more difficult task: obtaining security while fostering Palestinian institutions that enable a transition to peace. As for just war theorists grappling with the moral boundaries of this devastating form of conflict, what is needed is a recasting of the tradition's foundational principles to account for the particularities of occupation. Current theories, while making critical contributions to *in bello* conduct or *post bellum* results, nevertheless rest upon an incomplete picture of the moral, military, and political environment. Drawing upon a wider view of these dimensions, the

current analysis has drawn the just war principles into an integrative understanding of the unique reality of occupation. However, there is still much work to be done in fully laying out the ethics of occupation, including further assessment of specific occupier methods (like demolishing houses or deportations), and charting the limits of the tradition's ability to assess this situation. And then there is Benvenisti's principal concern with occupation:

It is ... my expectation that few future occupants will voluntarily recognize the applicability of the law of occupation. Occupants who deny its applicability are likely not to consider themselves bound by its commands, even on a de facto basis. Thus, the tendency to ignore the basic commands of the law of occupation seems to pose the most potentially destructive challenge to its survival.⁷⁸

This analysis has hopefully provided just war theorists with the theoretical scope to extend the tradition's tools and analyze wider forms of threat and force in occupation. Ideally, it has also demonstrated that, despite the situation's moral ambiguity and unique nature, effective rules for behavior can be found within just war theory. Ultimately, occupation is a zone of shifting responsibilities, both interstate war and domestic disturbance, requiring new conceptualizations of threat, power, and the tradition's principles.

Notes

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- 4 Walzer, *Just and Unjust Wars*, p. 55.
- 5 Walzer, *Just and Unjust Wars*, p. 185.
- 6 Walzer, *Just and Unjust Wars*, p. 187.
- 7 Walzer, *Just and Unjust Wars*, p. 180.
- 8 A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), p. 154.
- 9 For example, the US army's latest field manual on counterinsurgency – written in response to the experiences in Iraq and Afghanistan – marks the operation as 'an intelligence-driven endeavor'. Intelligence is collected by all soldiers, particularly through interaction with the local population. US Department of the Army, *Counterinsurgency*, p. 3-1.
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