2023

STUDY

THE LEGALITY OF THE ISRAELI OCCUPATION

OF THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM

COMMITTEE ON THE EXERCISE OF
THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE

Ollscoil na Gaillimhe
University of Galway

Ionad na hÉireann do Chearta an Duine
Irish Centre for Human Rights

Any inquiries about this publication should be addressed to the Committee's Secretariat, email: unpalestinecommittee@un.org

Information on the Committee can be accessed at: https://www.un.org/unispal/

The **United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People (CEIRPP)** was established in 1975 by General Assembly resolution 3376. The General Assembly requested that the Committee recommend a programme of implementation to enable the Palestinian people to exercise their inalienable rights to self-determination without external interference, national independence and sovereignty; and to return to their homes and property from which they had been displaced. At the beginning of each calendar year, the Committee elects its Bureau and adopts a Programme of Work. Assisted by the Division for Palestinian Rights, the Committee organizes international meetings and conferences, conducts an annual training programme at United Nations Headquarters and several other capacity-building activities, cooperates with civil society organizations worldwide, maintains publications and an information programme, and holds each year, on or around 29 November, a special meeting in observance of the International Day of Solidarity with the Palestinian People. The Committee reports to the General Assembly on the implementation of its Mandate through its Annual Report.

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Foreword

It is with a deep sense of responsibility that on behalf of the United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People, I present this groundbreaking Study on the Legality of the Israeli occupation of the Occupied Palestinian Territory, including East Jerusalem. As the Chair of the Committee, it is my honour to endorse this comprehensive examination, which has been meticulously researched and drafted by the Irish Human Rights Centre of the National University of Ireland in Galway.

The relevance and urgency of this study cannot be overstated. The Israeli occupation which started in 1967 is the only reality generations of Palestinians have grown up with. It continues to have far-reaching implications on the lives and rights of the Palestinian people. It is incumbent upon us, the international community, to deepen our understanding of the legal issues raised by this prolonged occupation and its profound impact on human rights, peace and stability in the region.

Against this backdrop, the study on the legality of the Israeli occupation fills a critical knowledge gap. This thorough legal analysis aspires to contribute to an informed discourse, empowering individuals and institutions with the knowledge and tools to advocate for justice, accountability and the realization of the inalienable rights of the Palestinian people. By examining the relevant international legal instruments, conventions and resolutions, the study also provides a comprehensive appraisal of the legal obligations and responsibilities incumbent on the occupying Power and the parties involved.

This study also underscores the pressing need for a just and lasting resolution based on international law of the Question of Palestine in all its aspects. It highlights the imperative of upholding the principles of international law, including respect for human rights, self-determination and the prohibition of the acquisition of territory by force. Such an understanding is crucial for fostering a conducive environment that paves the way for the end of the Israeli occupation and the realization of the inalienable rights of the Palestinian people.

Moreover, the timely nature of this study cannot be overlooked at a time when Israel is deepening its colonization and creeping annexation of the Occupied Palestinian Territory. In a rapidly evolving global landscape, where geopolitical dynamics continue to shape the debate on the Question of Palestine, the study offers a frame of reference to anchor policymakers, diplomats, international organizations and civil society actors on a comprehensive and authoritative legal analysis enabling informed decision-making, advocacy and the pursuit of justice.

I extend my heartfelt gratitude to the Irish Human Rights Centre of the National University of Ireland Galway for their unwavering commitment and for the rigorous research that underpins this study.

Finally, I recommend this study to all those dedicated to the realization of a just and lasting peace in the Middle East. It is my hope that the findings and insights presented herein will serve as a catalyst for informed dialogue, effective advocacy and meaningful actions towards a future where the rights and aspirations of both Palestinians and Israelis are realized with full respect for the rule of law.

Ambassador Cheikh Niang
Chair, United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People and Permanent Representative of Senegal to the United Nations

Executive Summary

Part I

This study examines two central questions. First, it asks whether Israel's *de facto* and *de jure* annexation measures, continued settlement and protracted occupation of the Palestinian territory – the West Bank, including East Jerusalem, and the Gaza Strip – render the occupation illegal under international law. Second, the study examines the question raised by the implications arising from a finding of illegal occupation. If an occupation can become illegal, what would be the legal consequences that arise for all States and the United Nations, considering, *inter alia,* the rules and principles of international law, including, but not limited to, the Charter of the United Nations; the Fourth Geneva Convention; international human rights law; relevant Security Council, General Assembly and Human Rights Council resolutions; and the advisory opinion of the International Court of Justice of 9 July 2004?

The study establishes that there are two clear grounds in international law establishing when a belligerent occupation may be categorized as illegal. First, where a belligerent occupation follows from a prohibited use of force amounting to an act of aggression, such occupation is illegal *ab initio*. Second, where a belligerent occupation follows from a permitted use of force in self-defence under Article 51 of the Charter of the United Nations but is subsequently carried out *ultra vires* the principles and rules of international humanitarian law and in breach of peremptory norms of international law, the conduct of the occupation may amount to an unnecessary and disproportionate use of force in self-defence. The study examines Israel's breaches of peremptory norms of international law, the prohibition of the acquisition of territory through force, the right to self-determination, and the prohibition on racial discrimination and apartheid, as indicative of an occupation being administered in breach of the principles of necessity and proportionality for a use of force in self-defence.

Part II – The nature of belligerent occupation

Part II of the study provides a thematic introduction to the legal nature of belligerent occupation and the divergent approach of Israel to the occupation of Palestine. In doing so, it broadly examines the principles underpinning the laws governing belligerent occupation, presents the theory of belligerent occupation as illegal under the *jus bello*, and highlights international practice and jurisprudence classifying belligerent occupations as illegal under the *jus ad bellum*. Further, the study introduces the central tenets of Israel's official policies and positions on the nature of the belligerent occupation of Palestine, its settlement enterprise and its annexation of Palestinian territory.

The laws governing belligerent occupation establish a number of important principles, including the temporary or *de facto* nature of occupation enshrined in Article 42 of the Hague Regulations (1907), which finds that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army". As such, although governmental authority may be "temporarily disrupted or territorially restricted" during a belligerent occupation, the "State remains the same international person".[1] The occupying Power therefore does not acquire sovereignty over the occupied territory,[2] but rather, is obliged to administer the territory

[1] Sir Robert Jennings, Arthur Watts, *Oppenheim's International Law, Volume I, Peace* (9th edition, Longman, London and New York) 204.
[2] Ottoman Debt Arbitration, *Borel Arbitration,* 3 International Law Reports 1925–1926, (28 April 1925) Case No. 360.

weighing the best interests of the occupied population with those of military necessity, under the limitative conservationist principle.[3] Significantly, the present study highlights the positions of leading authorities on international law which consider that the practice of "prolonged occupation" has related to occupations of no more than four or five years in length, such as Germany's four-year occupation of Belgium during World War I,[4] or Germany's five-year occupation of Norway in World War II.[5] Former United Nations Special Rapporteur Michael Lynk observes that modern occupations compliant with the principles of occupation law "have not exceeded 10 years, including the American occupation of Japan, the Allied occupation of western Germany and the American-led occupation of Iraq".[6]

That belligerent occupations may be considered illegal is not unique to Israel. For example, in *Case Concerning Armed Activities on the Territory of the Congo* (2005)*,* the International Court of Justice held that Uganda's occupation of Ituri "violated the principle of non-use of force in international relations and the principle of non-intervention".[7] Concomitantly, the United Nations Security Council condemned Iraq's "illegal occupation" of Kuwait,[8] and South Africa's "illegal administration" in Namibia.[9] The United Nations General Assembly, meanwhile, called on Third States to not "recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan"[10] and condemned Portugal for "perpetuating its illegal occupation" of Guinea-Bissau.[11] Similarly, the United Nations Commission on Human Rights denounced Vietnam's "continuing illegal occupation of Kampuchea".[12] In 1977, the General Assembly expressed its deep concern "that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights".[13] Likewise, the preambles to successive United Nations Economic and Social Council resolutions refer to the "severe impact of the ongoing illegal Israeli occupation and all of its manifestations".[14]

Finally, section II concludes with a presentation of Israel's policies and positions on the nature of its administration of the Palestinian territory, the legality of settlements and its annexation of Jerusalem. For instance, Israel's Ministry of Foreign Affairs considers there to be "competing claims" over the West Bank which "should be resolved in peace process

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[3] Gregory H. Fox, "Transformative Occupation and the Unilateralist Impulse", 885 *International Review of the Red Cross*, (March 2012) 237.
[4] Shwenk Edmund H., "Legislative Power of the Military Occupant under Article 43 Hague Regulations", 54(2) *Yale Law Journal* (1944–1945) 393–416, 399.
[5] Norway Supreme Court, *A. v. Oslo Sparebank (The Crown Intervening)* (January 14, 1956) International Law Reports Year, 1956, p. 791.
[6] Michael Lynk, "Prolonged Occupation or Illegal Occupant?" (*EJILTalk,* 16 May 2018).
[7] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports 168 (19 December 2005), para. 345, p. 280.
[8] United Nations Security Council resolution 674 (29 October 1990), para. 8.
[9] United Nations Security Council resolution 435 (1978), para. 2; United Nations Security Council resolution 276 (1970).
[10] United Nations General Assembly resolution 62/243 (25 April 2008) para. 5.
[11] United Nations General Assembly resolution 3061 (XXVIII), para. 2.
[12] United Nations Commission on Human Rights, Situation in Kampuchea (27 February 1985) E/CN.4/RES/1985/12, para. 3.
[13] United Nations General Assembly resolution 32/20 (1977), preamble; See also United Nations General Assembly resolution 3414 (XXX) (5 December 1975), para. 1.
[14] United Nations Economic and Social Council, E/RES/2010/6 (20 July 2010); United Nations Economic and Social Council, E/RES/2013/17 (9 October 2013); United Nations Economic and Social Council, E/RES/2015/13, 19 August 2015; United Nations Economic and Social Council, E/RES/2016/4, 22 July 2016.

negotiations", including the settlements.[15] However, Israel's High Court of Justice, in *Gaza Coast Regional Council v Knesset of Israel,* held that "the legal outlook of all Israel's governments" is that the "areas are held by Israel by way of belligerent occupation".[16] Nevertheless, Israel does not apply the Fourth Geneva Convention (1949) to the occupied territory as it has not been transposed into its domestic law; also, politically, Israel disputes the application of the Convention premised on its theory of the "missing sovereign". Meanwhile, Israel considers occupied Jerusalem "the eternal undivided capital of Israel"[17] and explains that Jerusalem was "reunified" in 1967 "as a result of the six-day war launched against Israel by the Arab world".[18]

Part III – Legality of the occupation

Part III presents two separate grounds under the *jus ad bellum* where a belligerent occupation may be considered illegal, whether from the outset or beginning at some subsequent point in the occupation. First, an occupation arising from an act of aggression is illegal *ab initio*. Article 2(4) of the United Nations Charter requires that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". Criminal liability may arise for aggressive acts of occupation; for example, the International Military Tribunal at Nuremberg considered Austria to be "occupied pursuant to a common plan of aggression".[19]

Second, a belligerent occupation may be conducted in a manner that amounts to an unnecessary and disproportionate use of force in self-defence.[20] Here the caselaw of the International Court of Justice provides useful guidance on proportionality. For example, in *Nicaragua,* the International Court of Justice considered, "the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated".[21] Further, in *Nuclear Weapons* the International Court of Justice suggested that a use of force should meet "in particular the principles and rules of humanitarian law" to be a lawful use of force in self-defence.[22] This study suggests that the occupying Power's breach of the principles and rules of international humanitarian law and peremptory norms of international law provide a strong indicator that a use of force is disproportionate. Such breaches include *de facto* and *de jure* annexations of territory, illegal acquisition of territory through use of force, the denial of the right of self-determination, and the administration of the occupied territory in breach of the prohibition of racial discrimination and apartheid.

[15] Ministry of Foreign Affairs, Israeli Settlements and International Law (30 November 2015).
[16] HCJ 1661/05 *Gaza Coast Regional Council v Knesset of Israel* (9 June 2005) para. 3.
[17] Amarachi Orie, "Australia Reverses Decision to Recognise West Jerusalem as Israel's Capital", *Sky News,* 25 October 2022.
[18] Ministry of Foreign Affairs, Israeli Settlements and International Law (30 November 2015).
[19] International Military Tribunal at Nuremberg, *Trial of Goring, von Schirach et al,* 1946–49, 10 Law Reports of the Trials of War Criminals (1946 – 1949), p. 533.
[20] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 99; Christine Gray, *International Law and the Use of Force* (OUP 2008) 154–155.
[21] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement, Merits) International Court of Justice Reports 1984, p. 213, para. 237.
[22] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) International Court of Justice Reports 1996, p. 245, para. 42.

Having established the two grounds for illegal occupation under the *jus ad bellum*, the study proceeds to examine, as a separate and subsequent ground of illegality, the occupying Power's breach of the external right of self-determination of Palestine as Mandate territory. Article 1(2) of the United Nations Charter provides for the right of self-determination of peoples, a *jus cogens* norm of international law[23] which has obligations on States *erga omnes*.[24] The right of self-determination has special resonance for Mandate territories, whose right of self-determination is held internationally as a "sacred trust" until full independence. As such, the colonial process can only be considered to be fully brought to a complete end once the right of self-determination has been exercised by the inhabitants of the colony.[25] The *South West Africa* advisory opinion provides the leading example of an illegal occupation of Mandate territory, considered by the International Court of Justice to be illegal *ab initio*. However, whereas South West Africa was mandated territory, held under occupation after the termination of the Mandate, it can be distinguished from Palestine, which is mandated territory held under belligerent occupation in the context of an international armed conflict. Nevertheless, if the occupation is administered in a way that denies the exercise of the right of the people to external self-determination and sovereignty, this may similarly be considered in breach of the "sacred trust". Depending on the circumstances giving rise to the breach of self-determination, the occupation could be illegal either *ab initio* or at some point thereafter.

Part IV – Evidence to support a finding that the Israeli occupation has become illegal

Part IV provides the factual basis to support the finding that Israel's occupation is illegal. The study presents clear and compelling evidence that Israel attacked Egypt first, in an act of aggression, making the consequent occupation illegal from the outset. At the Security Council meeting on the subject in 1967, the argument of anticipatory self-defence was rejected as inconsistent with the United Nations Charter.[26] Israel premised its self-defence arguments on two grounds: first, that Egypt's blockade of the Strait of Tiran amounted to an act of aggression; and second, that its actions were in response to cross-border attacks by Egyptian armoured columns. However, Egypt's blockade of the Strait of Tiran was essentially an Egyptian blockade on its own sea in response to a threatened attack from Israel, as distinct from "the blockade of the ports or coasts" of Israel.[27] As Schwarzenberger notes, "Article 51 of the Charter permits preparation for self-defence".[28] The preparatory measures taken by a State in consideration of self-defence include special precautionary measures in its territorial waters.[29] Nonetheless, Israel's Ministry of Foreign Affairs openly published that it pre-emptively attacked Egypt, stating, "Israel pre-empted the inevitable attack, striking Egypt's air force

[23] UNHCR "Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, Study Prepared by Mr. Hector Gros Espiell, Special Rapporteur", (20 June 1978) E/CN.4/Sub.2/405 (vol.I) para. 78.
[24] International Court of Justice, *East Timor (Portugal v. Australia),* (Judgment) International Court of Justice Reports 1995, p. 90, para. 29.
[25] International Court of Justice, *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) International Court of Justice Reports 1986 p. 554, Separate Opinion of Judge Luchaire, p. 653.
[26] United Nations General Assembly Official Records (29 June 1967) United Nations Doc. A/PV.1541, p. 7; United Nations General Assembly Official Records (27 June 1967) United Nations Doc. A/PV.1538, p. 9.
[27] Tom Ruys, *"Armed Attack" and Article 51 of the United Nations Charter, Evolutions in Customary Law and Practice* (CUP 2010) 277.
[28] Schwarzenberger, *International Courts, Volume II, The Law of Armed Conflict* (Stevens and Sons Limited 1968) 35.
[29] International Court of Justice, *Corfu Channel Case (United Kingdom v Albania)* (Merits Judgment) International Court of Justice Reports 1949 p. 4 (9 April 1949) p. 29.

while its planes were still on the ground".[30] Given the prohibition on pre-emptive strikes, Israel's attack on Egypt may amount to an unlawful use of force, rendering the subsequent occupation illegal.

The study further examines Israel's breach of three peremptory norms of international law as indications that the belligerent occupation is being administered in a manner which breaches the principles of necessity and proportionality for self-defence. First, the study establishes that in 1967, Israel *de jure* annexed East Jerusalem with the adoption of the Municipalities Ordinance (Amendment No. 6) Law, 5727-1967; then, in 1980, under its quasi-constitutional "Basic Law: Jerusalem", Israel made a constitutional claim to the City as the "the capital of Israel", thereby demonstrating an *animus* to acquire the territory permanently.[31] The study further concludes that Israel has *de facto* annexed Area C of the West Bank. In 1967, the legal adviser to Israel's Ministry of Foreign Affairs, in a classified cable, conveyed the annexationist reasons why Israel could not apply the Fourth Geneva Convention (1949): "we have to leave all options regarding borders open, we must not acknowledge that our status in the administered territories is simply that of an occupying power".[32] For decades successive Israeli governments have implemented master plans to settle the West Bank. By 1992, out of the 70,000 hectares of Palestinian land in Area C, only 12 per cent remained for Palestinian development after Israel appropriated it as "State land".[33] At the same time, Israel radically altered the demography of Area C, transferring in over 500,000 Israeli Jewish settlers[34] – an irreversible measure with permanent consequences, and one indicative of sovereign expression.[35] Meanwhile Israel applies a number of its domestic laws directly to the West Bank, including the Higher Education Law[36] and Administrative Affairs Court Law.[37]

Second, Israel's conduct in administering occupied Palestine, characterized by the prolonged nature of the occupation and by its policies and plans of settlement construction, further evinces a breach of the right of self-determination.[38] Taking the considerable length of Israel's belligerent occupation, now some 56 years on from Security Council resolution 242 (1967) calling for its "withdrawal", 45 years on from the Camp David accords ending the conflict with Egypt, and 39 years on from the Jordan peace agreement, it is clear that the original alleged threat prompting Israel's use of force in pre-emptive self-defence has completely and irrevocably ended. At the same time, Israel's zoning of Palestinian immoveable property for residential, agricultural, industrial and tourist settlements, nature and archaeological reserves, and military firing zones, has seen the appropriation of over 100,000 hectares of private and

[30] Israel Ministry of Foreign Affairs, "1967: The Six-Day War and the Historic Reunification of Jerusalem" (2013).
[31] Basic Law: Jerusalem, Capital of Israel, 34 Laws of the State of Israel 209 (1980).
[32] "The Comay-Meron Cable Reveals Reasons for Israeli Position on Applicability of 4th Geneva Convention" (*Akevot,* 20 March 1968).
[33] United Nations Habitat, "Spatial Planning in Area C of the Israeli Occupied West Bank of the Palestinian Territory Report of an International Advisory Board" (May 2015) 18.
[34] Population – Statistical Abstract of Israel 2019 – No. 70, Population of Jews and Others by Natural Region (2018); OCHA, "Under Threat: Demolition orders in Area C of the West Bank"; Claire Parker, "Jewish Settler Population in West Bank Passes Half a Million" *The Washington Post* (2 February 2023).
[35] Al-Haq, *Establishing Guidelines to Determine whether the Legal Status of 'Area C' in the Occupied Palestinian Territory represents Annexed Territory under International Law* (2020) 47.
[36] "Israel's Creeping Annexation: Knesset Votes to Extend Israeli Law to Academic Institutions in the West Bank", *Haaretz,* 12 February 2018.
[37] Naschitz Brandes Amir, "Administrative Law: The Jurisdiction of the Administrative Affairs Court is Extended to Cover a Variety of Additional Matters" *Lexology* (4 March 2016)
[38] International Criminal Court, *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine*, No. ICC-01/18 (22 January 2022) para. 9.

public Palestinian land and the demolition of over 50,000 Palestinian homes since 1967.[39] Israel's alteration of facts on the ground, erasure of the Palestinian presence and interference in the democratic process are carried out, it will be argued, to compromise Palestine's viability as an independent State, denying the collective right of the Palestinian people to self-determination.[40]

Third, there is currently a mounting body of recognition that Israel is carrying out discriminatory apartheid policies and practices against Palestinians on both sides of the Green Line.[41] Notably, Israel confers rights on Israeli Jews and systematically discriminates against Palestinians. The Land Acquisition Law, 5713-1953, for example, facilitates the alienation of confiscated Palestinian lands to various Israeli State institutions, including the Development Authority. Parastatal organizations, such as the Jewish Agency and the World Zionist Organization, are chartered to carry out material discrimination, including through the allocation of confiscated Palestinian lands to Israeli Jews.[42] At the same time, Israeli Jews can pursue ownership claims to Palestinian residential properties in occupied East Jerusalem under the Legal and Administrative Matters Law (1970).[43] The quest to engineer a Jewish majority demographic and reduce and remove Palestinians has been advanced by successive governments. Under Israel's Law of Return (1950), "every Jew has the right to come to this country as an oleh" and Israeli citizenship is "granted to every Jew who has expressed his desire to settle in Israel".[44] At the same time, some seven million Palestinian refugees are denied their right of return, including 450,000 Palestinians displaced as refugees during the Naksa arising from the 1967 Six Day War.[45] Such practices *inter alia* indicate that Israel is administering the Occupied Palestinian Territory under a regime of systematic racial discrimination and apartheid.

The section concludes that Israel's breach of the prohibition on annexation, denial of the exercise of the right of self-determination, and application of an apartheid regime in occupied Palestine may together be indicative of a *mala fide* illegal administration of the occupied territory, in breach of the principles of immediacy, necessity and proportionality for self-defence. The study then examines the consequent effects of a *mala fide* occupation on the exercise of the external right to self-determination of peoples. Because of Palestine's status as a former mandated territory, the international community continues to hold an international

[39] Amnesty International, Israel's Occupation: 50 Years of Dispossession, 2017.
[40] HCJ 7803/06, *Khalid Abu Arafeh, et al. v Minister of Interior* (2006).
[41] CERD/C/ISR/CO/17-19, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel (27 January 2020) para. 23; UNHCR, "Israel's 55-year Occupation of Palestinian Territory is Apartheid – UN Human Rights Expert" (25 March 2022); Al-Haq et al., *Israeli Apartheid: Tool of Zionist Settler Colonialism* (29 November 2022); Al Mezan, *The Gaza Bantustan – Israeli Apartheid in the Gaza Strip* (29 November 2021); Addameer and Harvard Human Rights Clinic, *Joint Submission on Apartheid to the UN Independent Commission of Inquiry on the Occupied Palestinian Territory and Israel* (3 March 2022); B'Tselem, *A regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid* (12 January 2021); Human Rights Watch, *A Threshold Crossed, Israeli Authorities and the Crimes of Apartheid and Persecution* (27 April 2021); Amnesty International, *Israel's Apartheid Against Palestinians A Look Into Decades of Oppression and Domination* (2022).
[42] The Constitution of the World Zionist Organization and the Regulations for its Implementation (Updated November 2019). Article 2 of the World Zionist Organization's Constitution states that "the aim of Zionism is to create for the Jewish people a home in Eretz Israel secured by public law".
[43] United Nations, "Amid International Inaction, Israel's Systematic 'Demographic Engineering' Thwarting Palestinians' Ability to Pursue Justice, Speakers Tell International Conference East Jerusalem Crisis 'Far from Over', Under-Secretary-General Says, Warning Threats to Status Quo in Holy City Can Have Severe Global Repercussions" (1 July 2021).
[44] Law of Return 5710-1950 (5 July 1950).
[45] State of Palestine, "It Is Apartheid: The Reality of Israel's Colonial Occupation of Palestine" (June 2021) 18.

obligation, as a "sacred trust" to the Palestinian people, "not to recognize any unilateral change in the status of the territory".[46] The idea that either occupied territories or former Mandate territories would revert back to a colonial status was dispositively dispensed with in the *South West Africa* advisory opinion. There, the International Court of Justice explained that "[t]o accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920."[47] Importantly, the situation in Palestine has been recognized as a case "concerning the right to self-determination of peoples under colonial or alien domination" which has not yet been settled.[48] As such, Israel's *mala fide* occupation of the Palestinian territory, treating it as a "disputed territory" with a "missing sovereign", and replete with *de jure* and *de facto* annexations, demographic manipulation and settlement enterprise, among other breaches, violates the continuing right of self-determination and sovereignty of the Palestinian people as a Mandate territory.

Part V – Obligation to bring the illegal occupation to an end

The international law on State responsibility requires Israel to cease internationally wrongful acts and to offer "appropriate assurances and guarantees of non-repetition".[49] Significantly, the International Court of Justice held that South Africa had an obligation to "withdraw its administration from the Territory of Namibia", and similarly, encouraged in *Chagos* that the British administration of the Chagos Archipelago end "as rapidly as possible".[50] For Palestine, appropriate restitution may thus take the form of the release of Palestinian political prisoners; the returning of properties, including cultural property seized by the occupying authorities; the dismantlement of unlawful Israeli settlements in the occupied West Bank and East Jerusalem; the lifting of the blockade of the Gaza Strip; the dismantling of the institutionalized regime of discriminatory apartheid laws, policies and practices; and the dismantling of the occupying administration. Given Israel's non-implementation of the prior advisory opinion on the construction of the Annexation Wall, assurances and guarantees of non-repetition may be an insufficient remedy.[51] It might also be necessary to establish a neutral arbitral claims commission to examine mass claims arising from the consequences of the occupying Power's violations.[52] Notably, a 2019 study by the United Nations Conference on Trade and Development concluded that the cumulative fiscal costs to the Palestinian economy from Israel's occupation in the period 2000–2019 is an estimated USD $58 billion. In the Gaza Strip, the economic costs of occupation in the period 2007–2018 were estimated at USD $16.7

[46] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) Separate Opinion of Judge Koroma, para. 7.
[47] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 21.
[48] Hector Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "The Right to Self-Determination Implementation of United Nations Resolutions" (1980) 48–51.
[49] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 30(a) and (b).
[50] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) International Court of Justice Reports 2019 p. 25 (25 February 2019) para. 178.
[51] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) p. 136.
[52] For example, the peace treaty signed between Ethiopia and Eritrea on 12 December 2000, which provided for the establishment of a neutral arbitral Claims Commission.

billion.[53] Exploitation and prevented development of natural resources has cost the Palestinian economy USD $7.162 billion over 18 years in gas revenues from the Gaza Marine and USD $67.9 billion in oil revenues from the Meged oil field at Rantis.[54] Overall, since 1948, the losses to Palestine are estimated to exceed USD $300 billion.[55]

The study outlines that there are international consequences for Israel's illegal occupation and its breaches of peremptory norms of international law,[56] and Third States and the international community are obliged to bring the unlawful administration of occupied territory to an end. In doing so, this study underscores the requirements for the full de-occupation and decolonization of the Palestinian territory, starting with the immediate, unconditional and total withdrawal of Israeli occupying forces and the dismantling of the military administration. Critically, withdrawal, as the termination of an internationally wrongful act, cannot be made the subject of negotiation. Full sanctions and countermeasures, including economic restrictions, arms embargoes and the cutting of diplomatic and consular relations, should be implemented immediately, as an *erga omnes* response of Third States and the international community to Israel's serious violations of peremptory norms of international law. The international community must take immediate steps towards the realization of the collective rights of the Palestinian people, including refugees and exiles in the diaspora, starting with a plebiscite convened under United Nations supervision, to undertake the completion of decolonization.

Notably, Security Council resolution 2334 (2016) urged, without delay, international and diplomatic efforts to put an "end to the Israeli occupation that began in 1967". However, such diplomatic efforts since the 1990s appear to be premised on a dubious "land for peace" formula, which, if used to deprive the protected Palestinian population of their inalienable rights to self-determination and permanent sovereignty over national resources, would also constitute an internationally wrongful act. As such, the obligation for State withdrawal from illegally occupied territory is unqualified, immediate and absolute. General Assembly resolutions include important qualifications for Israel's "unconditional and total withdrawal", meaning that withdrawal is not to be made the subject of negotiation, but is rather the termination of an internationally wrongful act.

Conclusion

The most prescient road map for the de-occupation and decolonization of the Palestinian territory comes in the form of the rich tapestry of Third State and international recommendations advanced in the *Chagos* and *Namibia* cases. It is also clear that the general law on State responsibility for grave violations of peremptory norms of international law can draw from the resolutions of the Security Council "as a general idea applicable to all situations created by serious breaches", including the prohibition of aid or assistance in maintaining the illegal regime.[57] Naturally, the most appropriate forum for examining the

[53] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: The Impoverishment of Gaza under Blockade" (2020) p. 34.
[54] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: The Unrealized Oil and Natural Gas Potential" (2019) p. 15, 25.
[55] Ibid.
[56] Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", 64 *AM. J. INT'L L.* 1, (1970) 8; Gabriella Blum, "The Fog of Victory" 24 *Eur. J. Int'l L.* (2012) 391; Omar Dajani, "Symposium on Revisiting Israel's Settlements: Israel's Creeping Annexation", 111 *American Journal of International Law* (2017) 52; Salvatore Fabio Nicolosi, "The Law of Military Occupation and the Role of *De Jure* and *De Facto* Sovereignty" XXXI *Polish Yearbook of International Law* (2011).
[57] United Nations Security Council resolution 1284 (1999), p. 115, para. 12.

legality of the occupation is the International Court of Justice. Whether the occupation is illegal *ab initio* or becomes illegal, the consequences should be the immediate, unconditional and total withdrawal of Israel's military forces; the withdrawal of colonial settlers; and the dismantling of the military administrative regime, with clear instructions that withdrawal for breach of an internationally wrongful act is not subject to negotiation. Full and commensurate reparations should be accorded to the affected Palestinian individuals, corporations and entities for the generational harm caused by Israel's land and property appropriations, house demolitions, pillage of natural resources, denial of return, and other war crimes and crimes against humanity orchestrated for the colonialist, annexationist aims of an illegal occupant.

I. Introduction

A. Outline

This study examines two central questions. The first is whether Israel's *de facto* and *de jure* annexation measures, continued settlement and protracted occupation of the Palestinian territory – the West Bank, including East Jerusalem, and the Gaza Strip – render the occupation illegal under international law. Second, the study examines the question raised by a finding of illegal occupation. If an occupation can become illegal, what would be the legal consequences that arise for all States and the United Nations, considering, *inter alia,* the rules and principles of international law, including, but not limited to, the United Nations Charter; the Fourth Geneva Convention; international human rights law; relevant Security Council, General Assembly and Human Rights Council resolutions; and the advisory opinion of the International Court of Justice of 9 July 2004?

Although the establishment of a belligerent occupation operates as a question of fact, the rationale behind the *de facto* nature of belligerent occupation was to prevent the disinterested or malevolent occupying Power from reneging on their obligations towards the occupied population.[58] For these purposes, international humanitarian law norms continue to bind the occupying Power regardless of the legality of the occupation. However, Giladi observes that "regulating situations of occupation is as much a *jus ad bellum* exercise as it is one of *jus in bello*".[59] *Jus ad bellum* refers to "conditions under which States may resort to war or to the use of armed force in general" while *jus in bello* refers to the law regulating the conduct of parties engaged in an armed conflict, primarily international humanitarian law.[60] Accordingly, this study establishes that there are two clear grounds in international law establishing when a belligerent occupation may be categorized as illegal. First, where a belligerent occupation follows from a prohibited use of force amounting to an act of aggression, such occupation is illegal from the outset. Second, where a belligerent occupation follows from a permitted use of force in self-defence under Article 51 of the United Nations Charter, but subsequently breaches the principles of necessity and proportionality, the resulting occupation may become illegal.

This study foregrounds its analysis on the illegality of the belligerent occupation primarily on Israel's breach of the law governing the use of force as an act of aggression. There is persuasive documentary evidence to indicate that Israel's initial invasion of Egypt in 1967 constituted a pre-emptive armed attack against the Egyptian blockade and therefore an unlawful use of force.[61] Even assuming *arguendo* that Israel's use of force was a legitimate act of self-defence in response to an armed attack, Israel's continued belligerent occupation of the Palestinian territory for almost 56 years – decades after it concluded peace agreements with Egypt and Jordan, key parties to the conflict, and after multiple Security Council calls for it to end – makes it clear that the belligerent occupation has exceeded the parameters of military necessity and proportionality for a legitimate act of self-defence. The study demonstrates that Israel is

[58] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports 2005 (19 December 2005) Separate Opinion of Judge Kooijmans, para. 62; Doris Appel Graber, *The Development of the Law of Belligerent Occupation* (Columbia University Press 1949) 40.
[59] Rotem Giladi "The *Jus ad Bellum/Jus in Bello* Distinction and the Law of Occupation" *Israel Law Review* vol. 41 (2008) 249.
[60] ICRC, "What are *Jus ad Bellum* and *Jus in Bello*?" (22 January 2015).
[61] John Quigley, "Israel's Unlawful 1967 Occupation of Palestine", in *Prolonged Occupation and International Law: Israel and Palestine*, Nada Kiswanson and Susan Power, eds. (BRILL Nijhoff 2023) 13–31.

carrying out an indefinite belligerent occupation, with annexationist intent, in violation of the exercise of the Palestinian people's right to self-determination and permanent sovereignty over national resources. In doing so, this research broadly examines Israel's breach of the principles and rules of international humanitarian law, and in particular, the breach of three peremptory norms: (1) the right to self-determination; (2) the prohibition on the acquisition of territory by use of force; and (3) the prohibition of racial discrimination and apartheid, as particularly compelling indicators that Israel is occupying the Palestinian territory in breach of the principles of immediacy, necessity and proportionality, rendering the belligerent occupation an unlawful use of force in self-defence.

Having established that Israel's pre-emptive use of force against Egypt amounted to an act of aggression, and dispelling Israel's arguments of self-defence, the study examines the particular consequences of the occupation and its breach of the external right of self-determination of the Palestinian people. It is clearly articulated in the *South West Africa* advisory opinion that the continued occupation of Mandate territory after the termination of the Mandate is illegal *ab initio*.[62] Nevertheless, the study draws a distinction between the administration of Namibia by South Africa – which had previously been the Mandatory Power and was acting *ultra vires* international resolutions terminating the Mandate – and the case of Palestine, a Mandate territory which is the subject of an international armed conflict and subsequent belligerent occupation.[63] As a "sacred trust" with particular international consequences, Israel's continued administration of occupied Palestine, as a *mala fide* illegal occupant, breaches the exercise of the right of the Palestinian people to external self-determination.

The study demonstrates that there are international consequences for Israel's illegal occupation and its breaches of peremptory norms of international law,[64] and that Third States and the international community are obliged to bring the unlawful administration of occupied territory to an end. In doing so, this study underscores the requirements for the full de-occupation and decolonization of the Palestinian territory, starting with the immediate, unconditional and total withdrawal of Israeli occupying forces and the dismantling of the military administration. Critically, withdrawal, as the termination of an internationally wrongful act, cannot be made the subject of negotiation. Full sanctions and countermeasures, including economic restrictions, arms embargoes and the cutting of diplomatic and consular relations, should be implemented immediately, as an *erga omnes (towards all)* response of Third States and the international community to Israel's serious violations of peremptory norms of international law. The international community must take immediate steps towards the realization of the collective rights of the Palestinian people, including refugees and exiles in the diaspora, starting with a plebiscite convened under United Nations supervision, to undertake the completion of decolonization.

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[62] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 54, paras. 118–119.

[63] Ralph Wilde, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation" *Palestine Yearbook of International Law* vol. 22 (2019–2020) p. 50.

[64] Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", *AM. J. INT'L L.* 1, vol. 64 (1970) p. 8; Gabriella Blum, "The Fog of Victory" *Eur. J. Int'l L.* vol. 24 (2012) p. 391; Omar Dajani, "Symposium on Revisiting Israel's Settlements: Israel's Creeping Annexation", *American Journal of International Law* vol. 111 (2017) p. 52; Salvatore Fabio Nicolosi, "The Law of Military Occupation and the Role of *De Jure* and *De Facto* Sovereignty" XXXI *Polish Yearbook of International Law* (2011).

B. Methodology

The study takes it as a starting point that the Palestinian territory – i.e., the West Bank, including East Jerusalem, and the Gaza Strip – was occupied by Israel in 1967, in the course of an international armed conflict. That the territory is under belligerent occupation is recognized by the International Court of Justice in the *Wall* advisory opinion:

> The territories situated between the Green Line… and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories… have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.[65]

The study also takes it as a starting point that Israel continues to occupy the Gaza Strip.[66] While recognizing that Israel is administering the territory occupied in 1967 as an occupying Power under the laws of armed conflict, the study also makes reference to territory held under Israeli control beyond the occupied territory acquired in the 1948–49 conflict. This territory includes both the effectively annexed West Jerusalem[67] and the territory demarcated for a Palestinian State under General Assembly resolution 181,[68] territory which at a minimum continues to be held as a "sacred trust" for the Palestinian people.[69]

The study undertakes a comparative analysis of the legal consequences of a number of occupations where the Security Council, the General Assembly and the International Court of Justice have pronounced on the illegality of the occupation. This includes South Africa's occupation of Angola, Iraq's occupation of Kuwait, Armenia's occupation of Azerbaijan, Uganda's occupation of Ituri in the Democratic Republic of Congo, Vietnam's occupation of Democratic Kampuchea, South Africa's occupation of Namibia, and Portugal's occupation of Guinea-Bissau. Drawing from these case studies, the study concludes with an outline of the requirements for the de-occupation and decolonization of occupied Palestine.

The research draws from the leading international law scholars on the subject of belligerent occupation, broadly analysing the discourse on illegality under three central legal arguments. The first argument provides that belligerent occupations may become illegal premised on

[65] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 78.
[66] ICRC, "What Does the Law Say About the Responsibilities of the occupying Power in the Occupied Palestinian Territory?" (28 March 2023). "The ICRC considers Gaza to remain occupied territory on the basis that Israel still exercises key elements of authority over the Strip, including over its borders (airspace, sea and land – at the exception of the border with Egypt). Even though Israel no longer maintains a permanent presence inside the Gaza Strip, it continues to be bound by certain obligations under the law of occupation that are commensurate with the degree to which it exercises control over it."
[67] "Jerusalem Declared Israel-Occupied City – Government Proclamation", Israeli Ministry of Foreign Affairs (12 August 1948).
[68] United Nations General Assembly resolution 181 (1947), part III.
[69] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 31.

breaches of peremptory norms of international law.[70] A second school of thought suggests that the ooccupying Power's breach of the principles of occupation law *in bello* taint the occupation with illegality.[71] And a third line of arguments posits that an occupation following from an unlawful use of force, in breach of the *jus ad bellum*, is illegal, or may become illegal should the occupation follow from an act of self-defence that later violates the principles of necessity and proportionality.[72] The study provides a substantive overview of the principles governing belligerent occupation. It provides a rationale for proceeding with use-of-force arguments,[73] while taking Israel's violation of the principles underpinning occupation, along with its breach of peremptory norms of international law in administering the occupied territory, as evidence that the continuing unnecessary use of force is disproportionate to its original aim.[74]

II. The nature of belligerent occupation

A. Principles governing belligerent occupation

This section provides a brief introduction to the *jus in bello* nature of belligerent occupation and examines the principles underpinning a belligerent occupation with reference to the Hague Regulations (1907), the Fourth Geneva Convention (1949), Additional Protocol 1 (1977), and customary and general principles of international law. The laws governing belligerent occupation establish a number of important principles, including the temporary or *de facto* nature of the occupation and the proviso that the occupying Power as temporary administrator

[70] Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective" *IDF L Rev* vol. 1(19) (2003) p. 24; UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk" (23 October 2017) A/72/43106, paras. 27–37; Ardi Imesis, "Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020" *EJIL* vol. 31 (2020) p. 1055.

[71] Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" 23 *Berkeley J. Int'l L.* (2005) 551, 600; David Hughes, "Framing Prolonged Occupation" (*Opinio Juris*, 18 June 2021); Ronen, "Illegal Occupation and Its Consequences" *Israel Law Review* vol. 41 (*ILR*) (2008) p. 201.

[72] Enzo Cannizzaro, "Contextualizing Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War" 88 *Int'l Rev. Red Cross* (2006) 779; Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 99; Christine Gray, *International Law and the Use of Force* (OUP 2008); Vaios Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?" 885 *Int'l Rev. Red Cross* (March 2012); David Hughes, "Of Tactics, Illegal Occupation and the Boundaries of Legal Capability: A Reply to Ardi Imseis" 31(3) *European Journal of International Law* (August 2020) 1087; Ralph Wilde, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation" *Palestine Yearbook of International Law* vol. 22 (2019–2020); Ralph Wilde, "Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'Legal' or 'Illegal' in International Law?" *University College London* (29 November 2022); Vito Todeschini, "Out of Time: On the (Il)legality of Israel's Prolonged Occupation of the West Bank" in *Prolonged Occupation and International Law Israel and Palestine,* Nada Kiswanson and Susan Power, eds. (Brill 2023); Valentina Azarova, "Israel's Unlawfully Prolonged Occupation: Consequences Under An Integrated Legal Framework" *European Council on Foreign Relations* (June 2017) p. 7; Valentina Azarova, "Business and Human Rights in Occupied Territory: The United Nations Database of Businesses Involved in Israel's Settlements in Occupied Palestinian Territory" *Business and Human Rights Journal* vol. 3(2) (2018) pp. 1–23; Valentina Azarova, "Illegal Territorial Regimes: On the Operation of International Law in Crimea", in *The Use of Force against Ukraine and International Law*, Sergey Sayapin and Evhen Tsybulenko, eds. (TMC Asser Press 2018).

[73] Valentina Azarova, "Towards a Counter-Hegemonic Law of Occupation: On the Regulation of Predatory Interstate Acts in Contemporary International Law" *Yearbook of International Humanitarian Law* vol. 20 (2017) p. 113–160.

[74] Stephen Schwebel, "What Weight to Conquest?" *AM. J. INT'L L.* vol. 64 (1970) p. 344.

does not have sovereignty: i.e., that the territory is administered in the best interests of the occupied population and follows the conservationist principle as much as possible while ensuring the legitimate security interests of the occupying Power.[75] It is important to examine each of these principles more extensively, as many distinguished authors argue that Israel's breach of the core principles constitutes an illegal occupation *jus in bello*. This research suggests that some of the breaches of the *jus in bello* principles reflect violations of peremptory norms of international law, and therefore offer particularly compelling evidence of violations of the principles of necessity and proportionality when considering occupation as a continuing use of force *jus ad bellum*. While the study focuses primarily on the violation of peremptory norms of international law as exemplifying inexorable breaches of self-defence, it must be noted that both the breach of general principles underlying the occupation and the violations of international humanitarian law, including grave breaches of the Geneva Conventions, may similarly be indicative of a breach of the principles of necessity and proportionality for self-defence.

1. *De facto* nature of belligerent occupation

Belligerent occupation is *de facto* in nature, meaning that it operates as a question of fact. This is more articulately reflected in Article 1 of the Lieber code of 1863, which provides, "Martial Law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its Martial Law".[76] The *de facto* nature of belligerent occupation is mirrored in the Hague Regulations, which provides that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself".[77] As expressed by the Italian Supreme Military Tribunal in *Re Lepore* (1946), "the form and the origin of the presence of armed forces of one State in the territory of another, with which it is at war, must be treated as irrelevant".[78] As such an invasion is "usually of a transitionary nature and constitutes in most cases the preliminary basis for an occupation".[79] In *Armed Activities in the Democratic Republic of Congo,* the International Court of Justice explained that once the armed forces have established and exercised authority, and regardless of whether there is a "structured military administration" of the territory, then "any justification given" by the occupying Power "for its occupation would be of no relevance".[80] Nevertheless, this does not rule out a characterization of illegality *jus ad bellum.*

Article 2 of the Fourth Geneva Convention (1949) states the general rule that "[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".[81] Notably, the International Committee of the Red Cross (ICRC) Commentary to the Fourth Geneva Convention explains

[75] Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the International Court of Justice Wall Advisory Opinion" *AJIL* vol. 99 (2005) pp. 102, 109–110, 112.
[76] Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863), art. 1.
[77] Hague Regulations (1907), art. 42.
[78] Italy Supreme Military Tribunal, *Re Lepore,* 13 International Law Reports 146, 1946, Case Number 146.
[79] Ibid.
[80] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports 2005 (19 December 2005) para. 173.
[81] *Convention Relative to the Protection of Civilian Persons in Time of War* (12 August 1949) 75 UNTS 287, art. 2. See also Article 1 of the Fourth Geneva Convention which requires that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

that the word "occupation" has a wider meaning than it has in Article 42 of the Hague Regulations, and for individuals concerned, the application of the Fourth Geneva Convention does not necessarily "depend upon the existence of a state of occupation".[82] For example, there is no intermediate period between the invasion and the establishment of the occupation. Instead, the Convention applies to the relations between "the civilian population of a territory and troops advancing into that territory, whether fighting or not".[83]

2. Temporary nature of belligerent occupation

Starting from the precursor Lieber Code, Brussels Declaration and Oxford Code, the temporary nature of belligerent occupation is a core principle.[84] From the outset, Article 3 of the Lieber Code, which even in 1863 constituted a codification of existing practice at the time,[85] provides for a temporary administration under military rule, as long as military necessity requires.[86] This temporary arrangement is reflected in Article 2 of the Brussels Declaration, which refers to "[t]he authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants". The Swedish delegate to the Brussels Conference, Baron Jomini, explained that "the occupation lasts so long as it *('tant qu'elle')* is exercised by fact", and that the temporal aspect was as such implicit in the revised text.[87] Furthermore, Article 41 of the Oxford Declaration regards territory as occupied when "the State to which it belongs has ceased, in fact, to exercise its ordinary authority", the occupation continuing for the duration this state of affairs exists.[88] Article 43 of the Hague Regulations follows with what has been described as a "mini constitution" of the regime governing the occupying Power's administration, outlining that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the 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".[89] Although governmental authority may be "temporarily disrupted or territorially restricted" during a belligerent occupation, the "State remains the same international person".[90]

In particular, Article 6 of the Fourth Geneva Convention provides for a one-year rule, which limits the breadth of applicable articles of the Fourth Geneva Convention in respect of

[82] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 60. See also Reports of International Arbitral Awards, *Eritrea-Ethiopia Claims Commission – Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26,* volume XXVI, 19 December 2005, p. 291–349, para. 27.
[83] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) p. 60.
[84] Doris Appel Graber, *The Development of the Law of Belligerent Occupation* (Columbia University Press 1949) p. 37.
[85] International Committee of the Red Cross, Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863).
[86] Instructions for the Government of Armies of the United States in the Field (24 April 1863) art. 3.
[87] Cited in Yutaka Arai-Takahashi, "Unearthing the Problematic Terrain of Prolonged Occupation" *Israel Law Review* vol. 52(2) (2019) pp. 125, 142.
[88] The Laws of War on Land (Oxford) (9 September 1880) art. 41.
[89] Hague Regulations (1907) art. 43; Eyal Benvenisti, *The International Law of Occupation* (OUP 2012) p. 69.
[90] Sir Robert Jennings, Arthur Watts, *Oppenheim's International Law, volume I, Peace* (9th edition, Longman, London and New York) p. 204. The temporary nature of occupation is also underscored by numerous provisions of the Hague and Geneva Conventions preventing substantial alteration of the legal system and territory of the occupied State, including Articles 43, 55, Hague Regulations (1907), Article 47, 49 and 64, Fourth Geneva Convention (1949), Articles 7, 8, 47, Fourth Geneva Convention (1949); Poland, Supreme Court, First Division, *Wlodzimierz (City of) v Polish Treasury*, 6 International Law Reports, 1931–1932, Case No 233.

occupations lasting more than one year after the general close of military operations. At the Stockholm Conference preparatory to the drafting of the Geneva Conventions, delegates considered that "if the occupation were to continue for a very long time after the general cessation of hostilities, a time would doubtless come when the application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the occupying Power had been handed over to the authorities of the occupied territory".[91] The International Court of Justice, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (hereafter *Wall*), considered that "[s]ince the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory".[92] This problematic interpretation of Article 6 has been criticized for its textual misreading of the one-year rule. The one-year rule specifically reduces the full application of the Fourth Geneva Convention "one year after the general close of military operations", rather than on the close of "military operations leading up to the occupation", as the International Court of Justice incorrectly suggests.[93]

Nonetheless, this rule has been largely complemented by Article 3(b) of Additional Protocol I, establishing that "the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation".[94] The ICRC, speaking in an expert meeting, explained that "[t]his 'one year after' rule is widely seen as of little or no relevance to actual occupations, and, as noted below, it has been effectively rescinded by a provision of Additional Protocol I of 1977, as between States party to the latter".[95] Although Israel is not a party to Additional Protocol I, Aeyal Gross notes that the Israeli High Court of Justice has "implemented provisions that would have been inapplicable in light of the language of Article 6, which has arguable been overridden by Article 3(b) of API that enjoys customary status".[96]

3. The contemporary practice of prolonged occupation

When the Hague Regulations were drafted, short-term occupations were the norm. Writing in

[91] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958), Commentary, art. 6; The Soviet Delegation who supported the inclusion of Article 6 (then draft Article 4) feared that an abrupt end of the Conventions protections might automatically cease "when the last shot was fired", leaving aliens who are nationals of an enemy State in a precarious position. For the Soviet Delegation, "the close of hostilities obviously cannot and does not signify the immediate resumption of normal relations". Final Record of the Diplomatic Conference of Geneva of 1949, volume 2, Section B, p. 387.

[92] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 125.

[93] Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the International Court of Justice Wall Advisory Opinion" *AJIL* vol. 99, pp. 102, 106; Aeyal Gross, *The Writing on the Wall, Rethinking the International Law of Occupation* (CUP 2017) pp. 31–34; Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2019) p. 306.

[94] *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts* (8 June 1977) 1125 UNTS 610, art. 3(b); While Article 3(b) of Additional Protocol I extends the protection of the Protocol on the termination of occupation "for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or reestablishment". Additional Protocol I (1977), art. 3(b).

[95] ICRC, "Occupation and Other Forms of Administration of Foreign Territory" *Expert Meeting* (March 2012) p. 42.

[96] Aeyal Gross, *The Writing on the Wall, Rethinking the International Law of Occupation* (CUP 2017) p. 33.

1894, Westlake suggests that the "sternest interpretation of the licence given by necessity" operates to draw operations to a swift close.[97] In 1921, these sentiments were echoed by de Watteville, who criticized belligerent occupations extending beyond four years as excessively detrimental to the economy of the occupied territory.[98] Likewise, Leurquin proposed that "[w]hen the occupation is prolonged and when owing to the war the economic and social position of the occupied country underscores profound changes, it is perfectly evident that new legislative measures are essential sooner or later".[99] Leurquin's observations on "prolonged occupation" came in response to Germany's four-year belligerent occupation of Belgium during World War I. Correspondingly, in *A. v. Oslo Sparebank (The Crown Intervening)* (1956), the Norwegian Supreme Court considered scenarios where an occupying Power may be required to spend resources to protect public order and civil life during "a long-drawn-out occupation".[100] In this case the German occupation of Norway under consideration had lasted for five years.

Although there is some recent practice of prolonged occupation,[101] such as Israel's occupation of the Palestinian territory, there is no specific legal provision governing prolonged occupation. Rather, belligerent occupation is still governed by the principle of temporariness, implicit in Article 43 of the Hague Regulations. An ICRC expert meeting in 2012 reflected that "nothing under IHL [International Humanitarian Law] would prevent occupying powers from embarking on long-term occupation. Occupation law would continue to provide the legal framework applicable in such cases".[102] That being said, the practice of prolonged belligerent occupation is glaringly inconsistent with the contemporaneous object and purpose of the Hague Regulations, which are "inspired by the desire to diminish the evils of war, as far as military requirements permit".[103]

A number of United Nations experts have advised that occupations not exceed the 10-year mark. Former United Nations Special Rapporteur Richard Falk proposes an international convention to secure the realization and exercise of the right to self-determination of peoples held under occupations exceeding ten years.[104] Drawing on the principle of temporariness, former United Nations Special Rapporteur Michael Lynk observes that "[m]odern occupations that have broadly adhered to the strict principles of temporariness, non-annexation, trusteeship and good faith have not exceeded 10 years, including the American occupation of Japan, the Allied occupation of western Germany and the American-led occupation of Iraq".[105] For example, Security Council resolution 1483 (2003), issued only two months after the US and UK-led establishment of an occupying administration in Iraq, expressed "resolve that the day when Iraqis govern themselves must come quickly".[106] If occupations tend in general to last no

[97] John Westlake, *Chapters on the Principles of International Law* (CUP 1894) p. 266.
[98] H. de Watteville, "The Military Administration of Occupied Territory in Time of War" 7 *Transactions of the Grotius Society*, *Problems of Peace and War, Papers Read before the Society in the Year 1921* (1921) pp. 133, 134, 146.
[99] Shwenk Edmund H., "Legislative Power of the Military Occupant under Article 43 Hague Regulations", *Yale Law Journal*, vol. 54(2) (1944–1945) pp. 393–416, 399.
[100] Norway Supreme Court, *A. v. Oslo Sparebank (The Crown Intervening)* (14 January 1956) International Law Reports Year, 1956, p. 791.
[101] United Nations General Assembly resolution 33/15 (1978); United Nations General Assembly resolution 35/19 (1980) paras. 3, 9.
[102] ICRC, "Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory" (2012) p. 13.
[103] Hague Regulations (1907), preamble.
[104] Cited in Adam Roberts, "Prolonged Military Occupation: The Israeli Occupied Territories Since 1967" 84(1) *American Journal of International Law* (1990) pp. 44, 79.
[105] Michael Lynk, "Prolonged Occupation or Illegal Occupant?" (*EJILTalk,* 16 May 2018).
[106] United Nations Security Council resolution 1483 (2003), preamble.

longer than 10 years, the question that then arises is this: Why has Israel's occupation of Palestine exceeded the half-century mark?

4. Occupying Power does not have sovereignty

The *de facto* and temporary nature of the occupation means that the occupying Power does not have sovereign rights in the occupied territory, a fact borne out by the continued inviolability of the rights of the protected population in the event of annexation enshrined in Article 47 of the Fourth Geneva Convention (1949).[107] The principle was specifically articulated in *Ottoman Debt Arbitration* (1925), whereby "[i]n no case does mere military occupation operate as a transfer of sovereignty".[108] Such considerations of the continued sovereignty of the ousted, exiled or occupied sovereign led to the World War II practice of continuing recognition of governments in exile, as embodying the "only exercise of sovereign power left to the people of the country".[109] As the Canadian military manual further highlights, "during occupation by the enemy, the sovereignty of the legitimate government continues to exist but it is temporarily latent".[110] This also means that the occupying Power cannot alienate the land and municipal properties of the occupied State, nor can it "lawfully take measures of a governmental character affecting the property of those who are not its subjects".[111] It also cannot acquire land belonging to the occupied State through land swaps, as consent obtained from the ousted sovereign or the political representatives of the occupied population cannot deprive the protected population of their rights under the Fourth Geneva Convention, as such acts may amount to coercion.[112]

5. Best interests of the occupied population

Another cornerstone of the law of belligerent occupation is that the territory is administered in the best interests of the protected occupied population, while also legislating to serve legitimate military interests.[113] Although not specifically provided for in the Hague Regulations and

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[107] Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) p. 49. Dinstein writes that "the main pillar of the law of belligerent occupation is embedded in the maxim that the occupation does not affect sovereignty".

[108] Ottoman Debt Arbitration, *Borel Arbitration,* 3 International Law Reports 1925–1926, (28 April 1925) Case No. 360. Similarly, the Greece Council of State expressed that "international law, in principle, imports no derogation from the sovereignty of the State whose territory is thus occupied". Greece Council of State (All Chambers Combined), *Marika Eliadi Maternity Home Case,* 11 International Law Reports, 1919–1942, (16 June 1942) Case No. 152.

[109] United States District Court, District of Maryland, *Moraitis v Delany, Acting Director of Immigration,* 10 International Law Reports, 1941–1942, (28 August 1942) Case No 96; Holland Special Criminal Court, the Hague, *re Van Huis*, 13 International Law Reports, 15 November 1946, Case No 143.

[110] Canada National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (Ottawa, 2001), para. 1205(1).

[111] Estonia, Court of Cassation, *City of Parnu v Parnu Loan Society,* 8 International Law Reports, 1935–1937, (28 February 1921) Case No 231. The Estonian Court of Cassation found that the immoveable property of communes must be treated as private property and may not be alienated or encumbered; France Civil Tribunal of the Seine (Referes), *Russian Trade Delegation v Societe Francaise Industrielle et Commerciale des Petroles (Groupe Maloposka),* International Law Reports, vol. 9, 1938–1940, (12 January 1940) Case No 83.

[112] Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2019) para. 789.

[113] UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967", (15 March 2019) A/HRC/40/73, para. 29. "As such, the occupying power acquires no sovereignty right over any of the territory, and it is prohibited from taking any steps towards annexation. It must govern the occupied territory in good faith, and it must act as trustee in the best interests of the protected people throughout the occupation, subject only to its own legitimate security and administrative requirements."; In its 2001 Declaration, the International Committee of the Red Cross emphasized that "any action States may decide

Geneva Conventions, the deference to the best interests of the occupied population is implicit in the Conventions' humanitarian direction.[114] Article 43 of the Hague Regulations requires the occupying Power to restore and ensure as far as possible the public order and civil life of the occupied territory.[115] In this regard, Schwenk suggests, new legislation introduced by the occupying Power must be limited to the "common interest or the interest of the population".[116] For example, in the aftermath of World War II, the Burmese High Court of Judicature held that courts established by the occupying Power in occupied Burma were legitimate acts which could continue in force, given that they were courts to accommodate the needs of the local population.[117] The protection is similarly echoed throughout the authoritative Commentaries to the Geneva Conventions. For example, Article 63 on denunciation "is dictated by the best interests of the victims of war", and Article 7 places limits on special agreements "set by the Convention concern[ing] … the interests of the protected persons".[118]

6. Conservationist principle

The conservationist principle deriving from Article 43 of the Hague Regulations (1907), and later Article 64 of the Fourth Geneva Convention (1949), places obligations on the occupying Power to maintain the *status quo* and refrain from making changes to the laws in force in the occupied territory.[119] Article 43, for example, requires the belligerent occupant to respect "unless absolutely prevented" the laws in force in the territory. As Gregory Fox describes, "the conservationist principle serves the critical function of limiting occupiers' unilateral appropriation of the subordinate state's legislative powers".[120] Nevertheless, the limits on the occupying Power's legislative competence are less clear-cut. In 1954, Julius Stone suggested:

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to take at international level must be aimed at achieving practical results and at ensuring application of and compliance with international humanitarian law, in the interests of the protected population". Official Statement of the International Committee of the Red Cross, *Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva* (5 December 2001).

[114] The protection is echoed throughout the Commentaries to the Geneva Conventions, for example, "[t]he fact that the Conventions deal with superior interests-the safeguarding of the lives and dignity of human beings" and Article 63 of the Fourth Geneva Convention on denunciation, which "is dictated by the best interests of the victims of war". The Commentary to Article 7, on special agreements, illustrates that "[t]he only limits set by the Convention concern the subject of the agreements, and are there in the interests of the protected persons". See Commentary to Article 7, International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958).

[115] Hague Regulations (1907), art. 43.

[116] Edmund Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations", *Yale Law Journal* vol. 54 (1944–1945) pp. 393, 395–397.

[117] High Court of Judicature, *The King v Maung Hmin et al, Burma*, 13 International Law Reports (11 March 1946), Case No 139. Contrariwise, orders, proclamations, decrees and regulations imposed by the German occupying Power, with the intent to govern the occupied population of Alto Adige through terror, "could not render lawful, even in respect of the principles of international law". Italy Court of Cassation, *re Mittermaier*, 13 International Law Reports (2 May 1946), Case No. 28.

[118] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) p. 412.

[119] Yutaka Arai-Takahashi, "Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation", *International Review of the Red Cross*, vol. 94(855) (2012) p. 53; Italy, Council of State, *Anastasio v Ministerio Dell Industria E Del Commercio, International Law Reports*, vol. 13 (22 January 1946), Case No. 50. Laws incompatible with the law of the occupied State may be annulled *post bellum*. As the occupier does not have sovereign rights over the occupied territory and is prohibited from annexing the territory, the conservationist principle constrains the legislative competence of the occupying Power. Fourth Geneva Convention (1949), art. 47.

[120] Gregory H. Fox, "Transformative Occupation and the Unilateralist Impulse", *International Review of the Red Cross* vol. 885 (March 2012) p. 237.

> The most widely approved line of distinction is that the Occupant, in view of his merely provisional position, cannot make permanent changes in regard to fundamental institutions, for instance, change a republic into a monarchy. It becomes, however, increasingly difficult to say with confidence what is a fundamental institution.[121]

Where this boundary is drawn has been the subject of more recent extensive debate after the transformative belligerent occupation of Iraq. While the interim government was analogous to an occupying Power in many respects, it did have the imprimatur of a Security Council Mandate, and the ICRC has therefore since stressed the "reassertion of the conservative principles that underlie occupation law", including the conservationist principle.[122] The general position is that the occupying Power can legislate for the best interests of the occupied population and considerations of legitimate military necessity.[123] Private law in the occupied territory remains in force as the object is "not to put the occupant in a privileged position, but to impose duties on the occupant".[124] Therefore, private laws which are not lawfully abrogated remain in force,[125] and the local institutions of the occupied territory remain intact.[126]

7. Security interests of occupying Power

As previously outlined, the occupying Power administers the territory weighing the best interests of the occupied population with those of military necessity. Articles deferring to the security considerations of the occupying Power are peppered throughout the Hague Regulations and Geneva Conventions, with many provisions containing clauses directly pertaining to military necessity.[127] For example, Article 64(1) of the Fourth Geneva Convention (1949) permits the repeal or suspension of penal laws in the occupied territory in cases "where they constitute a threat to [the occupying Power's] security".[128] Article 64(2) contains a clause of general application permitting the occupying Power to subject the occupied population to essential provisions which *inter alia* "ensure the security of the occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".[129] Additionally, Articles 55 and 62 allow for temporary restrictions on food, medical supplies and relief consignments when made necessary by imperative military requirements and security.[130]

B. Illegal occupations *jus in bello*

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[121] Julius Stone, *Legal Controls of International Conflict* (Rinehart, 1954) p. 698.
[122] ICRC, "Occupation and Other Forms of Administration of Foreign Territory" *Expert Meeting* (March 2012) p. 47.
[123] Belgium Court of Appeal of Liege*, Mathot v. Longue*, *International Law Reports*, vol. 1 (1919–1921), Case No. 329.
[124] Germano-Belgian Mixed Arbitral Tribunal, *Militaire v German State*, *International Law Reports*, vol. 2 (13 January 1923) Case No. 4.
[125] Ibid.
[126] Hague Regulations (1907), arts. 43, 56; Fourth Geneva Convention (1949), art. 47; Belgium Court of Cassation, *Borginon v Administration des Finances*, *International Law Reports*, vol. 13 (20 May 1946) Case No. 153.
[127] Article 49 of the Fourth Geneva Convention, for example, contains a qualifying clause limiting evacuations and detentions of protected persons, unless "the security of the population or imperative military reasons so demand". It also narrowly permits the practice of assigned residence or internments, and curbs the access of representatives of delegates of the Protecting Power "for imperative reasons of security". Fourth Geneva Convention (1949) arts. 49, 78, 143.
[128] Fourth Geneva Convention (1949), art. 64(1).
[129] Fourth Geneva Convention (1949), art. 64(2).
[130] Fourth Geneva Convention (1949), art. 55.

Many commentators on international law have adopted the position that the occupying Power's breach of core principles underpinning a belligerent occupation may indicate that the occupation has become illegal under *jus in bello*. For example, in 2005, Orna Ben-Naftali, Aeyal Gross and Keren Michaeli proposed *lex feranda (future law)* the "legal construction" of a new norm.[131] Here, the authors propose that an occupation may be rendered illegal for breach of "the normative order that generates the legal regime of occupation",[132] among them principles of temporality, annexation, the inalienability of sovereignty, gross violations of human rights, and the breach of trust regarding self-determination. Correspondingly, former United Nations Special Rapporteur Michael Lynk argues that the occupation may become illegal if the occupying Power breaches any one of the following principles: the prohibition on annexation, temporality, the best interests of the occupied population, and good faith.[133]

Again, this illegality is rooted not in the breach of a direct norm on the legality of occupation, but in the legal construction that significant breaches of the principles of belligerent occupation invalidate the legality of the regime of occupation. As such, there is an "inner morality" which dictates that the principles establishing a belligerent occupation ought to be followed, arguably stemming from the principle of legality.[134] This research takes the approach that the occupying Power's breach of peremptory norms of international law provides particularly compelling evidence of a breach of the principles of necessity and proportionality for self-defence *jus ad bellum.*[135] For example, a belligerent occupation which operates denying the right to self-determination of a people in Mandate territories may be considered a disproportionate use of force. Accordingly, the violation of the principles underpinning self-defence may characterize the occupation regime as an unlawful aggressor *de lege lata (as the law exists).*

C. Illegal occupations *jus ad bellum*

This section provides a non-exhaustive albeit consecutive overview of different occupations which have been declared illegal under Security Council resolutions, General Assembly resolutions and United Nations Commission on Human Rights resolutions, and in the jurisprudence of the International Court of Justice.

1. Iraq's occupation of Kuwait

The international response to Iraq's occupation of Kuwait in 1990, illustrates that an occupation arising from an illegal invasion of territory is unlawful *jus ad bellum.* Following Iraq's invasion and occupation of Kuwait,[136] which promised the "comprehensive and eternal" annexationist merger of Iraq with Kuwait, the Security Council issued a number of resolutions calling for the end of the occupation.[137] In October 1990, Security Council resolution 674 specifically denoted

[131] Orna Ben-Naftali, Aeyal M.Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" *Berkeley J. Int'l L.*, vol. 23 (2005) pp. 551, 553.
[132] Ibid.
[133] UNHCR, "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Michael Lynk" (23 October 2017) A/72/556, paras. 29–38.
[134] Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964).
[135] For extensive analysis on this point see Ralph Wilde, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation" *Palestine Yearbook of International Law*, vol. 22 (2019–2020) p. 50.
[136] United Nations Security Council resolution 660 (2 August 1990).
[137] United Nations Security Council resolution 661 (6 August 1990) Article 9(b) of the resolution called on States "[n]ot to recognize any regime set up by the occupying Power"; United Nations Security Council resolution 662 (1990); United Nations Security Council resolution 678 (1990).

the "illegal occupation", reminding Iraq that "under international law it is liable for any loss, damage or injury arising in regard to Kuwait and Third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait".[138] In March 1991 Security Council resolution 686 called on Iraq to accept liability for any loss, damage and injury arising under international law "as a result of the invasion and illegal occupation of Kuwait".[139] Security Council resolution 661, meanwhile, provided a list of sanctions conditioned on Iraq's failure to withdraw its troops from the territory and its usurpation of the legitimate Government of Kuwait, calling on Third States "[n]ot to recognize any regime set up by the occupying Power".[140]

2. Armenia's occupation of Azerbaijan

Between 1993 and the signing of the ceasefire agreement on 9 November 2020, Armenia occupied the Nagorno-Karabakh region and surrounding districts.[141] In 1993, Security Council resolution 822 (1993) condemned the Armenian invasion of the Kelbadjar district of the Republic of Azerbaijan, the displacement of large numbers of civilians, while reaffirming the inviolability of international borders and the inadmissibility of acquisition of territory though use of force.[142] The General Assembly characterized the continuation of the occupation as an internationally wrongful act: "No State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation".[143] General Assembly resolution 62/243 (2008) further recognized the inalienable right of the population expelled from the occupied territory to return.[144]

3. Uganda's occupation of Ituri, Democratic Republic of Congo

In *Case Concerning Armed Activities on the Territory of the Congo* (2005), the International Court of Justice held that the military intervention by Uganda in the Democratic Republic of Congo breached the principle of non-intervention prohibiting a State from intervening "directly or indirectly, with or without armed force, in support of an internal opposition in another State" and constituted a grave violation of the use of force under Article 2(4) of the United Nations

[138] United Nations Security Council resolution 674 (29 October 1990), para. 8.
[139] United Nations Security Council resolution 686 (2 March 1991).
[140] United Nations Security Council resolution 660 (1990), para. 2; United Nations Security Council resolution 661 (1990), paras. 1 and 9.
[141] Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation (10 November 2020).
[142] United Nations Security Council resolution 884 (1993), para. 1 condemned the breach of the ceasefire and Armenia's occupation of the Zangelan District and the City of Goradiz, but falls short of terming the occupation as illegal. See also United Nations Security Council resolution 822 (1993), which called for the withdrawal of all occupying forces from the Kelbadjar district and other occupied areas. In July 1993, the UN Security Council noted with alarm Armenia's seizure of the Agdam district and called again for the withdrawal of occupying forces from the district, United Nations Security Council resolution 853 (1993), para. 3. In October 1993, the UN Security Council called for the immediate implementation of the CSCE Minsk Group's "Adjusted timetable", and the withdrawal of forces from the occupied territories, United Nations Security Council resolution 874 (1993), para. 5.
[143] United Nations General Assembly resolution 62/243 (25 April 2008) The situation in the occupied territories of Azerbaijan, para. 5.
[144] Ibid.

Charter.[145] The Court found that the occupation of Ituri breached the principles of non-use of force and non-intervention *ad bellum*:

> [T]he Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention.[146]

Judge Verhoeven opined that the "occupation is unlawful because it results from the use of force otherwise than in self-defence".[147] On this basis the "occupying State bears an obligation, for example, to make reparation for all ensuing damage".[148]

4. Vietnam's occupation of Democratic Kampuchea

In 1985, the United Nations Commission on Human Rights reaffirmed that "the continuing illegal occupation of Kampuchea by foreign forces deprives the people of Kampuchea of the exercise of their right to self-determination and constitutes the primary violation of human rights in Kampuchea".[149] The preambular clauses highlighted that the illegal occupation had forced Kampucheans to flee from their homelands as displaced persons and refugees, whereas the reported demographic changes threatened the "survival of the Kampuchean people and culture".[150] Meanwhile, joint communiques of the 17th and 19th Association of Southeast Asian Nations (ASEAN) ministerial meetings expressed "deep concern at the continued illegal occupation of Kampuchea",[151] which violated the principles of self-determination and non-interference in the internal affairs of a sovereign state.[152] The Foreign Ministers expressed concern over the "demographic changes in Kampuchea brought about by the increasing number of Vietnamese settlers and the on-going process of Vietnamization of Kampuchea".[153]

5. South Africa's occupation of Namibia

In June 1968, the General Assembly condemned "the action of the Government of South Africa designed to consolidate its illegal control over Namibia and to destroy the unity of the people and the territorial integrity of Namibia" and called on Third States to desist from dealings aimed at perpetuating the "illegal occupation" and to take economic and other measures to secure the immediate withdrawal of South Africa.[154] The Security Council repeatedly referred to South Africa's "illegal administration" and declared that "the continued presence of the South African

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[145] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports, vol. 168 (19 December 2005), paras. 164–165.
[146] Ibid., para. 345, p. 280.
[147] Ibid., Declaration of Judge Ad Hoc Verhoeven, para. 5, p. 359.
[148] Ibid.
[149] United Nations Commission on Human Rights, Situation in Kampuchea (27 February 1985) E/CN.4/RES/1985/12, para. 3.
[150] United Nations Commission on Human Rights, Situation in Kampuchea (22 February 1988), E/CN.4/RES/1988/6, preamble.
[151] Joint Communiqué of the 17th ASEAN Ministerial Meeting Jakarta, Issued in Jakarta, Indonesia (10 July 1984), paras. 18, 28.
[152] 1986 Joint Communiqué of the 19th ASEAN Ministerial Meeting, para. 15.
[153] Ibid., para. 20.
[154] A/RES/2372(XX.II), 12 June 1968, para. 9.

authorities in Namibia is illegal".[155] In 1969, the Security Council recognized "the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in their Territory".[156] Meanwhile, in 1985, Security Council resolution 577 commended "the People's Republic of Angola for its steadfast support for the people of Namibia in their just and legitimate struggle against the illegal occupation".[157]

In a subsequent advisory opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* [hereafter *South West Africa*], the International Court of Justice held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[158]

6. Portugal's occupation of Guinea-Bissau

Like Namibia, the State of Guinea-Bissau was a former colony.[159] On 17 November 1967, General Assembly resolution 2270 condemned the colonial war being waged by Portugal in African territories under its administration, while recognizing the legitimacy of the people's struggle to achieve their freedom and independence. Later in 1973, General Assembly resolution 3061 (1973) condemned the Government of Portugal for "perpetuating its illegal occupation of certain sectors of Guinea-Bissau and the repeated acts of aggression committed by its armed forces against the people of Guinea-Bissau and Cape Verde".[160] In a preamble to the resolution, the General Assembly noted that "the State of Guinea-Bissau assumes the sacred duty to expel the forces of aggression of Portuguese colonialism" from its territory.[161] Meanwhile, Security Council resolution 321 reaffirmed the "inalienable right of the peoples of Angola, Mozambique and Guinea (Bissau) to self-determination" and the "legitimacy of their struggle to achieve that right".[162]

7. Israel's occupation of Palestine

It is important to note that Israel's occupation of the Palestinian and Syrian territories has already been characterized in numerous General Assembly resolutions as an illegal occupation.[163] In 1977, the General Assembly expressed its deep concern that "the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights", reaffirming that "the acquisition of territory by

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[155] United Nations Security Council resolution 435 (1978), para. 2; United Nations Security Council resolution 276 (1970).
[156] United Nations Security Council resolution 269 (1969), para. 4.
[157] United Nations Security Council resolution 577 (1985), para. 5.
[158] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 54, para. 125.
[159] United Nations General Assembly resolution 3205 (XXIX) (17 September 1974).
[160] United Nations General Assembly resolution 3061 (XXVIII), Illegal Occupation by Portuguese Military Forces of Certain Sectors of the Republic of Guinea-Bissau and the Acts of Aggression Committed by Them Against the People of the Republic, para. 2.
[161] Ibid.
[162] United Nations Security Council resolution 312 (1972) Territories under Portuguese Administration.
[163] United Nations General Assembly resolution 32/20 (Nov. 25, 1977) preamble, para. 4; United Nations General Assembly resolution 33/29 (7 December 1978) preamble, para. 4; United Nations General Assembly resolution 34/70 (6 December 1979), preamble, para. 5.

force is inadmissible and that all territories thus occupied must be returned".[164] The reference to the inalienable national rights of the Palestinian people speaks to a continuing and unlawful deprivation of the Palestinian right of self-determination from 1948, thus preceding the occupation.[165] General Assembly resolution 33/29 (1978) similarly echoed its deep concern that the Arab territories "occupied since 1967 have continued, for more than eleven years, to be under illegal Israeli occupation" and condemned "Israel's continued occupation of Palestinian and other Arab territories, in violation of the Charter of the United Nations".[166] Likewise, the preambles to successive United Nations Economic and Social Council resolutions include provisions on the grave situation in occupied Palestine and its impacts on Palestinian women "resulting from the severe impact of the ongoing illegal Israeli occupation and all of its manifestations".[167]

D. Israel's positions on occupied Palestine

This section provides a preface to the main arguments provided by Israel to justify its prolonged occupation of the Palestinian territory, providing insights on (1) Israel's arguments on the nature of the belligerent occupation; (2) Israel's arguments justifying the presence of settlements in the West Bank, including East Jerusalem; and (3) Israel's positions on the *de jure* and *de facto* annexation of territory in occupied Palestine. The section is a reference point for the central Israeli arguments, which are threaded throughout and rebutted in the study.

1. Israel's arguments on belligerent occupation

Politically, the position of Israel since 1967 is that Palestine is not occupied territory but is rather "disputed territory". Israel's Ministry of Foreign Affairs states that "[i]n legal terms, the West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations – and indeed both the Israeli and Palestinian sides have committed to this principle".[168] In 2003, Ariel Sharon publicly retracted a statement that Israel's control over the West Bank and the Gaza Strip was an "occupation", instead conveying that he should have referred to Israel's presence as "control over disputed lands."[169]

In 2012, a committee commissioned by Prime Minister Benjamin Netanyahu and then–Justice Minister Professor Yaacov Neeman was headed by retired Supreme Court Justice Edmund Levy, examining *inter alia* the legal status of Israel's presence in the West Bank under international law. The resulting "Levy Report" concluded that "from the perspective of international law, the [laws] of 'occupation', as reflected in the relevant international conventions, do not apply to the special historical and legal circumstances of Israeli presence

[164] United Nations General Assembly resolution 32/20 (1977), preamble; See also United Nations General Assembly resolution 3414 (XXX) (5 December 1975), para. 1.
[165] United Nations General Assembly resolution 32/20 (1977), para. 1.
[166] United Nations General Assembly resolution 33/29 (7 December 1978), para. 1.
[167] United Nations Economic and Social Council, "Situation of and assistance to Palestinian women" E/RES/2010/6 (20 July 2010); United Nations Economic and Social Council, "Situation of and assistance to Palestinian women" E/RES/2013/17 (9 October 2013); United Nations Economic and Social Council, "Situation of and assistance to Palestinian women" E/RES/2015/13, 19 August 2015; United Nations Economic and Social Council, "Situation of and assistance to Palestinian women" E/RES/2016/4, 22 July 2016.
[168] Ministry of Foreign Affairs, "Israeli Settlements and International Law" (30 November 2015).
[169] Rebecca Trounson And Megan K. Stack, "Sharon Says 'Occupation' Not What He Meant" *Los Angeles Times*, 28 May 2003.

in Judea and Samaria".[170] Rather, the Committee argued, the legal basis for Israel's sovereignty over the entirety of historic Palestine derives from the Mandate for Palestine. As such, the partition plan enshrined in General Assembly resolution 181, in addition to the subsequent Jordanian occupation, did not have the legal imprimatur to override the Mandate.[171]

Interestingly, the Committee asserted that given the prolonged nature of Israel's control over the Palestinian territory, Israel's occupation does not fulfil the temporary condition for a belligerent occupation, which envisages a situation of short-term occupation. The Committee's conclusions on this point are worth presenting in full:

> After having considered all the approaches placed before us, the most reasonable interpretation of those provisions of international law appears to be that the accepted term "occupier" with its attending obligations, is intended to apply to brief periods of the occupation of the territory of a sovereign state pending termination of the conflict between the parties and the return of the territory or any other agreed-upon arrangement. However, Israel's presence in Judea and Samaria is fundamentally different: Its control of the territory spans decades and no one can foresee when or if it will end.[172]

Moreover, according to the Levy Report, occupation only applies to the territory of a State, and the West Bank was not under any sovereignty when it was occupied.[173] The report maintains that "the territory was captured from a state (the kingdom of Jordan), whose sovereignty over the territory had never been legally and definitively affirmed, and [which] has since renounced its claim of sovereignty; the State of Israel has a claim to sovereign right over the territory".[174]

However, in contradistinction to the political arguments proffered publicly, the legal arguments submitted to Israel's Supreme Court by successive Israeli governments since 1967 have supported the position that the nature of Israel's effective control over, and administration of, the Palestinian territory, is one of belligerent occupation.[175] For example, in *Gaza Coast Regional Council v Knesset of Israel* (9 June 2005), the Court considered the positions of successive Israeli governments on the question of belligerent occupation:

> According to the legal outlook of all Israel's governments as presented to this court – an outlook that has always been accepted by the Supreme Court – these areas are held by Israel by way of belligerent occupation. The legal regime that applies there is determined by the rules of public international law and especially the rules relating to belligerent occupation.[176]

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[170] Report of the Committee to Examine the Status of Building in the Judea and Samaria Area (Levy Report) June 2012, p. 83.
[171] Ibid., para. 8.
[172] Ibid., para. 5.
[173] Yesh Din, *Unprecedented: A Legal Analysis of the Report of the Committee to Examine the Status of Building in Judea and Samaria [the West Bank] ("The Levy Committee") – International and Administrative Aspects* (January 2014) p. 10.
[174] Report of the Committee to Examine the Status of Building in the Judea and Samaria Area (Levy Report) June 2012, para. 5.
[175] David Kretzmer, Yael Ronen, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (OUP 2021) p. 64.
[176] HCJ 1661/05 *Gaza Coast Regional Council v Knesset of Israel* (9 June 2005) para. 3.

In 2005, Israel removed its military forces from the Gaza Strip, and evacuated and dismantled the settlements there.[177] Upon removal of the military from Gaza, under Israel's Disengagement Law, Israel considered that it was no longer in belligerent occupation of the Gaza Strip. A ruling from Israel's High Court of Justice in 2008 held:

> [S]ince September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there.[178]

Almost two decades later, in March 2023, the Knesset voted to repeal the Disengagement Law (2005), which saw the dismantling of settlements and the removal of Israeli settlers from the Gaza Strip. By repealing the law, Israel has removed domestic legal impediments to the construction of settlements in the Gaza Strip, leaving it to the competence of the Military Commander to decide on when to proceed with settlement construction.

At the same time, Israel further argues that the West Bank and Gaza Strip do not meet the stipulation of "territory of a High Contracting party" to the Geneva Conventions for the purposes of establishing total or partial occupation. Article 2(2) of the Fourth Geneva provides that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".[179] According to former Israeli Attorney General Meir Shamgar, writing in 1971, the relevant provision of the Fourth Geneva Convention (1949) is not applicable to Israel's occupation owing to the missing sovereign. According to Shamgar:

> The whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign… Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Convention to the territories under consideration which, as stated, does not in my opinion apply to these territories, and decided to act *de facto* in accordance with the humanitarian provisions of the Convention.[180]

The Geneva Conventions, although signed by Israel, have not been transposed into domestic law. Accordingly, the Fourth Geneva Convention cannot be invoked by petitioners before the Israeli Supreme Court, and only the customary provisions of the Conventions are applied by the Court.[181]

2. Israel's legal arguments pertaining to settlements

Israel provides three core arguments for its claim that it is lawfully settling occupied Palestine: first, that rights were granted to settle the territory under the Palestine Mandate; second, that

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[177] Orna Ben-Naftali, Michael Sfard, Hedi Viterbo, *The ABC of the OPT, A Legal Lexicon of the Israeli Control Over the Occupied Palestinian Territory* (CUP 2018) p. 25.
[178] HCJ 9132/07 *Jabar Al-Bassiouni Ahmed v Prime Minister et al.* (27 January 2008) para. 12.
[179] Fourth Geneva Convention (1949), art. 2(2).
[180] Shamgar, M. "The Observance of International Law in the Administered Territories" 1 *Israeli Yearbook on Human Rights* (1971) 262–77.
[181] HCJ 606/78 *Ayub et al. v. Minister of Defence et al.,* 33(2) PD pp. 113, 120–2; 127–8; Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2019) p. 31, para. 89.

private acts of settlement are not prohibited under the Fourth Geneva Convention (1949); and third, that agreements concluded between Israel and the Palestinians relegate the matter of settlements to final status negotiation.

Israel grounds its arguments for continued settlement expansion in Article 6 of the Palestine Mandate, which provides that in administering Palestine, the Mandatory Power ensure:

> that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews, on the land, including State lands and waste lands not required for public purposes.[182]

Professor Eugene Rostow, former US Under Secretary of State for Political Affairs, cited as authority by Israel's Ministry of Foreign Affairs, similarly roots Jewish claims to the West Bank in the continued applicability of the Palestine Mandate:

> Many believe that the Palestine Mandate was somehow terminated in 1947, when the British Government resigned as mandatory, or in 1948, when the British withdrew. This is incorrect. A trust never terminates when a trustee dies, resigns, embezzles the trust property, or is dismissed. The authority responsible for the trust appoints a new trustee, or otherwise arranges for its winding up. Thus, in the case of the Mandate for German South West Africa, the International Court of Justice found the South African Government to have been derelict in its duties as the mandatory power, and it was therefore deemed to have resigned.[183]

In this vein, Israel's Ministry of Foreign Affairs notes that "[s]ome Jewish settlements, such as in Hebron, existed throughout the centuries of Ottoman rule, while settlements such as Neve Ya'acov, north of Jerusalem, the Gush Etzion bloc in southern Judea, and the communities north of the Dead Sea, were established under British Mandatory administration".[184]

Taking the subsequent application of Article 49 of the Fourth Geneva Convention to the territory occupied in 1967, the Ministry of Foreign Affairs subtly questions the applicability of the Geneva Conventions to territory "such as the West Bank over which there was no previous legitimate sovereign".[185] It contends that "the case of Jews voluntarily establishing homes and communities in their ancient homeland, and alongside Palestinian communities, simply does not match the kind of forced population transfers contemplated by Article 49(6)".[186] The Ministry argues that Article 49(6) does not in any way "prohibit the movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership".[187] In this vein, the Ministry notes the published opinion of Professor Eugene Rostow, who suggests that "[t]he Jewish right of settlement in the area is equivalent in every way to the right of the local population to live there".[188] The Ministry gives assurances that the Supreme Court of Israel examines property claims in a process "which is designed to

[182] League of Nations, Mandate for Palestine, art. 6.
[183] Eugene Rostow, "Correspondence" *AJIL*, vol. 84 (1990) pp. 717, 718 – 719.
[184] Ministry of Foreign Affairs, Israeli Settlements and International Law (30 November 2015).
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid.

ensure that no communities are established illegally on private land".[189] It further dismisses the notion that the settlements constitute grave breaches of the Geneva Conventions, suggesting that provision for grave breaches derives from the Additional Protocols, to which Israel is not a party.

Last, Israel notes that the agreements concluded between Israel and the Palestine Liberation Organization (PLO) contain no clauses prohibiting settlement construction in occupied Palestine. Specifically, Israel recalls that the Israel Palestine Interim Agreement (1995) expressly provides that "the Palestinian Authority has no jurisdiction or control over settlements or Israelis and that the settlements are subject to exclusive Israeli jurisdiction pending the conclusion of a permanent status agreement".[190]

3. Israel's arguments pertaining to annexation

Introducing its position on the "reunification" of Jerusalem, Israel's Ministry of Foreign Affairs explains how "[t]he Zionist movement, which arose to give modern political expression to the Jewish people's national identity, draws its name from the ancient Hebrew word for Jerusalem, and always viewed the return to Zion – and the restoration of Jewish sovereignty in the ancient Land of Israel – as its primary purpose".[191] The Ministry further highlights how Jerusalem was "reunified" in 1967 "as a result of the six-day war launched against Israel by the Arab world".[192] The Israeli Ministry of Foreign Affairs clearly articulates how Israel struck Egypt in pre-emptive acts of aggression:

> Invoking its inherent right of self-defense, Israel preempted the inevitable attack, striking Egypt's air force while its planes were still on the ground … Israel had no choice but to quickly counterattack, capturing the Jordanian-occupied West Bank. On 7 June, after particularly harsh fighting, Israeli paratroopers liberated the Old City of Jerusalem.[193]

Almost immediately after the start of the occupation, on 27 June 1967, the Knesset amended the Law and Administrative Ordinance 1948, adding the declaration that the "law, jurisdiction and administration of the State of Israel government shall extend to any area of "Eretz Israel" it so orders". Notably, the land of Eretz Israel refers to the entirety of the territory of Mandate Palestine.[194] The following day, on 28 June 1967, Israel amended the Basic Law of 1950 to include the newly expanded Jerusalem Municipality.

Successive governments have continued the position that Jerusalem "undivided" is the capital of the State of Israel. The most recent reiteration of this came in October 2022, from then–Prime Minister Yair Lapid, who stated that "Jerusalem is the eternal undivided capital of Israel and nothing will change that".[195] More recently, on 21 May 2023, in an address to the Cabinet, Prime Minster Netanyahu announced that a Cabinet meeting would be held in occupied

[189] Ibid.
[190] Ibid.
[191] Israel Ministry of Foreign Affairs, 1967: The Reunification of Jerusalem (2013).
[192] Ibid.
[193] Israel Ministry of Foreign Affairs, 1967: The Six-Day War and the Historic Reunification of Jerusalem (2013).
[194] John Quigley, "Jerusalem: The Illegality of Israel's Encroachment" *The Palestine Yearbook of International Law* (1996–1997) 30, fn. 49.
[195] Amarachi Orie, "Australia Reverses Decision to Recognise West Jerusalem as Israel's Capital", *Sky News,* 25 October 2022.

Jerusalem "at the foot of the Temple Mount" and applauded his government's insistence on settlement construction in occupied Jerusalem, stating:

> Some prime ministers were willing to give in to these pressures … We acted differently … I am proud of the great merit I had to build new neighborhoods in Jerusalem like Har Homa, Givat Hamatos and Ma'aleh Hazeitim, in which tens of thousands of Israelis live. We did this under massive international pressure and we stood up to that pressure.[196]

4. Concluding remarks

While the Israeli analysis correctly identifies the continued application of the Mandate as a sacred trust, the argument conveniently sidesteps the context of the preceding Article 5 of the Palestine Mandate, which requires that "[t]he Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power".[197] Further, Israel ignores the categorization of Palestine as a Class A Mandate, whose provisional independence was accordingly recognized under the League of Nations.

Although Israel relies on Professor Rostow's conclusion that there is a Jewish right of settlement equivalent to the rights of the local population, Rostow concedes in the same article that even though "the State Department has never denied that under the mandate 'the Jewish people' has the right to settle in the area", it "took the position that Jewish settlements in the West Bank violated Article 49(6) of the Fourth Geneva Convention of 1949, dealing with the protection of civilian persons in time of war".198

These arguments will be examined in further detail in later sections, highlighting how Israel's policies reveal an annexationist intent underlying the illegal occupation.

III. Legality of occupation

Belligerent Occupation can be considered illegal *jus ad bellum* when the occupation arises from an act of aggression. Concomitantly, an occupation which is carried out in breach of the principles of immediacy, necessity, and proportionality for self-defence may likewise become an illegal occupation under the *jus ad bellum*. This section examines in further detail these two grounds for illegal occupation. Having established the two grounds for illegal occupation under the *jus ad bellum*, the section examines the occupying Power's breach of the external right of self-determination, a peremptory norm of international law, as a separate and subsequent ground of illegality.

A. Unlawful occupation arising from an act of aggression

Article 2(4) of the United Nations Charter contains the general rule against unlawful use of force whereby "[a]ll Members shall refrain in their international relations from the threat or use

[196] Lahav Harkov, "Netanyahu hits Back at Abbas' lies that Jews Have no History in Jerusalem" *The Jerusalem Post*, 21 May 2023.
[197] League of Nations, Mandate for Palestine, art. 5.
[198] Eugene Rostow, "Correspondence" *AJIL*, vol. 84 (1990) pp. 717, 719.

of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations", with the exception of (1) mandated force under Security Council resolution; or (2) self-defence in response to an armed attack as per Article 51 of the United Nations Charter.[199] The prohibition on aggression is binding on all States as a peremptory norm of international law from which no derogation is permitted.[200] Accordingly, a belligerent occupation arising from an act of aggression will be tainted with illegality *ad bellum*. General Assembly resolution 3314 (1974), which both defines and provides examples of acts of aggression, considers even temporary military occupations resulting from an invasion or an attack carried out in contravention of the United Nations Charter as acts of aggression.[201] European States consider that where the military occupation or acquisition of another European territory arises through a direct or indirect use of force in contravention of international law, "[n]o such occupation or acquisition will be recognized as legal".[202] In these circumstances, it is the function of the Security Council to make a determination on the existence of an illegal act of aggression.[203]

Further, an act of aggression including "any military occupation, however temporary", resulting from an invasion or attack by the armed forces of a State of the territory of another State, may be prosecuted as an international crime.[204] In 1923, the draft League of Nations Treaty of Mutual Assistance characterized any war of aggression as an "international crime".[205] Following this, in 1976, the International Law Commission listed the breach of the prohibition on aggression as an international crime.[206] Further, Article 8 (bis) of the Rome Statute of the International Criminal Court provides that the crime of aggression "means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". Although there have been no prosecutions for the crime of aggression at the International Criminal Court to date, the Nuremberg Tribunal considered a number of cases where planning a military occupation amounted to participation in acts of aggression.

Article 6(1) of the Charter of the International Military Tribunal at Nuremberg provided for a crime against peace, "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances", which notably did not mention belligerent occupation.[207] Nevertheless, at Nuremberg, the Tribunal in *Von Schirach* explained *obiter*:

> As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a "crime within the jurisdiction of the Tribunal" as that term is used in Article 6 (c) of the Charter. As a result, "murder, extermination,

[199] UN Charter, art. 2(4).
[200] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), art. 26, Commentary, p. 85, para. 5.
[201] United Nations General Assembly resolution 3314 (XXIX), art. 3. Definition of Aggression.
[202] Conference on Security and Co-Operation in Europe Final Act (Helsinki 1975). Questions relating to Security in Europe, Territorial Integrity of States.
[203] UN Charter (1945), art. 39.
[204] Article 8(2)(a), statute of the International Criminal Court.
[205] See League of Nations, Official Journal, Fourth Year, No. 12, December 1923, p. 1521.
[206] International Law Commission, "Report of the International Law Commission on its twenty-eighth session", (1976) art. 19(3)(a).
[207] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (London, 8 August 1945), art. 6.

enslavement, deportation and other inhumane acts" and "persecutions on political, racial or religious grounds" in connection with this occupation constitute a crime against humanity under that Article.[208]

Similarly, the Tribunal, in *Von Papen,* considered whether the defendants were criminally liable for aggressive acts arising from an occupation.[209]

In summation, a belligerent occupation resulting from an act of aggression is illegal from the outset. Further, an occupation carried out pursuant to a common plan of aggression may be prosecuted as an international crime, for which there is individual criminal liability.

B. Unlawful occupation arising from a breach of self-defence

The general consensus is that belligerent occupation may be necessary, and therefore constitutes a lawful military administration *ad bellum,* when it arises from a use of force in self-defence.[210] An occupation as an act of self-defence against an armed attack is legitimate for as long as the armed attack continues. Dapo Akande and Antonios Tzanakopoulos opine that "any occupation *that is the direct consequence of an armed attack* constitutes a continuing armed attack" for the purposes of self-defence.[211] The question of when the continuing act of self-defence ends is answered simply: when it is no longer necessary to repel an armed attack through the use of force. Either of two scenarios may arise: first, the armed attack has taken place, giving rise to a right to use necessary and proportionate force in self-defence, and is over; or secondly, an armed attack leads to an occupation, and the armed attack continues as long as the occupation lasts.

Usually, a use of force in self-defence necessitates contemporaneous communication from the belligerent State to the Security Council that the State is acting in self-defence.[212] As Greenwood suggests, "the fact that a State has not reported measures which it subsequently claims were taken in self-defence is likely to make that claim less plausible".[213] Article 51 of the United Nations Charter provides for the right of self-defence which continues "until the Security Council has taken measures necessary to maintain international peace and security".[214] In any case, the right of self-defence is subject to the customary international law "conditions of necessity and proportionality".[215] The legitimacy of continued occupation as an act of self-

[208] International Military Tribunal at Nuremberg, *Trial of Goring, von Schirach et al,* 1946–49, Law Reports of the Trials of War Criminals, vol. 10 (1946–1949) p. 533.
[209] International Military Tribunal at Nuremberg, *Trial of Goring, Von Papen et al,* 1946–49, 10 Law Reports of the Trials of War Criminals (1946–1949) pp. 519, 537; There the Tribunal found "no evidence that he [Von Papen] was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary". In a dissenting opinion, the Soviet member of the IMT proposed that the evidence established beyond doubt that "Von Papen actively participated in the Nazi aggression against Austria culminating in its occupation".
[210] Stephen M. Schwebel, "What Weight to Conquest?" *Am. J. Int'l L.*, vol. 64 (1970) pp. 344, 345–346.
[211] Dapo Akande and Antonios Tzanakopoulos, "Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?" (*EJIL Talk*, 18 November 2020).
[212] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) International Court of Justice Reports, vol. 3, 1996 (8 July 1996) para. 44.
[213] Christopher Greenwood, "Self-Defence" *OUP Max Planck Encyclopedia of Public International Law*, para. 31.
[214] Charter of the United Nations, art. 51.
[215] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* International Court of Justice Reports 1984, p. 392, para. 41. This was restated in the

defence may be temporally limited; and certainly, as an occupation continues, it may subsequently fail to satisfy the principles of necessity and proportionality.[216]

Our first consideration is the possibility of occupation becoming illegal at some point *durante bello*. As advanced by Cassese, the longer the military occupation continues, the more difficult it is to satisfy the conditions of military necessity and proportionality.[217] The principle of military necessity in self-defence is explained by Webster in the seminal Caroline incident, where "the act justified by that necessity of self-defence, must be limited by that necessity, and kept clearly within it".[218] Azarova reflects on cases of belligerent occupation that do not meet with resistance from the local population, stating that "the idea of regulating the manner in which a state defends the indefensible cause of territorial aggrandizement and regime change is inimical to the logic of the right to self-defence as a narrow and stringent exception to the cardinal prohibition on the use of interstate force".[219]

Similarly, the principle of proportionality further restricts the use of force permissible for self-defence. Proportionality was described abstractly by Saint Thomas Aquinas in *Summa Theologica*: "Whenever a thing is for an end, its form must be determined proportionally to that end; as the form of a saw is such as to be suitable for cutting … everything that is ruled and measured must have a form proportionate to its rule and measure".[220] Christopher Greenwood advises that a State "must also show that all its measures involving the use of force, throughout the conflict, are reasonable, proportionate acts of self-defence. Once its response ceases to be reasonably proportionate, then it is itself guilty of a violation of the *jus ad bellum*".[221] In the International Court of Justice decision *Case Concerning Oil Platforms*, the Court considered the disproportionate "scale"[222] of a US military operation to be an unlawful act of self-defence: the United States had destroyed two Iranian frigates and a number of other naval vessels and aircraft, in response to an alleged armed attack by Iran which had merely damaged, not sunk, a single US warship, without loss of life.[223] Similarly, a "massive and extended military action ranging from the bombing of the upper Kodori Valley to the deployment of armoured units to reach extensive parts of Georgia"[224] was considered by the Independent International Fact-Finding Mission on the Conflict in Georgia to have gone "far beyond the reasonable limits of defence", including military acts beyond the terms of the ceasefire.[225] Likewise, weighing proportionality in the *Nicaragua* case*,* the International Court of Justice found that "the reaction of the United States in the context of what it regarded as

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International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 3 International Court of Justice Reports 1996 (8 July 1996) para. 41.

[216] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) p. 99; Christine Gray, *International Law and the Use of Force* (OUP 2008) pp. 154–155.

[217] Ibid.

[218] Parliamentary Papers [1842] in 30 *British and Foreign State Papers* pp. 195, 202.

[219] Valentina Azarova, "Towards a Counter-Hegemonic Law of Occupation: On the Regulation of Predatory Interstate Acts in Contemporary International Law" *Yearbook of International Humanitarian Law*, vol. 20 (2017) p. 132.

[220] Cited in Emily Crawford, "Proportionality" Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (May 2011).

[221] Christopher Greenwood, "The Relationship Between *Ius Ad Bellum* and *Ius In Bello*", *Review of International Studies*, vol. 9(4) (1983) pp. 221, 223.

[222] International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America*, (Judgment) International Court of Justice Reports vol. 161 (6 November 2003) para. 77.

[223] Ibid.

[224] Independent International Fact-Finding Mission on the Conflict in Georgia, volume I, (September 2009) p. 24, para. 21.

[225] *Ibid.,* p. 23, para. 21.

self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated".[226] The temporality considerations implicit to the proportionality analysis are further echoed in Article 51 of the Charter of the United Nations, which provides the right to self-defence only until the Security Council takes measures.

More significantly, in the *Nuclear Weapons* advisory opinion, the International Court of Justice opined that "a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law".[227] This draws an important bridge to the *jus in bello*, and any manifest breaches of the principles underpinning occupation law may weigh the balance of a proportionality analysis on self-defence toward a finding that the occupation is unlawful.[228] Such principles of occupation law cogently outlined by former United Nations Special Rapporteur Michael Lynk include: the prohibition on annexation, temporality, and whether the occupying Power is acting in good faith and in the best interests of the occupied population.[229]

1. Violations of peremptory norms breach necessity and proportionality

In some cases, prolonged occupation may be predicated on the violation of numerous international humanitarian law and international law norms, including peremptory norms. For example, the prohibitions on (1) the acquisition of territory by force, (2) the denial of the right of self-determination, and (3) the imposition of an apartheid regime of institutionalized racial discrimination to maintain domination are noted as widely accepted peremptory norms by the International Court of Justice and International Law Commission, among others.[230] A peremptory norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[231] This study rests on the legal orthodoxy that the use of force in violation of the peremptory norms of (1) non-acquisition of territory by force, (2) self-determination, and (3) the prohibition of racial discrimination and apartheid may constitute an illegal use of force which delegitimizes the continuing occupation.[232] These three principles, taken separately or together with the breach

[226] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment, Merits) International Court of Justice Reports 1984, p. 213, para. 237.
[227] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) International Court of Justice Reports 1996, p. 245, para. 42.
[228] UNHCR, "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Michael Lynk" (23 October 2017) A/72/556.
[229] Ibid., paras. 29–38.
[230] International Court of Justice, *East Timor (Portugal v. Australia), Judgment*, International Court of Justice Reports 1995, pp. 90, 102, para. 29; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons,* (Advisory Opinion) International Court of Justice Reports 1996, pp. 226, 258, para. 83; and International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) (Judgment) International Court of Justice Reports 1996, p. 595, pp. 615–616, paras. 31–32; The torture and crimes against humanity have been extensively documented by human rights organizations. Addameer, *Torture Positions in Israeli Prisons* (2020); Human Rights Watch, "Systematic Oppression and Institutional Discrimination" in *A Threshold Crossed Israeli Authorities and the Crimes of Apartheid and Persecution* (27 April 2021); B'Tselem and PCHR, *Unwilling and Unable Israel's Whitewashed Investigations of the Great March of Return Protests* (27 April 2018).
[231] Vienna Convention on the Law of Treaties (1969), arts. 53 and 64.
[232] See also Ralph Wilde, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation" *Palestine Yearbook of International Law*, vol. 22 (2019–2020) p. 33.

of principles and rules of international humanitarian law, may indicate a breach of the principles of immediacy, necessity and proportionality for the use of force in self-defence.

2. Annexation, an illegal acquisition of territory breaching self-defence

Critically, both *de facto* and *de jure* annexations of occupied territory are prohibited as illegal acquisitions of territory through force, in violation of the United Nations Charter, and breach the requirements of necessity and proportionality for self-defence. The act of annexation is, concomitantly, a breach of the prohibition on the acquisition of territory by force, a violation of the right of self-determination, and an act constituting the international crime of aggression incurring individual criminal liability. The Working Group on the Crime of Aggression for the Preparatory Commission of the International Criminal Court, for example, distinguishes between annexation and acts of incorporation for the purposes of the Rome Statute crime of aggression. Acts of incorporation pertain to the signing of a law or decree, which is for all intents and purposes a *de jure* annexation of territory.[233] Hershey suggests that the incorporation of subjugated territory "must be shown by some act showing intention (such as a decree of annexation) and ability to maintain permanent possession".[234] However, the language in the Rome Statute refers to "any annexation", language which is broader than incorporation and may encompass both *de facto* and *de jure* annexations, as well as full or partial annexation of territory.[235]

De jure annexation takes place when two conditions are satisfied: first, there is a "forcible seizure" of the territory, followed by the annexing State's "unilateral assertion of title", which indicates its intention to annex, integrate or merge the territory.[236] *De facto* annexation occurs where the annexing State forcibly seizes the territory; the intention to annex, however, is not formally expressed, but implied through the State's measures and actions.[237] Wilde suggests that an examination of annexation may be useful for "addressing certain elements of existential illegality but not [for] providing a complete treatment of the matter".[238] Nonetheless, such prohibited acts of aggression are illegal acts and may invalidate the legality of an occupation as a continuing act of self-defence. This section examines annexation of occupied territory as indicative of a disproportionate use of force for self-defence *ad bellum*.[239]

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[233] Preparatory Commission for the International Criminal Court, *Historical Review of Developments Relating to Aggression* (18 January 2002) PCNICC/2002/WGCA/L.1/Add.1, p. 65.
[234] Amos S. Hershey, *The Essentials of International Public Law and Organization* (Macmillan 1930) p. 277.
[235] Rome Statute of the International Criminal Court, Amendments to the Rome Statute of the International Criminal Court, (Kampala, 11 June 2010) Adoption of Amendments on the Crime of Aggression.
[236] See Judge Lauterpacht, International Court of Justice, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures Order) International Court of Justice Reports 1993, p. 325, Dissenting Opinion, para. 82; During the Iraq annexation of Kuwait, the United Nations Security Council decided "[n]ot to recognize any regime set up by the occupying Power" either directly or indirectly, and that the annexation "under any form and whatever pretext has no legal validity, and is considered null and void". United Nations Security Council resolution 661 (2 August 1990) UN Doc/S/RES/661; United Nations Security Council resolution 662 (9 August 1990) UN Doc S/RES/662.
[237] Professor Emeritus Michael Bothe, "Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory" (June 2017) p. 7.
[238] Ralph Wilde, "Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'Legal' or 'Illegal' in International Law?" *Legal Opinion, University College London* (29 November 2022) p. 33, para. 59.
[239] It is worth noting that, in a separate opinion of Vice-President Yusuf in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* a contentious case in which Costa Rica argued that Nicaraguan armed forces were occupying Costa Rican territory, considerations of inviolability of territorial

2.1. The categorical prohibition of annexation of occupied territory as an illegal use of force

Today, there is a clear prohibition on annexation resulting from a use of force. The Brussels Code (1874) and the Oxford Manual on the Laws of War on Land (1880) stress the temporary nature of occupation – "the authority of the legitimate Power being suspended"[240] – and drop all reference to annexationist practices.[241] Specifically, the Friendly Relations Declaration (1970)[242] provides that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal".[243] Similarly, Article 5(3) of General Assembly resolution 3314 on the Definition of Aggression[244] provides that "no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful", while the preamble reaffirms that "the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and … it shall not be the object of acquisition by another State resulting from such measures or the threat thereof".

Such is the categorical and absolute prohibition on annexation, that its inclusion as a wrongful act under the Geneva Conventions was hotly debated by plenipotentiaries at the preparatory meetings: annexation was so obviously illegal its inclusion was considered by many to be superfluous.[245] Initially, draft Article 43 [now Article 47] in the Final Record of the Diplomatic Conference of Geneva of 1949, volume III, on the inviolability of rights, did not contain any specific reference to annexation.[246] However, the text agreed upon at the Diplomatic Conference held at Geneva from 21 April to 12 August 1949 concluded the section on protected

integrity could be considered separately from use of force arguments. For example, a State might "violate the customary rule on territorial inviolability without breaching the prohibition on the use of force". International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) — Question of Compensation* (2 February 2018) International Court of Justice Reports 2015 p. 665, Separate Opinion of Vice-President Yusuf, para. 4.

[240] Project of an International Declaration concerning the Laws and Customs of War (Brussels) (27 August 1874) art. 2.

[241] Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863) art. 33. "It is no longer considered lawful – on the contrary, it is held to be a serious breach of the law of war – to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country."

[242] United Nations General Assembly resolution 2625 (XXV) (24 October 1970) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.

[243] Ibid.

[244] United Nations General Assembly resolution 3314 (XXIX) (14 December 1974) Definition of Aggression.

[245] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) p. 276; Final Record of the Diplomatic Conference of Geneva of 1949, volume 2, Section A, p. 774. At the forty-third meeting, on 8 July 1949, Colonel Du Pasquier (Switzerland), Rapporteur, noted that a reference to annexation contained in the French draft had been omitted because "certain delegations had observed that a unilateral annexation in time of war was inadmissible in international law".

[246] Rather, draft Article 43 stated: "Protected persons who may find themselves in occupied territories cannot in any case or in any manner whatsoever be deprived of the benefit of the present Convention, either by virtue of changes introduced as the result of the occupation into the institutions or government of the said territories, or by arrangements which may be concluded between the authorities of the occupied territories, and the occupying Power. Conversely, no provision in this Convention is intended to confer upon protected persons, including internees in occupied territories, a right to standards of living higher than those prevailing before the occupation began." Final Record of the Diplomatic Conference of Geneva of 1949, volume 3, p. 129.

persons with references to whole or partial annexation.[247] At the 16th meeting, on 16 May 1949, Mr. Meulblok (Netherlands) recommended the omission of the word annexation, "since annexation in time of war was not recognised", suggesting instead an indirect reference to "*infraction au statut*".[248] In the meeting, Mr. De Geouffre de la Pradelle (Monaco) supported the proposal of the Netherlands, suggesting that "[c]ertain theories tended to confuse occupation with annexation, but such theories should be repudiated as contrary to positive international law. It was essential that no text should be adopted which might throw doubt on the legality of occupation".[249] However, at the 43rd meeting, on 8 July 1949, Mr. Pashkov (Union of Soviet Socialist Republics) argued that the removal of the word annexation from the English version of the text had been a mistake. He recommended that it be restored to provide the occupied population with additional safeguards.[250] Mr. Clattenburg (United States of America) similarly made clear that it was "immaterial" whether a specific reference to annexation was included, as the draft applied to all cases of occupations.[251]

As such, Article 47 ensures that the population is protected against demographic manipulation and the status of the territory is maintained intact.[252] This protection is similarly borne out in Article 4 of Additional Protocol 1 (1977) which provides that "[n]either the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question".[253] Commentary to Article 6 explains further that "[t]he Convention could only cease to apply as the result of a political act, such as the annexation of the territory or its incorporation in a federation, and then only if the political act in question had been recognized and accepted by the community of States; if it were not so recognized and accepted, the provisions of the Convention must continue to be applied".[254] Commentary to Article 2 of the Fourth Geneva Convention explains that the *de facto* spirit and character of the Convention intends to counter the evasion of States' obligations, as "the temporary disappearance of sovereign States as a result of annexation or capitulation, has been put forward as a pretext for not observing one or other of the humanitarian Conventions".[255]

In summation, the annexation of occupied territory which has fallen into *debellation* is absolutely prohibited. As Boutruch and Sassòli observe, "[s]uch prohibition [on annexation] is, however, an issue of *jus ad bellum*. *Jus in bello* simply continues to apply despite such changes and such changes do not justify violations of its provisions – including those on the admissibility of legislative changes".[256] Further, the inclusion of annexation during occupation, as discussed in the Diplomatic Conference of Geneva, does not in any way obviate the continuation of the belligerent occupation, which continues regardless of legality, on the facts.

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[247] Final Record of the Diplomatic Conference of Geneva of 1949, volume 1, p. 306.
[248] Final Record of the Diplomatic Conference of Geneva of 1949, volume 2, Section A, p. 663.
[249] Ibid.
[250] Ibid., p. 774.
[251] Ibid.
[252] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) pp. 275–76; Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" *Berkeley J. Int'l L.*, vol. 23 (2005) p. 551; See also Article 4 of Additional Protocol I (1977): "Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question".
[253] Additional Protocol I (1977) art. 4; ICRC "Occupation and other forms of Administration of Foreign Territory", *Expert Meeting* (March 2021) p. 43.
[254] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) p. 63.
[255] Ibid., p. 18.
[256] Dr. Théo Boutruche and Professor Marco Sassòli, "Expert Opinion on the Occupier's Legislative Power over an Occupied Territory Under IHL in Light of Israel's On-going Occupation", (June 2017) p. 10.

However, as Bothe asserts, "taking advantage of the situation for the purpose of annexation is not covered by the justification as self-defence. It would go beyond the limits of what is allowed as self-defence, namely measures which are militarily necessary and proportionate means of self-protection".[257]

2.2 Factoring de facto *annexation into a proportionality analysis*

Territorial acquisition through *de facto* annexation may be factored into a proportionality analysis to establish whether the occupying Power's self-defence has crossed red lines into illegality. In the *Wall* advisory opinion, for example, the International Court of Justice considered 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, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation".[258] Similarly, Vice-President Ammoun, in the *South West Africa* advisory opinion, referred to the "*de facto* annexation of the territory of Namibia"; and likewise, dissenting Judge Tanaka warned that "[t]he Respondent may find it difficult to defend itself against the charge of possessing the avowed intention of piece-meal incorporation amounting to *de facto* annexation".[259]

Even economic integration, such as customs unions, may be evidence of *de facto* annexation. For example, in *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)*, the Permanent Court of International Justice examined the prohibitions on Austria under Article 88 of the Treaty of Saint Germain,[260] which prevented acts of alienation of independence and acts exposing Austrian independence to danger.[261] The Permanent Court of International Justice elucidated that "alienation" must be understood as "any voluntary act by the Austrian State which would cause it to lose its independence or which would modify its independence in that its sovereign will would be subordinated to the will of another Power or particular group of Powers, or would even be replaced by such will".[262] The ruling contends that such prohibitions include undertaking obligations that would alienate economic or financial independence.[263] As such, the Permanent Court of International Justice found that "a regime established between Germany and Austria, on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, would not be compatible with Protocol No. I signed at Geneva on October 4th, 1922".[264]

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[257] Ibid., p. 8.
[258] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 121.
[259] Separate Opinion of Vice-President Ammoun, [re Advisory opinion of 21 June 1971] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 88; Dissenting Opinion of Judge Tanaka, [re Judgment of 18 July 1966] *Ethiopia v. South Africa* (Case Concerning South West Africa) p. 317.
[260] Treaty of Peace concluded at Saint-Germain (10 September 1919) art. 88. "The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power."
[261] *Customs regime between Germany and Austria (Protocol of March 19th, 1931)* Permanent Court of International Justice Series A/B, No 41 (1931). See also Opinion of Judge Anzilotti, p. 63.
[262] Ibid., para. 27.
[263] Ibid., para. 47.
[264] Ibid., para. 65.

In 1947, the United Nations War Crimes Commission established to examine war crimes during World War II, including war crimes committed in Ethiopia during the Italian-Abyssinian war, explained that "the annexation of Ethiopia by Italy was recognised by most Governments *de jure* and by all the Governments *de facto*".[265] In *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V Gebr)* the UK House of Lords established the threshold for determining when occupied territory can be considered subjugated: "It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatedly permanent character and to show the intention to keep it. I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation".[266] The annexation is "decided as a question of fact with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised".[267]

Meanwhile, former United Nations Special Rapporteur Michael Lynk has proposed a four-part test for establishing if territory has been *de facto* annexed, including ascertaining the occupying Power's effective control, its exercises of sovereignty, its expressions of intent and its refusal to be directed by international law.[268] Accordingly, this study argues that acts of *de facto* annexation (with or without acts of *de jure* annexation) may be considered as acts occurring as part of an unlawful acquisition of territory by force, and further as a breach of the necessity and proportionality requirements for a continuing use of force in self-defence, as well as an intent to administer the territory in denial of the right of self-determination.

3. Belligerent occupation denying the exercise of the right of self-determination

The occupying Power's acts in breach of peremptory norms of international law, including the denial of self-determination, may be evidence of a breach of necessity and proportionality, rendering the occupation an unlawful act of self-defence under the United Nations Charter. That prolonged occupation breaches the right of occupied peoples to self-determination has been posited by numerous international law scholars, including Antonio Cassese, who argues that "self-determination is violated whenever there is a … belligerent occupation of a foreign

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[265] United Nations War Crimes Commission, *Submission of Cases by Ethiopia, Commissions Jurisdiction over Crimes Committed in Ethiopia* (10 February 1947) para. 5.

[266] England, House of Lords, *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V Gebr*) International Law Reports, vol. 10 (3 December 1942) Case No. 165.

[267] Ibid. Later, in *Anglo-International Bank Ltd,* the Court altered the test previously laid down in *Sovfracht (V/O),* due to the difficulty in establishing the intention of the occupying Power to "keep" the occupied territory. Rather, the test for trading with corporations of "enemy character" should be whether the occupying Power intends to accrue "an advantage" to himself. For the Court, "[s]uch an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever the ultimate intentions as to the future of the occupied country may be". England Court of Appeal, *Anglo-International Bank Ltd,* International Law Reports, vol. 10 (3 June 1943) Lord Greene M.R.; Luxmore and Goddard, L.JJ, pp. 524–526.

[268] "Effective control: The state is in effective control of territory that it forcibly acquired from another state; Exercises of sovereignty: The state has taken active measures that are consistent with permanency and a sovereign claim over parts or all of the territory or through prohibited changes to local legislation, including the application of its domestic laws to the territory, demographic transformation and/or population transfer, the prolonged duration of the occupation and/or the granting of citizenship; Expressions of Intent: This would include statements by leading political leaders and/or state institutions indicating, or advocating for, the permanent annexation of parts or all of the occupied territory; International Law and Direction: "The state has refused to accept the application of international law, including the laws of occupation, to the territory and/or is failing to comply with the direction of the international community respecting the present and future status of the territory." UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967", (22 October 2018) A/73/45717, para. 31.

country, except where the occupation … is of a minimal duration".[269] Bothe suggests that "[i]f the occupying power makes it impossible for a population to exercise this right [of self-determination] by deciding its own system of government and, thus, its own political fate, this amounts to a deprivation of that right".[270] Likewise, Ben-Naftali et al suggest that a belligerent occupation should end within a reasonable time, which can be deduced by examination of the purpose, nature and circumstances of the occupation.[271] Nicolosi argues that "prolonged occupation and its maintenance in violation of international law can represent a specific ground for illegality, as it undermines the principles of inalienability of sovereignty and territorial integrity".[272]

In particular, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the United Nations Charter, 1970, provides that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of self-determination]".[273] Specifically, Article 49 of the Fourth Geneva Convention protects against the colonization of occupied territory, providing that "[t]he occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".[274] Commentary to the Fourth Geneva Convention conveys how the provision "is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population into occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race".[275] For example, the Nuremberg Tribunal described the practices of transfer into and Germanization of occupied territories whereby "[t]he defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists". Meanwhile, "the demand for land was to be the justification for the acquisition of 'living space' at the expense of other nations", a practice commonly referred to in German as Lebensraum[276] and understood to mean "territory claimed by a nation or State as being necessary to its growth or survival".[277] Such practices offend against the duty "[t]o bring a speedy end to colonialism" and in doing so, violate the fundamental right to self-determination.[278] Comparative practices of settler transfer in and

[269] Antonio Cassese, *Self-Determination of Peoples: A Legal Reprisal* (CUP 1995) 99.
[270] Professor Emeritus Michael Bothe, "Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory" (June 2017) p. 8.
[271] Orna Ben-Naftali, Aeyal M.Gross and Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" *Berkeley J. Int'l L.*, vol. 23 (2005) pp. 551, 600.
[272] Salvatore Fabio Nicolosi, "The Law of Military Occupation and the Role of *De Jure* and *De Facto* Sovereignty" XXXI *Polish Yearbook of International Law* (2011) pp. 165, 184.
[273] United Nations General Assembly resolution 2625 (XXV) (24 October 1970) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.
[274] Fourth Geneva Convention (1949), art. 49; Similarly, the ICRC considers settlements in violation of Article 27 of the Fourth Geneva Convention. 24th International Conference of the Red Cross, Res. III, Application of the Fourth Geneva Convention of 12 August 1949; The act is similarly prohibited under Rule 130 of the ICRC customary international law study and is a grave breach under Article 85(4)(a) of Additional Protocol 1 (1977).
[275] International Committee of the Red Cross, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) Article 49, p. 281.
[276] Michael Loughridge, Sándor Hervey, Ian Higgins, *Thinking German Translation* (Routledge 2006) p. 36.
[277] Trial of the Major War Criminals before International Military Tribunal, volume I, p. 175.
[278] United Nations General Assembly resolution 2625 (XXV) (24 October 1970) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter

forced displacement of the occupied Palestinian population, to obliterate the national character of occupied Palestine, may be similarly indicative of prohibited colonial practices, which deny the right of self-determination.

Here Israel's practices and policies of settler transfer and settlement construction in occupied Palestine can be examined, to ascertain whether Israel's actions are denying the exercise of the right of the Palestinian people to self-determination and full independence as a sovereign nation. The denial of external self-determination and sovereignty of the occupied people, alongside other cumulative international law violations and breaches of peremptory norms of international law, may be indicative of an occupation in breach of the principles of self-defence for a legitimate use of force, rendering the occupation illegal.

4. Belligerent occupation breaching the prohibition on apartheid

A belligerent occupation which is administered in a manner that entrenches and maintains a legal regime of segregation breaches the prohibition on racial discrimination and apartheid, a peremptory norm of international law, and may accordingly be considered an act indicative of a breach of the principles of necessity and proportionality for self-defence under Article 51 of the United Nations Charter.

The prohibition against apartheid is a peremptory norm of international law.[279] Under the Convention on the Elimination of Racial Discrimination, States "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction".[280] The International Convention on the Suppression and Punishment of the Crime of Apartheid (hereafter the Apartheid Convention), defines the crime of apartheid as inhuman acts including:

> similar policies and practices of racial segregation and discrimination as practised in southern Africa … committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.[281]

The definition of apartheid in the Apartheid Convention is declaratory of customary international law and therefore binding on all States. Article 7(2)(h) of the Rome Statute defines the crime against humanity of apartheid as meaning "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".[282]

The main precedent against the application of an apartheid regime in occupied territory derives from the *South West Africa* advisory opinion. There, South Africa's application of a

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of the United Nations; Further, Additional Protocol I (1977), art. 1(4), specifically covers situations of "armed conflict in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".

[279] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), p. 112, para. 4.

[280] International Convention on the Elimination of Racial Discrimination (1969), art. 3.

[281] United Nations General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid, (30 November 1973) A/RES/3068(XXVIII), art. 2.

[282] Rome Statue of the International Criminal Court (2002), art. 7(2)(h).

discriminatory apartheid regime to Namibia, a Mandate territory, was rejected by the International Court of Justice, which stated: "There can be no excuse in the case of South West Africa for the application of the policy of apartheid, so far as the White population are concerned".[283] Similarly, Judge Castro opined that "in applying the laws of apartheid in South West Africa (Namibia), South Africa is in breach of its duties as the mandatory Power; it is not permissible to administer an entrusted territory in a manner contrary to the purposes and principles of the Charter".[284] Judge Padilla Nervo recalled the relevant General Assembly resolutions, detailing that:

> the rules and standards which the Mandatory by its policy of apartheid contravenes, in violation of its obligations under the Mandate, [obligations which are not dormant at all], but alive and in action, as are equally well alive and not dormant the rights of the peoples of the Territory who are the beneficiaries of such obligations.[285]

Importantly, Judge Padilla Nervo concludes that on this basis "the power of administration and legislation could not be legitimately exercised by methods like apartheid which run contrary to the aims, principles and obligations stated in Article 22 of the Covenant".[286]

It is clear that where an occupying Power applies an apartheid regime in occupied territory, this is an unlawful exercise of administration and legislation. Such acts may be indicative of a disproportionate use of force in self-defence. Further, this section concludes that the occupying Power's breach of the prohibition on annexation, denial of the exercise of the right of self-determination, and application of an apartheid regime, may together be indicative of a *mala fide* administration of the occupied territory. The next section will examine the consequent effects of a *mala fide* illegal occupation on the exercise of the external right to self-determination of peoples.

C. Unlawful occupation in breach of the right of external self-determination

As general practice, all belligerent occupations operate under the principle of the temporary suspension of sovereignty of the occupied State.[287] Today, these sovereign rights are understood to remain vested in the occupied people.[288] General Assembly resolution 43/177, for example, affirmed "the need to enable the Palestinian people to exercise their sovereignty over their territory occupied in 1967".[289] Wilde suggests that "it is necessary, in order to invoke international law to challenge the legitimacy of the occupation, to make a case on the basis of *both* the law on the use of force *and* the law of self-determination".[290] Once it has been established that a belligerent occupation is unlawful, that occupation's continued administration "necessarily negatively affects the enjoyment of the self-determination right of

[283] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports, vol. 16 (1971) p. 63.
[284] Ibid., Separate Opinion of Judge De Castro, p. 217.
[285] Ibid., Separate Opinion of Judge Padilla Nervo, p. 112.
[286] Ibid., p. 125.
[287] Article 2 of the Brussels Declaration, describing "[t]he authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants".
[288] United Nations General Assembly resolution 67/19 (2012). "[T]he Palestinian people have the right to self-determination and to sovereignty over their territory."
[289] United Nations General Assembly resolution 43/177 (15 December 1988), para. 2.
[290] Ralph Wilde, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation" *Palestine Yearbook of International Law*, vol. 22 (2019–2020) p. 42.

the population affected".[291] Here the occupying Power, rather than administering the territory *bona fide* temporarily under a suspension of sovereignty, instead administers the territory *mala fide* to prevent the exercise of the right of external self-determination and sovereignty. In Mandate territories, like Palestine, this means denying the exercise of its right to an independent State. Such acts constitute a stand-alone breach of the right of self-determination, a peremptory norm of international law, and additionally, may be considered *ultra vires* the principles of necessity and proportionality for self-defence.

1. Using force to deny the exercise of the right of external self-determination

Article 1(2) of the United Nations Charter provides for the right of self-determination as a founding principle, to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Article 55 of the United Nations Charter provides for the goal of creating the conditions for "peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Article 73 recognizes the interests of inhabitants of non-self-governing territories as a matter of "sacred trust".[292] Correspondingly, Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights reaffirms the right of self-determination, obliging States parties "to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter".[293]

By 1976, the subcommission of the International Law Commission considered the principle of self-determination a *jus cogens* norm of international law.[294] The right of self-determination has been recognized by the International Court of Justice as an *erga omnes* right in general international law.[295] For peoples under colonial rule, the International Court of Justice in *Frontier Dispute Case (Burkina Faso/Republic of Mali)* outlined the application of the principle of *uti possidetis*, which requires "the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples".[296] Such continued considerations would undoubtedly apply to the colonial frontiers of the British Mandate in Palestine. Drawing on the history of the past few decades, the Separate Opinion of Judge *ad hoc* Luchaire explained that "the frontiers of an independent State emerging from colonization may differ from the frontiers of the colony which it replaces, and this may actually result from the exercise of the right of self-determination".[297] As such, the colonial process can

[291] Ibid.
[292] "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories." Article 73, Charter of the United Nations (1945).
[293] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports, vol. 136 (2004) para. 88.
[294] UNHCR "Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, Study Prepared by Mr. Hector Gros Espiell, Special Rapporteur", (20 June 1978) E/CN.4/Sub.2/405(vol.I) para. 78.
[295] International Court of Justice, *East Timor (Portugal v. Australia),* (Judgment) International Court of Justice Reports 1995, p. 90, para. 29.
[296] International Court of Justice, *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) International Court of Justice Reports 1986 pp. 554, 567, para. 25.
[297] Ibid., Separate Opinion of Judge Luchaire, p. 653.

only be considered finally over once the right of self-determination has been exercised by the inhabitants of the colony.[298]

The use of force to prevent the exercise of self-determination of peoples who are subject to alien subjugation, domination and exploitation is unlawful.[299] The final Commentaries of the International Law Commission on State Responsibility explicitly reference the prohibition of both formal and implied acts of the recognition of an "attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples".[300] More specifically, the Declaration on Friendly Relations prohibits the use of force, providing that "[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence".[301] In this vein, South Africa's occupation of Mandated territory in denial of the exercise of the right of self-determination of the Namibian people was found by the International Court of Justice to be illegal.

2. South Africa's illegal occupation of Namibia (South West Africa)

In accordance with the Treaty of Versailles, Namibia, a German colony, was entrusted to the administration of South Africa under the supervision of the Council of the League of Nations.[302] A number of advisory opinions pronounced on the legal relationship of South Africa's administration under the supervision of the United Nations,[303] including South Africa's failure to submit reports and facilitate United Nations country visits.[304] Denouncing South Africa's failure "to fulfil its obligations in respect of the administration of Mandated Territory", the General Assembly formally ended the Mandate in 1966, recognizing South West Africa (later renamed Namibia) as a territory having international status until its full independence is recognized.[305] However, given South Africa's failure to withdraw from the Territory of Namibia, Security Council resolution 264 (1969) called upon the Government of South Africa "to withdraw immediately its administration from the Territory".[306] Once the Mandate to administer the territory was revoked by the United Nations, South Africa was considered to be "occupying [Namibia's] territory without title".[307] Accordingly, this placed

[298] Ibid., p. 653.
[299] United Nations General Assembly, "Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations", A/RES/2625(XXV) (24 October 1970).
[300] International Law Commission, "Report of the International Law Commission on the work of its fifty-third session, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", (2001) p. 114.
[301] United Nations General Assembly, "Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations", A/RES/2625(XXV) (24 October 1970) para. 1.
[302] Julio Faundez, "Namibia: The Relevance of International Law" *Third World Quarterly* vol. 8(2) (1986) 540, 541.
[303] International Court of Justice, *Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South-West Africa*, (Advisory Opinion) International Court of Justice Reports 1955 (7 June 1955) p 66; International Court of Justice, *Admissibility of Hearings of Petitioners by the Committee on South West Africa,* (Advisory Opinion) International Court of Justice Reports 1956 (1 June 1956) p. 22.
[304] United Nations General Assembly resolution 1142 (XII) 1957.
[305] United Nations General Assembly resolution 2145 (XXI) Question of South West Africa (27 October 1966) para. 1; See also United Nations Security Council resolution 246 (1968) (South-West Africa).
[306] United Nations Security Council resolution 264 (1969), para. 3.
[307] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* (Advisory Opinion) International Court of Justice Reports 1971, p. 54, para. 118.

Member States of the United Nations under an obligation to "abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia".[308]

The International Court of Justice has also examined the nature of South Africa's occupation of Namibia after the termination of the Mandate, and whether this relationship constituted a continuing annexation. In its 1950 advisory opinion on the *International Status of South West Africa*, the International Court of Justice outlined two principles of paramount importance underpinning the Mandate system: (1) the principle of non-annexation; and (2) the principle that the well-being and development of such peoples form "a sacred trust of civilization".[309] While the Court admitted that previously there had been "a strong tendency to annex former enemy colonial territories", the outcome of negotiations and the adoption of Article 22 of the Covenant of the League of Nations "was a rejection of the notion of annexation".[310] Instead, South Africa's continued presence in Namibia in the aftermath of the Mandate was characterized as a "continuing occupation", with the Security Council declaring that "the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter".[311]

The International Court of Justice further described the Mandate territory as being a "sacred trust": "[t]he Mandate was created in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization".[312] As Judge Padilla Nervo stated, "[t]he sacred trust is not only a moral idea, it has also a legal character and significance; it is in fact a legal principle".[313] In the *South West Africa* advisory opinion, the International Court of Justice noted that the United Nations Charter expanded the concept of "sacred trust" to apply to "all territories whose peoples have not yet attained a full measure of self-government" and accordingly embraced those territories under a "colonial regime" who retained the right to self-determination.[314] As such, the International Court of Justice concluded, "[t]hese developments leave little doubt that the ultimate objective of the sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination … of the peoples concerned".[315]

Thus, the Mandate continues in force until the people come to full independence. In particular, Article 80 of the League of Nations resolution (18 April 1946) governing the termination of

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[308] Ibid., p. 55.
[309] International Court of Justice, *International Status of South-West Africa*, (Advisory Opinion) International Court of Justice Reports 1950, p. 131.
[310] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* (Advisory Opinion) International Court of Justice Reports 1971, p. 16, p. 42.
[311] United Nations Security Council resolution 264 The Situation in Namibia (20 March 1969), para. 2; United Nations Security Council resolution 276 (30 January 1970); See also A/RES/2403(XXIII), 16 December 1968.
[312] International Court of Justice, *International Status of South-West Africa*, (Advisory Opinion) International Court of Justice Reports 1950, p. 132.
[313] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) Separate Opinion of Judge Padilla Nervo, p. 106.
[314] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 31.
[315] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 31, paras. 52–53.

the League of Nations recognized the continuation of the administration of the territories in accordance with the obligations of the respective Mandates.[316] The principal purpose of Article 80, according to Judge De Castro, "is to avoid any alteration of the rights of peoples subject to mandate, directly or indirectly, in any manner whatsoever".[317] As explained by Wright, "the League, whose competence is defined by the Covenant, could not withdraw a territory from the status of mandated territory unless through recognition that the conditions there defined no longer exist in the territory".[318] In addition, this would mean that the obligations of the administration as a "sacred trust", the obligations for securities for the performance of the trust and the rights of the population could not be brought to an end with the liquidation of the League, "*as they did not depend on the existence of the League*".[319] Rather, Namibia remained an international responsibility, possessing "a *sui generis* international status, not being under the sovereignty of any State, and having been placed under the overall authority and protection of the international community represented since 1946 by the United Nations".[320] Accordingly, as Judge Dillard explains, "the exercise of the power involved no invasion of national sovereignty since it was focussed on a territory and a régime with an international status".[321]

The Court outlined its view that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States", including non-Member States of the United Nations, who are similarly bound by *erga omnes* obligations[322] "to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia".[323] In particular, "they are under an obligation not to recognize any right of South Africa to continue to administer the Mandate".[324] Judge Padilla Nervo opined that "[g]iven that the continued presence of the South African authorities in Namibia is illegal, all the measures taken by them in the name of that Territory, or concerning that Territory, after the cessation of the Mandate, are illegal and invalid".[325]

However, whereas South West Africa was mandated territory, held under occupation after the termination of the Mandate, it can be distinguished from Palestine, which is mandated territory held under belligerent occupation in the context of an international armed conflict. While South Africa had been mandated to administer South West Africa, its continued presence after the Mandate was terminated, amounted to an illegal occupation of territory *ab initio*. Nevertheless, if the occupation is administered denying the exercise of the right of the people to external self-determination, this may similarly be considered in breach of the "sacred trust". Depending on the circumstances giving rise to the breach of self-determination, the occupation could be illegal *ab initio*, or at some point in the future.

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[316] Ibid., Separate Opinion of Judge Padilla Nervo, p. 109.
[317] Ibid., Separate Opinion of Judge De Castro, p. 187.
[318] Wright, *Mandates Under the League of Nations* (1930) p. 440–441 quoted in International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) Separate Opinion of Judge Padilla Nervo, p. 108.
[319] Ibid., p. 109 (*italics in original*).
[320] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) Separate Opinion of Judge Padilla Nervo, p. 114.
[321] Ibid., Separate Opinion of Judge Dillard, p. 163.
[322] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 126.
[323] Ibid., para. 119
[324] Ibid., Separate Opinion of Judge Petrén, p. 134.
[325] Ibid., Separate Opinion of Judge Padilla Nervo, p. 118.

A key takeaway from the precedent in *South West Africa* is that the Palestine Mandate, like the Namibia Mandate, did not end on the occupation of the territory. Rather, an unlawful occupation of Mandate territory further breaches the right of external self-determination, including the right to an independent state, which continues as a sacred trust.

IV. Is there available evidence to support a finding that Israel's occupation has become illegal?

As previously outlined, occupations may become illegal on two grounds. First, an occupation arising from an unlawful act of aggression is illegal *ab initio.* Second, a belligerent occupation may become illegal where it operates in breach of the principles of immediacy, necessity and proportionality for self-defence. Consequent to a finding of illegality, the continuing administration of the occupied territory may further breach the right of external self-determination and statehood of a people.

Taking each ground of illegality in turn, this section provides the factual evidence to support a conclusion that Israel's occupation of Palestine is illegal on the first two grounds, the continuation of which breaches the right of the Palestinian people to self-determination.

A. Illegal occupation arising from an unlawful aggressive use of force

The first ground for illegality is met when a belligerent occupation arises from an unlawful use of force and therefore amounts to an unlawful act of aggression in breach of the United Nations Charter. This section examines the factual lead-up to the Six Day War in 1967, culminating in Israel's pre-emptive use of force against Egypt on 5 June 1967. Dispelling Israel's arguments pertaining to self-defence, the section concludes that Israel's use of force constitutes an unlawful act of aggression, and the resulting belligerent occupation of Palestinian territory was accordingly unlawful *ab initio*.

1. Israel's use of force against Egypt is an act of aggression

In 1967, following the presence of Egyptian troops in the Sinai and Egypt's blocking of the Straits of Tiran to Israeli vessels, Israel launched a military offensive on Egypt. On 5 June 1967, Israeli warplanes targeted Egyptian aircraft and air defences on the ground, Egyptian positions in the Sinai and the Suez Canal, and the Jordanian and Syrian fronts.[326] In turn, Israel argued in the Security Council debates that Egypt's acts amounted to an armed attack, after which Israel responded with military force in self-defence.[327] In the West Bank, Jordan argued that its recourse to force was within the permissible "collective self-defence", an exception under Article 51 of the United Nations Charter, in response to Israel's armed attack on Egypt on 5 June 1967.[328] Having established that occupation may be considered an illegal act of aggression *jus ad bellum*, this section will briefly examine whether the initial aggression in 1967 was an unlawful act, which would also taint the occupation with illegality *ab initio*.

[326] Terry D. Gill, "The Temporal Dimensions of Self-Defence", in *International Law and Armed Conflict, Exploring the Faultlines,* Michael M. Schmitt and Jelena Jejic, eds. (Martinus Nijhoff Publishers 2007) p. 136.
[327] Christine Gray, *International Law and the Use of Force* (OUP 2018) p. 171.
[328] Allan Gerson, *Israel, the West Bank, and International Law* (Frank Cass 1978) p. 71.

Quigley, for example, argues that Israel's invasion and subsequent occupation of Egyptian-occupied Gaza and the Jordanian-occupied West Bank, including East Jerusalem, was an illegal use of force. Quigley conducts an in-depth examination of the meeting records of the Security Council in 1967 and highlights how countries such as Cyprus rejected Israel's claims of self-defence, finding "no evidence of Arab armed attack or invasion of the territory of Israel".[329] In particular, Zambia and Malaysia disregarded the possibility that pre-emptive strikes could be brought within the remit of an "armed attack" as per Article 51.[330] The strongest critic of Israel's attack was the Soviet Union, which, in meetings on the draft resolution, stated, "The entire world knows that Israel started an aggressive war".[331] Although the draft resolution was not adopted given the abstention of eleven Member States from the vote, none of the abstaining States suggested that Egypt had committed an act of aggression.

On its website, Israel's Ministry of Foreign Affairs openly describes the lead-up to Israel's pre-emptive strikes on Egypt:

> On 22 May, in a move that constituted a *casus belli* [an act that justifies war], Egypt closed the Straits of Tiran to Israeli shipping, cutting off Israel's only route to Asia and Iran, its main supplier of oil… As Yitzhak Rabin, then the IDF's [Israeli Defense Force's] chief of staff, stated at the time, "I believe we could find ourselves in a situation in which the existence of Israel is at great risk." Invoking its inherent right of self-defense, Israel preempted the inevitable attack, striking Egypt's air force while its planes were still on the ground.[332]

However, the failure of the Security Council to adopt a resolution on aggression meant that the subsequent occupation was not treated as an unlawful act of aggression.

Instead, debate has hinged on whether Israel's use of force amounted to an act of anticipatory self-defence.[333] While Member States did reflect on the possibility that Israel's acts amounted to anticipatory self-defence at the Security Council meetings in 1967, the premise of anticipatory self-defence was rejected as inconsistent with the United Nations Charter.[334] In this vein, Cassese warns that "the risks of abuse should lead us to interpret the construction of

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[329] United Nations General Assembly Official Records (29 June 1967) UN Doc. A/PV.1541, pp. 7–8.
[330] John Quigley, "Israel's Unlawful 1967 Invasion of Palestine", in *Prolonged Occupation and International Law Israel and Palestine,* Nada Kiswanson and Susan Power, eds. (Brill 2023).
[331] "The entire world knows that Israel started an aggressive war. The United States of America and its allies have not even mildly reprimanded Israel for this, but, in an attempt to support the Israel militarists in their annexation designs, have been telling us at length that peace, if you please, would be endangered if Israel troops were sent back to the positions they occupied before 5 June and if they left the Arab lands they now occupy. These allegations are nothing less than absurd." United Nations General Assembly 1548th Plenary Meeting Held at Headquarters, New York, (Tuesday, 4 July 1967, at 4. P.m.) para. 14.
[332] Israel Ministry of Foreign Affairs, "1967: The Six-Day War and the Historic Reunification of Jerusalem" (2013).
[333] Christine D. Gray, *International Law and the Use of Force* (OUP 2008) 161; James Crawford, *The Creation of States in International Law* (OUP 2006) 171; Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2012) 192; Thomas M. Franck, "Who Killed Article 2(4)?" *American Journal of International Law* vol. 804 (1970); Even under the contentious Caroline anticipatory self-defence formula, which may not have survived the UN Charter, this is reserved for acts of absolute military necessity that are "instant, overwhelming and leaving no choice of means, and no moment for deliberation". Michael Wood, "The Caroline Incident – 1837", in *The Use of Force in International Law: A Case-Based Approach,* Tom Ruys, Olivier Corten, Alexandra Hofer, eds. (OUP 2018).
[334] United Nations General Assembly Official Records (29 June 1967) UN Doc. A/PV.1541, page 7; United Nations General Assembly Official Records (27 June 1967) UN Doc. A/PV.1538, p. 9.

Art. 51 very strictly and consider it as giving only very exceptional licence".[335] That being said, Israel did not invoke the right to strike based on anticipatory self-defence at the time.[336] Instead Israel argued that it acted in actual self-defence against the Egyptian blockade to which this assessment now turns.

2. Israel's armed attack as an act of self-defence against the Egyptian blockade

On 19 June 1967, Israel's Minister for Foreign Affairs, Abba Eban, provided Israel's justification for using force to the General Assembly, stating that "[f]rom the moment at which the blockade was imposed, active hostilities had commenced and Israel owed Egypt nothing of her charter rights".[337] However, Israel's arguments that Egypt's partial blockade of the Straits of Tiran amounted to an armed attack for the purposes of Article 51 did not garner support at the Security Council.[338] That being said, it is axiomatic that a blockade amounts to an act of aggression under international law. Article 3(c) of the Definition of Aggression, adopted in 1974, includes as an act of aggression "[t]he blockade of the ports or coasts of a State by the armed forces of another State".[339] Although the customary status of the declaration has been questioned,[340] it has since been imported *verbatim* into the definition of the crime of aggression in the statute of the International Criminal Court.[341] While the law governing the establishment of blockades is constitutive of customary international law, including the Paris Declaration (1856) and the London Declaration (1909), there is no evidence prior to 1974 that blockades were characterized as an act of aggression under customary international law.[342] As such, Israel's argument that it was responding to a blockade as an armed attack may be inconsistent with the applicable law at that time.

More precisely, the Strait of Tiran belongs to Egypt, and the blockade of the Strait of Tiran was essentially an Egyptian blockade on its own sea, as distinct from "the blockade of the ports or coasts" of Israel.[343] Notably, as previously mentioned, Israel did not invoke the right to strike based on anticipatory self-defence.[344] Dinstein proposes that, when all measures by Egypt were taken together "in aggregate", such as the closing of the Straits of Tiran, the removal of the United Nations Emergency Force from the Gaza Strip and the Sinai Peninsula, and the presence of armed forces on the Egyptian border, "Israel was entitled to self-defence as soon as possible".[345] Gerson correspondingly agrees that following the blockade, there was "no

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[335] Antonio Cassese, "Return to Westphalia? Considerations on the Gradual Erosion of the Charter System", in *The Current Use of Legal Regulation of the Use of Force,* Antonio Cassese, ed. (Martinus Nijhoff Publishers, 1986) p. 516.
[336] *Christine D. Gray, International Law and the Use of Force* (OUP 2008) p. 161.
[337] Reprinted in Allan Gerson, *Israel, the West Bank, and International Law* (Frank Cass 1978) p. 72.
[338] See generally, John Quigley, *The Six-Day War and Israeli Self-Defence* (CUP 2013).
[339] United Nations General Assembly resolution 3314 (XXIX) Definition of Aggression, art. 3(c).
[340] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports 2005 (19 December 2005) Separate Opinion Judge Kooijmans, para. 63.
[341] Rome Statute of the International Criminal Court (2002) art. 8 bis.
[342] Martin Fink, "The Ever-Existing 'Crisis' of the Law of Naval Warfare" No. 920–921, *International Review of the Red Cross* (November 2022); Declaration Respecting Maritime Law, Paris, 16 April 1856; Declaration concerning the Laws of Naval War, 208 Consol. T.S. 338 (1909).
[343] Tom Ruys, *"Armed Attack" and Article 51 of the UN Charter, Evolutions in Customary Law and Practice* (CUP 2010) p. 277.
[344] Christine D. Gray, *International Law and the Use of Force* (OUP 2008) p. 161.
[345] Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2012) p. 192; Thomas M. Franck, "Who Killed Article 2(4)?" *American Journal of International Law,* vol. 804 (1970).

assurance of a peaceful outcome once the escalation of threats had taken place – then the decision for war had to be made".[346]

However, the month previous, in May 1967, a Russian delegation to Egypt warned Cairo of a potential war instigated by Israel to topple the Syrian regime.[347] In fact, as early as August 1963, an Israeli order regarding Military Government in an Emergency outlined that the "expected expansion trajectories" for the next war included the West Bank, the Sinai Peninsula to the Suez Canal, the Syrian Heights to Damascus, and Lebanon to the Litani River.[348] The question then arises: Was Egypt entitled to take special precautionary measures on its territory in self-defence?[349] In *Corfu Channel (Merits)* (1949), the International Court of Justice provided that preparatory measures could be taken by a State in consideration of self-defence, and that Albania in this case was justified in taking special precautionary measures in its territorial waters.[350] Schwarzenberger likewise concedes that "it is implied, and accords with common sense, that Article 51 of the Charter permits preparation for self-defence or collective defence".[351] Terry D. Gill, drawing a distinction between a partial and full blockade, explains that while in some cases a blockade may amount to an "armed attack", Egypt's partial blockade did not seriously impact Israel's economy or impact its air and sea communications in the Mediterranean. It was clear, Gill argues, that no armed attack had been launched.[352] Meanwhile, Constantinou points out that at the time, Israel did not raise the issue of the blockade as an act of aggression, but as a breach of convention obligations. In its view, the question of self-defence was levelled against cross-border attacks.[353]

3. Israel's armed attack as an act of self-defence against border attacks

Israel's second self-defence claim was that it had acted in response to Egyptian armoured columns penetrating Israel's borders. At an emergency session of the Security Council on the morning of 5 June 1967, the representative of Israel charged that:

> in the early hours of 5 June, Egyptian armoured columns had moved in an offensive thrust against Israel's borders while at the same time Egyptian planes from airfields in Sinai had struck out towards Israel. Egyptian artillery in the Gaza Strip had shelled several Israel villages in that area. Israel was acting in self-defence.[354]

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[346] Allan Gerson, *Israel, the West Bank, and International Law* (Frank Cass 1978) p. 73.
[347] Meron Medzini, *Golda Meir: A Reference Guide to Her Life and Works* (Rowman and Littlefield 2020) p. 15.
[348] Organisational Order – Military Government in an Emergency 10/63, (August 1963) (translated by Akevot); See also "Organisation and Training of Military Government Headquarters for Control of Occupied Territories", (*Akevot*, June 1967).
[349] International Court of Justice, *Corfu Channel Case (United Kingdom v Albania)* (Merits Judgment) International Court of Justice Reports 1949 p.4 (9 April 1949) p. 29.
[350] Ibid.
[351] Schwarzenberger, *International Courts, volume II, The Law of Armed Conflict* (Stevens and Sons Limited 1968) p. 35.
[352] Terry D. Gill, "The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy", in Michael N Schmitt and Jelena Pejic, *International Law and Armed Conflict: Exploring the Faultlines, Essay's in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers 2007) p. 138.
[353] Avra Constantinou, *The Right of Self-defence Under Customary International Law and Article 51 of the United Nations Charter* (Ant. N. Sakkoulas 2000) pp. 77–81.
[354] Outbreak of Hostilities on 5 June 1967 and Consideration by the Security Council, Outbreak of Hostilities and Adoption of First Cease-Fire Resolution on 6 June 1967, Yearbook of the United Nations (1967).

Similarly, at a special session of the General Assembly opened on 15 June 1967, Israel's representative broke down the self-defence arguments into two strands: first, that Israel acted in self-defence in response to the Egyptian blockade; and second, that "[o]n 5 June 1967, when Egyptian forces moved by air and land against Israel's western coast and southern territory, the choice for Israel was to live or to perish. For five days Israel employed armed force alone and unaided in a just and righteous self-defence".[355] Later Moshe Dayan, Israel's Minister of Defence, indicated in a press briefing that he "did not reply directly to the [who fired] the 'first shot' question, but since they had already heard my views on the importance of initiative and surprise in battle, they did not need to do much guessing".[356]

An Israeli Knesset Cabinet resolution dated from 4 June 1967, published some years later, instructs Moshe Dayan and Prime Minister Eshkol to set an hour for the authorized invasion of Egypt.[357] A ground and aerial assault was then scheduled for 7:45 a.m. Greenwich Mean Time on 5 June 1967.[358] Meanwhile, the government decision to engage a pre-emptive strike stated that:

> [t]he armies of Egypt, Syria and Jordan are deployed for a multifront attack that threatens Israel's existence. It is therefore decided to launch a military strike aimed at liberating Israel from encirclement and preventing assault by the United Arab Command.[359]

Two days later, on 7 June 1967, Israel's Prime Minister Levi Eshkol was quoted in an interview in the *New York Times*, recalling that once Egypt closed the Straits of Tiran and drew its troops to the armistice line, Israel's only issue was whether it would act "today or tomorrow".[360] He does not mention Egypt's alleged shelling of the three Israeli villages.[361] Addressing the Knesset the following week, on 12 June, Prime Minister Eshkol recounted:

> In my statement to the Knesset on May 29, I informed you that our forces were "ready and prepared to frustrate the enemy's designs in all sectors and on all our borders" … … The decisive moment came. Facing the movement of Egyptian forces to the Israeli border, our forces went out to repulse the enemy's aggression, and air and armoured battles developed.[362]

Quigley observes that after 7 June, "Israeli officials stopped mentioning any precipitating military action by Egypt", and by 1968 were invoking instead the argument of anticipatory

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[355] Consideration of the Middle East Situation by the General Assembly Consideration at First Part of Fifth Emergency Special Session (17 June-5 July 1967). In this vein, Israel suggested that President Nasser's announced blockade of the Gulf of Aqaba and the Strait of Tiran to Israel ships was "an act which was by definition an act of war and which was regarded by Israel as an attack justifying her acting in self-defence under Article 51 of the United Nations Charter".
[356] Moshe Dayan, *Story of My Life* (1976) 824; Robbie Sabel, *International Law and the Arab Israeli Conflict* (CUP 2022) p. 182.
[357] John Quigley, "The Six Day War – 1967", in *The Use of Force in International Law: A Case-Based Approach,* Tom Ruys, Olivier Corten, Alexandra Hofer, eds. (OUP 2018) p. 135.
[358] Ibid.
[359] Cited in Orna Ben-Naftali, Michael Sfard, Hedi Viterbo, *The ABC of the OPT, A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (CUP 2018) p. 122.
[360] Cited in John Quigley, "The Six Day War – 1967", in *The Use of Force in International Law, A Case-Based Approach,* Tom Ruys and Olivier Corten, eds. (OUP 2018) p. 133.
[361] Ibid.
[362] Prime Minister Eshkol Reviews Six Day War (12 June 1967).

self-defence.[363] In his autobiography on the subject, Colonel Indar Jit Rikhye, Chief of Staff of the United Nations Emergency Force, recalled details of a meeting he held with General Rabin in Tel Aviv where Rabin explained:

> [I]n a surprise attack, on 5th June the air force succeeded in destroying most of Egypt's air force on the ground before it could do any damage to Israeli troop concentrations and especially its cities. His land offensive had been planned meticulously. Rabin chose to open his offensive against the less populated areas of Khan Yunis and Rafah in the Gaza Strip, with El Arish as the axis for his attack.[364]

Rikhye further recounts, "[t]he Israelis, fully ready for a ground attack anyway, were able to pretend that the Egyptian forces had attacked them first, and therefore, they launched a land counteroffensive. It suited Israel not to mention that its air force was first to start the war".[365]

4. Subsequent international resolutions highlighting acts of aggression

Although a Russian-tabled resolution at an Emergency Special Session of the General Assembly on 17 June was voted against, it is significant that no State considered Egypt legally responsible for the hostilities.[366] However, a number of subsequent General Assembly resolutions clearly consider Israel's occupation to be illegal[367] and characterize the occupation as a continuing act of aggression.[368] The preamble to General Assembly resolution 32/20 concerns Israel's "illegal occupation" and "condemns Israel's continued occupation of Arab territories, in violation of the Charter of the United Nations, the principles of international law and repeated resolutions of the United Nations".[369] Specifically, the preamble to General Assembly resolution 3414 provides that it is guided by the United Nations Charter and "those principles of international law which prohibit the occupation or acquisition of territory by the use of force and which consider any military occupation, however temporary, or any forcible annexation of such territory, or part thereof, as an act of aggression".[370] Likewise, the preamble to General Assembly resolution 2799, concerned with Israel's continued occupation since 5 June 1967, determined that:

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[363] Ibid., p. 134

[364] Major General Indar Jit Rikhye, *The Sinai Blunder, Withdrawal of the United Nations Emergency Force Leading to the Six Day War of June 1967* (Routledge 1981) p. 143.

[365] Ibid., p. 145.

[366] John Quigley, "The Six Day War – 1967", in *The Use of Force in International Law, A Case-Based Approach,* Tom Ruys and Olivier Corten, eds. (OUP 2018) p. 136.

[367] United Nations General Assembly resolutions dated from 1975 and 1976, and from 1977 to 1981, condemn the "illegal occupation" of Arab territories.

[368] United Nations General Assembly resolution 32/20 (25 November 1977), United Nations General Assembly resolution 33/29 (7 December 1978), United Nations General Assembly resolution 34/70 (6 December 1979), United Nations General Assembly resolution 35/122E (11 December 1980), United Nations General Assembly resolution 35/207 (16 December 1980), United Nations General Assembly resolution 36/147E (16 December 1981).

[369] United Nations General Assembly resolution 32/20 (25 November 1977), para. 1.

[370] United Nations General Assembly resolution 3414 (XXX) (5 December 1975), preamble. Accordingly, the resolution condemned the continued occupation of Arab territories in violation of the UN Charter and requested that all States "desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people". The resolution called for the intervention of the UN Security Council to work out a framework for "complete Israeli withdrawal from all the occupied Arab territories". United Nations General Assembly resolution 3414 (XXX) (5 December 1975), paras. 2–4; United Nations General Assembly resolution 31/61 (9 December 1976), para. 5.

> the territory of a State shall not be the object of occupation or acquisition by another State resulting from the threat or use of force, which is contrary to the Charter of the United Nations and to the principles enshrined in Security Council resolution 242 (1967) as well as in the Declaration on the Strengthening of International Security adopted by the General Assembly on 16 December 1970.[371]

General Assembly resolution 37/135 on permanent sovereignty over national resources in the occupied Palestinian and other Arab territories further reaffirms:

> the right of the Palestinian and other Arab peoples subjected to Israeli aggression and occupation to the restitution of, and full compensation for the exploitation, depletion and loss of and damages to, their natural, human and all other resources, wealth and economic activities, and calls upon Israel to meet their just claims.[372]

In summation, despite the absence of a clarifying Security Council or General Assembly resolution at the time, there are reasonable grounds to consider that Israel struck Egyptian forces first, in a pre-emptive strike amounting to an act of aggression. The consequent belligerent occupation amounts to a use of force in breach of Article 51 of the United Nations Charter, and an illegal occupation *ab initio*.

B. Israel's administration of occupied Palestine breaches peremptory norms

There is clear evidence that Israel acted unlawfully *jus ad bellum* in its use of force against Egypt in 1967. Nevertheless, this section assumes *arguendo* the validity of Israel's apocryphal self-defence argument, that Israel's attack on Egypt was a legitimate response to an armed attack, in the form of Egypt's blockade of the Strait of Tiran.[373] This section will examine whether Israel's occupation, which may be lawful subsequent to a use of force in self-defence, has concomitantly become illegal over time, thus failing the principles of immediacy, necessity and proportionality. In doing so, this section provides a factual basis demonstrating how Israel has breached the principles and rules of international humanitarian law and at least three key peremptory norms of international law: (1) the prohibition on the acquisition of territory through use of force; (2) the right to self-determination; and (3) the prohibition of racial discrimination and apartheid. Such evidence indicates that the occupation is being administered in breach of the principles of necessity and proportionality for a legitimate use of force in self-defence, rendering the occupation illegal.

1. *Jus contra bellum*, prohibition of acquisition of territory by force

The section broadly examines the *de jure* annexation of Jerusalem; the *de facto* annexation of settlements and the territory comprising Area C; and the planning, construction and expansion of permanent settlements, as evidence that the occupation is being carried out in breach of peremptory norms governing the non-acquisition of territory through use of force.

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[371] United Nations General Assembly resolution 2799 (13 December 1971).
[372] United Nations General Assembly resolution 37/135 (17 December 1982), para. 4; See also United Nations General Assembly resolution 32/161 (19 December 1977).
[373] Julius Stone, *Israel and Palestine, Assault on the Law of Nations* (John Hopkins University Press 1981) p. 52.

1.1 De jure *annexation of Jerusalem*

Notably, the western part of Jerusalem was purportedly annexed in 1949, having been held as "Israel-occupied territory" until 1949.[374] Israel's continued occupation of West Jerusalem breaches the international regime of *corpus separatum* provided for in General Assembly resolution 181 (III).[375] In 1967 Israel, similarly, forcibly seized Palestinian territory in East Jerusalem and, immediately upon occupation, expanded the boundaries of the Jerusalem Municipality to absorb the entire city and additional parts of the West Bank, under its Civil Administration.[376]

On 4 July 1967, General Assembly resolution 2253, concerned with the situation prevailing in Jerusalem, "called upon Israel to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem".[377] Around a week later, on 14 July 1967, the General Assembly once again "deplored the failure of Israel to implement General Assembly resolution 2253".[378] Meanwhile, the report of the United Nations Secretary-General in September 1967 observed that the "municipality of West Jerusalem began operations in East Jerusalem the day after the fighting ceased. In the beginning it acted as the agent of the Military Government, but from 29 June municipal processes started to function according to Israel law".[379] The United Nations Secretary-General concluded that "Israel was taking every step to place under its sovereignty those parts of the city which were not controlled by Israel before June 1967".[380]

Israel's unilateral assertion of title over Jerusalem underscores its intention to integrate and merge occupied East Jerusalem into Israel proper. For example, on 27 June 1967, when introducing the bill that would become the "Jerusalem Law", the Minister of Justice Ya'akov Shimshon Shapira addressed the Knesset, stating:

> The legal conception of the State of Israel – an organic conception adjusted to the practical political realities – has always been based on the principle that the law, jurisdiction and administration of the State apply to all those parts of Eretz Israel which are *de facto* under the State's control. It is the view of the Government – and this view is in conformity with the requirements of international law – that in addition to the control by the Israel Defence Forces of these territories there is required also an open

[374] "Jerusalem Declared Israel-Occupied City – Government Proclamation", Israeli Ministry of Foreign Affairs (12 August 1948).
[375] United Nations General Assembly resolution 181 (29 November 1947); See also UN CEIRPP, DPR study, "The Status of Jerusalem" (1981): "(a) During the period 1950–1967, despite the international acquiescence in the division of the City of Jerusalem, the General Assembly continued to uphold the principle of the internationalization of Jerusalem as a *corpus separatum* in terms of its resolutions 181 (II) and 194 (III). (b) The resolutions of the General Assembly and Security Council in relation to Jerusalem following the occupation of the entire City of Jerusalem by Israel in June 1967 also maintained this original principle of internationalization. Further, they required Israel to withdraw from territories occupied during the conflict, and to rescind all measures taken, as well as to refrain from taking further measures, to alter the status of Jerusalem. Thus, it would appear that the United Nations since 1947 has maintained the principle that the legal status of Jerusalem is that of a *corpus separatum* under an international regime."
[376] Israel Ministry of Foreign Affairs, Municipalities Ordinance (Amendment No. 6) Law, 5727-1967 (27 June 1967).
[377] United Nations General Assembly resolution 2253 (1967), para. 2.
[378] United Nations General Assembly resolution 2254 (1967).
[379] Report of the Secretary-General Under General Assembly resolution 2254 (ES-V) Relating to Jerusalem, S/8146 (12 September 1967) para. 28.
[380] Ibid., para. 33.

> act of sovereignty on the part of Israel to make Israel law applicable to them ... It is for this reason that the Government has seen fit to introduce the bill which I now submit to the Knesset.[381]

Later, in 1980, the Israeli Knesset adopted the Basic Law: Jerusalem, stating that "Jerusalem, complete and united" is "the capital of Israel".[382]

Israel's direct application of sovereignty in occupied Jerusalem violates the prohibition of acquisition of territory by force. Security Council resolution 478 (1980) reaffirmed that "the acquisition of territory by use of force is inadmissible", and determined that all "legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter, the character and status of the Holy City of Jerusalem and in particular the recent 'Basic Law' on Jerusalem, are null and void and must be rescinded forthwith".[383] In 2017, the relocation of the United States embassy to Jerusalem was similarly countered with a condemnatory General Assembly resolution, calling on "all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478 (1980)".[384]

While Jerusalem has effectively been formally annexed *de jure*, elsewhere large tracts of occupied Palestine have been *de facto* annexed. In doing so, Israel, without a formal declaration of annexation, has still demonstrated *corpus et animus*, i.e., the effective occupation of territory in addition to the intention to appropriate it permanently, amounting to *de facto* annexation of territory.[385]

1.2 Israel's acquisition of territory through de facto *annexation*

Throughout the decades, Israel's laws, policies and practices in occupied Palestine have underscored its intent to retain permanent effective control and to apply its sovereignty therein. Such acts breach *inter alia* the prohibition on the acquisition of territory through use of force, amount to *de facto* annexation, and are indicative of a breach of the principles of necessity and proportionality for self-defence. Speaking in June 2021, former United Nations Secretary-General Ban Ki-Moon stated that "Israel has pursued a policy of incremental *de facto* annexation in the territories it has occupied since 1967, to the point where the prospect of a two-state solution has all but vanished."[386] More concretely, in a resolution of the lower house adopted on 26 May 2021, the Republic of Ireland condemned Israel's settlement activity in Jerusalem and other areas of the West Bank as amounting "to unlawful *de facto* annexation of that territory".[387]

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[381] Divrei HaKnesset [Parliamentary Records], vol. 49 (27 June 1967), col 2420 cited in Yehuda Z. Blum, "The Status of Judea and Samaria Revisited: A Response to Eyal Benvenisti", *Isr. L. REV.,* vol. 51 (2018), pp. 165, 167.
[382] Basic Law: Jerusalem, Capital of Israel, 34 Laws of the State of Israel 209 (1980).
[383] United Nations Security Council resolution 478 (1980), preamble, para. 3.
[384] United Nations General Assembly ES-10/19 Status of Jerusalem (21 December 2017), para.1.
[385] Rainer Hofmann, "Annexation" *Max Planck Encyclopedias of International Law [MPIL]* (January 2020).
[386] The Elders, "Ban Ki-Moon: The World Should Back a New Approach to the Israeli-Palestinian Conflict" (30 June 2021); Omar Dajani, "Symposium on Revisiting Israel's Settlements: Israel's Creeping Annexation" 111 *American Journal of International Law* (2017) p. 51; Valentina Azarova, "Israel's Unlawfully Prolonged Occupation: Consequences Under An Integrated Legal Framework" *European Council on Foreign Relations Policy Brief* (June 2017) p. 7.
[387] Dáil Éireann Debate (26 May 2021) vol. 1007 (6), Annexation of Palestine Motion.

This section establishes that large tracts of the Palestinian territory allocated for settlements, including Area C, are effectively *de facto* annexed. The study draws on five key indicators to assess the *de facto* annexation: (1) the seizure of territory; (2) the treatment of settlements as inseparable from Israel; (3) Israel's application of domestic legislation to occupied Palestine; (4) an intention to keep the territory; and (5) the permanency of the occupation.

1.2.1 Seizure of Palestinian territory

Similar to *de jure* annexation, *de facto* annexation also includes the seizure of territory; in the latter case, however, the intention to annex is implied. In occupied Palestine, the seizure of territory is evidenced through the sweeping appropriations of private and public Palestinian lands for settlement throughout the West Bank, including Jerusalem. These practices include the appropriation of public and private Palestinian lands for the construction of more than 250 settlements and the transfer of 719,452 Israeli Jewish settlers into the West Bank, including East Jerusalem. [388]

Israel engineers every aspect of the settlement enterprise: planning and zoning; appropriating Palestinian lands, including "uncultivated" agricultural lands, as "State lands"; providing water, sanitation and electricity services to the settlements; and authorizing the construction of roads, railway lines and other infrastructure to connect the settlements to each other and to Israel proper.[389] The government-commissioned 2012 Levy Report made a number of recommendations to retroactively authorize settlement outpost construction and expand Israel's settlement enterprise in the West Bank – recommendations which have since been *de facto* implemented by the government and its agencies.[390] In 1971, the Israeli Military Commander issued Military Order 418, which transferred competence for planning and zoning from the local Palestinian village councils to the Military Commander.[391] Not only does this military order impact the civilian sphere absent of military necessity, and therefore in breach of Article 43 of the Hague Regulations; Israel also relies on its provisions to systematically deny Palestinians permits for housing construction. Between January 2009 and January 2023, some 9,163 unlicensed structures were demolished by the Israeli military, resulting in the displacement of 13,000 Palestinians.[392] By 1992, out of the 70,000 hectares of Palestinian land in Area C, only 12 per cent remained for Palestinian development after Israel appropriated it as "State land".[393] At the same time, Israel has radically altered the demography of the West

[388] State of Palestine, Palestinian Central Bureau of Statistics, Number of Settlers in the Israeli Settlements in the West Bank by Region, 1986–2021.
[389] The Fourth United Nations Seminar on the Question of Palestine, "The Inalienable Rights of the Palestinian People", 31 August – 4 September 1981, Havana.
[390] Yesh Din, *From Occupation to Annexation the Silent Adoption of the Levy Report on Retroactive Authorization of Illegal Construction in the West Bank* (February 2016) 4. In 2017, the "Land Regularisation Law" providing for the retroactive legalization of outposts was struck down by the Israeli High Court of Justice for disproportionately affecting Palestinian rights to property, dignity and equality. HCJ 1308/17, *Silwad Municipality, et al. v. The Knesset, et. al* (9 June 2020) (joined by the Court with HCJ 2055/17, *The Head of Ein Yabrud Village v. The Knesset*).
[391] Israeli Military Order No. 418, Concerning Towns, Villages and Buildings Planning Law (Judea & Samaria) (1971).
[392] OCHA, Breakdown of Data on Demolition and Displacement in the West Bank.
[393] United Nations Habitat, "Spatial Planning in Area C of the Israeli Occupied West Bank of the Palestinian Territory Report of an International Advisory Board" (May 2015) p. 18.

Bank, transferring in over 500,000 Israeli Jewish settlers to Area C[394] – an irreversible measure with permanent consequences, and indicative of sovereign expression.[395]

In July 2020, Israel came close to implementing the Trump Peace to Prosperity Plan, which would have seen large tracts of the Jordan Valley and settlement blocs formally annexed to Israel.[396] A joint statement issued by United Nations Special Rapporteurs warned that "the acquisition of territory by war or force is inadmissible … Israel's stated plans for annexation would extend sovereignty over most of the Jordan Valley".[397] However, even without the Trump plan, Israel's intention to permanently acquire the territory comprising most of Area C has already been established.

1.2.2 Treatment of settlements as inseparable from Israel

Former United Nations Special Rapporteur Michael Lynk has argued that one of the indicators of *de facto* annexation is the occupying Power's exercise of sovereignty over the occupied territory.[398] Undoubtedly, the planning and zoning of Palestinian land for Israeli residential, commercial and agricultural settlement, repurposing it for Israeli nationals, reflects an incontrovertible exercise of sovereign authority by successive Israeli governments over occupied Palestine. For example, master plans for settlement construction are not drawn up by the Military Commander to serve the best interests of the protected occupied population or for reasons of absolute military necessity in reaction to ongoing military operations, but rather, are colonial plans reflective of Israeli government policy.

A number of elaborate unofficial master plans for the settlement of the West Bank, including East Jerusalem, underpinned successive Israeli government decisions to construct and expand settlements since 1967 – acts of settlement which have continued for over half a century. In 2012, an Independent International Fact-Finding Mission to investigate the implications of the Israeli settlements noted that:

> [d]espite these plans not having been officially approved they have largely been acted upon by successive Israeli Governments. The Mission notes a pattern where plans that were developed regarding the settlements were mirrored in Government policy instruments and implemented on the ground.[399]

These plans include the Allon Plan (1967) drafted by Israeli Defence Minister Yigal Allon, which saw the settlement of Ma'ale Adumim between 1975 and June 1979 under the Labour

[394] Population – Statistical Abstract of Israel 2019 – No. 70, Population of Jews and Others by Natural Region (2018); OCHA, "Under Threat: Demolition Orders in Area C of the West Bank"; Claire Parker, "Jewish Settler Population in West Bank Passes Half a Million" *The Washington Post* (2 February 2023).
[395] Al-Haq, *Establishing Guidelines to Determine Whether the Legal Status of 'Area C' in the Occupied Palestinian Territory Represents Annexed Territory Under International Law* (2020) p. 47.
[396] The White House, Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People (2017); Shalom Yerushalmi and TOI Staff, "Netanyahu to Initially Annex 3 Settlement Blocs, not Jordan Valley — Officials" (10 June 2020).
[397] UNHCR "Israeli Annexation of Parts of the Palestinian West Bank Would Break International Law – United Nations Experts Call on the International Community to Ensure Accountability" (16 June 2020).
[398] UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967", (22 October 2018) A/73/45717, para. 31.
[399] United Nations HRC, "Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, including East Jerusalem" (2012) para. 23.

government. The aim, as outlined by Allon, was to secure the "maximum security and maximum territory for Israel with a minimum number of Arabs".[400] Settlement continued with the establishment of the Inter-Ministerial Committee to Examine the Rate of Development for Jerusalem in 1973, which provided for an outer ring of settlements around Jerusalem, including Mishor Adumim, developed by the Jerusalem Municipality.[401] In 1976, Prime Minister Rabin unofficially approved the Wachman Plan (1976), which provided a template for the construction of settlements in sparsely populated areas strategically encircling the major Palestinian population centres around the West Bank.[402] Following the Likud election in 1977, Ariel Sharon become Chairman of the Inter-Ministerial Settlement Committee, and under the Sharon-Wachman Plan (1977) he proposed "urban, industrial settlements on the ridges" and strategically placed settlements in belts to fragment the Palestinian territory.[403] However, it was the Drobles Plan (1977) that became the Likud government's blueprint for settlement in the 1980s.[404] The plan aimed to connect all existing settlements into one network while breaking Palestinian territorial contiguity. This provided "settlements with immediate territorial unity and overall contiguity with Israel's coastal plain".[405] By 1979, some 43 settlements had been established and 10,000 settlers transferred into the West Bank.[406]

Under the Gush-Drobles (1978) and Sharon (1981) plans, then–Minister of Defence Ariel Sharon advanced the plans for settlement construction along the central mountain ridge and the Green Line, while leaving pockets of densely populated Palestinian centres under Palestinian control.[407] This saw the establishment of a corridor of 10 settlements along the mountain ridge in the West Bank and north of Jerusalem.[408] The Hundred Thousand Plan (1983), published by Israel's Ministry of Agriculture, prepared the way for a total of 100,000 settlers to live in 43 new Israeli settlements, with settlement construction plans forecast up to the year 2010.[409] Guidelines presented by Prime Minister Yitzhak Shamir to the Knesset mirrored provisions of the Hundred Thousand Plan.[410] In 1991, Sharon, now serving as Minister of Construction and Housing, developed the Seven Stars Plan (1991), constructing a new industrialized belt of settlement towns and connecting settlement blocs in outer Jerusalem to settlement blocs in other parts of the West Bank.[411] In 1996 Prime Minister Netanyahu's guidelines for

[400] Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (Verso 2007) p. 58.
[401] Leila H. Farsakh, *Rethinking Statehood in Palestine Self-Determination and Decolonization Beyond Partition* (University of California Press 2021) 84–85; "The History of Israeli Settlement Expansion in and around East Jerusalem from 1967 to 1993" *Jerusalem Story,* 6 December 2022.
[402] "Israel Settlement Master Plans 1976–1991", *Palestinian Academic Society for the Study of International Affairs*
[403] Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (Verso 2007) p. 80.
[404] United Nations, The Question of Palestine, "Settlements/Mattityahu Drobless plan/Settlements by Israel in the illegally occupied Arab territories – Letter from CEIRPP Acting Chairman" (9 June 1981).
[405] "Israel Settlement Master Plans 1976–1991", *Palestinian Academic Society for the Study of International Affairs;* "The History of Israeli Settlement Expansion in and around East Jerusalem from 1967 to 1993" *Jerusalem Story,* 6 December 2022.
[406] United Nations HRC, "Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, including East Jerusalem" (2012) p. 27.
[407] "Israel Settlement Master Plans 1976–1991", *Palestinian Academic Society for the Study of International Affairs.*
[408] Ibid.
[409] United Nations HRC, "Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, including East Jerusalem" (2012) p. 30.
[410] Ibid., p. 31.
[411] "Israel Settlement Master Plans 1976–1991", *Palestinian Academic Society for the Study of International Affairs.*

government, similarly, focused squarely on settlement expansion beyond the Green Line. The policy dictated that "[s]ettlement in the Negev, the Galilee, the Golan Heights, the Jordan Valley, and in Judea, Samaria [West Bank] and Gaza is of national importance, to Israel's defense and an expression of Zionist fulfilment".[412]

By 1999, at the end of Prime Minister Netanyahu's first term in office, more than 50 new settlement outposts had been established.[413] Settlement construction continued apace, greenlighted by Prime Minister Ehud Barak's "settlement guidelines" in the years 1999 to 2001, continued under Prime Minister Ariel Sharon's government from 2001 to 2003, and again during Sharon's second term from 2003 to 2006.[414] At the same time, a number of Jerusalem master plans including the *Jerusalem 2000,* and the *Jerusalem 2020 Master Plan* (2004) sought to consolidate Israeli Jewish presence in occupied Jerusalem and radically alter the demographic of the City.[415] The Jerusalem 5800 Master Plan lays out plans for a Greater Jerusalem Metropolitan – an area engulfing major Palestinian cities Bethlehem, Jericho and Ramallah.[416] The plan proposes a new international airport for Jericho, and the connection of settlement roads and rail infrastructure to ferry incoming tourists to developed tourist settlements across the West Bank as the planned mainstay of the Israeli economy.[417] Moreover, the Atarot settlement will be expanded and developed as the main industry hub for Israel.[418]

The first six months of 2023 saw Israel advance record rates of settlement housing units. In April 2023, the incoming Israeli government approved six master plans for settlement construction in the West Bank, including for the establishment of two new settlements.[419] Israel advanced plans for 16,000 settlement units in occupied East Jerusalem[420] and 13,000 settlement units in the West Bank.[421] Only six months into 2023, this total of almost 30,000 proposed new housing units in the Israeli settlements in occupied Palestine is already an annual record for the approval of settlement housing units.

1.2.3 Israel's application of domestic legislation to occupied Palestine

The application of a series of Israeli laws directly to the West Bank is further evidence of annexationist intent.[422] To start, Israel has avoided determining its borders and considers that its law, jurisdiction and administration extend to any area of "Eretz Israel" – a geographical area comprising the entirety of the territory of Mandatory Palestine, including the occupied

[412] United Nations HRC, "Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, including East Jerusalem" (2012) p. 32.
[413] Ibid., p. 33.
[414] Ibid., p. 35–36.
[415] Local Outline Plan Jerusalem 2000, Report No. 4 The Proposed Plan and the Main Planning Policies Prepared for Jerusalem Municipality, section 7.
[416] Jerusalem 5800 Magazine, 20–21.
[417] Jerusalem 5800 Magazine, 48–49.
[418] Jerusalem 5800 Magazine, 26–27.
[419] United Nations Security Council Report, "The Middle East, including the Palestinian Question: April 2023 Monthly Forecast" (April 2023).
[420] Ir Amim, Major Acceleration of Israeli Settlement Activity since January 2023 Juxtaposed with Deprivation of Palestinian Housing Rights (15 June 2023).
[421] "Israel Sets Record for Illegal Settlement Approvals: Rights Group" *Al Jazeera* (14 July 2023).

[422] Since 1967, Israel has applied its currency to occupied Palestine under Military Order Concerning the Establishment of the Israeli Currency as Legal Tender (Judea and Samaria) (No. 76), 5727-1967.

territory.[423] Although many of the measures implemented by Israel in the West Bank mirror Israeli law, they are introduced under military order, for example the application of Israel's currency to occupied Palestine.[424] However, Israel directly negotiates leases and licensing agreements for the exploitation of Palestinian natural resources with Israeli and international corporations operating in the occupied territory to exploit quarries, water, oil, and mineral resources.[425] Israel applies a number of Emergency Regulations, renewable every five years since 1967, which extend Israel's criminal jurisdiction over settlers,[426] and also provide for the application of Israeli tax and health insurance law to settlers in occupied Palestine.[427]

Likewise, Israel directly applies its Administrative Affairs Court Law, 5760-2000, which provides for the jurisdiction of an Administrative Affairs Court established under Israeli law to hear planning and construction cases from the West Bank.[428] Similarly, the Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria – Jurisdiction in Offenses and Legal Aid) 2007, grants jurisdiction to Israel's courts to hear cases related to Israeli settlers for conduct in the West Bank.[429] In 2018, the Knesset voted to facilitate the accreditation of settlement universities under the Higher Education Law[430] and the designation of settlements as "National Priority Areas", among others.[431] Further, the recent absorption of the Civil Administration and parts of Coordination of Government Activities in the Territories (COGAT), from the authority of the Military Commander into the civil competence of the Minister for Finance sitting as the second Defence Minister, are clear indicators of an intention to extend sovereignty over occupied Palestine.[432]

1.2.4 Demonstrating an intention to keep the territory

The extensive pre-planning for the occupation is further indicative of Israel's permanent plans to obtain Palestinian territory, as the declassified historical records recently published by Akevot clearly outline.[433] In July 1967, in a Military Advocate General briefing to the Knesset

[423] Law and Administration Ordinance, 5708-1948, art. 11(b); "The Comay-Meron Cable reveals reasons for Israeli position on applicability of 4th Geneva Convention" (*Akevot,* 20 March 1968); John Quigley, "Jerusalem: The Illegality of Israel's Encroachment" *The Palestine Yearbook of International Law* (1996–1997) 30, fn. 49.
[424] Order Concerning the Establishment of the Israeli Currency as Legal Tender (Judea and Samaria) (No. 76), 5727-1967; Eyal Benvenisti, *The International Law of Occupation* (OUP 2012) p. 235.
[425] See Human Rights Watch, *Occupation Inc. How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights* (2016).
[426] The Criminal Procedure Law (Enforcement Powers – Detentions) 5756-1996; Criminal Procedure Law (Detainee Suspected of Security Offenses) (Temporary Order) 5766-2006. The Israeli High Court of Justice has ruled that Israel's Basic Law: Human Dignity and Liberty applies *in personam* to Israeli settlers. HCJ 1661/05, *Gaza Beach Regional Council et al v. Knesset of Israel et al*., 59 (2) PD 481 (2005) para. 80.
[427] TOI Staff, "Months After Felling Coalition, Settler Law Extension Cruises Through Knesset" *Times of Israel* (10 January 2023); Noa Shpigel, "Israel's Knesset Extends West Bank Emergency Orders by Another Five Years" *Haaretz* (24 January 2023).
[428] Naschitz Brandes Amir, "Administrative Law: The Jurisdiction of the Administrative Affairs Court is Extended to Cover a Variety of Additional Matters" *Lexology* (4 March 2016).
[429] Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria – Jurisdiction in Offenses and Legal Aid) 2007, art. 2(a) and (c); "Bill Giving Illegal Settlers Full Rights as Citizens Passes First Reading in Israel" *Middle East Monitor* (10 January 2023).
[430] "Israel's Creeping Annexation: Knesset Votes to Extend Israeli Law to Academic Institutions in the West Bank", *Haaretz,* 12 February 2018.
[431] Adalah, *Israeli Government Adds 20 Jewish Towns to "National Priority Area" List, 9 are Settlements in the Occupied West Bank; Arab Towns in Israel Excluded* (14 August 2013).
[432] Emmanuel Fabian, "'Civil Responsibility' in West Bank Handed to Smotrich After Meeting with COGAT Head", *The Times of Israel,* 12 January 2023.
[433] Military Government Organisation in Preparation for War – Proposed Discussion (*Akevot,* June 1963).

Constitution, Law and Justice Committee, Col Shamgar (who later became a Supreme Court Justice and Chief Justice) explained the advance planning for the occupation, including the phrasing of military orders, which took place "long before this war began".[434] In 1968, a classified cable sent by Israeli legal adviser Theodore Meron to then–Israeli Ambassador Yitzhak Rabin recommended that Israel avoid being classed as an occupying Power.[435] Meron advised that "[e]xpress recognition on our part of the applicability of the Geneva Convention would highlight serious issues … [W]e have to leave all options regarding borders open, we must not acknowledge that our status in the administered territories is simply that of an occupying power".[436] The deliberate omission of Israel's status as an occupying Power underlined its expansionist and annexationist aims in administering Palestine.

Alongside the policies and plans for settlement construction and expansion, a number of Israeli leaders have expressed an *animus* to acquire the territory permanently. In his Knesset speech on the ratification of the Oslo Accords, Prime Minister Yitzhak Rabin outlined the vision for Israel's expansion, stating that "[t]he borders of the State of Israel, during the permanent solution, will be beyond the lines which existed before the Six Day War" and promising "[t]he establishment of blocs of settlements in Judea and Samaria, like the one in Gush Katif".[437] In 2012, Naftali Bennett, leader of the Yamina party, issued a seven-point plan for "managing" the "Arab-Israeli Conflict in Judea and Samaria" premised on Israel's extension of sovereignty over Area C of the West Bank. According to Bennett:

> Through this initiative, Israel will secure vital interests: providing security to Jerusalem and the Gush Dan Region, protecting Israeli communities, and maintaining sovereignty over our National Heritage Sites. The world will not recognize our claim to sovereignty, as it does not recognize our sovereignty over the Western Wall, the Ramot and Gilo neighborhoods of Jerusalem, and the Golan Heights. Yet eventually the world will adjust to the *de facto* reality.[438]

Likewise, in 2020, in the aftermath of the Trump Peace to Prosperity Plan to annex the Jordan Valley and other parts of the West Bank to Israel, Prime Minister Netanyahu emphatically restated Israel's annexationist intent: "There is no change to my plan to extend sovereignty … our sovereignty in Judea and Samaria [is] in full coordination with the United States".[439]

More recently, Israel amended its quasi-constitutional Nation State Law, providing exclusively that "the State of Israel is the nation state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination".[440] Presciently, Article 7 of the law established that "the State [of Israel] views the development of Jewish settlement as a national value" and commits to "act to encourage and promote its establishment and strengthening". In December 2022, incoming Prime Minister Netanyahu underscored that the government would

[434] Sixth Knesset, Second Session 1399, Transcript No. 126 of the Constitution, Law and Justice Committee Session held Wednesday, 27 Sivan 5727 – July 5, 1967 at 8:30 (*Akevot*).
[435] Valentina Azarova, "Israel's Unlawfully Prolonged Occupation: Consequences Under an Integrated Legal Framework" *European Council on Foreign Relations* (June 2017) p. 7.
[436] "The Comay-Meron Cable reveals reasons for Israeli position on applicability of 4th Geneva Convention" (*Akevot,* 20 March 1968).
[437] Yitzhak Rabin: Speech to Knesset on Ratification of Oslo Peace Accords, 5 October 1995.
[438] Naftali Bennett, The Israeli Stability Initiative, February 2012.
[439] "Netanyahu Says West Bank Annexation Plans Still 'On The Table'" *Al Jazeera,* 13 August 2020.
[440] See Adalah, Israel's Nation-State Law (2 August 2018).

"promote and develop settlement in all parts of the Land of Israel – in the Negev, the Golan, Judea and Samaria".[441]

1.2.5 Permanency of the occupation as an indicator for *de facto* annexation

As the UK House of Lords expressed in the *Sovfracht* case, territory can be considered *de facto* annexed when the control over the occupied territory is of a sufficiently permanent character to "show the intention to keep it".[442] In the *Wall* advisory opinion, the International Court of Justice considered that "the construction of the wall and its associated regime create a '*fait accompli*' on the ground that could well become permanent, in which case … it would be tantamount to *de facto* annexation".[443] Likewise, Jordan, in its written statement to the International Court of Justice in the *Wall* advisory opinion, referred to the notion of "creeping" and "indirect" expropriation in private property and noted that "[t]here is no reason in international law to treat the taking of territory by way of *de facto* annexation any differently".[444]

Certainly, the temporary nature of belligerent occupation is well understood by the Israeli Supreme Court, which has argued: "This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander".[445] Nonetheless, the Israeli Supreme Court, sitting as the High Court of Justice, has for decades sidestepped the applicability of Article 49 of the Geneva Conventions prohibiting civilian settlement by the occupying Power; at the same time, it has deferred to the Military Commander's security arguments to appropriate Palestinian lands and forcibly transfer the occupied Palestinian population, actions which have grave and permanent consequences.[446]

The aim, as outlined by former Jewish Home Member of Knesset Orit Struk, is "the application of Israeli sovereignty gradually over the areas of settlement in Judea and Samaria … in keeping with the idea that the entire process of Zionism is a gradual process".[447] Following the Israeli High Court of Justice decision in the 1979 *Elon Moreh* case, which ruled that Israel could not construct settlements on privately owned Palestinian land, Attorney General Yitzhak Zamir responded with a legal recommendation to create a special ministerial committee to safeguard

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[441] Carrie Keller-Lynn and Michael Bachner, "Judicial Reform, Boosting Jewish Identity: The New Coalition's Policy Guidelines" *The Times of Israel*, 28 December 2022; This continues previous policy aims of Prime Minister Netanyahu, who stated in 2017, "There will be no more uprooting of settlements in the land of Israel. It has been proven that it does not help peace." "Netanyahu Vows to Never Remove Israeli Settlements from West Bank: 'We're Here to Stay, Forever'", *Haaretz,* 29 August 2017.
[442] England, House of Lords, *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V Gebr*) 10 International Law Reports (3 December 1942) Case No. 165.
[443] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) p. 121.
[444] Ibid., Jordan, Written Statement Submitted by the Hashemite Kingdom of Jordan, (30 January 2004) pp. 79–80, para. 5.106.
[445] HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.,* (30 June 2004) para. 28.
[446] See, for example, HCJ 10356/02, *Hass v IDF Commander in the West Bank (the Machpela Cave case)* (4 March 2004) (this case was joined with HCJ 10497/02, *Hebron Municipality v IDF Commander in Judaea and Samaria*); HCJ 1890/03, *Bethlehem Municipality v. the State of Israel (Rachel's Tomb case),* (3 February 2005); HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel* et al., (30 June 2004) and HCJ 7857/04, *Mara'abe et al., v. The Prime Minister of Israel et. al.,* (15 September 2005).
[447] "Is Israel Moving Closer to Full Sovereignty in Judea-Samaria?" *Arutz Sheva*, 20 October 2014.

settlements from legal challenge and to provide land for settlement construction.[448] In 1982, Israeli Supreme Court Justice Meir Shamgar suggested that a military administration of territory could "from the legal point of view, continue indefinitely".[449]

Some 19 years after the advisory opinion in the *Wall* case, there is clear evidence that Israel's actions in seizing land in Area C, *inter alia,* as 'State land' for settlement construction; its governmental implementation of master plans; and its allocation of State resources for settlement zoning, construction and utilities across the West Bank,[450] including East Jerusalem, have in fact become a *fait accompli, de facto* annexed.[451] Israel's application of laws directly to the occupied territory, deliberate evasion of international humanitarian law, and prolonged indefinite occupation, indicate that the massive land appropriations for settlements and the Wall, are reflective of colonial practices revealing a settled and permanent annexationist "character, purpose and intention".[452]

In summation, there is clear evidence that Israel has effectively *de jure* annexed East Jerusalem and *de facto* annexed the settlements and the land comprising Area C,[453] and continues to maintain and promote the settlement of Palestinian lands as a constitutional aim. Such annexations breach the prohibition on the acquisition of territory through use of force, a peremptory norm of international law. Further, the permanent annexationist intentions demonstrate that the occupation, supposedly undertaken as an act of self-defence but concluded instead as a land grab, has breached military necessity and proportionality and is radically divorced from its origins as a use of force responding to the alleged Egyptian blockade.

2. Israel's acts denying Palestinian right to self-determination breach the necessity and proportionality principles for self-defence

The second peremptory norm breached by Israel is the realization of the Palestinian people of their right to external self-determination and an independent State. Here the study outlines two parallel grounds on which the right is breached: (1) through the prolonged and indefinite nature of the occupation; and (2) through Israel's policies and practices in maintaining the unlawful settlement enterprise. On this basis, the administration of the Palestinian territory in a manner denying the external right to self-determination, a *jus cogens* norm of international law, is indicative of a breach of the principles of necessity and proportionality for self-defence, making the occupation unlawful.

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[448] Ian Lustick, "Israel and the West Bank after Elon Moreh: The Mechanics of *De Facto* Annexation" *Middle East Journal*, vol. 35(4) (1981) pp. 557, 565.
[449] Meir Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage", in *Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects,* Meir Shamgar, ed. (Hebrew University of Law) pp. 14, 43.
[450] For further analysis on utilities see Marya Farah and Maha Abdallah, "Domination, Transformation and Annexation via Utilities", in *Prolonged Occupation and International Law: Israel and Palestine,* Nada Kiswanson and Susan Power, eds. (BRILL Nijhoff, 2023) pp. 348–370.
[451] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 121.
[452] England, House of Lords, *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V Gebr*) 10 International Law Reports (3 December 1942) Case No. 165.
[453] Al-Haq, *Establishing Guidelines to Determine Whether the Legal Status of 'Area C' in the Occupied Palestinian Territory Represents Annexed Territory Under International Law* (2020) p. 83.

2.1 Israel's prolonged occupation breaches regional peace agreements

The scale of Israel's prolonged occupation of the Palestinian territory, now in its fifty-sixth year, far outweighs the threat of the original attack. Furthermore, a number of regional peace agreements have been concluded in the intervening years.[454] A ceasefire agreement between Egypt and Israel was negotiated in November 1973.[455] In 1979 the Egypt–Israel Peace Treaty was signed, whereupon the Sinai Peninsula was returned to Egyptian sovereign control.[456] On 25 July 1994, a peace treaty terminating belligerency between Israel and Jordan was signed.[457] Any continuing right to self-defence would have formally ended as a result of the peace agreements with Egypt in 1979 and with Jordan in 1994.

However, somewhat anomalously, Israel still continued its military occupation of the Palestinian territory despite the peace agreements with Egypt and Jordan. A letter agreement signed on 26 March 1979 "concerning the establishment of full autonomy in the West Bank and the Gaza Strip" was annexed to the peace treaty between Egypt and Israel.[458] To this end, the parties agreed to start negotiations within a month after the exchange of the instruments of ratification of the Peace Treaty. The letter outlined the purpose of the negotiations in defining the powers and responsibilities of an elected self-governing authority (administrative council) in the West Bank and Gaza whereby:

> The two Governments agree … that the objective of the negotiations is the establishment of the self-governing authority in the West Bank and Gaza in order to provide full autonomy to the inhabitants. Israel and Egypt set for themselves the goal of completing the negotiations within one year so that elections will be held as expeditiously as possible after agreement has been reached between the Parties.[459]

Following this, there was a planned transitional period of five years for the withdrawal of the Civil Administration and the occupying forces:

> The Israeli military government and its civilian administration will be withdrawn, to be replaced by the self-governing authority, as specified in the "Framework for Peace in the Middle East". A withdrawal of Israeli armed forces will then take place and there will be a redeployment of the remaining Israeli forces into specified security locations.[460]

The Framework for Peace in the Middle East agreed upon at Camp David on 17 September 1978 was premised on Security Council Resolutions 242 and 338 "in all their parts".[461] In particular, Security Council resolution 242 called for the "withdrawal of Israel armed forces from territories occupied in the recent conflict" and the "termination of all claims or states of

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[454] W. Thomas Mallison, George K. Walker, John F. Murphy and Jordan Paust, "Aggression or Self-Defense in Lebanon in 1982?" 77 *Proceedings of the Annual Meeting (American Society of International Law)* (April 14–16, 1983) pp. 174, 175.
[455] Egypt-Israel, Ceasefire Agreement, 1973, 12 ILM 1312 (1973).
[456] Treaty of Peace Egypt-Israel (26 March 1979), 18 ILM 362 (1979); Rashid Khalidi, *The Hundred Years War on Palestine, A History of Settler Colonial Conquest and Resistance* (Profile Books 2020) p. 134.
[457] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, 26 October 1994.
[458] No. 17813 Egypt and Israel, Treaty of Peace 1 (with annexes, maps and agreed minutes), 26 March 1979.
[459] Letter Agreement Additional to the Treaty of Peace of 26 March 1979 between Egypt and Israel, Concerning the Establishment of Full Autonomy in the West Bank and the Gaza Strip.
[460] Ibid.
[461] A Framework for Peace in the Middle East Agreed at Camp David, 17 September 1978.

belligerency".[462] Given the provisions for the withdrawal of Israel's armed forces and the Civil Administration, it is clear that the intention of the agreement was for the conclusion of hostilities and for the belligerent occupation to come to an end.

Similarly, in 1994, Israel and Jordan agreed to recognize and respect each other's sovereignty, territorial integrity and political independence. Articles governing the issue of Palestinian refugees referred to a framework to be agreed upon in negotiations "in conjunction with and at the same time as the permanent status negotiations pertaining to the Territories".[463] The demarcation of an international boundary between Jordan and Israel was similarly concluded "without prejudice to the status of any territories that came under Israeli military government control in 1967".[464] In official minutes annexed to the peace treaty, the two governments further agreed to consult each other "with regard to economic and monetary matters pertaining specifically to the territories under Israeli military control".[465] However, the agreement did not include provision for withdrawal or ending the occupation. As it currently stands, Israel's occupation of the Palestinian territory exceeds calls for its withdrawal under Security Council resolution 242 by 56 years. Some 45 years on from the Camp David accords, and 39 years on from the Jordan peace agreement, it is clear that the original alleged threat prompting Israel's use of force in pre-emptive self-defence has completely and irrevocably ended.

It is clear from the foregoing that Israel is administering the territory under a protracted and indefinite occupation with permanent elements. The manner in which Israel is administering the Palestinian territory as a prolonged occupation with permanent elements is, further, *ultra vires* international humanitarian law. For example, although the Israeli Supreme Court, sitting as the High Court of Justice (IHCJ), recognizes the occupation of the Palestinian territory as temporary in nature,[466] in practice, the deliberate failure of the State to incorporate the Geneva Conventions into domestic law[467] and the subsequent reliance of the IHCJ on a narrow arbitrary band of *ad hoc* customary provisions of the Geneva Conventions facilitates practices whereby Israel carries out acts with a permanent character. The IHCJ has increasingly adapted the application of the Hague Regulations to provide for the "prolonged nature" of the occupation,

[462] United Nations Security Council resolution 242 (22 November 1967), para. 1(1).
[463] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, art. 8(2)(b).
[464] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, art. 3(2).
[465] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Agreed Minutes A. Concerning Article 3(1), vol. 2042, 1-35325, p. 467.
[466] "This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander". HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel, Commander of the IDF Forces in the West Bank* (30 June 2004) para. 28.
[467] Notably, the Hague Regulations are binding on Israel as customary international law. See International Court of Justice*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 89; HCJ 606/78, *Saliman Tawfiq Ayub et al v. Minister of Defense et al* (15 March 1979) and HCJ 610/78, *Ayub et al. v. Minister of Defense et al.* (*Bekaoth)* (15 March 1979). See also HCJ 390/79, *Izzat Muhammad Mustafa Duweikat et al. v. Government of Israel et al* (the Elon Moreh case) (22 October 1979).

[468] to grant equal rights to settlers illegally transferred into occupied territory,[469] to construct road infrastructure connecting the settlements and Israel,[470] to approve the harmonization of the VAT rate in the occupied territory with that of Israel,[471] and to integrate the electricity infrastructure.[472] These actions include civilian settlement and property appropriation and alienation – practices which are usually the preserve of the legitimate sovereign and are strictly prohibited under the Fourth Geneva Convention.[473]

In the *Wall* advisory opinion, the written statement of South Africa recalled that States have rejected prolonged occupation in the name of self-defence by reference to the precedents of necessity and proportionality.[474] Similarly, in *Armed Activities on the Territory of the Congo,* the separate reply of the Democratic Republic of Congo posited that "[t]he duration of the occupation of Congolese territory shows in any case that the means used by Uganda are disproportionate".[475] More recently, the reports of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, have described the situation of Israel's "permanent occupation" and "perpetual occupation" of the Palestinian territory.[476]

2.1.2 Settlements and the denial of the Palestinian right to self-determination

This section demonstrates how Israel's conduct in administering the Occupied Palestinian Territory to establish colonial settlements not only violates international humanitarian law

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[468] That occupation is temporary in nature is clearly established from the *de facto* conditions for its establishment under Article 42 of the Hague Regulations. ICTY, *Prosecutor v. Mladen Naletilic, Aka "Tuta" and Vinko Martinovic, aka "ŠTELA",* Judgment Case No. IT-98-34-T, 31 March 2003, para. 214. More specifically, belligerent occupation is described as a "transitional period following invasion and preceding the agreement on the cessation of the hostilities", which places more "onerous duties" on the occupying Power than a party to an international armed conflict.; See HCJ 337/71, *Christian Society for the Holy Places v. Minister of Defense* (1972) (An English summary of the decision is available at Court Decisions, *Christian Society for the Holy Places v. Minister of Defense*, 2 *Israel Yearbook of Human Rights* (1972) 354, para. 582). "Life does not stand still, and no administration, whether an occupation administration or another, can fulfil its duties with respect to the population if it refrains from legislating and from adapting the legal situation to the exigencies of modern times."

[469] HCJ 256/72, *Jerusalem District Electricity Co. Ltd. v. Minister of Defense et al.,* 27(1) PD 124, 138. The Israeli High Court of Justice found that supplying electricity to recently constructed settlements fulfilled the "obligation of the government to look after the economic welfare of the area's population".

[470] HCJ 393/82, *Jamayat Askan et al., v. Commander of IDF Forces in the Judea and Samaria region et al.* (12 December 1983) p. 13, para. 12.

[471] HCJ 69/81, *Abu Aita et al. v. Commander of Judea and Samaria et al. (VAT case),* 37(2) PD 197, 310. English translation in 13 *IYHR* 348 (1983).

[472] "*Jerusalem District Electricity Co Ltd v. Minister of Energy and Infrastructure and Commander of the Judea and Samaria Region"*, 11 *Israel Yearbook on Human Rights* 354 (1981) 357; Scobbie, "Prolonged Occupation and Article 6(3) of the Fourth Geneva Convention: Why the International Court Got It Wrong Substantively and Procedurally" (*EJIL Talk* 16 June 2016).

[473] Fourth Geneva Convention (1949), arts. 33 and 49.

[474] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) Written Statement Submitted by the Government of the Republic of South Africa (30 January 2004) para. 37.

[475] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports 2005 (19 December 2005) Merits, Written Proceedings, Reply of the Democratic Republic of the Congo, (29 May 2002), 240–242, para. 3.172 [unofficial translation from French].

[476] A/77/328, "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel" (14 September 2022), paras. 51, 75; A/HRC/50/21, "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel" (9 May 2022) para. 69.

governing belligerent occupation, but also amounts to a violation of the exercise of the right to self-determination, a peremptory norm of international law. This warrants an examination of (1) Israel's policies and practices of settlement construction, (2) the zoning of settlements to fragment the Palestinian territory, (3) the administrative fragmentation of the Palestinian people, (4) the erasure of Palestinian presence, (5) the forcible transfer of Palestinians and the transfer in of nationals of Israel, the occupying Power, and (6) interference in the democratic process.

Today, the territory of the West Bank, including East Jerusalem, has been broken up by the construction of over 250 Israeli settlements and outposts, and the Israeli civilian presence of some 719,452 settlers.[477] Israel's 2018 Nation State Law entrenched the long-held practice that "[t]he state views Jewish settlement as a national value and will labor to encourage and promote its establishment and development" and that "[t]he exercise of the right to national self-determination in the State of Israel is unique to the Jewish people".[478] However the construction of settlements during belligerent occupation breaches a number of provisions of international humanitarian law regulating the conduct of an occupying Power. This includes Article 46 of the Hague Regulations (1907) protecting private property, Article 52 limiting the requisitions of private property, and Article 55 governing the *usufruct* of public immoveable property, in addition to Article 49 of the Fourth Geneva Convention (1949) prohibiting the forcible transfer of the protected population from the occupied territory and the transfer into the occupied territory of nationals of the occupying Power. Moreover, Israel's acts of property appropriation, destruction, pillage and forcible transfer, among others, may amount to grave breaches of the Geneva Conventions, war crimes and crimes against humanity. In this vein, the Prosecutor of the International Criminal Court announced in December 2019 the opening of an investigation into the Situation in Palestine, concluding that "there was a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip".[479] At the Pre-Trial Chamber the Prosecutor further argued that Israel's "imposition of certain unlawful measures (including the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem)" had "severely impaired" the exercise of the Palestinian people's right to self-determination.[480]

In this regard, Security Council resolution 446 (1979) determined that "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East".[481] More recently, Security Council resolution 2334 (2016) reaffirmed that "the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution".[482] Likewise, in the *Wall* advisory opinion, the International Court of Justice concluded that "the Israeli settlements in the Occupied Palestinian Territory (including East

[477] State of Palestine, Palestinian Central Bureau of Statistics, "Number of Settlers in the Israeli Settlements in the West Bank by Region", 1986–2021.
[478] Basic Law: Israel – The Nation State of the Jewish People, 5778-2018.
[479] International Criminal Court, The Office of the Prosecutor, Situation in Palestine, *Summary of Preliminary Examination Find*ings, (2020) para. 1.
[480] International Criminal Court, *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine*, No. ICC-01/18 (22 January 2022) para. 9.
[481] United Nations Security Council resolution 446 (1976).
[482] United Nations Security Council resolution 2334 (2016) para. 1.

Jerusalem) have been established in breach of international law".[483] Further, the International Court of Justice found that the construction of the Wall, which deviates from the Green Line, "severely impedes the exercise by the Palestinian people of its right to self-determination".[484] Similarly, the United Nations Human Rights Council considered that the Wall made "the two-State solution physically impossible to implement".[485]

Geographically, the territorial components of occupied Palestine – the West Bank, including Jerusalem, and the Gaza Strip – have been fragmented and segregated administratively from each other. Israel exercises full civil and military control over Area C, an area comprising 61 per cent of the West Bank. Area C surrounds and fragments densely populated Palestinian cities and towns into an archipelago of disconnected islands, systematically cutting them off from each other. Israel further entrenches fragmentation by constructing segregating infrastructure such as the Wall, settlements and "bypass roads connecting the settlements to each other and to the Israeli transportation system", and by restricting Palestinian access physically and administratively via "roadblocks, exclusive zoning laws, restricted areas and military no-go zones".[486] Concomitantly, Israel's zoning of Palestinian immoveable property for residential, agricultural, industrial and tourist settlements; nature and archaeological reserves; and military firing zones has seen the appropriation of over 100,000 hectares of private and public Palestinian land and the demolition of over 50,000 Palestinian homes since 1967.[487] Across occupied Palestine, Israel has granted leases and licences for the exploitation of Palestinian quarries, Dead Sea minerals, oil, gas and water resources, acts which may amount to acts of pillage in breach of Articles 47 and 55 of the Hague Regulations (1907) and Article 33 of the Fourth Geneva Convention (1949).[488]

Israel administers the West Bank (not including East Jerusalem) under military rule,[489] and separately administers Palestinians in occupied East Jerusalem as "permanent residents" (a temporary and revocable status) in territory it has effectively annexed in contravention of international law.[490] Meanwhile, the Gaza Strip is treated as a "hostile entity" where over two million Palestinians, denied their freedom of movement, have been held since 2007 under a military siege and closure of land, sea and air.[491] The economic loss to the Gaza Strip alone between 2007 and 2018 from the continued military closure amounts to $16.7 billion, which has brought the Gaza Strip to the brink of economic collapse.[492] Crucially, Security Council

[483] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 120.
[484] Ibid., para. 122.
[485] UN HRC resolution 37/36 (2018), preamble.
[486] United Nations General Assembly, Situation of human rights in the Palestinian territories occupied since 1967, A/71/554 (19 October 2016) para. 41.
[487] Amnesty International, *Israel's Occupation: 50 Years of Dispossession*, 2017.
[488] ESCWA, Palestine Under Occupation III, Mapping Israel's Policies and Practices and their Economic Repercussions in the Occupied Palestinian Territory (2022) vii.
[489] United Nations Human Rights Council, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding Observations of the Human Rights Committee, Israel (29 July 2010) para. 5.
[490] CERD/C/ISR/CO/17-19, Concluding Observations on the combined seventeenth to nineteenth reports of Israel, (12 December 2019) para. 15.
[491] UN, "The Question of Palestine, Israel's Decision to Designate Gaza 'Hostile Entity'" – Russia's Foreign Ministry statement/Non-UN document, Statement by Mikhail Kamynin, the Spokesman of Russia's Ministry of Foreign Affairs, "Regarding Israel's Decision to Declare Gaza a 'Hostile Entity'" (20 September 2007).
[492] "UN Report Finds Gaza Suffered $16.7 Billion Loss From Siege and Occupation" *United Nations News*, 25 November 2020.

resolution 1860 (2009) stresses "that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state".[493]

Israel's alteration of facts on the ground and erasure of the Palestinian presence are carried out to compromise Palestine's viability as an independent State. For example, Israeli military orders prevent Palestinian symbols from being displayed, in a repression of Palestinian identity. In this vein, Military Order 101 dictates that Palestinians in the occupied territory may not "hold, wave, display or affix flags or political symbols, except in accordance with a permit of the military commander".[494] Likewise, Palestinian presence in the occupied territory is gradually eroded as Israel renames Palestinian villages and roads into Hebrew.[495] Further, the Budgets Foundations Law (Amendment No. 40) authorizes Israel's Minister of Finance to reduce public funding to institutions that fail to commemorate "Israel's Independence Day or the day on which the state was established as a day of mourning" and to those institutions that reject "the existence of Israel as a Jewish and democratic state".[496] This essentially aims at de-funding Palestinian institutions in Israel and occupied Jerusalem. Meanwhile, Israel's repeated attacks on the sacred Al-Aqsa Mosque, its facilitation of settler access into the Al-Aqsa compound,[497] and its deliberate restrictions on Holy Easter Sunday ceremonies at the Church of the Holy Sepulchre[498] underscore its targeted erasure of Palestinian Muslim and Christian presence from the City.

Since 1967, Israel, through its laws, policies and practices, has radically altered the demography of occupied Palestine, forcibly displacing the protected population, both directly – through house demolitions, residency revocations, and deportations – and indirectly, through the imposition of coercive measures to force transfer.[499] Since 2009, the demolition of 9,509 structures in the West Bank has resulted in the displacement of 13,739 Palestinians.[500] Under the 2004 Jerusalem Local Outline Plan 2000, Israel aimed to achieve a "demographic balance" of 70 per cent Jews and 30 per cent "Arabs" in Jerusalem by the year 2020.[501] Towards this end, since 1997, Israel has revoked the residencies of 14,643 Palestinians, forcing their transfer from Jerusalem.[502] At the same time, Israel systematically denies the right of Palestinian refugees to return to their homes under its Entry into Israel Law (1952) and Law of Return (1950) in addition to restricting entry to foreigners, including for reasons of family unification, under its Entry Procedure (2022).[503] Today, some seven million Palestinian refugees are denied their right of return, including 450,000 Palestinians displaced as refugees during the Naksa

[493] United Nations Security Council resolution 1860 (2009).
[494] Israeli Military Order No 101, Order Regarding Prohibition of Incitement and Hostile Propaganda Actions (27 August 1967); "Israeli Bill to Ban Palestine Flag," *Al-Arabiya* (20 May 2020).
[495] Nur Masalha, *The Palestine Nakba: Decolonising History, Narrating the Subaltern, Reclaiming Memory* (Zed Books 2012).
[496] Budget Foundations Law (Amendment No. 40), 5771-2011
[497] United Nations, "Israel: United Nations Expert Condemns Brutal Attacks on Palestinians at Al-Aqsa Mosque" (6 April 2023).
[498] United Nations, "Israel-Palestine: United Nations Envoy Calls for Greater Effort Towards Peace Amid Mounting Violence" (25 April 2023); United Nations Security Council, "Status Quo of Jerusalem's Holy Sites Must Be Upheld, Special Middle East Coordinator Tells Security Council, as Speakers Express Alarm over Recent Violent Clashes" SC/14869 (25 April 2021).
[499] UN Division for Palestinian Rights, *Bulletin on Action by the United Nations System and Intergovernmental Organisations Relevant to the Question of Palestine*, October 2022, volume XLV, Bulletin No. 10.
[500] OCHA, *Data on Demolition and Displacement in the West Bank* (24 May 2023).
[501] Jerusalem Municipality, Local Outline Plan Jerusalem 2000: Report No. 4 (August 2004).
[502] B'Tselem, Statistics on Revocation of Residency in East Jerusalem (19 April 2023).
[503] Entry into Israel Law 5712-1952; The Law of Return 5710 (1950); Procedure for entrance and residence of foreigners in the Judea and Samaria Area, 2022.

arising from the 1967 Six Day War.[504] Accordingly, in 2013, a United Nations Fact-Finding Mission concluded that:

> the right to self-determination of the Palestinian people, including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the Occupied Palestinian Territory and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and ongoing expansion of the settlements.[505]

At the same time, Israel interferes with Palestinian democratic processes, closing the PLO headquarters in Jerusalem, arresting Palestinian parliamentarians, and launching military attacks on Palestinian Legislative Council buildings and Palestinian cultural properties, including the raid, closure and pillage of archives from Orient House in Jerusalem, which was the former PLO headquarters and the potential seat of the capital of an independent Palestinian State.[506] In the meantime, Israel amended its Entry into Israel law to apply a penalty of revocation of Jerusalem residencies for "breach of allegiance [to Israel]", a provision which Israel has applied to Palestinian parliamentarians elected to the Palestinian Legislative Council.[507] Notably, Article 45 of the Hague Regulations (1907) and Article 68(3) of the Fourth Geneva Convention (1949) strictly prohibit the occupying Power from forcing the occupied population to swear allegiance.[508] In May 2022, the United Nations Commission of Inquiry reported on the continuation of Israel's systematic control over the Palestinian democratic process, including the detention of elected political representatives and members of the Government, the collective punishment of the Palestinian population for the democratic election of Hamas in 2006, and the military attacks on the Palestinian Legislative Council buildings in Gaza in 2009.[509] The Commission of Inquiry concluded that "the cumulative impact of those policies and actions made prospects for political and economic integration between Gaza and the West Bank more remote".[510] Likewise, Israel's systematic repression of civil and political rights across occupied Palestine, including the lethal suppression of demonstrations,[511] the designation of Palestinian human rights organizations as "terror" organizations,[512] mass arrests and raids,[513] and its arbitrary regime of administrative

[504] State of Palestine, "It Is Apartheid: The Reality of Israel's Colonial Occupation of Palestine" (June 2021) 18.
[505] United Nations Human Rights Council, "Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, including East Jerusalem" A/HRC/22/63, (7 February 2013) para. 38.
[506] Yara Hawari, "Destroying Palestinian Jerusalem, One Institution at a Time" *Al Shabaka,* 29 October 2020.
[507] HCJ 7803/06, *Khalid Abu Arafeh, et al. v. Minister of Interior* (2006). Since then, the provision has been employed to revoke the residency of renowned human rights defender Salah Hammouri. UNHCR, "Comment by United Nations Human Rights Spokesperson Jeremy Laurence on Deportation of Salah Hammouri from Occupied Palestinian Territory" (19 December 2022).
[508] Knesset, "Knesset Passes Legislation Authorizing Interior Minister to Revoke Permanent Residency Status over Involvement in Terrorism" (7 March 2018).
[509] A/HRC/50/21, "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel" (9 May 2022) para. 47.
[510] Ibid.
[511] A/HRC/50/21, "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel" (9 May 2022).
[512] UN, "UN experts Condemn Israeli Suppression of Palestinian Human Rights Organizations" (24 August 2022).
[513] United Nations Human Rights Council, "Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan Report of the United Nations High Commissioner for Human Rights" A/HRC/49/85 (21 February 2012) para. 30.

detentions,[514] ensures that the Palestinian people are systematically prevented from mobilizing to exercise collectively their right to self-determination.

In summation, Israel's prolonged occupation of Palestine decades after the Security Council demanded its withdrawal in 1967, and decades after the conclusion of peace agreements with Egypt and Jordan, has been characterized by a myriad of illegal acts, including settlement construction, alteration of the demography of the occupied territory, and the denial of civil and political rights to the occupied population. Such settlement policies and practices are instituted in a manner that denies the collective right of the Palestinian people as a whole to self-determination – a peremptory norm of international law – and that concomitantly is indicative of an unlawfully administered occupation breaching the principles of proportionality and necessity for a legitimate act of self-defence.

3. Israel's occupation as an act of apartheid and violation of *jus cogens* norm

This section examines how Israel's administration of occupied Palestine is carried out in breach of the prohibition of racial discrimination and apartheid, a peremptory norm of international law. Notably, Israel applies discriminatory apartheid policies and practices against Palestinians on both sides of the Green Line. Although the core framework institutionalizing the apartheid regime was established in the years after 1948, the segregationist laws, policies and practices continued in the form of military orders in occupied Palestine beginning in 1967.

3.1 The legal framework of apartheid

Notably, the foundational laws of the State of Israel provide the legal framework for Israeli Jewish domination over the Palestinian people. Under the Apartheid Convention, inhuman acts of apartheid include "legislative measures … calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country" and "legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups".[515] That Israel is constitutionally established as a Jewish State is reflected in Israel's Basic Law: Human Dignity and Liberty (1992) which espouses "the values of the State of Israel as a Jewish and democratic state".[516] A more recent 2018 amendment to the Basic Law provides that "[t]he State of Israel is the nation state of the Jewish People in which it realizes its natural, cultural, religious and historical right to self-determination. The realization of the right to national self-determination in the State of Israel is exclusive to the Jewish People".[517] Thereupon Prime Minister Netanyahu announced, "Israel is not a state of all its citizens. According to the Nation-State Law that we passed, Israel is the nation-state of the Jewish people – and its alone".[518]

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[514] United Nations, "Special Rapporteurs Demand Accountability for Death of Khader Adnan and Mass Arbitrary Detention of Palestinians" (3 May 2023). "We cannot separate Israel's carceral policies from the colonial nature of its occupation, intended to control and subjugate all Palestinians in the territory Israel wants to control," the United Nations experts said. "The systematic practice of administrative detention, is tantamount to a war crime of wilfully depriving protected persons of the rights of fair and regular trial."

[515] Article II, International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly resolution 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.

[516] Basic Law: Human Dignity and Liberty, 1992, art. 1.

[517] Basic Law: Israel – The Nation State of the Jewish People (Originally adopted in 5778-2018, arts. 1(b), 1(c).

[518] Jonathan Ofir, "Netanyahu Tells the Truth: 'Israel is Not a State of all its Citizens'" *Mondoweiss* (11 March 2019).

Israel systematically denies the right of return to Palestinian refugees and exiles in the diaspora in order to engineer and maintain the demographic of an Israeli Jewish majority. Under Israel's Law of Return (1950), "every Jew has the right to come to this country as an oleh" and Israeli citizenship is "granted to every Jew who has expressed his desire to settle in Israel".[519] In Jerusalem, which has been *de jure* annexed, Israel applies a temporary residency status to Palestinians therein, who must continually prove that their centre of life is Jerusalem, otherwise their residency will be revoked.[520] Palestinians from the West Bank (not including East Jerusalem) and the Gaza Strip are prevented from acquiring citizenship and full residency rights and are effectively prevented from family unification under the Citizenship and Entry into Israel Law (Temporary Provision) (2003), which provides:

> [T]he Minister of the Interior shall not grant the inhabitant of an area (the West Bank and the Gaza Strip) citizenship on the basis of the Citizenship law, and shall not give him a license to reside in Israel on the basis of the Entry into Israel Law, and the Area Commander shall not grant a said inhabitant, a permit to stay in Israel, on the basis with the security legislation in the area.[521]

The quest to engineer a Jewish majority demographic and reduce and remove Palestinians has been advanced by successive governments. In 2003, Prime Minister Olmert suggested that the "formula for the parameters of a unilateral solution are: to maximize the number of Jews; to minimize the number of Palestinians".[522] Prime Minister Yitzhak Rabin similarly warned that "the red line for Arabs is 20% of the population, that must not be gone over… I want to preserve the Jewish character of the state of Israel".[523]

Article II(d) of the Apartheid Convention provides that apartheid measures include "the expropriation of landed property belonging to a racial group or groups or to members thereof".[524] Article 4 of the Absentees' Property Law, 5710-1950, transferred rights over the absentee property of Palestinian refugees and exiles to the Custodian, a Chairperson appointed by Israel's Minister of Finance.[525] Article 19(a)(1) of the Absentees' Property Law provided for the transfer of immoveable Palestinian property to a "Development Authority established under a law of the Knesset".[526] The Land Acquisition Law, 5713-1953, facilitated the alienation of confiscated Palestinian lands to various Israeli State institutions, including the Development Authority. At the same time, the Minister for Finance was granted competence to confiscate lands for public purposes under the Land (Acquisition for Public Purposes) Ordinance – Amendment No. 10, a law that was used primarily to vest ownership of Palestinian lands in the State of Israel.[527]

Parastatal organizations such as the Jewish Agency and the World Zionist Organization are chartered to carry out material discrimination including through the allocation of confiscated

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[519] Law of Return, 5710-1950 (5 July 1950).
[520] Entry into Israel Law, 5712-1952, art. 1(b).
[521] The Citizenship and Entry into Israel Law (temporary provision), 5763-2003.
[522] David Landau, "Maximum Jews, Minimum Palestinians", *Haaretz,* 13 November 2003.
[523] Rhoda Ann Kanaaneh, *Birthing the Nation: Strategies of Palestinian Women in Israel* (University of California Press 2002) p. 50.
[524] International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly resolution 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976, art. II(d).
[525] Absentees' Property Law (5710-1950), arts. 2(a), 4.
[526] Ibid., art. 19(a)(1).
[527] Land (Acquisition for Public Purposes) Ordinance – Amendment No. 10.

Palestinian lands to Israeli Jews.[528] For example, Article 1 of Israel's Basic Law, Israel Lands, prevents the transfer of "[t]he ownership of Israel's Lands, which is the real estate belonging to the State, the Development Authority, or the Jewish National Fund … whether by means of sale, or in any other manner".[529] At the same time, Israeli Jews can pursue ownership claims to Palestinian residential properties in occupied East Jerusalem under the Legal and Administrative Matters Law (1970), despite the protection of private property in occupied territory against confiscation under Article 46 of the Hague Regulations (1907).[530] Meanwhile, the Military Commander issues military orders for the appropriation of public Palestinian property as State lands, and private Palestinian property for, *inter alia,* nature reserves, archaeological reserves, military training zones, the construction of the Wall, settlements and settlement roads, and infrastructure.[531]

Israel operates a "comprehensive and dual" legal system in occupied Palestine, where Israeli Jews enjoy full human rights under the application of Israeli domestic law and Palestinians are segregated and subjugated under repressive military rule.[532] Treated like their counterparts in Tel Aviv, Israeli Jewish settlers "have the same access to health insurance, national insurance, social services, education, regular municipal services and the right of entry into and out of Israel and around much of the West Bank", while receiving government incentives to live in the settlements.[533] Meanwhile Palestinians are separated from each other under different administrative domains: for example, Palestinians in Gaza are held under siege as a "hostile entity", Palestinians in Jerusalem are held under a revocable residency status, and Palestinians in the West Bank are held under occupation law, with freedom of movement substantially curtailed by the Wall and its administrative regime.[534] The occupied territory is physically fragmented by settlements, a network of settler-only roads, a massive annexationist wall and a military surveillance system of watchtowers and checkpoints. The Palestinian population, living in pockets of cities and villages, are completely surrounded and cut off by the settlement infrastructure, turning the Palestinian Authority–administered areas into Bantustan-style enclaves.[535]

3.2 Recognition of Israel's apartheid

[528] The Constitution of the World Zionist Organization and the Regulations for its Implementation (Updated November 2019). Article 2 of the World Zionist Organization's Constitution provides "the aim of Zionism is to create for the Jewish people a home in Eretz Israel secured by public law".
[529] Basic Law: Israel Lands 5720 – 1960, art. 1.
[530] United Nations, "Amid International Inaction, Israel's Systematic 'Demographic Engineering' Thwarting Palestinians' Ability to Pursue Justice, Speakers Tell International Conference"; "East Jerusalem Crisis 'Far from Over', Under-Secretary-General Says, Warning Threats to Status Quo in Holy City Can Have Severe Global Repercussions" (1 July 2021).
[531] A/HRC/52/76 "Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan Report of the United Nations High Commissioner for Human Rights", (15 March 2023) p. 7.
[532] A/HRC/49/87, "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk" (12 August 2022) para. 38.
[533] Ibid., para. 39
[534] Israel Ministry of Foreign Affairs, "Security Cabinet Declares Gaza Hostile Territory" (19 July 2007); United Nations Economic and Social Commission for Western Asia, "Israeli Practices towards the Palestinian People and the Question of Apartheid" (2017) United Nations Doc E/ESCWA/ECRI/2017/1.
[535] The State of Palestine, "It Is Apartheid, The Reality of Israel's Colonial Occupation of Palestine" (June 2021) 9; Al Mezan Centre for Human Rights, "The Gaza Bantustan – Israeli Apartheid in the Gaza Strip" (29 November 2021).

That the occupation of the Palestinian territory is taking place in the context of an institutionalized regime of racial discrimination and domination of one racial group over another, amounting to apartheid, has been catalogued by the United Nations Committee on the Elimination of Racial Discrimination;[536] United Nations Special Rapporteurs;[537] and prominent Palestinian,[538] Israeli,[539] and international civil society organizations;[540] and recognized as such by a growing cohort of Third States, including, among others, Namibia,[541] South Africa[542] and the 57 Member States of the Organisation of Islamic Cooperation.[543] The relationship between the apartheid and occupation regimes is succinctly contextualized by the State of Palestine, which has drawn a distinction between the discriminatory framework of laws and regulations denying Palestinian rights in Israel in 1948, and the continuation of the discriminatory and settler-colonialist enterprise facilitated by military orders in 1967 in occupied Palestine.[544] The State of Palestine report clarifies that "[a]lthough prolonged occupation has enabled Israel to retain the occupied Palestinian population under its effective military control while entrenching Israeli-Jewish national domination, this is merely one fragment of a much broader apartheid regime spanning both sides of the Green Line".[545] Further, in this vein, United Nations Special Rapporteur Francesca Albanese has warned against limitations on the recognition of apartheid, which must address "the experience of the Palestinian people in its entirety and in their unity as a people, including those who were displaced, denationalized and dispossessed in 1947–1949".[546]

From the aforementioned, there is a reasonable basis to conclude that Israel is carrying out inhumane acts of apartheid in breach of Article 2(c) of the Apartheid Convention. The latter defines apartheid as:

> [a]ny legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the

[536] CERD/C/ISR/CO/17-19, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel (27 January 2020) para. 23.
[537] UNHCR, "Israel's 55-year Occupation of Palestinian Territory is Apartheid – United Nations Human Rights Expert" (25 March 2022).
[538] Al-Haq et al., *Israeli Apartheid: Tool of Zionist Settler Colonialism* (29 November 2022); Al Mezan, *The Gaza Bantustan – Israeli Apartheid in the Gaza Strip* (29 November 2021); Addameer and Harvard Human Rights Clinic, *Joint Submission on Apartheid to the UN Independent Commission of Inquiry on the Occupied Palestinian Territory and Israel* (3 March 2022);
[539] Yesh Din, *The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion* (9 July 2020); B'Tselem, *A regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid* (12 January 2021).
[540] Human Rights Watch, *A Threshold Crossed, Israeli Authorities and the Crimes of Apartheid and Persecution* (27 April 2021); Amnesty International, *Israel's Apartheid Against Palestinians A Look Into Decades of Oppression and Domination* (2022); Diakonia, *Expert Opinion of Dr Miles Jackson: Occupation and the Prohibition of Apartheid* (23 March 2021).
[541] Statement by H.E. Penda Naanda, Ambassador/Permanent Representative, 43rd Session of the Human Rights Council (General Debate Item 9: Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action, including the reports of the Intergovernmental Working Group and the High Commissioner) 16 June 2020.
[542] South African National Statement General Debate on Item 7, 43rd Session of the Human Rights Council (15–16 June 2020).
[543] United Nations Commission on Human Rights, "Israeli Practices in Occupied Palestinian Territories, Form of Apartheid Fourth Committee Told, As Debate Continues" (12 November 2002).
[544] The State of Palestine, "It Is Apartheid, The Reality of Israel's Colonial Occupation of Palestine" (June 2021) pp. 9–12.
[545] Ibid., p. 9.
[546] A/77/356, "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Francesca Albanese" (21 September 2022) para. 10(a).

country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms.[547]

As such, there are grounds to consider that the establishment *de facto* of a prolonged and intentionally indefinite occupation regime, applying limited military laws, which by their nature subjugate the protected occupied population to the military interests of the occupying Power, may itself amount to an act of apartheid. At a minimum, the continuing operation of a discriminatory apartheid regime in occupied Palestine amounts to a breach of a *jus cogens* norm of international law.

C. Israel's administration of occupied Palestine breaches the right of the Palestinian people to external self-determination

It has been established that Israel's occupation constitutes a continuing use of force arising from an illegal act of aggression. This section illustrates how Israel's continued illegal occupation of Palestinian territory breaches the right to external self-determination of the Palestinian people. Such includes the right to full independence and statehood in Palestine, a Mandate territory held under "sacred trust". In doing so, this section refers to the catalogue of United Nations resolutions recognizing the right of the Palestinian people to self-determination, national independence and sovereignty.

1. Denial of Palestinian self-determination is a breach of "sacred trust"

Palestine, as a Class A Mandate, similar to Iraq, Syria and Lebanon, had "reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone".[548] While the subsequent provision of Article 73(b) of the United Nations Charter, adopted in 1945, does not explicitly mention the right of self-determination, it does recognize, as part of the "sacred trust", the obligations of United Nations Member States towards peoples administered under Mandate "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement".[549] Later, the Declaration on the Independence of Colonial Peoples required that "immediate steps shall be taken in Trust and Non-Self-Governing Territories… to transfer all powers to the peoples of those territories, without any conditions of reservations, in accordance with their freely expressed will and desire".[550]

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[547] United Nations General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, A/RES/3068(XXVIII), art. 2(c).
[548] Covenant of the League of Nations, art. 22.
[549] Charter of the United Nations (1945) art. 73(b); Karen Knop, *Diversity and Self-Determination in International Law* (CUP 2004) p. 200.
[550] United Nations General Assembly resolution 1514 (XV) (1960) Declaration on the Granting of Independence to Colonial Countries and Peoples, para. 3; See United Nations, "The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments, study prepared by Aureliu Cristescu" Sales No. E.80.XIV.3; Yearbook of the International Law Commission (1988) Volume II Part One, draft Code of Crimes against the Peace and Security of Mankind, p. 201.

In the *South West Africa* advisory opinion, the International Court of Justice advanced that "the ultimate objective of the sacred trust was the self-determination and the independence of the people concerned".[551] Significantly, in the *Wall* advisory opinion, the International Court of Justice recalled that Palestine, at the end of World War I, was a class "A" Mandate under the administration of Great Britain pursuant to Article 22, paragraph 4 of the Covenant of the League of Nations.[552] Drawing on its advisory opinion on the *International Status of South West Africa*, the Court further recalled that the Mandates were established as a "sacred trust of civilization" based on two principles: non-annexation; and the principle of "the well-being and development of … peoples [not yet able to govern themselves]".[553] There the International Court of Justice reasoned that "'the ultimate objective of the sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was the self-determination … of the peoples concerned'".[554]

Judge Koroma, in a separate opinion to the *Wall case*, stressed the importance of the obligations that the international community as a whole continues to bear "towards the Palestinian people as a former mandated territory, on whose behalf the international community holds a 'sacred trust', not to recognize any unilateral change in the status of the territory".[555] Any pre-emptive arguments that Palestine's status prior to Israel's occupation in 1967 might be considered *terra nullius* are resolutely dismissed by Judge Al-Khasawneh as being "incompatible with the territories' status as a former mandatory territory".[556] This is consistent with the International Court of Justice findings in *South West Africa* stressing the important safeguards inherent in Article 22, which provides no exception to considerations of geographical contiguity.[557] Judge Elaraby postulates that "[t]he only limitation imposed by the League's Covenant upon the sovereignty and full independence of the people of Palestine was the temporary tutelage entrusted to the Mandatory Power".[558] Therefore, axiomatically, "when the stage of rendering administrative advice and assistance had been concluded and the Mandate had come to an end, Palestine would be independent as of that date, since its provisional independence as a nation was already legally acknowledged by the Covenant".[559]

While following the Mandate, the Palestinian territory notably did not come under the international administration of the United Nations Trusteeship Council, General Assembly

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[551] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 16.
[552] *Advisory* International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 70.
[553] Ibid.
[554] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) paras. 52–53; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 88.
[555] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) Separate Opinion of Judge Koroma, para. 7.
[556] Ibid., Separate Opinion of Judge Al-Khasawneh, p. 237.
[557] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 154.
[558] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) Separate Opinion of Judge Elaraby, p. 249.
[559] Ibid.

resolution 181, which provided for the partition of Mandatory Palestine, foresaw a role for the Trusteeship Council, which would be "designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations" over the City of Jerusalem as a *corpus separatum*.[560] However, since 1948, Israel has extended its effective control over the territory demarcated for the Palestinian State under General Assembly resolution 181, in addition to the Palestinian territory occupied since 1967. More recently, Human Rights Council resolution 49/28 on the Right of the Palestinian People to Self-Determination, recalled, among others, "General Assembly resolutions 181 A and B (II) of 29 November 1947 and 194 (III) of 11 December 1948 … that confirm and define the inalienable rights of the Palestinian people, particularly their right to self-determination".[561] This is an important continued recognition of the right of the Palestinian people to self-determination in the territory beyond that occupied in 1967, as preserved in the application of the *uti possidetis* principle. In international practice, the frontiers of a new State may differ from the colony which it replaces.[562]

Israel's arguments pointing to a missing sovereign in occupied Palestine are inconsistent with the continued protection of the territory as a "sacred trust". For example, former Israeli Attorney General Meir Shamgar argues that the Geneva Conventions do not apply because of the "missing reversioner".[563] He suggests that the previous governing authorities in occupied Palestine – Egypt and Jordan – were not the legitimate sovereigns of the territory and therefore "those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application".[564] This position has been met with international opprobrium and resolutely dismissed as a misinterpretation of the law, which remains applicable *in toto* to the occupied territories.[565] The idea that either occupied territories or former Mandate territories would revert back to a colonial status was dispositively dispensed with in the *South West Africa* advisory opinion. The International Court of Justice explained that "[t]o accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation,

[560] United Nations General Assembly resolution 181 (1947) part III.
[561] United Nations Human Rights Council resolution 49/28 (11 April 2022) Right of the Palestinian people to self-determination A/HRC/RES/49/28, preamble.
[562] International Court of Justice, *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) International Court of Justice Reports 1986 p. 554, Separate Opinion of Judge Luchaire, p. 653.
[563] Shamgar, M., "The Observance of International Law in the Administered Territories" *Israeli Yearbook on Human Rights,* vol. 1 (1971) pp. 262–77.
[564] Yehuda Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" *Israeli Law Review* (1968) 279.
[565] "Applicability of the Fourth Convention: the ICRC is of the opinion that it is applicable *in toto* in the three occupied territories and cannot accept that a duly ratified international treaty may be suspended at the wish of one of the parties." ICRC, *Annual Report* 1975, p. 22; United Nations General Assembly resolution 72/85 (December 2017); International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 75; United Nations General Assembly resolution 73/97, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories (7 December 2018); While Israel has not signed or ratified the Additional Protocols to the Geneva Conventions, the customary provisions are binding and directly applicable. HCJ 9132/07 *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence* (27 January 2008) paras. 14–15; On the customary status of Additional Protocol I, see Reports of International Arbitral Awards, *Eritrea-Ethiopia Claims Commission – Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26,* volume XXVI, 19 December 2005, pp. 291–349, para. 14.

so determinedly excluded in 1920."[566] Even Yehuda Blum admits that his thesis on the "missing reversioner", if published today, would be changed in light of the agreements concluded between the PLO and Israel, namely the Israel–PLO Declaration of Principles of 1993.[567]

2. The continuing right of the Palestinian people to an independent state

Colonialism, in all its manifestations, is prohibited under the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), which is internationally binding as *jus cogens*.[568] The Declaration requires that:

> [i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.[569]

In this vein, a 1980 report prepared by United Nations Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Hector Gros Espiell, lists Palestine among the cases "concerning the right to self-determination of peoples under colonial or alien domination" which have not yet been settled.[570]

There is clear and unequivocal agreement in the myriad of international resolutions on Palestine, spanning decades, that the Palestinian people have a right to a sovereign independent State.[571] For example, General Assembly resolution 3236 (1974) recognized both the right of the Palestinian people to self-determination without external interference and "the right to national independence and sovereignty".[572] General Assembly resolution 32/20 (1977) condemned Israel's "illegal occupation" and the three-decades-long deprivation of the

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[566] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 21.
[567] Yehuda Z. Blum, "The Status of Judea and Samaria Revisited: A Response to Eyal Benvenisti", *Isr. L. REV.,* vol. 51 (2018) pp. 165, 168.
[568] United Nations General Assembly resolution 1514 (XV) (14 December 1960).
[569] Ibid., para. 5.
[570] Hector Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "The Right to Self-Determination Implementation of United Nations Resolutions" (1980) pp. 48–51.
[571] United Nations General Assembly resolution 2535 (XXIV) (1969), part B; United Nations General Assembly resolution 3236 (XXIX) (1974); United Nations General Assembly resolution 3376 (1975), para. 2(a); United Nations General Assembly resolution 43/177 (1988), para. 2; United Nations General Assembly resolution 55/87 (2000), para. 1; United Nations General Assembly resolution 58/163 (2003); United Nations General Assembly resolution 58/292 (2004); United Nations General Assembly resolution 66/17 (2011), para. 21(b); United Nations General Assembly resolution 67/19 (2012), para. 1; United Nations General Assembly resolution 70/15 (2015), para. 21(b); United Nations General Assembly resolution 70/141 (2015), para. 1; United Nations General Assembly resolution 71/23 (2016), para. 22; United Nations General Assembly resolution 71/95 (2016); United Nations General Assembly resolution 72/14 (2017), para. 24; United Nations General Assembly resolution 72/160 (2017), para. 1; United Nations General Assembly resolution 73/19 (2018), para. 22; United Nations General Assembly resolution 73/96 (2018); United Nations General Assembly resolution 73/158 (2018), para. 1; United Nations General Assembly resolution 77/208 (2022), para. 1; United Nations General Assembly resolution 77/22 (2022) para. 8.
[572] United Nations General Assembly resolution 3236 (XXIX) (1974), para. 1.

Palestinian people of "the exercise of their national inalienable rights", which essentially recognizes the continuing right of external self-determination from 1948.[573] This General Assembly resolution reaffirmed at a minimum "the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967", and accordingly admitted the State of Palestine as a non-Member observer to the United Nations.[574] Likewise, United Nations Human Rights Council resolution 34/29 "[r]eaffirms the inalienable, permanent and unqualified right of the Palestinian people to self-determination, including their right to live in freedom, justice and dignity and the right to their independent State of Palestine".[575]

The renegation of Israel's agreement with the Palestine Liberation Organization, under the Oslo Accords, to transition the administration of the occupied territory to full Palestinian control within five years, is a further manifestation of the violation of the exercise of the Palestinian people to self-determination.[576] Israel continues to occupy Palestine in breach of the Palestinian right to external self-determination, even despite the overwhelming support for Palestine's admission as a non-Member observer State to the United Nations and recognition as an independent State.[577]

To address the matter of Palestinian self-determination, the General Assembly established the CEIRPP "to recommend a programme of implementation to enable the Palestinian people to exercise their inalienable rights to self-determination without external interference, national independence and sovereignty; and to return to their homes and property from which they had been displaced".[578] Furthermore, as the General Assembly has previously asserted, the exercise of Palestinian self-determination has been denied since 1948.[579] All uses of force since 1948, including Israel's occupation of the Palestinian territory, which operate to prevent the exercise of the Palestinian people, including refugees and exiles in the diaspora, of their inalienable right to self-determination, are prohibited under the United Nations Charter. Further, Israel's *de jure* and *de facto* annexation and occupation of the Palestinian territory demarcated for a Palestinian State under General Assembly resolution 181, and separate to the 1967 territory held under belligerent occupation, is illegal *ab initio* as a breach of the sacred trust. In this respect, the lens on the right of self-determination should be expanded wider than the Palestinian territory occupied in 1967. This warrants a temporal examination of the continuing rights since the Mandate, and the consequent successive illegal uses of force operating to quash the realization of the right of self-determination.

In summation, Palestine is a continuing Mandate territory, whose people have a right to external self-determination and statehood. Israel's half-century belligerent occupation breaches

[573] United Nations General Assembly resolution 32/20 (1977), preamble.
[574] United Nations General Assembly 67/19 (2012), paras. 1, 2.
[575] United Nations Human Rights Council 34/29 Right of the Palestinian People to Self-Determination (24 March 2017).
[576] "The Declaration of Principles, signed by the PLO and Israel, contains a set of mutually agreed-upon general principles regarding the 5-year interim period of Palestinian self-rule. As such, the DOP defers permanent status issues to the permanent status negotiations, which will begin no later than the third year of the interim period. The permanent status agreement reached in these negotiations will take effect after the 5-year interim period." Israel Ministry of Foreign Affairs, "Declaration of Principles – Main Points" (13 September 1993).
[577] United Nations General Assembly resolution 67/19 (2012).
[578] UN The Question of Palestine, UN Committee on the Exercise of the Inalienable Rights of the Palestinian People.
[579] United Nations General Assembly resolution 32/20 (1977), preamble; See also United Nations General Assembly resolution 3414 (XXX) (5 December 1975), para. 1.

the right of the Palestinian people to exercise full self-determination. Further, it is important to take into account that Palestine represents a *sui generis* case in that colonization is ongoing in the form of Israel's settlement enterprise. Further, the right of self-determination is vested in all the Palestinian people, including the seven million refugees and exiles in the diaspora, Palestinians in the occupied territory and Palestinian citizens of Israel.

D. Concluding remarks

Clearly, the longer an occupation continues, the more difficult it becomes to satisfy the principles of necessity and proportionality for the continuing use of force. At its simplest level, the temporal scale of Israel's occupation of Palestine, now passing the half-century mark, and decades after peace agreements have been concluded with the parties to the conflict, demonstrates that any legitimacy for the continuing occupation as an alleged act of self-defence has long since expired. Further, the violation of the principles and rules of international humanitarian law and peremptory norms of international law, including the prohibition on the acquisition of territory through force through *de facto* and *de jure* annexations, the prohibition on the denial of self-determination, and the prohibition on apartheid, are composite acts which together indicate, *inter alia*, a violation of the necessity and proportionality requirements for self-defence.[580] In particular, Israel's administration of the Palestinian territory, which is underpinned by serious and irreversible breaches of peremptory norms of international law, evinces the magnitude and disproportionate scale of its continuing armed attack against Egypt's original alleged blockade and cross-border incursions.

V. Obligations of the international community in bringing illegal occupations to an end

Given the very serious nature of the violations described above, this section examines the obligations on Israel, as the wrongdoer, to make reparations to the State of Palestine, individuals, communities and corporations affected by the myriad of international law violations, including grave breaches of the Geneva Conventions, breaches of peremptory norms of international law and the illegal occupation as a continuing act of aggression. Notably, many of the internationally wrongful acts, such as the imposition of an apartheid regime and the breach of self-determination as a "sacred trust" of the Palestinian people, are continuing acts since 1948. In this vein, Israel's occupation of Resolution 181 territory (beyond the territory occupied in 1967), is illegal *ab initio* and also has consequences for the affected Palestinian people therein. Notably, the Palestinian people include those in the Occupied Palestinian Territory, Palestinian citizens of Israel, and Palestinian refugees and exiles in the diaspora denied their right of return. Such territorial and temporal considerations should be at the fore when considering Israel's obligations of cessation and non-repetition, and the forms of reparations, including restitution, compensation and satisfaction.

A. Specific obligations regarding the Israeli occupation

[580] Articles on State Responsibility for Internationally Wrongful Acts (2001), art. 15.

When a state has committed an internationally wrongful act, it is incumbent on the wrongdoer to make adequate reparations.[581] The classic statement outlining the various forms of reparations made by the Permanent Court of International Justice in the *Chorzów Factory* case "is that reparation must, as far as possible, wipe out all the consequences of that illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[582] The *Rainbow Warrior* arbitral decision outlined the forms of satisfaction, noting that:

> [t]here is a long established practice of States and International Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[583]

More specifically, Article 31 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts clarifies that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[584]

Article 12 requires for State responsibility that the international obligation be in force for that State. In addition, Article 14(2) speaks to continuing wrongful acts whereby the international obligation for that State continues in force only in respect of the period during which the act continues.[585] It is noteworthy here that the denial of the right of self-determination by Israel through its application of an institutionalized regime of systematic oppression and domination is a continuing act since 1948. In the draft Commentary, the International Law Commission examines cases where the obligation is only partly in operation for the State, for acts which extend over a period of time. This is useful for gauging whether, for example, acts which may have originally been lawful may, over time, become unlawful due to an obligation which is partly in operation for the State. The simplest characterization of a continuing unlawful act is the "unjustified occupation of the territory of another State".[586] As explained by the European Court of Human Rights, an act which may be lawful prior to the entry into force of the Convention, and which continues after the start date of the Convention, may be considered a

[581] Permanent Court of International Justice, *Case Concerning the Factory at Chorzów,* (Jurisdiction) Permanent Court of International Justice Reports, Series A, No 9 (1927) pp. 4, 21: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"; Permanent Court of International Justice, *Case Concerning the Factory at Chorzów,* (Merits) Permanent Court of International Justice Reports, Series A No 17 (1928) pp. 4, 29: "[T]he Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."
[582] Permanent Court of International Justice, *Case Concerning the Factory at Chorzów,* (Merits) Permanent Court of International Justice Reports, Series A No 17 (1928) p. 47.
[583] *Rainbow Warrior* XX Reports of International Arbitral Awards (1990) pp. 215, 272–273.
[584] See International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary.
[585] Ibid., art. 14(2), p. 59.
[586] International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary art. 18(3), p. 93.

continuing violation of the Convention.[587] The same premise is true for an occupation that is legal *jus ad bellum* at the outset of hostilities, but whose continuation over time breaches the necessity and proportionality requirement of Article 51 of the United Nations Charter.

1. Cessation and non-repetition

Israel is further under an obligation to cease internationally wrongful acts and to offer "appropriate assurances and guarantees of non-repetition".[588] Although not counted as reparations in their own right, the principles of cessation and non-repetition are crucial aspects of the law relating to the consequences of internationally wrongful acts. Cessation requires the state responsible for the internationally wrongful act to "cease that act, if it is continuing".[589] This reaffirms the principle that the breach of an international obligation does not affect the continued duty of the responsible state to abide by that obligation.[590] In this vein, the International Court of Justice held that:

> [W]hile official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[591]

In *Cyprus v Turkey* (1994), the European Court of Human Rights cited with approval the precedent in the International Court of Justice advisory opinion on *South West Africa* on the non-recognition of South Africa's illegal rule in Namibia, which nonetheless still guaranteed the validity of certain legislative and administrative acts of the illegal entity.[592] Consequently, the European Court of Human Rights explicated, "[i]t appears indeed difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts".[593] In this vein, Israel, despite the illegality of the occupation, continues to have obligations towards the occupied Palestinian population until the occupation is completely dismantled.

Cessation is often confused with restitution, discussed below; however, it is crucial to note that while circumstances may render restitution impossible, cessation is always possible, and always required.[594] Similarly, the obligation of cessation is not subject to a proportionality analysis, as is the case for restitution.[595] In the context of the occupation of the Palestinian territory, the obligation of cessation would require Israel to unconditionally end the occupation of the West Bank, East Jerusalem and the Gaza Strip.

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[587] *The de Becker case*, vol. II Yearbook of the European Convention on Human Rights, 1958–1959 (The Hague), (1960) p. 232 et seq.
[588] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 30(a) and (b).
[589] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 30(a).
[590] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 29.
[591] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 125.
[592] *Cyprus v. Turkey*, App No 25781/94 (ECHR, 10 May 2001), para. 86, 93.
[593] Ibid., para. 101.
[594] Oliver Corten, "The Obligation of Cessation" in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) pp. 548–549.
[595] International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary, art. 30, para. 7.

Regarding non-repetition, the International Law Commission Articles on State Responsibility provide for a conditional obligation for the wrongdoing state "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require".[596] This conditional language reflects the "exceptional character" of assurances and guarantees of non-repetition.[597] Indeed, in general, the International Court of Justice assumes that states will act in good faith once their conduct has been established to be in breach of international law. In the *Jurisdictional Immunities* case, the Court stressed that:

> while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.[598]

Nevertheless, the Court has previously taken such steps. In *LaGrand*, the International Court of Justice held that Germany's request that the United States issue assurances and guarantees of non-repetition of certain breaches of the Vienna Convention on Consular Relations was admissible and thus within the powers of the Court.[599] It further found that a mere apology made by the United States to Germany following a breach by the former of the obligation to give consular notification was an insufficient remedy,[600] but ultimately held that certain steps taken by the United States to ensure its compliance with the Convention "must be regarded as meeting Germany's request for a general assurance of non-repetition".[601]

Relevant factors for an assessment of assurances or guarantees of non-repetition may include consideration of whether there is a real risk of repetition, the nature of the obligation breached (particularly when the obligation constitutes a *jus cogens* norm), and the seriousness of the breach.[602] Given Israel's non-implementation of the prior advisory opinion on the construction of the Annexation Wall, assurances and guarantees of non-repetition may be an insufficient remedy.[603]

2. Forms of reparation

As noted above, reparations may take the form of restitution, compensation or satisfaction, and may be awarded "either singly or in combination".[604] The International Law Commission Articles on State Responsibility establish a nominal hierarchy, with restitution taking

[596] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 30(b).
[597] International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary, art. 30, para. 13.
[598] International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) International Court of Justice Reports 2012, p. 99, para. 138; See also International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) International Court of Justice Reports 2002 p. 303, para. 318.
[599] International Court of Justice, *LaGrand (Germany v United States of America)* (Judgment) International Court of Justice Reports 2001, p. 466, para. 48.
[600] Ibid., para. 123.
[601] Ibid., para. 124.
[602] Sandrine Barbier, "Assurances and Guarantees of Non-Repetition", in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) pp. 557–558.
[603] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) p. 136.
[604] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 34.

precedence, followed by compensation, with satisfaction ostensibly serving as a final option.[605] This is undercut somewhat by an injured state's right to decide on what form of reparation it wishes to seek.[606] Each of the forms of reparation have a proportionality requirement built in, intended to ensure that reparations are not used as punitive instruments, but instead contribute towards eliminating or mitigating the harm suffered as a result of the wrongful act.[607]

2.1 Restitution

Article 35 of the International Law Commission Articles on State Responsibility provides that "a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed".[608] Restitution is closely linked to cessation but may be distinguished in that restitution requires the re-establishment of "the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act".[609] It is not necessary to engage in any speculation as to what the state of affairs may have been had the wrongful act never been committed.[610] Rather, restitution may require the return of unlawfully seized property,[611] the release of unlawfully detained persons,[612] or the cancelling or withdrawal of legal or administrative instruments such as arrest warrants.[613] In the context of occupied Palestine, appropriate restitution may thus take the form of the release of Palestinian political prisoners; the returning of properties, including cultural property seized by the occupying authorities; the dismantlement of unlawful Israeli settlements in the occupied West Bank and East Jerusalem; the lifting of the blockade of the Gaza Strip; the dismantling of the institutionalized regime of discriminatory apartheid laws, policies and practices; and the dismantling of the occupying administration.

Article 35 introduces two key limitations on the obligation to provide restitution. Pursuant to these provisions, restitution may not be appropriate where it is materially impossible,[614] or where the burden on the wrongdoing state is disproportionate to the benefit of restitution over simple financial compensation.[615] Thus, restitution must only be made "as far as possible" to rectify the effects of the wrongful act.[616] If this is not possible, compensation may be the more appropriate solution. Situations in which the Court found restitution to be inappropriate include

[605] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), arts. 35–37.
[606] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 43.
[607] International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary, art. 34, para. 5.
[608] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 35.
[609] International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary, art. 35, para. 2.
[610] Permanent Court of International Justice, *Case Concerning the Factory at Chorzów,* (Merits) Permanent Court of International Justice Reports, Series A No 17 (1928) p. 47: "[R]eparation must, as far as possible, wipe out all the consequences of that illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."
[611] International Court of Justice, *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) International Court of Justice Reports 1962, p. 6.
[612] International Court of Justice, *United States Diplomatic and Consular Staff in Tehran,* International Court of Justice Reports 1980, p. 3.
[613] International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* International Court of Justice Reports 2002, p. 3.
[614] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 35(a).
[615] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 35(b).
[616] International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) International Court of Justice Reports 1997, p. 7, paras. 149–150.

the aftermath of the Bosnian genocide[617] and the felling by Nicaragua of trees in Costa Rica which were over 200 years old.[618] It is also worth noting that in its previous *Wall* advisory opinion, the Court appeared to acknowledge that it may not have been materially possible for Israel to return "the land, orchards, olive groves and other immoveable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory".[619] It is conceivable that this may prove equally true in the context of Israel's well-documented and long-running practice of house demolitions, or other situations wherein property has been entirely destroyed or irreparably altered. For example, the denial of Palestinian access to develop Area C, which amounts to more than 60 per cent of the West Bank and contains "more than two thirds of grazing land, with more than 2.5 million productive trees destroyed under occupation since 1967", has cost the Palestinian economy USD $1 billion in lost revenues, amounting to 25 per cent of gross domestic product (GDP), and while restitution might not be feasible, certainly these losses can and should be compensated.[620] Restitution would similarly be impossible where the issue concerns the killing of Palestinian civilians.

Forms of restitution may therefore include the immediate cessation of hostilities[621] and the immediate, unconditional and complete withdrawal of occupying forces from the territory, without delay and without negotiation. Significantly, the International Court of Justice further held that South Africa had an obligation to "withdraw its administration from the Territory of Namibia", and similarly, encouraged in *Chagos* that the British administration of the Chagos Archipelago end "as rapidly as possible".[622] Specific obligations on the occupying Power to bring the illegal situation to an end and make restitution include the dismantling of the administrative regime,[623] including the repeal of legislative measures contravening international law;[624] the unconditional release of all political prisoners;[625] and the immediate halting of transfer in of settlers and deportation and forced displacement of the occupied population.[626] In the *South West Africa* advisory opinion, Judge Castro opined that the

[617] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* (Judgment) International Court of Justice Reports 2007, p. 43, para. 460.
[618] James Crawford, *State Responsibility: The General Part* (CUP 2014) 513.
[619] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 153.
[620] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People and their Human Right to Development: Legal Dimensions", (2021) 12.
[621] United Nations Security Council resolution 1177 (1998), para. 1. In May 1988, Ethiopia occupied approximately 1,000km^2 of territory in and around the town of Badme, following a border conflict with Eritrea. United Nations Security Council resolution 1177 (1998) issued a general condemnation on resort to use of force and demanded that both parties immediately cease hostilities, but did not pronounce on the occupation *per se.*
[622] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) International Court of Justice Reports 2019 p. 25 (25 February 2019) para. 178.
[623] The International Court of Justice, having found the situation illegal, held that South Africa had an obligation to bring it to an end and "withdraw its administration from the Territory of Namibia". International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 118.
[624] United Nations General Assembly resolution 74/168 (21 January 2020) Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, para. 6(e).
[625] A/76/503–S/2021/908, Letter dated 29 October 2021 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General (2 November 2021).
[626] United Nations General Assembly resolution 2270 (XXII), Question of Territories under Portuguese Administration, para. 5.

consequences for South Africa's *mala fide* occupation must be "the restitution of property, assets and the fruits thereof to the people of Namibia. Noting that all public assets, such as railways, ports, waterways among others, remain the exclusive property of the Namibian people and there can be no bar of limitation to their restitution".[627]

2.2 Compensation

Where restitution would be unavailable, compensation may be granted.[628] Claims may be made for damage suffered either by an injured state or by other natural or legal persons,[629] including a loss of profits.[630] The International Law Commission Articles on State Responsibility do not allow for punitive damages, and restrict themselves wholly to compensatory awards, with the possible exception of serious breaches of obligations *erga omnes*.[631] It is also of note that Article 38 allows for interest to be applied to "any principle sum" due by way of reparation.

The text of Article 36(2) limits the award of compensation to damages which are "financially assessable", thus precluding what may be described as "moral damage".[632] However, the Court has allowed for compensation for moral or non-material damage in the *Diallo* case, wherein Judge Greenwood stressed that:

> just as the damages are no less real because of the difficulty of estimating them, so the determination of compensation should be no less principled because the task is difficult and imprecise. What is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded. Moreover, those principles must be capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of this case, but by comparison with other cases.[633]

The Court has moreover recently reaffirmed in its reparations judgment in *Armed Activities on the Territory of the Congo* that compensation may be made for both material and moral damage, so long as there is a sufficient causal link between the internationally wrongful act and the injury suffered.[634] In establishing such a link, the Court very relevantly stressed that:

> Uganda is under an obligation to make reparation for all damage resulting from the conflict in Ituri, even that resulting from the conduct of third parties, unless it has

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[627] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971), Separate Opinion of Judge De Castro, p. 218.
[628] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 36 International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) International Court of Justice Reports 1997, para. 152.
[629] Ibid., para. 5.
[630] Articles on the Responsibility of States for Internationally Wrongful Acts (2001), art. 36(2).
[631] James Crawford, *State Responsibility: The General Part* (CUP 2014) pp. 524–525.
[632] International Law Commission, "Articles on State Responsibility, Report of the International Law Commission on its Twenty-Eighth Session", Commentary, art. 36(1).
[633] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation Judgment) International Court of Justice Reports 2012, Declaration of Judge Greenwood, p. 391, para. 7.
[634] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment Reparations) (9 February 2022) para. 93.

established, with respect to a particular injury, that it was not caused by Uganda's failure to meet its obligations as an occupying Power.[635]

In February 2022, the International Court of Justice ruled that Uganda is under an obligation to make reparations for "illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources".[636] The reparations ordered by the Court included damages to persons, property and natural resources, amounting to USD $325 million, reflecting the "harm suffered by individuals and communities as a result of Uganda's breach of its international obligations".[637]

There is also an obligation to make reparation "for all ensuing damage" from the illegal occupation as an act of aggression, and from violations of peremptory norms.[638] Examples of such reparations would include, for example, a duty of compensation for individuals, corporations and communities for illegal acts of requisition,[639] such as property appropriations and the pillage of natural resources, where compensation is at least equal to the value of the goods disappeared.[640] In many cases, it might be necessary to establish a neutral arbitral claims commission to examine mass claims arising from the consequences of the occupying Power's violations.[641] That being said, it is important that reparations are transformative and place the Palestinian people at the centre of the process, with input into the agenda and means. It must be noted as well that even after Israel withdraws from the territory, it still remains accountable for any violations of international law relating to its obligations towards Palestine.

The construction of the Wall has severely impacted the economy, as Israel's appropriation of Palestinian land results in "major disruptions to economic activity".[642] For this reason, the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory was established under General Assembly resolution ES-10/17 to record and document the "damage emanating from construction of the separation barrier in the West Bank, not covering any other measure taken by the occupying Power".[643] As of July 2020, this

[635] *Ibid*., para. 96.
[636] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (19 December 2005), para. 69.
[637]Ibid., para. 405.
[638] Ibid., Declaration of Judge Ad Hoc Verhoeven, p. 359, para. 5.
[639] United Nations Security Council resolution 674 (29 October 1990), para. 8. Reminding Iraq "that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait"; International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment Reparations) (9 February 2022), para.405.
[640] Greco-German Mixed Arbitral Tribunal, *Evghenudes v German State*, 5 International Law Reports (20 December 1929) Case No. 296; Meuron, Fazy, Guex, *Portugal v Germany*, 5 International Law Reports (1929–1930) Case No. 92; United Nations Security Council resolution 545 (1983), para. 4; United Nations Security Council resolution 546 (1984), paras. 6–7. Reaffirmed Angola's entitlement to compensation for damage to life and property from South Africa's aggression and continuing occupation.
[641] For example, the peace treaty signed between Ethiopia and Eritrea on 12 December 2000, which provided for the establishment of a neutral arbitral Claims Commission.
[642] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: The Unrealized Oil and Natural Gas Potential" (2019) p. 22.
[643] United Nations Conference on Trade and Development, "Report on United Nations Conference on Trade and Development assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory", TD/B/63/3, (28 September 2016) para. 46.

body has included some 36,023 claims in its Register.[644] This body may be of use to the Court should it be required to assess damages owed in connection with the occupation of the West Bank, East Jerusalem and the Gaza Strip. [645]

2.2 Assessing compensation in occupied Palestine

A 2019 study by the United Nations Conference on Trade and Development assessed "the impact of the fiscal costs of occupation on the economy,"[646] examining losses from the denial of the various benefits of "diverse natural and water resources" and other goods and services "such as petroleum, energy, water, health services, sanitation and waste services". It further calculated estimates from "the leakage of tax revenues from indirect imports",[647] examining Israel's "monopoly on exports to the Palestinian market of some high value goods, such as agricultural products, animal feed and medical products".[648] The study concluded that the cumulative fiscal costs to the Palestinian economy from Israel's occupation, during the period 2000–2019, are estimated at $58 billion, "equivalent to 4.5 times the size of the West Bank regional economy".[649] Significantly, the United Nations Conference on Trade and Development recommended "[t]erminating and reversing the evolving and accumulated costs of the Israeli occupation for the Palestinian people, which cannot be realized without ending the occupation".[650]

Similarly, an authoritative World Bank study in 2013 examined losses and spillover effects to the Palestinian economy from Israel's continued occupation of Area C and imposed access restrictions. The projected impact to Palestinian industries, including, among others, transportation, electricity, water and telecommunications infrastructure, and the inability of the Palestinian Authority "to develop roads, airports, or railways in or through Area C", was estimated "to amount to some USD 3.4 billion – or 35 percent of Palestinian GDP in 2011" in losses to the Palestinian economy.[651] In terms of industry-specific costs, Israel's restrictions on telephone providers alone, by limiting the bands they are allowed to use, resulted in losses of between USD $436 million and USD $1,050 million from 2013 to 2015.[652] Meanwhile, Israeli quarrying companies operating in Area C were shown in official Israeli government estimates to have produced, in 2008 alone, 12 million tons of gravel materials, with a market value of

[644] UN Doc A/ES-10/839, Letter from the Secretary-General addressed to the President of the General Assembly (24 July 2020) para. 5; United Nations Conference on Trade and Development, "Report on United Nations Conference on Trade and Development Assistance to the Palestinian People: Developments in the Economy of the Occupied Palestinian Territory", TD/B/63/3, (28 September 2016) para. 46. The records catalogued by the Register of Damage highlight the scale of the appropriations: "52,870 claim forms and over 300,000 supporting documents had been collected in 233 Palestinian communities, with a population of 946,285".
[645] Ibid.
[646] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: Cumulative Fiscal Costs" (2019) p. 44.
[647] Ibid., p. 1.
[648] Ibid., p. 15.
[649] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People and their Human Right to Development: Legal Dimensions" (2021) p. 32.
[650] Ibid.
[651] The World Bank, "Area C and the Future of the Palestinian Economy" (2014) p. 5.
[652] ESCWA, "Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the Occupied Syrian Golan", A/77/90–E/2022/66 (8 June 2022) p. 29.

USD $900 million.[653] Notably, direct and indirect costs to the Palestinian National Authority from "physical, legal or regulatory restrictions on Palestinian investments or production" in the sectors of agriculture, Dead Sea minerals, quarries, construction, tourism, communications and cosmetics, amounted to an estimated USD $4.4 billion in losses in 2015.[654]

In the Gaza Strip, "economic costs of occupation related to the closure and restrictions and the military operations in the period 2007–2018" were estimated by the United Nations Conference on Trade and Development at USD $16.7 billion, equivalent to "six times the GDP of Gaza" in 2018.[655] However, the estimates did not include "costs in the billions of dollars, borne by the Palestinian people and the international community, resulting from the destruction of infrastructure, residential units and commercial structures that occurred during the recurrent hostilities and from reconstruction".[656] The numerous military offensives on the Gaza Strip have resulted in significant economic losses for occupied Palestine. During Israel's military offensive Operation Cast Lead between December 2008 and January 2009, economic losses to the Gaza Strip amounted to USD $4 billion.[657] In 2014, the Palestinian Economic Council for Research and Development projected that Gaza's reconstruction costs amounted to USD $7.8 billion.[658] More recently, Israel's May 2021 eleven-day offensive on the Gaza Strip resulted in destruction amounting to an "estimated $290 million to $380 million in direct damages, and $105 million to $190 million in economic losses".[659] Damage to educational facilities amounted to an estimated USD $3.5 million.[660]

The denial of access to the Palestinian Authority to develop its substantial gas fields in Gaza Marine 1 and 2, held under a naval blockade off the Gaza coast, has resulted in lost reserve values of USD $7.162 billion over 18 years.[661] Correspondingly, the denial of access to develop the Meged oil fields in occupied Palestine has cost the Palestinian economy 1,525 billion barrels of oil, amounting to an estimated USD $67.9 billion in economic losses.[662] Significantly, the United Nations Economic and Social Commission for West Asia (ESCWA) contends that Palestinians may have a continuing claim to oil and gas reserves in historic Palestine, noting in particular that "General Assembly resolution 181 of 29 November 1947 allocated 42.88 per cent of historic Palestine".[663] Since 1948, the losses to Palestinians are estimated to exceed USD $300 billion.[664] Appositely, Israel has international responsibility to

[653] The World Bank, Area C and the Future of the Palestinian Economy (2014) p. 25; Yesh Din, *Petition for an Order Nisi and an Interim Injunction, The Supreme Court of Israel, Jerusalem* (2009) which quotes the "National Blueprint (NBP) 14b – NBP of Mining and Quarrying Sites for the Construction and Road Building Business" (2008).
[654] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: Cumulative Fiscal Costs" (2019) p. 39.
[655] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: The Impoverishment of Gaza under Blockade" (2020) p. 34.
[656] Ibid.
[657] United Nations Conference on Trade and Development, 2015, Report on United Nations Conference on Trade and Development Assistance to the Palestinian People: Developments in the Economy of the Occupied Palestinian Territory, TD/B/62/3, (6 July 2015).
[658] Noah Browning, "Palestinians put Gaza Reconstruction Cost at $7.8 billion", *Reuters*, 4 September 2014.
[659] ESCWA, "Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan", A/77/90–E/2022/66 (8 June 2022) p. 14, para. 81.
[660] Ibid., p. 18, para. 111.
[661] United Nations Conference on Trade and Development, "The Economic Costs of the Israeli Occupation for the Palestinian People: The Unrealized Oil and Natural Gas Potential" (2019) p. 15.
[662] Ibid., pp. 15, 25.
[663] Ibid., p. 30.
[664] Ibid., p. 15.

make "full reparation for the injury caused by the internationally wrongful act", including monetary compensation which is "full and adequate".[665]

2.3 Satisfaction

The final form of reparation for internationally wrongful acts is satisfaction. This may be required where restitution or compensation are inadequate,[666] and may involve, *inter alia*, an acknowledgement of a breach of international law, an expression of regret, or a formal apology.[667] The Internal Law Commission, in its commentaries, notes that satisfaction is "not a standard form of reparation" and ought to be considered of an "exceptional character".[668] As with restitution and compensation, satisfaction may not be used as a punitive tool, and thus must be proportionate to the injury suffered and "may not take a form humiliating to the responsible State".[669]

Satisfaction may be granted by an international court or tribunal directly. In the *Corfu Channel* case, the International Court of Justice did precisely that, stating, "to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty".[670] This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[671] Just satisfaction "may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".[672] In 1993, for example, President Clinton offered a formal apology to the people of Hawaii for the US "illegal overthrow" of the Kingdom of Hawaii on 17 January 1893, in denial of the rights of Native Hawaiians to self-determination.[673] In other cases, apologies have been required to be made by the offending state. In the *I'm Alone* arbitration, the United States was directed to apologize to Canada in addition to providing compensation.[674] Similarly, in *Rainbow Warrior*, the Prime Minister of France was required to apologize to the Prime Minister of New Zealand.[675] As has

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[665] Articles on Responsibility for Internationally Wrongful Acts (2001), art. 31; Addressing South Africa's occupation of Angola, the United Nations Security Council called for the need for full and adequate compensation, United Nations Security Council resolution 546 (1984) paras. 7–8.
[666] Articles on Responsibility for Internationally Wrongful Acts (2001), art. 37(1).
[667] Articles on Responsibility for Internationally Wrongful Acts (2001), art. 37(2).
[668] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), art. 37(1).
[669] Articles on Responsibility for Internationally Wrongful Acts (2001), art. 37(3).
[670] International Court of Justice, *Corfu Channel Case (United Kingdom v Albania)* (Merits Judgment) International Court of Justice Reports 1949 (9 April 1949) p. 35.
[671] International Court of Justice, *Corfu Channel Case (United Kingdom v Albania)* (Merits Judgment) International Court of Justice Reports 1949 (9 April 1949) p. 35; International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* International Court of Justice Reports 2002, para. 75; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* (Judgment) International Court of Justice Reports 2007, para. 463; International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (Dijbouti v France)* (Judgment) International Court of Justice Reports 2008, p. 177, para. 204.
[672] Articles on Responsibility for Internationally Wrongful Acts (2001), art. 37(2).
[673] Joint Resolution, 107 STAT. 1510 Public Law 103-150 – November 23, 1993; On 4 December 1893, in his State of the Union Address, US President Grover Cleveland stressed his "embarrassment" at the overthrow of Hawaii, stating, "Upon the facts developed it seemed to me the only honorable course for our Government to pursue was to undo the wrong that had been done by those representing us and to restore as far as practicable the status existing at the time of our forcible intervention." President Grover Cleveland, *President of the United States, State of the Union* (1893).
[674] *S. S. "I'm Alone" (Canada v United States)* III Reports of International Arbitral Awards (1935) pp. 1609, 1618.
[675] *Rainbow Warrior* XX Reports of International Arbitral Awards (1990) p. 213.

been seen above, however, in *LaGrand* the Court found that an apology alone was insufficient satisfaction, and could only be considered adequate when coupled with the United States' assurance of non-repetition. Finally, and very recently, the Court in *Armed Activities on the Territory of the Congo* declined to order Uganda to conduct criminal investigations of those responsible for grave breaches of the Geneva Conventions as a form of satisfaction, noting that Uganda already "is required to investigate and prosecute by virtue of the obligations incumbent on it".[676]

In summation, it is difficult to discern whether the Court may consider satisfaction to be necessary in the context of the unlawful occupation of Palestine. Nevertheless, given the nature and seriousness of the international law violations, an apology would appear to be an insufficient remedy for the generational harm caused to the Palestinian people. Instead, the primary focus should be on restitution and compensation for the affected individuals, communities and corporations. Crucially, it is incumbent upon the Court to address the root causes of the illegal belligerent occupation and the illegal occupation of internationally protected Mandate territory held as a "sacred trust", drawing from the important precedents of its comparative jurisprudence in the *South West Africa* and *Chagos* advisory opinions to end the Israeli occupation as rapidly as possible. This warrants the full dismantling of both the Civil Administration and Coordination of Government Activities in the Territories, the dismantling of the apartheid regime on both sides of the Green Line, and the dismantling of the illegal settlement enterprise. Further, full compensation should take into consideration the reports of the World Bank, ESCWA and the United Nations Conference on Trade and Development detailing the broad sweep of economic losses from the occupation including, *inter alia,* fiscal leakages, losses from denied access to natural resources in Area C, and Israel's exploitation of Palestinian oil, gas, quarries, Dead Sea minerals, water and agricultural lands.

B. What legal consequences arise, for all States and the United Nations, to bring illegal occupation to a complete and immediate end in conformity with international law?

In addition to Israel's responsibility for internationally wrongful acts, and its obligations of cessation, non-repetition and reparation, there are also some key Third State and international obligations owed to Palestine. This section maps out the general responsibility of Third States for internationally wrongful acts, and provides an overview of international practice drawn from international resolutions on Third State responsibility in comparative occupations which, the International Law Commission notes, "express a general idea applicable to all situations created by serious breaches in the sense of article 40".[677]

1. Third State responsibility for internationally wrongful acts

Given the nature of some internationally wrongful acts, the violating State, all States and the international community may have an interest in bringing the unlawful conduct to an end.[678] Article 40(2) of the International Law Commission Articles on State Responsibility provides

[676] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) International Court of Justice Reports 168 (19 December 2005), para. 390.
[677] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) p. 115, para. 12.
[678] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment Second Phase), International Court of Justice Reports 1970 p. 3 (5 February 1970), p. 32, para. 33.

that "[n]o State shall recognize as lawful a situation created by a serious breach [of peremptory norms of general international law] nor render aid or assistance in maintaining that situation".[679] In the *South West Africa* advisory opinion, the question turned to Third State obligations to put an end to the illegal situation, "requiring them to apply other measures of pressure against South Africa because of its refusal to withdraw from Namibia".[680] Previously, in the *Wall* advisory opinion, the International Court of Justice considered that legal consequences arise for all States, which are "under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to cooperate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefore".[681] In addition, Third State obligations can arise for breaches of the Geneva Conventions, where the High Contracting Parties undertake to "respect and ensure respect for the present Convention in all circumstances".[682]

Article 41(2) of the International Law Commission Articles on International Responsibility requires that Third States not "render aid or assistance in maintaining that situation".[683] In *South West Africa,* the International Court of Justice examined the consequences arising for Third States in terms of "putting an end to the illegal situation".[684] Significantly, the Court drew a distinction between the steps advanced by Security Council resolution 283 (1970), which the Court noted it had not been called to advise on, and the obligation of non-recognition incurring consequences under general international law.[685] Third States, the Court outlined, were "under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia".[686] In addition, Third States were obliged to abstain from sending diplomatic, consular, or special missions "to South Africa including in their jurisdiction, the Territory of Namibia", and withdraw any agents already there.[687] Implicit in the obligation of non-recognition, Third States were to "abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory".[688]

1.1 Resolutions expressing a general idea applicable to all situations

As previously noted, the Commentary of the International Law Commission to Article 40 indicates that the resolutions of the Security Council, for example, "prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule … express a general idea applicable to all situations created by serious breaches in the

[679] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), art. 41(2).
[680] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 117; Ibid., Separate Opinion of Judge Petrén, p. 136.
[681] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 146.
[682] Article 1, Fourth Geneva Convention (1949).
[683] Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 41(2).
[684] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) para. 117.
[685] Ibid., paras. 118, 121.
[686] Ibid., para. 122.
[687] Ibid., para. 123.
[688] Ibid., para. 124.

sense of article 40".[689] This section draws from General Assembly and Security Council resolutions on comparative illegal occupations highlighting Third State practice on non-recognition and not rendering aid and assistance, which may be applicable to all situations of serious breaches of peremptory norms of international law.

Foremost, there is a general obligation not to recognize as lawful the situation resulting from an internationally wrongful act, nor render aid or assistance in maintaining this situation.[690] For example, the Security Council has called on Third States "[n]ot to recognize any regime" set up by Iraq in occupied Kuwait.[691] The General Assembly has likewise called on Third States to not "recognize as lawful the situation resulting from the [Armenian] occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation".[692] This has also been described as "the principle of non-recognition of the conquest".[693] Other aspects of non-recognition include the continued obligation of Third States to recognize the inalienable rights of return of the displaced and exiled members of the occupied population, exemplified in the Armenian occupation of Azerbaijan.[694]

Acting under Chapter VII, the Security Council has requested that all States prevent imports of all commodities and products from, and not make available any commercial, industrial or public utility to, an aggressor occupying Power.[695] Such measures are taken on order to secure the withdrawal of the occupying Power. [696] Similarly, the Security Council called on Third States to implement fully an arms embargo against South Africa.[697] Likewise, the Council of Europe urged Member States to refrain from providing weapons and munitions supplies to Armenia which might continue the occupation and called for the "withdrawal of the occupying forces".[698] Further, the General Assembly called on "all States" to desist from providing any assistance to Portugal, including military trainings, within or outside the North Atlantic Treaty Organization (NATO) framework, in order to prevent the sale or supply of military equipment to Portugal, including materials for the manufacture of weapons and ammunition.[699]

States also have a clear obligation to collaborate to bring the occupation to an end, where its continuation would breach peremptory norms of international law.[700] For example, Third States have assisted in collecting information to ascertain the incurred losses arising from Iraq's

[689] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) p. 115, para. 12.
[690] United Nations General Assembly resolution 62/243 (25 April 2008), The situation in the occupied territories of Azerbaijan, para. 5.
[691] United Nations Security Council resolution 660 (1990), para. 2; United Nations Security Council resolution 661 (1990), paras. 1 and 9; United Nations Security Council resolution 541(1983).
[692] United Nations General Assembly resolution 62/243, (25 April 2008) The situation in the occupied territories of Azerbaijan, para. 5.
[693] Argentina, Civil Court of the Capital*, Miletich v CIA Generale de Construcciones, SA*, 12 International Law Reports 12 (7 July 1943) Case No. 163.
[694] United Nations General Assembly resolution 62/243, (25 April 2008) The situation in the occupied territories of Azerbaijan, para. 5; United Nations General Assembly resolution 75/192 Situation of human rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine (16 December 2020).
[695] United Nations Security Council resolution 661 (1990), para. 3.
[696] A/RES/2372(XXII) (12 June 1968), para. 9.
[697] United Nations Security Council resolution 546 (1984), para. 4.
[698] Council of Europe, Recommendation 1690 (2005), The Conflict over the Nagorno-Karabakh Region dealt with by the OSCE [Organization for Security and Co-operation in Europe] Minsk Conference.
[699] United Nations General Assembly resolution 2270 (XXII), Question of Territories under Portuguese Administration, para. 8(a)–(c).
[700] Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 41(1).

illegal occupation of Kuwait.[701] In Namibia, international coordination took the form of an Ad Hoc Subcommittee of the Security Council with oversight to examine the implementation of resolutions requesting that Third States refrain from economic dealings with South Africa. [702] More recently, an International Platform brought together United Nations Member States as well as representatives of NATO, the European Union, the Council of Europe and the Organization for Democracy and Economic Development to assess relevant and targeted countermeasures for "achieving the de-occupation of Crimea".[703]

1.2 Countermeasures to induce Israel to comply with international law obligations

While the injured State can take countermeasures against the violating State for internationally wrongful acts, more tenuous is the right of Third States to take countermeasures against the violating State for breaches of peremptory norms.[704] The inclusion of such provision was controversial at the drafting of the Articles on State Responsibility; however, there has since been considerable and growing practice of countermeasures taken by Third States for breaches of peremptory norms.[705] Such targeted countermeasures may include abstaining from diplomatic and consular relations; ending the supply of military equipment and trainings; implementing arms embargoes; and implementing trade and financial restrictions, assets freezes, and individual sanctions. The latter may be aimed at settler organizations, political representatives, military personnel, banks, financial institutions and corporations that are financing and contributing to the settlement enterprise or carrying out other ancillary violations of international law against the protected Palestinian population and helping to underpin the illegal occupation.

2. Responsibility of the United Nations

Finally, the primary responsibility for the decolonization of Palestine is vested in the United Nations, which has particular responsibility for supervising the return of refugees and overseeing the dismantling of the illegal occupying administration and withdrawal of military forces.

The United Nations has permanent responsibility with regard to the Question of Palestine "until the question is resolved in all its aspects in accordance with international law and relevant resolutions".[706] For example, in the *Wall* advisory opinion, the International Court of Justice found that "[t]he United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation

[701] United Nations Security Council resolution 674 (29 October 1990), para. 8; United Nations General Assembly resolution 2270 (XXII) (2 March 1991) Question of Territories under Portuguese Administration, para. 8(a)–(c). Resolution 686.
[702] United Nations Security Council resolution 276 (30 January 1970), paras. 5–6.
[703] The Platform recommended using "appropriate mechanisms of the UN, the Council of Europe, the OSCE, other international and regional organizations to address issues related to the temporary occupation". Such include the establishment of Crimea focal points in the respective Ministries of Foreign Affairs, and to "recognize the role of national parliaments in addressing the temporary occupation of Crimea and to encourage the coordination of activities on Crimea between national parliaments as well as within inter-parliamentary assemblies". The Platform also planned to "invite international and national non-governmental organizations, think-tanks and the expert community to contribute to the network's activities". A/76/503–S/2021/908, Letter dated 29 October 2021 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General (2 November 2021).
[704] Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 54.
[705] Annie Bird, "Third State Responsibility for Human Rights Violations", 898 *EJIL* 21 (2010), pp. 883, 896–898.
[706] United Nations General Assembly resolution 71/23, (30 November 2016).

resulting from the construction of the wall and the associated regime, taking due account of the present advisory opinion".[707] Likewise, the International Court of Justice may call on the United Nations to play a central role in matters pertaining to the return of Palestinian refugees, the withdrawal of armed forces, ending the occupation, and organizing a plebiscite.

Accordingly, similar to the decision in *Chagos*, certain matters, such as the resettlement into Palestine of returned Palestinian nationals, may be an issue that the International Court of Justice addresses to the General Assembly for the completion of decolonization, including calls for the cooperation of all States in this regard.[708] The General Assembly has previously condemned Portugal's "settlement of foreign immigrants in the Territories" of Guinea-Bissau, and called on Portugal "to stop immediately the systematic influx of foreign immigrants into these Territories and the forcible exporting of African workers to South Africa".[709] It similarly recognized the inalienable right of the population expelled from the occupied territory of Azerbaijan to return,[710] and the inalienable right of return of the Kampuchean people.[711] Likewise, the Set of Ideas on an Overall Framework Agreement on Cyprus (1992) included important provisions for the return of displaced persons.[712] A ceasefire agreement, meanwhile, included provision for return of the internally displaced and refugees to the territory of Nagorno-Karabakh under the supervision of the United Nations High Commissioner for Refugees.[713]

Generally, the General Assembly and Security Council may call for the withdrawal of armed forces and the termination of occupation, in cases of occupations arising from acts of aggression. In response to the invasion and occupation of Kuwait, the Security Council demanded that Iraq "withdraw immediately and unconditionally all its forces". [714] Likewise, the General Assembly has called on Portugal to apply "without delay" the principle of the right to self-determination, and to withdraw military forces from Guinea-Bissau.[715] The dismantling and non-recognition of the occupying Power's administrative regime has similarly featured in a number of international resolutions.[716] The General Assembly called for the immediate

[707] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 70, para. 163(E).
[708] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) International Court of Justice Reports 2019 p. 25 (25 February 2019) para. 181.
[709] United Nations General Assembly resolution 2270 (XXII), Question of Territories under Portuguese Administration, para. 5.
[710] United Nations General Assembly resolution 62/243 (25 April 2008) The Situation in the Occupied Territories of Azerbaijan, para. 5.
[711] United Nations General Assembly resolution 39/5 The Situation in Kampuchea (30 October 1984).
[712] "The settlement of those who select to return will take place after the persons who will be affected have been satisfactorily relocated. If the current occupant is also a displaced person and wishes to remain, or if the property has been substantially altered or has been converted to public use, the former permanent resident will be compensated or will be provided an accommodation of similar value." "Set of Ideas on an Overall Framework Agreement on Cyprus" (1992) para. 84.
[713] Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation (10 November 2020), para. 7; Mandate of the Co-Chairmen of the Conference on Nagorno-Karabakh under the auspices of the OSCE ("Minsk Conference") (Vienna, 23 March 1995).
[714] United Nations Security Council resolution 660 (1990), para. 2; United Nations Security Council resolution 661 (1990), paras. 1 and 9.
[715] United Nations General Assembly resolution 2270 (XXII), Question of Territories under Portuguese Administration, para. 5.
[716] United Nations General Assembly resolution 35/19 (11 November 1980) paras. 3, 9; United Nations General Assembly resolution 37/253 (1983).

withdrawal of all foreign troops from occupied Kampuchea and for all States to refrain from acts of aggression.[717] Similarly, Turkey, in the first universal periodic review of Armenia in 2010, recommended the withdrawal of Armenian troops and "ending [the] occupation of Azerbaijani territories".[718]

In this vein, important recommendations were offered by the International Court of Justice in the *South West Africa* advisory opinion to instruct the United Nations on its role in terminating the occupation. These recommendations included the withdrawal of South Africa's troops in consultation with the United Nations, whereupon the United Nations would substitute in its place United Nations control.[719] That being said, for Palestine, which has been subjected to a half-century of occupation, the imposition of an international trusteeship may amount to a continuing breach of the right of self-determination. Additionally, in Namibia a plebiscite was to be held under United Nations supervision, specifying that where a clear preponderance of views was established "in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible".[720] The proposed plebiscite was not undertaken specifically in order to bring about the independence of Namibia or a change of administration, but simply to obtain information.[721] This type of plebiscite would be useful to gather more specific information to facilitate the exercise of self-determination of the Palestinian people.

2.1 Decolonizing Palestine

It is the duty of every State to "promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".[722] What the decolonization process should look like has been expounded in a number of International Court of Justice cases, including *Namibia, Northern Cameroons* and *Chagos*. Judge Dillard explains that while "the existence of ancient 'legal ties' … may influence some of the projected procedures for decolonization, [they] can have only a tangential effect in the ultimate choices

[717] United Nations General Assembly resolution 34/22 The Situation in Kampuchea (14 November 1979), para. 7.

[718] A/HRC/15/9, "Report of the Working Group on the Universal Periodic Review" (6 July 2010), para. 32; See also United Nations Security Council resolution 822 (1993), which called for the withdrawal of all occupying forces from the Kelbadjar district and other occupied areas. In July 1993, the UN Security Council noted with alarm Armenia's seizure of the Agdam district and called again for the withdrawal of occupying forces from the district, United Nations Security Council resolution 853 (1993), para. 3. In October 1993, the UN Security Council called for the immediate implementation of the CSCE Minsk Group's "Adjusted timetable", and the withdrawal of forces from the occupied territories, United Nations Security Council resolution 874 (1993), para. 5; Similarly, the Parliamentary Assembly of the Council of Europe called for the "withdrawal of the occupying forces" from Azerbaijan, Recommendation 1690 (2005), The Conflict over the Nagorno-Karabakh Region Dealt with by the OSCE Minsk Conference.

[719] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) International Court of Justice Reports 16 (1971) p. 65.

[720] Ibid.

[721] Ibid., Separate Opinion of Judge De Castro, p. 179.

[722] Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, preamble. United Nations General Assembly resolution 1654 (XVI) established a Special Committee of seventeen members, nominated by the President of the General Assembly, to examine the application of the declaration and to make recommendations. United Nations General Assembly resolution 1654 (XVI) (27 November 1961) The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

available to the people".[723] Rather, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people". For example, in *Northern Cameroons,* the Court considered that it is within the International Court of Justice's discretion whether issues pertaining to the Mandate can still be adjudicated on.[724] For Palestine, this is particularly pertinent given continuing denial of the exercise of self-determination since the British Mandate. In *Chagos* the International Court of Justice concluded that decolonization was not carried out in a manner consistent with the right of peoples of Mauritius to self-determination and, accordingly, the United Kingdom's continued administration of the territory constituted an unlawful act, which the UK was obliged to end as rapidly as possible.[725] A subsequent General Assembly resolution on Chagos demanded that the UK "withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible".[726] In this vein, the modalities of completing the decolonization are within the competence of the General Assembly, while all States have obligations *erga omnes* in order to cooperate to put the modalities into effect.[727]

For Palestine, diplomatic efforts since the 1990s appear to be premised on a dubious "land for peace" formula which, if used to deprive the protected Palestinian population of their inalienable rights to self-determination and permanent sovereignty over national resources, would also constitute an internationally wrongful act.[728] It is important to note that, as early as 1967, Security Council resolution 242 (1967) emphasized the "inadmissibility of the acquisition of territory by war", a prohibition subsequently expressed in at least eight Security Council resolutions on occupied Palestine.[729] Delegates to the meeting stressed that "with regard to the principles that need to be affirmed, we deem it most essential that due emphasis be put on the inadmissibility of acquisition of territory by war and hence on the imperative

[723] International Court of Justice, International Court of Justice Reports 1975 p. 12 (16 October 1975), Separate Opinion of Judge Dillard, p. 122.
[724] International Court of Justice, *Case Concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections Judgment) International Court of Justice Reports 1963 p. 15 (2 December 1963) p. 37.
[725] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) International Court of Justice Reports 2019 p. 25 (25 February 2019) para. 178.
[726] United Nations General Assembly resolution 73/295 (22 May 2019) para. 3.
[727] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) International Court of Justice Reports 2019 p. 25 (25 February 2019) paras. 179–180. "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle." United Nations General Assembly resolution 2625 (XXV) (24 October 1970) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.
[728] United Nations General Assembly resolution 71/23 (30 November 2016), paras. 4, 16; United Nations General Assembly resolution 67/19 (29 November 2012), paras. 4, 5; United Nations General Assembly resolution 66/17 (30 November 2011), para. 15;
[729] United Nations Security Council resolution 242 (1967), preamble; United Nations Security Council resolution 252 (1968), preamble; United Nations Security Council resolution 267 (1969), preamble; United Nations Security Council resolution 271 (1969), preamble; United Nations Security Council resolution 298 (1971), preamble; United Nations Security Council resolution 476 (1980), preamble; United Nations Security Council resolution 478 (1980), preamble; United Nations Security Council resolution 681(1990), preamble; United Nations Security Council resolution 2334 (2016), preamble.

requirement that all Israel armed forces be withdrawn from the territories occupied".[730] Hughes notes that regardless of calls for political negotiation to end the occupation, "the withdrawal of Israel from the occupied territory is a 'fundamental prerequisite'" to negotiation.[731] As such, Israel's obligation of withdrawal from the illegally occupied territory is unqualified, immediate and absolute.[732] General Assembly resolutions include important qualifications for Israel's "unconditional and total withdrawal", meaning that withdrawal is not to be made the subject of negotiation, but is rather the termination of an internationally wrongful act.[733] In this vein, Security Council resolution 476 (1980) reaffirms "the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem".[734] Security Council resolution 2334 (2016) likewise urges, without delay, international and diplomatic efforts to "end to the Israeli occupation that began in 1967".[735]

VI. Conclusion

Throughout the decades, United Nations Special Rapporteurs on the Situation of Human Rights in the occupied Palestinian territories have questioned the legality of the occupation. In 2007, former United Nations Special Rapporteur John Dugard pondered the legal consequences arising from a prolonged occupation: "[W]hen such a regime has acquired some of the characteristics of colonialism and apartheid … Does it continue to be a lawful regime? Or does it cease to be a lawful regime, particularly in respect of 'measures aimed at the occupants' own interests'?" Dugard suggested the question be put to the International Court of Justice for an

[730] United Nations Security Council 1382nd Meeting, The Situation in the Middle East, S/Agenda/1382, para. 27. Mr Makonnen, Ethiopia. See also Mr. Parthasarathi (India), "Members of the Council will recall that during the fifth emergency special session an overwhelming majority of Member States of the United Nations, whether they voted for the Latin American draft resolution or the non-aligned, Afro-Asian draft resolution, had reaffirmed the principle of non-acquisition of territory by military conquest and had supported the call for the withdrawal of Israel armed forces to the position they held prior to the outbreak of the recent conflict on 5 June 1967".

[731] David Hughes, "Of Tactics, Illegal Occupation and the Boundaries of Legal Capability: A Reply to Ardi Imseis", *EJIL,* vol. 31 (2020) pp. 1087–1103, 1100.

[732] See Ardi Imseis, "Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020" *EJIL,* vol. 31 (2020) p. 1055.

[733] United Nations General Assembly resolution A/RES/36/147E (16 December 1981); United Nations General Assembly resolution A/RES/36/226A (17 December 1981); United Nations General Assembly resolution A/RES/37/123F (20 December 1982); United Nations General Assembly resolution A/RES/38/180D (19 December 1983); United Nations General Assembly resolution A/RES/39/146A (14 December 1984); United Nations General Assembly resolution A/RES/40/168A (16 December 1985); United Nations General Assembly resolution A/RES/41/162A (4 December 1986); United Nations General Assembly resolution A/RES/42/209B (11 December 1987); United Nations General Assembly A/RES/43/54A (6 December 1988); United Nations General Assembly resolution A/RES/44/40A (4 December 1989); United Nations General Assembly resolution A/RES/45/83A (13 December 1990); United Nations General Assembly resolution A/RES/46/82A (16 December 1991).

[734] United Nations Security Council resolution 476 (1980), para. 1. More specifically, the UN Security Council has affirmed that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith". See United Nations Security Council resolution 478 (20 August 1980); See also United Nations Security Council resolution 267 (1969), which "censures in the strongest terms all measures taken to change the status of the City of Jerusalem" and "confirms that all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and properties thereon, are invalid and cannot change that status".

[735] United Nations Security Council resolution 2334 (2016), para. 9.

advisory opinion.[736] Similarly, in the final report of his mandate, former United Nations Special Rapporteur Richard Falk recommended an International Court of Justice advisory opinion "on the legal status of the prolonged occupation of Palestine, as aggravated by prohibited transfers of large numbers of persons from the occupying Power and the imposition of a dual and discriminatory administrative and legal system".[737]

Applying a four-point test, former United Nations Special Rapporteur Michael Lynk concluded that Israel's annexation of territory, breaches of the principle of temporariness, breaches of its duty as occupying Power to act in the best interests of the occupied population, and failure to administer the territory in good faith[738] together indicated that the belligerent occupation had crossed the "red line" into illegality.[739] More recently, United Nations Special Rapporteur Francesca Albanese drew on three separate rationales underpinning the illegality of Israel's occupation. First, the occupation breaches *jus in bello* principles of temporariness, is conducted in violation of the best interests of the occupied population, and has resulted in the annexation of Palestinian territory. Second, the occupation breaches peremptory norms of international law, including the prohibition of acquisition of territory through use of force, the imposition of institutionalized racially discriminatory regimes including apartheid, and the denial of the exercise of the right of self-determination. Third, the occupation constitutes an act of aggression.[740]

This study lends its weight to the growing body of evidence that Israel's belligerent occupation of the Palestinian territory is illegal, basing its conclusions on two separate and stand-alone grounds. First, the study finds that there is evidence that Israel attacked Egypt in 1967 in a pre-emptive strike, a prohibited use of force amounting to an act of aggression. This renders the subsequent belligerent occupation of the territory an illegal use of force *ab initio*. Second, even assuming for the purposes of argument that Israel's use of force was a legitimate act of self-defence, Israel is administering the Occupied Palestinian Territory in breach the principles and rules of international humanitarian law and peremptory norms of international law. Therefore, the conduct of the occupation, in breach of the principles of immediacy, necessity and proportionality, exceeds the reasonable limits of self-defence and amounts to an illegal use of force. Further, that the occupation is carried out in a manner which denies the inalienable right of the Palestinian people to self-determination – including their right to an independent State of Palestine, a right held in "sacred trust" since the establishment of the Palestine Mandate – is further indicative of an unlawful administration of territory in the context of an assessment of proportionality.

The most prescient road map for the de-occupation and decolonization of the Palestinian territory comes in the form of the rich tapestry of Third State and international recommendations advanced in the *Chagos* and *Namibia* cases. It is also clear that the general law on State responsibility for grave violations of peremptory norms of international law can draw from the resolutions of the Security Council "as a general idea applicable to all situations

[736] UNHCR "Implementation of General Assembly resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council', Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard" (29 January 2007) A/HRC/4/17, para. 62.
[737] UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk" (13 January 2014) A/HRC/25/67, para. 81(b).
[738] UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk" (23 October 2017) A/72/43106, paras. 27 – 37.
[739] Ibid., para. 64.
[740] UNHCR "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese" (21 September 2022) A/77/356, p. 5, para. 10(b).

created by serious breaches", including the prohibition of aid or assistance in maintaining the illegal regime.[741] Naturally, the most appropriate forum for examining the legality of the occupation is the International Court of Justice. While the Court briefly examined the issue of self-defence in the *Wall* advisory opinion, it only addressed new arguments of self-defence and not continuing acts of self-defence *ad bellum*. There, Israel had argued that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter" as per the resolutions of the Security Council.[742] Responding, the Court found that Article 51 had no relevance to the case of the construction of the Annexation Wall, and the provision did not apply to threats originating in territory held under its effective control.[743] Whether the occupation is illegal *ab initio* or subsequently becomes illegal, the consequences should be the immediate, unconditional and total withdrawal of Israel's military forces; the withdrawal of colonial settlers; the repeal of all discriminatory laws; and the dismantling of the military administrative regime; with clear instructions that withdrawal for breach of an internationally wrongful act is not subject to negotiation. Full and commensurate reparations should be accorded to the affected Palestinian individuals, corporations and entities, for the generational harm caused by Israel's land and property appropriations, house demolitions, pillage of natural resources, denial of return, and other war crimes and crimes against humanity orchestrated for the colonialist, annexationist aims of an illegal occupant.

[741] United Nations Security Council resolution 1284 (1999), p. 115, para. 12.
[742] UN Doc. A/ES-10/PV.21, (20 October 2003) Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, p. 7.
[743] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004) para. 139. "However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."

COMMITTEE ON THE EXERCISE OF
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OF THE PALESTINIAN PEOPLE

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