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# Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020

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## Abstract

*This article takes a critical look at the United Nations' commitment to the international rule of law through an examination of its position on occupied Palestine post 1967. Occupation of enemy territory is meant to be temporary, and the occupying power may not rightfully claim sovereignty over such territory. Since 1967, Israel has systematically and forcibly altered the status of occupied Palestine, with the aim of annexing, de jure or de facto, most or all of it. While the UN has focused on the legality of Israel's discrete violations of humanitarian and human rights law, it has paid scant attention to the legality of Israel's occupation regime as a whole. By what rationale can it be said that Israel's prolonged occupation of Palestine remains legal? This article argues that the occupation has become illegal for its systematic violation of at least three jus cogens norms. Although an increasing number of commentators have subscribed to this view, little attention has been paid to its relevant international legal consequences which dictate a paradigm shift away from negotiations as the condition precedent for ending the occupation, as unanimously affirmed by the international community through the UN.*

## 1 Introduction

This article addresses the United Nations (hereinafter UN or 'the Organization') position on the legal status of Israel's prolonged military occupation of the State of Palestine, known as the occupied Palestinian territory (OPT). It claims that the UN's failure to consistently and clearly take a principled position on the very legality of Israel's half-century 'temporary' occupation of the OPT exposes a fundamental chasm. The UN's position has ostensibly been rooted in its commitment to the post-World War II

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international rule of law ordering framework. However, critical examination reveals it to be more demonstrative of what I have called an international rule *by* law framework. Under the rule by law framework, the promise of justice through international law and institutions is repeatedly proffered to global subaltern classes – here represented by Palestine and its indigenous people – under a cloak of political legitimacy furnished by the international community, but its realization interminably withheld.<sup>1</sup> Rule by law at the UN is important to understand because, as noted by Anghie, ‘it is sometimes precisely the international system and institutions that exacerbate, if not create, the problem they ostensibly seek to resolve’.<sup>2</sup>

Under international law, occupation of enemy territory is meant to be temporary and occupying powers may not rightfully claim sovereignty over territory they occupy. Despite this, and as will be demonstrated, since 1967 Israel has systematically altered the status of the OPT with the aim of annexing it, *de jure* or *de facto*. In the intervening 53-year period, the Palestinian people’s right to self-determination in the OPT has been recognized by the UN, whose position has been held out as forming the only normative basis for its realization. Central to this, the UN has undertaken considerable documentation of individual violations of international humanitarian law (IHL) and international human rights law (IHRL) by the occupying power in furtherance of its purported rule of law ordering framework, yet it has paid scant attention to the legality of the occupation regime as a whole and the concomitant requirement that it be brought to an end *unconditionally*,<sup>3</sup> in line with UN practice and the law governing state responsibility. Instead, emphasis has been placed on encouraging the parties to end the occupation through continued, though highly unbalanced and widely discredited, bilateral negotiations.

<sup>1</sup> For further exposition of the international rule by law, and the condition of International Legal Subalternity it has spawned, see A. Imseis, *The United Nations and the Question of Palestine: A Study in International Legal Subalternity* (2018) (Ph.D. thesis, University of Cambridge), available at <https://doi.org/10.17863/CAM.37976>.

<sup>2</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 192.

<sup>3</sup> Traditionalists note that because IHL contains no express provisions imposing time limits on occupation, the phenomenon itself can only be regarded as a factual matter not capable of giving rise to normative conclusions. They note that because IHL contemplates the existence of a legal regime governing military occupation, it necessarily follows that occupation as such cannot *ipso facto* represent an illegal state of affairs. But this fails to account for state practice which affirms that occupations resulting from the impermissible use of force have been treated as necessarily illegal, while the opposite has been true of occupations resulting from a lawful use of force notwithstanding subsequent transgressions by the occupying power of the *jus in bello* during the occupation. This article builds upon a growing literature that understands occupation as a normative phenomenon and, especially when prolonged, one that necessarily has normative implications under the *jus ad bellum*. See Ben-Naftali, Gross and Michaeli, ‘Illegal Occupation: Framing the Occupied Palestinian Territory’, 23(3) *Berkeley Journal of International Law (Berkeley JIL)* (2005) 551; A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017); *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN Doc. A/72/43106, 23 October 2017 (‘Lynk Report’); Ronen, ‘Illegal Occupation and its Consequences’, 41 *Israel Law Review* (2008) 201; and N. Finkelstein, *Gaza: An Inquest into its Martyrdom* (2018), Appendix.

One consequence has been for the UN to have provided a measure of legitimacy to Israel's occupation of the OPT at a time when the Organization has been pivotal in developing a universally binding international legal proscription against all forms of alien domination, subjugation and exploitation, itself one of the bases upon which the Palestinian people's right to self-determination in the OPT rests. By choosing a humanitarian/managerial approach to assessing the legality of Israeli actions in the OPT, the constitutional propriety of its occupation regime has been taken as a given by the UN and has therefore been regarded intrinsically, if impliedly, to be legal. This article argues that through the UN's failure to consistently and clearly identify Israel's prolonged occupation of the OPT as illegal owing to its structural violation of peremptory norms of international law, the UN's position on the OPT runs counter to the conventional wisdom which has presented the re-emergence and relative gains made by the subaltern Palestinian people within the Organization during decolonization and after as emblematic of the UN's commitment to uphold the international rule of law in their case. As an embodiment of the quasi-sovereignty of the Third World in the post-decolonization era, UN recognition of Palestinian rights in this period has thereby remained contingent and nominal in essence.

This article consists of three sections. Section 2 outlines the ostensible universalization of the post-1945 liberal international legal order within the UN following decolonization, with reference to the contingency of Third World sovereignty. Section 3 examines Palestine's embodiment of this Third World contingency by showing how the UN's approach to the OPT post 1967 has helped maintain, rather than remedy, its contingent legal status in the Organization by reducing the question of Palestine almost exclusively to the humanitarian management of the occupation of the OPT through the IHL/IHRL paradigm without definitively addressing the occupation's legality. Finally, Section 4 examines why the occupation of the OPT is illegal under international law as supported by the UN record, including discussion of relevant legal consequences of same. It posits that the General Assembly and International Court of Justice (ICJ) should be looked to as potential sites where the illegality of the occupation can be definitively established within the UN in order to mitigate Palestine's contingent position in the international legal order.

## 2 Realizing the Universal Promise of the International Rule of Law? Decolonization, Third World Sovereignty and the UN

When the UN was founded in 1945, European colonialism was still a marked feature of international life, with approximately one-third of the global population – 750 million people – subject to some form of alien subjugation, domination and exploitation.<sup>4</sup> Although international law was beginning to acknowledge the interests of

<sup>4</sup> United Nations, 'United Nations and Decolonization', available at <https://www.un.org/dppa/decolonization/en>.

colonized peoples, as evinced by the UN Charter's incorporation of the principles of self-determination and human rights, the global legitimacy of the UN's law-making role remained dubious in the shadow of empire which had long relied upon a Eurocentric international legal order to rule over others. Decolonization therefore presented a means of realizing the universal promise of the UN Charter, unleashing the counter-hegemonic potential of the international rule of law for the global south.

The over three-fold increase in UN membership occasioned by decolonization shifted the automatic majority in the General Assembly from Europe to the 'new' Afro-Asian states, which in turn shifted the agenda of the Organization to issues that were of primary interest to the Third World,<sup>5</sup> namely decolonization and development.<sup>6</sup> New political blocs, such as the Group of 77 and the Non-Aligned Movement, helped promulgate normative frameworks aimed at bolstering Third World sovereignty. This included, inter alia, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples;<sup>7</sup> the 1961 Special Committee on Decolonization (a.k.a. the Committee of 24)<sup>8</sup> and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.<sup>9</sup> Among other things, these instruments and mechanisms affirmed principles of direct relevance to Palestine: the need to bring colonialism, in all its forms, to a speedy and unconditional end; that all peoples have the right to self-determination; and that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle of self-determination, fundamental human rights and the UN Charter.<sup>10</sup>

Yet, despite these gains, evidence suggests that the rule-by-law nature of the old international order survived decolonization. Thus, despite the almost complete eradication of classic forms of colonialism between 1960 and 1980, a number of regions continue to experience neo-colonial rule, with 17 non-self-governing territories presently 'administered' largely by Western powers and monitored by the UN Committee of 24.<sup>11</sup> More deeply, even accounting for the achievement of Third World territorial sovereignty, certain structural inequities between the former imperial powers and their relatively newly independent colonies have remained, such that the full realization of Third World political, cultural and economic sovereignty seems to have been impaired from the start. One striking example is represented in the neo-liberal mechanisms of the Bretton Woods (BW) institutions (i.e. World Bank

<sup>5</sup> E. Luard, *A History of the United Nations*, vol. 2: *The Age of Decolonization, 1955–1965* (1989), at 517–518.

<sup>6</sup> Kay, 'The Politics of Decolonization: The New Nations and the United Nations Political Process', 21(4) *International Organization* (1967) 786, at 808–809.

<sup>7</sup> GA Res. 1514(XV), 14 December 1960 ('1960 Declaration on Colonialism').

<sup>8</sup> GA Res. 1654(XVI), 27 November 1961.

<sup>9</sup> GA Res. 2625(XXV), 24 October 1970 ('Friendly Relations Declaration').

<sup>10</sup> See 1960 Declaration on Colonialism, *supra* note 7, Preamble, Arts. 1, 2; and Friendly Relations Declaration, *supra* note 9.

<sup>11</sup> With the exception of Western Sahara, a former Spanish colony occupied by Morocco since 1975, the remaining 16 non-self-governing territories are administered by France, New Zealand, the United Kingdom and the United States.

and International Monetary Fund). Replete with legal conditions that privilege market fundamentalism through the Washington Consensus, these institutions have resulted in considerable loss of Third World control over its economic sphere. The result has been the evolution of Third World sovereignty as unequal relative to that of its Western progenitors, and the political legitimization of this situation within the work of the UN.<sup>12</sup>

Given the diverse experiences of the global south, it is impossible to identify a single way in which Third World quasi-sovereignty has manifested itself. In principle, this condition can appear across a wide spectrum of areas – territorial, political, cultural, economic – and may vary from people to people. What seems clear, however, is that beyond this spectrum of potential fields of manifestation, a unifying theme running throughout appears to be the unfulfilled promise of international law and institutions upon which they are based. As will be demonstrated below, the impact of the quasi-sovereignty of the Third World on the maintenance of Palestine's legal subjugation post 1967 has manifested itself in a different way from that described above. Nevertheless, it has still been underpinned by the unifying theme of the unfulfilled promise of international law and institutions as promoted by the UN itself.

### 3 Palestine as an Embodiment of Third World Contingency at the UN

An examination of the UN's treatment of the question of Palestine during decolonization and after brings the themes of the circumscribed nature of Third World sovereignty through the rule by law into sharp relief. Decolonization enabled a gradual if incomplete recognition at the UN of Palestinian legal personality and rights that in some respects approximated the recognition of Third World territorial sovereignty in this period. At the same time, a close examination of the UN record reveals that the Organization has operationally reduced the question of Palestine to a humanitarian problem, according to which the UN's task has largely been confined to monitoring and reporting violations of IHL and IHRL within the OPT without paying sufficient attention to the illegality of the very regime generating these outcomes. As a result, UN recognition of Palestinian rights seems to have been only nominal in nature. This is underscored by the fact that a central element of this humanitarian/managerial approach has been the UN's insistence that the end of the occupation of the OPT must be contingent on negotiations with a bad faith and infinitely more powerful occupant, which in effect offers no way for the Palestinians to actualize their putative sovereignty, ostensibly recognized as a legal entitlement by the Organization. The result has been to maintain Palestine's protracted subjugation in the UN during a period in which the received wisdom posits the Organization as *the* standard-bearer of the international rule of law. These claims are fleshed out in further depth below.

<sup>12</sup> See R. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (2011).

## *A Bringing the International Rule of Law to Bear in Palestine? Decolonization and the Gradual Recognition of Palestinian Legal Subjectivity at the UN*

As part of the Third World's attempt to promote decolonization through the UN, specific effort was made to highlight the international legal rights of the Palestinian people. This took place against the context of the institutional erasure of the Palestinians within the UN following the Organization's attempt at partition, and the resulting dispossession and collapse of their country in 1948. In the 20 years following the 1948 Nakba, the question of Palestine was treated merely as a 'refugee problem' by the UN, largely through the work of the United Nations Relief and Works Agency (UNRWA)<sup>13</sup> and the United Nations Conciliation Commission for Palestine (UNCCP).<sup>14</sup> Following the 1967 war, during which Israel captured the OPT (see Figure 1), the Security Council passed Resolution 242 in which it continued this trend by calling for 'a just settlement of the refugee problem', without reference to Palestine or the Palestinians.<sup>15</sup>

Decolonization offered an opportunity to correct this through an attempt to bring the counter-hegemonic promise of the international rule of law to bear in the UN's work on Palestine. Much like the Third World's preoccupation with economic development through the BW institutions, the Palestinians became preoccupied with gaining recognition of their plight, national movement and legal rights within the UN.

In the decade following the emergence of the Palestine Liberation Organization (PLO) in 1964, the General Assembly recognized 'the inalienable rights of the people of Palestine',<sup>16</sup> including the right to self-determination,<sup>17</sup> national independence and sovereignty,<sup>18</sup> affirmed the denial of Palestinian rights as the main impediment to peace<sup>19</sup> and granted the PLO observer status,<sup>20</sup> including the right to participate in the deliberations of the Assembly on the question of Palestine in plenary meetings.<sup>21</sup> Mirroring the Committee of 24, in 1975 the General Assembly established the Committee on the Exercise of the Inalienable Rights of the Palestinian People (UNCEIRPP). Composed of 20 member states drawn from the Third World, the UNCEIRPP remains mandated to promote the realization of the inalienable rights of the Palestinian people. From that point, the General Assembly increased the number of its resolutions on Palestine, with the result that today there exists a copious body of resolutions demonstrative of widespread state practice and *opinio juris* supportive of Palestinian legal subjectivity and rights.<sup>22</sup>

<sup>13</sup> GA Res. 302(IV), 8 December 1949.

<sup>14</sup> GA Res. 194(III), 11 December 1948.

<sup>15</sup> SC Res. 242, 22 November 1967.

<sup>16</sup> GA Res. 2535(XXIV)(B), 10 December 1969.

<sup>17</sup> GA Res. 2672(XXV)(C), 8 December 1970; GA Res. 3070(XXVIII), 30 November 1973.

<sup>18</sup> GA Res. 3236(XXIX), 22 November 1974.

<sup>19</sup> GA Res. 2535(XXIV)(B), 10 December 1969.

<sup>20</sup> GA Res. 3237(XXIX), 22 November 1974.

<sup>21</sup> GA Res. 3210(XXIX), 14 October 1974.

<sup>22</sup> To the record of Assembly resolutions affirming the rights of Palestine refugees under Resolution 194(III) of December 1949 has been added resolutions devoted to Palestine refugee property and revenues, the Palestinian people's right to self-determination, the applicability to the OPT of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, development assistance, Jerusalem, Israeli settlements in the OPT, the permanent sovereignty of the Palestinian people over its natural resources in the OPT, international protection of the Palestinian people and the peaceful settlement of the question of Palestine.



**Figure 1:** Territories occupied by Israel since June 1967.

Source: Territories Occupied by Israel Since June 1967, Map No. 3243 Rev. 4, United Nations, June 1997. Reproduced with permission of the UN.

Notes: Only the West Bank and Gaza Strip, including East Jerusalem, constitute the OPT; Israeli occupation of the Egyptian Sinai Peninsula ended in 1982.

It is apparent, therefore, that decolonization was responsible for giving greater substance to the UN's commitment to the universal application of international law in general, including bringing it to bear on the Palestine issue. Evidence of the underlying promise to the Palestinian people inherent in this process is found in what the General Assembly has, since 1992, referred to as the UN's 'permanent responsibility' over the question of Palestine until it 'is resolved in all its aspects in accordance with international law'.<sup>23</sup> The central importance of both international law and the unique role of the UN as guarantor of that law in helping forge a peaceful resolution to the question of Palestine has by now become a common article of faith within the international system. Nowhere has this faith been more reverent than among the Palestinians themselves.<sup>24</sup> Thus, in line with the post-WWII Charter-based liberal order, the conventional view of the UN as guarantor of the universal international rule of law in respect of the OPT appears to have held. As will be seen, however, critical examination of the evidence would not seem to fully justify this position.

### ***B The Maintenance of the International Rule by Law in Palestine: The Reduction of Palestine and the Limits of Palestinian Legal Subjectivity at the UN***

A closer review of the UN's record in the decolonization period and after reveals that the rule by law character of the Organization's treatment of Palestine has been its unwillingness to bring the full normative regime of international law to bear on its treatment of the OPT in line with the international rule of law. Here, the stress is not so much on the positive illegality of a specific UN action. Rather, the problem is with the failure *by omission* of the UN to apply the full array of relevant international law to the issue at hand, and this while the Organization has held itself out as a protector of Palestinian legal subjectivity and rights. More specifically, the problem rests in the UN's failure to clearly and consistently identify Israel's prolonged presence in the OPT as illegal as such, with all the consequences such illegality entails in international law.

To better understand this it is helpful to examine the following three interrelated aspects of the UN's management of the question of Palestine in the post-1967 era: (i) the increased recognition of Palestinian legal subjectivity within the UN subject to the restriction of the territorial scope of Palestinian national claims to the OPT; (ii) the proliferation of UN machinery focused on the humanitarian/managerial documentation of IHL and IHRL violations by the occupying power short of definitively identifying Israel's continued occupation of the OPT as illegal; and (iii) the UN's conditioning of the end of Israel's occupation of the OPT on negotiations. Each of these will be taken in turn.

<sup>23</sup> GA Res. 71/23, 30 November 2016.

<sup>24</sup> In his 2017 address to the General Assembly, Mahmoud Abbas, current President of the State of Palestine, affirmed that '[t]he path we have chosen as Palestinians and Arabs, and the path chosen by the world is that of international law'. See Statement of His Excellency Mahmoud Abbas, President of the State of Palestine, Before the United Nations General Assembly, 72nd Session, New York, 20 September 2017, available at [www.nad.ps/en/media-room/speeches/he-president-mahmoud-abbas-statement-un-general-assembly-72nd-session-2017](http://www.nad.ps/en/media-room/speeches/he-president-mahmoud-abbas-statement-un-general-assembly-72nd-session-2017).



First, the 1988 recognition of Israel by the PLO signalled the latter's acceptance of the political legitimacy of the 1947 UN partition plan in Resolution 181(II).<sup>25</sup> Reminiscent of the Third World's acceptance of the principle of *uti possidetis*, this recognition was notable for the fact that its adherents had no part in fashioning its terms but were compelled to accept them as a *quid pro quo* for the achievement of a modicum of their national rights. This historic compromise resulted in greater levels of recognition of Palestine's international legal personality at the UN, albeit within the two-state framework. This included permission to use the designation 'Palestine' in the Organization,<sup>26</sup> a qualified right to participate in debate at the General Assembly<sup>27</sup> and, following Palestine's failed 2011 application for UN membership, upgraded status as a non-member observer state in 2012,<sup>28</sup> thereby allowing it to accede to multilateral treaties, including the main IHL and IHRL instruments and the Rome Statute of the International Criminal Court.<sup>29</sup> This increased recognition of Palestinian legal subjectivity at the UN was accompanied by the usual affirmation of the Palestinian right to self-determination. Yet, it was only in 1988 that the General Assembly identified the territorial scope within which this self-determination should be affected when it affirmed 'the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967'.<sup>30</sup> The territorialisation of Palestinian national rights in the post-decolonization era thus began with the PLO's compelled recognition of Resolution 181(II) and the UN's recognition of the OPT – an area approximately half that proposed in the 1947 partition plan – as the self-determination unit of the Palestinian people. Since then, this position has been reaffirmed, expressly and impliedly, by each of the General Assembly,<sup>31</sup> the Security Council,<sup>32</sup> the ICJ,<sup>33</sup> the Economic and Social Council (ECOSOC)<sup>34</sup> and the Secretariat through the Secretary-General.<sup>35</sup> To the extent that the promise of the UN's copious affirmation of Palestinian legal subjectivity has yet to materialize, the historic compromise that produced it has arguably assumed a Faustian bargain of sorts.

Second, since the decolonization era there has emerged a proliferation of UN machinery devoted to a humanitarian/managerial approach through the documentation

<sup>25</sup> GA Res.181(II), 29 November 1947.

<sup>26</sup> GA Res. 43/177, 15 December 1988.

<sup>27</sup> GA Res. 52/250, 13 July 1998.

<sup>28</sup> GA Res. 67/19, 29 November 2012.

<sup>29</sup> Rome Statute of the International Criminal Court, UN Doc. 32/A/CONF 183/9, 17 July 1998, 37 ILM 999 ('Rome Statute').

<sup>30</sup> GA Res. 43/177, 15 December 1988.

<sup>31</sup> GA Res. 67/19, 29 November 2012.

<sup>32</sup> See SC Res. 2334, 23 December 2016 and SC Res. 1515, 19 November 2003, where, insofar as the Council endorses a vision in which two states, Israel and Palestine, live side by side in peace within secure and recognized borders on the basis of SC Res. 242, 22 November 1967, it is implied that the OPT is the self-determination unit of the Palestinian people.

<sup>33</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004), paras 115, 118, 122 ('Wall Advisory Opinion').

<sup>34</sup> ECOSOC Res. 2017/10, 7 June 2017.

<sup>35</sup> Peaceful Settlement of the Question of Palestine, Report of the Secretary General, UN Doc. S/2016/732, 24 August 2016, paras 23, 40.

of IHL and IHRL violations by the occupying power in the OPT.<sup>36</sup> This is the result of the prolonged nature of the conflict and an expression of the above-mentioned permanent responsibility of the UN for its resolution in accordance with international law. Despite the broad scope of this machinery's comprehensive cataloguing of the occupying power's IHL and IHRL record in the OPT, it is notable for its conspicuous failure to definitively address the legality of Israel's very presence in the territory. Indeed, the hyper-legality of the UN's approach to the OPT through the narrow confines of the IHL/IHRL paradigm has produced an absurdity. By focusing so much energy on documenting IHL/IHRL violations in the OPT, the UN has unduly raised expectations of what application of that humanitarian normative paradigm can reasonably achieve. This has led to a false if misguided hope among Palestinian officials and civil society that adherence to IHL/IHRL norms will eventually deliver the end of the occupation. This has been reinforced by the 'rights-based' humanitarian approaches presently driving all non-UN international stakeholders in the OPT, including third states. Although occupation is meant to end under international law, nothing in the conventional IHL/IHRL paradigm expressly compels this result;<sup>37</sup> rather, adherence to its norms merely operates to enhance the manner in which the occupation is administered pending its eventual end. Thus, by focusing on the IHL/IHRL framework, instead of failing to definitively identify Israel's occupation as illegal as such, the UN has privileged a humanitarian/managerial approach to the OPT over a remedial/emancipatory one. This has ultimately lent Israel's presence in the OPT a legitimacy in which its legality has also been implied.

Third, and most important, has been the UN's position that the end of Israel's prolonged occupation of the OPT must be contingent on the conclusion of negotiations between it and the PLO. This is a universally held position among each of the relevant five principal organs, and one that has been parroted throughout the UN system. Thus, the Security Council has since 1967 affirmed the need for Israel to withdraw from the OPT as part of a negotiated settlement under the land for peace formula.<sup>38</sup>

<sup>36</sup> Bespoke machinery includes the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967, UNCERIPP and its secretariat the Division for Palestinian Rights, the UN Register of Damage Caused by the Construction of the Wall in the OPT (UNROD) and UNRWA.

<sup>37</sup> One might attempt to rebut this claim on the basis that IHRL includes the right to self-determination which necessarily engages obligations of the occupying power to ensure respect for its exercise. Nonetheless, in practice UN operations in the OPT have not placed relative emphasis on the realization of the Palestinian people's right to self-determination when compared to other human rights. For example, the Office of the High Commissioner for Human Rights country office in the OPT indicates that it '[m]onitors, documents and reports on human rights violations perpetrated by all duty bearers in the oPt, with a . . . specific focus on the right to life and security, freedom of expression, arbitrary detention, arrest and detention of children, human rights defenders, and accountability for settler violence'. See Office of the High Commissioner for Human Rights, 'OHCHR in Occupied Palestinian Territory', available at [www.ohchr.org/EN/Countries/MENARegion/Pages/OPT.aspx](http://www.ohchr.org/EN/Countries/MENARegion/Pages/OPT.aspx). While it is true that other branches of the UN's human rights system do highlight Palestinian self-determination, in practice that work has been dwarfed by both the broader human rights framework that is operationally applied as well as the *lex specialis* of IHL which is devoid of any specific treaty reference to self-determination.

<sup>38</sup> SC Res. 242, 22 November 1967, paras 1, 3; SC Res. 2334, 23 December 2016, preamble, para. 9.

Likewise, the General Assembly has on multiple occasions stressed ‘the need for a resumption of negotiations’ based on the principle of land for peace, ‘with a view to achieving without delay an end to the Israeli occupation that began in 1967’.<sup>39</sup> For its part, ECOSOC has reiterated ‘the importance of the revival and accelerated advancement of negotiations . . . for the realization of the two-State solution . . . based on the pre-1967 borders’.<sup>40</sup> To this has been added similar calls by various Secretaries-General, most recently Antonio Guterres who has gone so far as to assert that negotiation is ‘the *only* way to achieve the inalienable rights of the Palestinian people’.<sup>41</sup> Finally, in 2004 the ICJ underscored the need ‘to achiev[e] as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours’.<sup>42</sup>

It is true that the UN’s call for negotiation covers matters beyond the OPT as such, including refugees and mutual security. Indeed, one is hard-pressed to imagine any resolution of these issues without some form of negotiation. But to the extent that this negotiation condition also qualifies the UN’s position on ending the occupation itself, it is fraught with a telling paradox. Because the OPT has been determined by the UN to be the territorial unit within which the Palestinian people are entitled to exercise their right to self-determination under international law, the result has been for the UN to have frustrated, on its own terms, the very recognition it has bestowed upon the Palestinian people since decolonization. If realization of Palestinian self-determination in the OPT is a long-established right in the nature of a peremptory norm, derogation from which is not permitted, how can the culmination of this right be left to negotiation between an infinitely more powerful occupier and a beleaguered and vastly weaker occupied people? This is particularly so if the occupation itself is or has become illegal through the acts of a bad-faith occupant, as will be shown to be the case with the OPT.

Insofar as the above factors have been the basis of the UN’s ostensibly rights-based approach to the question of Palestine through which the subaltern Palestinians have been encouraged to overcome their contingent status, the evidence suggests that they actually demonstrate the nature of Palestine’s quasi-sovereignty inherent in the present international legal order. Palestinian acquiescence to partition brought with it UN recognition of Palestinian national rights, if only in the OPT. Nevertheless, actual realization of those rights has been partly frustrated by the UN itself owing to its failure to definitively characterize Israel’s occupation as illegal, as such. Instead, the UN has dogmatically insisted on the chimera of negotiation as the only means through which the occupation’s end is to be brought about. In this, we can see a shifting of the legal goalposts for the subalterns who, having acquiesced to prior legislative

<sup>39</sup> GA Res. 71/23, 30 November 2016, paras 4, 16; GA Res. 67/19, 29 November 2012, paras 4, 5; GA Res. 66/17, 30 November 2011, para. 15.

<sup>40</sup> ECOSOC Res. 2014/26, 16 July 2014, para. 17; ECOSOC Res. 2017/10, 7 June 2017, para. 7.

<sup>41</sup> Guterres, ‘Continuing Occupation Sends “Unmistakable Message” that Both Palestinian, Israeli Hopes Remain Unattainable, Secretary-General Warns in Anniversary Statement’, Press Release SG/SM/18554, 5 June 2017.

<sup>42</sup> *Wall Advisory Opinion*, *supra* note 33, para. 162.

acts of the UN (i.e. partition) cannot be allowed to rely in good faith that the gesture will be met with a commitment by the Organization to bring international law *fully* to bear in their case. In place of a position based upon the fulsome application of the international rule of law, the interests of the Palestinians are governed according to a rule by law dynamic, where rights are affirmed only to a point (e.g. IHL/IHRL), and implementation is left subject to the whims of a purportedly legitimate Israeli hegemon.

In the following section, we examine the question of why Israel's continued occupation of the OPT is illegal, and what the consequences of this are in law. In addition, we examine how various organs of the UN can be resorted to in order to confirm this finding with a view to mitigating the effects of the rule by law nature of the Organization's handling of the question of Palestine post 1967.

## 4 Mitigating Palestine's Contingency at the UN: The Illegality of Israel's Continued Presence in the OPT and Its Legal Consequences

### *A Why Legality Matters: Negotiating the Illegal in Light of the Law of State Responsibility*

Before delving into why Israel's continued presence in the OPT is illegal, a word about why its legality matters is in order. At the heart of the issue is the tension between the UN's position on the OPT and the relevant international law governing state responsibility. On the one hand is the political consensus that the emergence of an independent Palestinian state in the OPT can only arise through a negotiated withdrawal of the occupying power and the conclusion of peace on the basis of the two-state land for peace formula. On the other hand is the relevant international law concerning the responsibility of states for internationally wrongful conduct, an elemental foundation of which is the proposition that states may not negotiate the consequences of their illegal actions: *ex injuria jus non oritur*.<sup>43</sup> A review of the growing literature on the illegality of Israel's occupation of the OPT demonstrates a curious neglect of the international legal consequences of same in light of the law of state responsibility.<sup>44</sup> Nevertheless, it is submitted that understanding the international law governing state

<sup>43</sup> See *infra* note 55.

<sup>44</sup> See Gross, *supra* note 3; Lynk Report, *supra* note 3, Finkelstein, *supra* note 3, none of which engage with the law of state responsibility. See also Ben-Naftali, Gross and Michaeli, *supra* note 3, at 612, where the authors merely restate in their conclusion that a state 'whose conduct constitutes an internationally wrongful act having a continuing character is under an obligation to cease that conduct, without prejudice to the responsibility it has already incurred'. No other elements of the law of state responsibility are discussed by Ben-Naftali et al., nor is the dilemma raised by the UN's conditioning of the end of the occupation on negotiation examined in this light. In a similar vein, the only article that raises the legal consequences of 'illegal occupation', *per se*, at any length confines its discussion of negotiation as a means of ending such occupation to one line. See Ronen, *supra* note 3, at 228. Although Ronen partially examines General Assembly and ICJ pronouncements on the legality of Israel's occupation of the OPT, her analysis does not examine the UN's position that the end of the occupation must be contingent on negotiation.

responsibility is required to appreciate the continued rule by law character of the UN's handling of the OPT post 1967.

The International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) is widely considered to be a codification of customary international law governing state responsibility.<sup>45</sup> Under the ARSIWA, an internationally wrongful act of a state occurs when conduct consisting of an action or omission is both attributable to the state under international law and constitutes a breach of an international obligation of that state.<sup>46</sup> A state may breach an international obligation through a composite series of actions or omissions defined in aggregate as wrongful, in which case the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation of the state.<sup>47</sup> The state responsible for an internationally wrongful act is under three general obligations in respect of that act. First, if continuing, it must cease the act forthwith.<sup>48</sup> Second, it must offer appropriate assurances and guarantees of non-repetition if circumstances dictate.<sup>49</sup> Third, it must make full reparation for the injury caused by the act, including any material or moral damage.<sup>50</sup> Finally, where a state's internationally wrongful conduct entails a serious – meaning gross or systematic – breach of an obligation arising under a peremptory norm of general international law, in addition to the above obligations of the wrongdoing state, all other states are under a twofold obligation to cooperate to bring the serious breach to an end through lawful means, and to refrain from recognizing as lawful the situation created by the serious breach nor render aid or assistance in maintaining that situation.<sup>51</sup>

The international law governing state responsibility is rooted in a desire to ensure the primacy of the international rule of law, in line with the ostensible organizing principle of the UN. In his commentary on the ARSIWA, Crawford indicates that '[t]he responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law'.<sup>52</sup> Where a state responsible for

<sup>45</sup> Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (23 April–1 June and 2 July–10 August 2001), II(2) *Yearbook of the International Law Commission* (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), 26–30 ('ARSIWA'). For the customary nature of the ARSIWA, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Reports (2007), p. 43, para. 401; J. Crawford, *State Responsibility: The General Part* (2013) 43.

<sup>46</sup> ARSIWA, *supra* note 45, Art. 2.

<sup>47</sup> *Ibid.*, Art. 15.

<sup>48</sup> *Ibid.*, Art. 30(a). Although the text of the article does not reference any time parameters within which cessation must occur, ICJ jurisprudence suggests cessation must occur forthwith. See *Wall Advisory Opinion*, *supra* note 33, paras. 151, 163.

<sup>49</sup> ARSIWA, *supra* note 45, Art. 30(b).

<sup>50</sup> *Ibid.*, Art. 31.

<sup>51</sup> *Ibid.*, Arts 40, 41; *Wall Advisory Opinion*, *supra* note 33, para. 163.

<sup>52</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2005), at 197.

an internationally wrongful act refuses to perform its obligations of cessation, non-repetition and reparation, as applicable, an injured state may take appropriate and proportional countermeasures to help induce such performance.<sup>53</sup> Where the obligation breached is owed to a group of states and is established for the protection of a collective interest of that group or is owed to the international community as a whole (i.e. obligations *erga omnes*), states other than the injured state are entitled to take lawful measures against the responsible state to ensure its observance.<sup>54</sup>

It therefore follows that where an internationally wrongful act has taken place and/or is continuing, international law neither mandates nor requires the responsible state to make adherence to its obligations of cessation, non-repetition and reparation conditioned on negotiation.<sup>55</sup> To do so would be to legitimate that which is illegal. Rather, the law requires strict, unconditional and timely performance of those obligations in keeping with its overall object and purpose of ensuring the international rule of law. This is particularly so where a state's internationally wrongful conduct entails a serious breach of an obligation arising under a peremptory norm of general international law. In such case, international law neither mandates nor requires third states (collectively or individually) to make adherence to their own obligations to bring such breaches to an end, nor to recognize their legality nor render aid or assistance in their maintenance, conditional on negotiation.

It is apparent, therefore, that the question of the legality of Israel's continued presence in the OPT, as such, is important because it animates the paradox of the UN's supposed commitment to the international rule of law. If Israel's occupation is legal, for the Organization to contemplate its end through negotiation would amount to a mere invocation of Charter principles regulating peaceful resolution of disputes. In such case, the legitimacy of the Organization's call for negotiations could not be impugned on the basis that it runs counter to international law, despite any disparity in the negotiating power of the parties. If, on the other hand, Israel's presence is or has become illegal, for the Organization to condition its end on negotiation would run counter to the relevant international law governing state responsibility. In such a case, any disparity in negotiating power could be abused by the more powerful party to consolidate its illegal actions under a cloak of legitimacy provided by the UN. This would only operate to marginalize the weaker party, thereby prolonging injustice and conflict indefinitely.

<sup>53</sup> ARSIWA, *supra* note 45, Arts 49–54.

<sup>54</sup> *Ibid.*, Arts. 48, 54.

<sup>55</sup> While art. 52(1) of the ARSIWA imposes an obligation on an injured state to, inter alia, notify the responsible state of any decision to take countermeasures and to offer to negotiate with that state, such recourse to negotiation remains the sole prerogative of the injured state, and only then if it invokes countermeasures. Negotiation cannot be invoked by the responsible or any other state under the ARSIWA. In any event, even where invoked by an injured state, it is doubtful whether the ARSIWA would contemplate recourse to negotiations if doing so would frustrate the overall obligation of the responsible state to abide by the underlying primary rule it has violated. Such an allowance would sabotage the object and purpose of the ARSIWA and the international rule of law itself. For a judicial opinion in which these principles are followed, see *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, ICJ Reports (2005), p. 168, paras 261, 345.

This is why, for instance, the UN has never suggested that the end of Israel's individual violations of IHL or IHRL in the OPT, including settlement and wall construction, be conditioned on negotiation.<sup>56</sup> It is also why the practice of the UN in respect of occupations in other contexts demonstrates that where an occupation has been deemed illegal by the Organization, the end of that illegality has not been made contingent on negotiation. The cases of South Africa's occupation of Namibia,<sup>57</sup> the Soviet Union's occupation of Afghanistan<sup>58</sup> and Iraq's occupation of Kuwait<sup>59</sup> are the most prescient examples.

## B *The Need for Clarity in the UN's Practice on the OPT*

The UN's handling of Israel's prolonged occupation of the OPT stands out insofar as it has failed to definitively determine that presence to be illegal on the basis of its own UN record, and has made its end subject to negotiation. The need for definitiveness derives from the fact that the Organization's treatment of the issue has suffered from inconsistency and contradiction. While some UN organs began consideration of the matter with a principled approach, their positions have become diluted or legally confused over time. Still other organs have remained silent altogether. The net result has been an undermining of the UN's stated commitment to the maintenance of the international rule of law in its policy on the question of Palestine, and the unfulfilled promise of that policy for its people.

Thus, in 1975 and 1976 the General Assembly condemned the occupation as a 'violation of the Charter of the United Nations',<sup>60</sup> while from 1977 to 1981 it expressly qualified it as 'illegal'.<sup>61</sup> Between 1981 and 1991 the Assembly dropped this reference and reverted to condemning the occupation as a 'violation of the Charter of the United Nations', albeit demanding Israel's 'immediate, unconditional and total withdrawal'.<sup>62</sup> Taken together, this practice suggests the Assembly was of the view

<sup>56</sup> See SC Res. 2334, 23 December 2016; Bekker, 'The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective', 38(2) *Cornell International Law Journal* (2005) 553, at 560.

<sup>57</sup> GA Res. 2248(S-V), 19 May 1967; GA Res. 2325(XXII), 16 December 1967; GA Res. 2372(XXII), 12 June 1968; GA Res. 2403(XXIII), 16 December 1968; SC Res. 246(1968); SC Res. 264, 20 March 1969; SC Res. 276 (1970), and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971), p. 16, para. 133 ('*Namibia*').

<sup>58</sup> GA Res. ES-6/2, 14 January 1980.

<sup>59</sup> SC Res. 662, 9 August 1990; SC Res. 678, 29 November 1990; GA Res. 45/170, 18 December 1990.

<sup>60</sup> GA Res. 3414(XXX), 5 December 1975; GA Res. 31/61, 9 December 1976.

<sup>61</sup> GA Res. 32/20, 25 November 1977; GA Res. 33/29, 7 December 1978; GA Res. 34/70, 6 December 1979; GA Res. 35/122E, 11 December 1980; GA Res. 35/207, 16 December 1980; GA Res. 36/147E, 16 December 1981.

<sup>62</sup> GA Res. 36/147E, 16 December 1981; GA Res. 36/226A, 17 December 1981; GA Res. 37/123F, 20 December 1982; GA Res. 38/180D, 19 December 1983; GA Res. 39/146A, 14 December 1984; GA Res. 40/168A, 16 December 1985; GA Res. 41/162A, 4 December 1986; GA Res. 42/209B, 11 December 1987; GA Res. 43/54A, 6 December 1988; GA Res. 44/40A, 4 December 1989; GA Res. 45/83A, 13 December 1990; GA Res. 46/82A, 16 December 1991.

that at least by the eighth year of the occupation, Israel's presence in the OPT had become illegal for being in violation of the *jus ad bellum* provisions of the Charter and, accordingly, could not condition its end on negotiation in line with the law of state responsibility. The problem arises from the fact that from 1992 onward – just after the convening of the Madrid Peace Conference – all such references in Assembly resolutions simply vanish. From that point on, the Assembly has satisfied itself with an annual affirmation that 'the occupation itself' constitutes a 'grave', 'gross' or 'primary' violation only of 'human rights', while expressing the 'hope' that the parties are able to bring it to an end through negotiation.<sup>63</sup> The only other organ of the UN that has qualified Israel's occupation as illegal as such has been ECOSOC. This has been done annually since 2010, while curiously also urging the conclusion of a negotiated peace leading to the occupation's end, the requirements of the law of state responsibility notwithstanding.<sup>64</sup> For its part, the office of the Secretary-General has been more conservative. When Kofi Annan called upon Israel to 'end the illegal occupation' of the OPT in 2002, public criticism resulted in a quick reversal and clarification that his reference to illegality was meant to be understood in relation to the IHL and IHRL violations of the occupying power, not the occupation as such. Notably, this clarification included an affirmation of the standard UN position on the need for negotiations based on the land-for-peace formula.<sup>65</sup> In the *Wall Advisory Opinion*, the ICJ failed to opine on the legality of Israel's presence in the OPT, although in a separate opinion Judge Elaraby affirmed 'the illegality of the Israeli occupation regime itself'.<sup>66</sup> The silence of the majority on the legality of the occupation was made problematic by the fact of the Court's invocation of the need for negotiations as a means to resolve the conflict, as noted above. In addition, any value placed in Elaraby's illegality finding

<sup>63</sup> Reference to the occupation constituting a grave, gross or primary violation of human rights dates from 1981. See GA Res. 36/147C, 16 December 1981; GA Res. 37/88C, 10 December 1982; GA Res. 38/79, 15 December 1983; GA Res. 39/95, 14 December 1984; GA Res. 40/161D, 16 December 1985; GA Res. 41/63D, 3 December 1986; GA Res. 42/160D, 8 December 1987; GA Res. 43/58, 6 December 1988; GA Res. 44/48, 8 December 1989; GA Res. 45/74, 11 December 1990; GA Res. 46/47, 9 December 1991; GA Res. 47/70A, 14 December 1992; GA Res. 49/36, 9 December 1994; GA Res. 50/29, 6 December 1995; GA Res. 51/131, 13 December 1996; GA Res. 52/64, 10 December 1997; GA Res. 53/53, 3 December 1998; GA Res. 54/76, 6 December 1999; GA Res. 55/130, 8 December 2000; GA Res. 56/59, 10 December 2001; GA Res. 57/124, 11 December 2002; GA Res. 58/96, 9 December 2003; GA Res. 59/121, 10 December 2004; GA Res. 60/104, 8 December 2005; GA Res. 61/116, 14 December 2006; GA Res. 62/106, 17 December 2007; GA Res. 63/95, 5 December 2008; GA Res. 64/91, 10 December 2009; GA Res. 65/102, 10 December 2010; GA Res. 66/76, 9 December 2011; GA Res. 67/118, 18 December 2012; GA Res. 68/80, 11 December 2013; GA Res. 69/90, 5 December 2014; GA Res. 70/87, 9 December 2015; GA Res. 71/95, 6 December 2016; GA Res. 72/84, 14 December 2017; GA Res. 73/96, 18 December 2018; GA Res. 74/87, 26 December 2019.

<sup>64</sup> ECOSOC Res. 2010/6, 20 July 2010; ECOSOC Res. 2011/18, 26 July 2011; ECOSOC Res. 2012/25, 27 July 2012; ECOSOC Res. 2013/17, 24 July 2013; ECOSOC Res. 2014/1, 12 June 2014; ECOSOC Res. 2015/13, 10 June 2015; ECOSOC Res. 2016/4, 2 June 2016; ECOSOC Res. 2017/10, 7 June 2017; ECOSOC Res. 2018/10, 16 July 2018.

<sup>65</sup> UN GAOR, 57th Sess., 4488th Mtg., 3, UN Doc. S/PV.4488 (12 March 2002); Fletcher, 'Annan's Careless Language', *New York Times* (21 March 2002) A37; Eckhard, Letter to the Editor, 'A Delicate Word in the Mideast', *New York Times* (23 March 2002) A16.

<sup>66</sup> *Wall Advisory Opinion*, *supra* note 33, Separate Opinion of Judge Elaraby, at 124.



was undermined by his incorrect statement of law that occupation *per se* is always illegal.<sup>67</sup> The Security Council has never opined on the legality of Israel's presence in the OPT, an omission demonstrative of the lack of unanimity among its members on the legality of Israel's use of force in 1967. Finally, the current UN Special Rapporteur on Human Rights in the Palestinian Territories Occupied since 1967, Michael Lynk, has issued a report identifying Israel as an illegal occupant in the OPT.<sup>68</sup> Nevertheless, given Lynk's status as an independent expert, his views cannot be taken as the official position of the UN.

Therefore, given the incongruity and, at times, incoherence of the positions articulated by various organs of the UN, there is a need for the Organization to definitively confirm whether Israel's continued occupation of the OPT is legal. This is perhaps why the current literature on the legality of Israel's occupation has largely neglected to discuss the above-noted practice of the UN, instead taking it as a given that the international community treats Israel as the lawful occupant of the OPT.<sup>69</sup> By definitively addressing the illegality of Israel's occupation regime, the UN would be able to consummate its application of the international rule of law in the OPT, going beyond the usual humanitarian/managerial paradigm. This, in turn, would allow the Palestinian people to mitigate the effects of their quasi-sovereign and contingent status within the UN system.

### C *The Illegality of Israel's Continued Presence in the OPT*

Despite earlier academic affirmations of the illegality of Israel's occupation of the OPT – including by this author<sup>70</sup> – it wasn't until 2005 that scholarship emerged providing a more robust rationale for the assertion.<sup>71</sup> Building upon this and subsequent literature, this section explains why Israel's continued presence in the OPT is illegal, filling a number of gaps in the existing literature, particularly in relation to the UN's position on the matter.

Understanding why Israel's prolonged occupation of the OPT is illegal requires consideration of three branches of international law: the law governing use of force (*jus ad bellum*), the law governing how force is used in armed conflict (*jus in bello* or IHL) and IHRL, including the law on self-determination. Because of the OPT's status as an occupied territory, the starting point must be the law of occupation.<sup>72</sup>

<sup>67</sup> *Ibid.*

<sup>68</sup> Lynk Report, *supra* note 3. At the request of the Special Rapporteur, the author advised him in the preparation of his report while conducting this research.

<sup>69</sup> Lynk Report, *supra* note 3, para. 18. See also E. Benvenisti, *The International Law of Occupation* (2nd ed., 2012); Gross, *supra* note 3; Finkelstein, *supra* note 3; Ben-Naftali, Gross and Michaeli, *supra* note 3. The only exception to this is Ronen, *supra* note 3, at 216–221, who surveys the UN's position on the illegality of Israel's occupation based only on a sample of GA and ICJ practice, without going into that of other key organs of the Organization. The result is to give the false impression that the UN's position on the illegality of the occupation is more definitive than it actually is.

<sup>70</sup> Imseis, 'Law, Reality and the Oslo "Peace" Process', 20:3 *Oxford Journal of Legal Studies* (2003) 469; M. Mazzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israeli Conflict* (1997), 235.

<sup>71</sup> *Supra* note 3.

<sup>72</sup> The law of occupation is codified in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 ('Fourth Geneva Convention') and the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277 ('1907 Hague Regulations'). Both treaties are regarded as codifications of customary international law. While Israel

As I have elsewhere written,<sup>73</sup> two fundamental principles underpin the law of occupation. First, occupation is a temporary condition during which the occupying power may act only as *de facto* administrator of the territory in trust and for the benefit of the protected population. Under no circumstances may an occupying power permanently alter the status of the territory, including through annexation, population transfer or imposition of puppet regimes or regimes inimical to humanity as a whole (e.g. racial discrimination). Second, under no circumstances does the fact of being in occupation of a territory entitle the occupant to sovereignty over it. Contemporary state practice, exemplified by the 2003 occupation of Iraq, affirms that the law of occupation defers to the principle of self-determination of peoples and its corollary that sovereignty lies in the people and not its ousted government. The right of peoples to self-determination has been recognized by the ICJ as a right *erga omnes*.<sup>74</sup> As such, occupying powers are obligated to respect that right and do nothing to permanently frustrate its exercise.<sup>75</sup>

These fundamental principles are rooted in the protection of at least three *jus cogens* norms of international law: the prohibition of the acquisition of territory through the use of force; the obligation of states to respect the right of peoples to self-determination; and the obligation of states to refrain from imposing regimes of alien subjugation, domination and exploitation inimical to humankind, including racial discrimination.<sup>76</sup> The essential question, therefore, is this: where an initially lawful occupant engages in gross or systematic violations of international law involving breaches of obligations of a *jus cogens* and *erga omnes* character, by what rationale can it be said that the regime of force maintaining such situation remains legal?

Despite the objections of at least one writer,<sup>77</sup> the present literature on Israel's prolonged occupation of the OPT suggests that occupation regimes not otherwise impugned by an initial violation of the *jus ad bellum* and which violate any one of these

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has not disputed the applicability of the 1907 Hague Regulations to the OPT, it argues that the Fourth Geneva Convention, to which it is signatory without reservation, does not apply. The UN, including the ICJ, has rejected this. See SC Res. 2334, 23 December 2016; GA Res. 70/88, 9 December 2015; ECOSOC Res. 2017/10, 7 June 2017; and *Wall Advisory Opinion*, *supra* note 33, para. 101. For discussion of the merits of the Israeli claim, see Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory', 44(1) *Harvard International Law Journal* (2003) 65, at 92–100.

<sup>73</sup> Imseis, *supra* note 72, at 91–92.

<sup>74</sup> *Case Concerning East Timor (Portugal v. Australia)*, 30 June 1995, ICJ Reports (1995), p. 90, para. 29; *Wall Advisory Opinion*, *supra* note 33, para. 88; *Namibia*, *supra* note 57, para. 12.

<sup>75</sup> Benvenisti, *supra* note 69, at 198.

<sup>76</sup> Crawford, *supra* note 52, at 188, 246–247. Of note, Crawford's commentary on the ARSIWA was published in 2002 and does not expressly identify the inadmissibility of the acquisition of territory through the use of force as a *jus cogens*, but rather only its parent principle, the general prohibition on the threat or use of force. Nevertheless, as Orakhelashvili has argued, 'once the exercise of sovereign authority entails, or is consequential upon, a breach of a peremptory norm, the acts performed become subject to the overriding effect of *jus cogens*. Not only are they illegal – which would be the case for every wrongful act – but they are also void', resulting in what he calls 'a *jus cogens* nullity'. A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 216, 218–223.

<sup>77</sup> Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 2 (arguing that it is a 'myth surrounding the legal regime of belligerent occupation that it is, or becomes in time, inherently illegal under international law'). This encapsulates the traditionalist position set out in *supra* note 3.

three peremptory norms must be regarded as illegal.<sup>78</sup> What is missing from this literature, however, is a thorough treatment of what the UN *as a whole* has said regarding the illegality of Israel's occupation of the OPT as well as an analysis of what the legal consequences of that illegality are, particularly as regards the Organization's negotiations condition.<sup>79</sup>

The legality of Israel's occupation of the OPT may be impugned on two grounds. First, it may be regarded as illegal *ab initio* being the result of the impermissible use of force in 1967. Without wholly discounting its merits, the problem with this argument for the purposes of this article whose focus is on the UN's position on the OPT is that the UN record does not lend itself to finding that Israel's invocation of force in 1967 was illegal. Between the silence of the Security Council in 1967, and the subsequent confusion in General Assembly resolutions, it is difficult to point to any uniform UN practice sufficient to ground this claim.<sup>80</sup> Second, even if the occupation was not illegal *ab initio*, it has been rendered illegal over time for being in violation of the aforementioned *jus cogens* norms. This ground is easier to establish based on the UN record, which demonstrates a clear nexus between Israel's contraventions of IHL and IHRL and its systematic violation of the relevant *jus cogens* norms over time. Relying primarily on the UN record, the remainder of this section briefly assesses various Israeli actions in the OPT against each of these *jus cogens* norms. In this respect, it is important to bear in mind that of all of its actions, Israel's policy of transferring its civilian population into the OPT in violation of the Fourth Geneva Convention,<sup>81</sup> the Rome Statute<sup>82</sup> and customary international law<sup>83</sup> is the single most important factor animating its violations of these norms.

### 1. Prohibition on the Acquisition of Territory Through the Use of Force

The question of whether or not occupied territory may be considered annexed is a factual one not requiring formal declarations of annexation to be satisfied under international law.<sup>84</sup> Since 1967, Israel has annexed a substantial portion of the OPT through a series of legislative, administrative and other acts in contravention of the peremptory norm prohibiting the acquisition of territory through the use of force.

Following the 1967 war, Israel extended its municipal law and jurisdiction to occupied East Jerusalem, expanding the city's 6.5km<sup>2</sup> area to encompass 71km<sup>2</sup> of expropriated Palestinian land.<sup>85</sup> In response, the General Assembly declared 'all measures

<sup>78</sup> See *supra* note 3. Not all of the authors cited rely on the three *jus cogens* norms referred to in this article. Yet the cumulative thrust of their arguments affirms that all three are equally applicable.

<sup>79</sup> But see Ronen, *supra* note 3.

<sup>80</sup> SC Res. 242, 22 November 1967. For GA resolutions, see *supra* notes 60–63. Leaving aside the position of the UN, for an argument that Israeli actions were objectively illegal in 1967, see J. Quigley, *The Six Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (2013).

<sup>81</sup> Fourth Geneva Convention, *supra* note 72, Art. 49.

<sup>82</sup> Rome Statute, *supra* note 29, Art. 8(2)(b)(viii).

<sup>83</sup> J. M. Henckaerts and L. Doswald-Beck, *ICRC Customary International Humanitarian Law*, vol. 1: *Rules* (2005) at 462.

<sup>84</sup> I. Brownlie, *Principles of Public International Law* (6th ed., 2003), at 140.

<sup>85</sup> Imseis, 'Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem', 15(5) *American University International Law Review* (2000) 1039, at 1043–1047.

taken by Israel to change the status of the city' to be 'invalid',<sup>86</sup> while the Security Council determined that 'all legislative and administrative actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem, are invalid and cannot change that status'.<sup>87</sup> These resolutions affirmed the inadmissibility of the acquisition of territory by force. After the passage of Israel's 1980 'basic law' declaring Jerusalem to be its 'complete and united' capital, the Security Council reaffirmed this position, decided 'not to recognize the basic law, and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem' and called upon 'all member states to accept this decision'.<sup>88</sup> Despite Israel's agreement in the Oslo accords to refrain from initiating 'any step that will change the status of the West Bank and Gaza Strip',<sup>89</sup> since 1993 Israeli policies designed to alter the status of Jerusalem have been aggressively pursued, with thousands of Palestinians evicted from the city while expanding the Israeli settler population exponentially. In response, the Assembly and the Council have continued to denounce Israel's purported annexation of East Jerusalem as 'illegal', 'null and void' and having 'no validity whatsoever'.<sup>90</sup>

Beyond Jerusalem, Israeli actions elsewhere in the OPT have effectuated its annexation in all but name. This includes the expropriation of large segments of territory for Israeli settlements and related infrastructure (by-pass roads, electrical/sewage grids, tunnels, checkpoints, etc.), as well the construction of the wall and its associated regime. As noted by a UN Fact-Finding Mission, each Israeli government since 1967 has 'openly lead and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements' in the OPT through various political, military and economic means.<sup>91</sup> Whereas between 1967 and 1973, the number of Jewish settlers in the West Bank was approximately 1,500,<sup>92</sup> by 1987 their number in the OPT, including East Jerusalem, had grown to 169,000.<sup>93</sup> Since 1993 – with the Oslo proviso that nothing be done by either party to prejudge the negotiations – the settler population has more than tripled, with the UN Fact-Finding Mission estimating it to be 520,000 as at 2012,<sup>94</sup> and the Israeli Prime Minister himself putting it at

<sup>86</sup> GA Res. 2253(ES-V), 4 July 1967.

<sup>87</sup> SC Res. 252(1968). See also SC Res. 267, 3 July 1969; SC Res. 298, 25 September 1971.

<sup>88</sup> SC Res. 478, 20 August 1980. See also SC Res. 476, 30 June 1980.

<sup>89</sup> Israel-Palestine Liberation Organization: Interim Agreement on the West Bank and Gaza Strip, 28 September 1995, 36 ILM 551, Art. 31(7).

<sup>90</sup> SC Res. 2334, 23 December 2016; GA Res. 71/25, 30 December 2016; GA Res. 70/16, 24 November 2015; GA Res. 69/24, 25 November 2014; GA Res. 68/16, 26 November 2013.

<sup>91</sup> Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem, UN Doc. A/HRC/22/63, 7 February 2013, paras 20–24 ('UN Fact-Finding Mission').

<sup>92</sup> R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (1997), 3.

<sup>93</sup> UN Office for the Coordination of Humanitarian Affairs, 'The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank' (July 2007), at 20, available at [https://www.ochaopt.org/sites/default/files/ocharpt\\_update30july2007.pdf](https://www.ochaopt.org/sites/default/files/ocharpt_update30july2007.pdf).

<sup>94</sup> UN Fact-Finding Mission, *supra* note 91, para. 28.

650,000 in 2011.<sup>95</sup> Today, between 19% and 23% of the population of the West Bank, including East Jerusalem, are settlers.<sup>96</sup> According to the UN Fact-Finding Mission, settler growth rate in the OPT between 2002 and 2012 was almost triple that of the yearly average in Israel.<sup>97</sup>

In 2004, the ICJ found Israel's wall and its associated regime in the OPT contrary to international law, as it 'gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements'.<sup>98</sup> The Court held that the wall risks 'further alterations to the demographic composition' of the territory 'in as much as it is contributing . . . to the departure of Palestinian populations from certain areas'.<sup>99</sup> It further noted that the wall would incorporate, in the area between it and the 1949 armistice line, 'more than 16 per cent of the territory of the West Bank' and '[a]round 80 per cent of the settlers' in the OPT. The Court accordingly 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'.<sup>100</sup> Some 16 years on, Israel has expanded the wall and its associated regime, effectively annexing huge swathes of the OPT, as the ICJ foretold.

In January 2020, following extensive bilateral consultations with Israel, the United States issued what it called a plan for 'peace' endorsing, *inter alia*, Israel's illegal annexation of the whole of the Jordan valley and every Israeli settlement in the OPT, amounting to roughly 30 per cent of the territory (the 'Trump Plan').<sup>101</sup> This was followed by an April 2020 Israeli announcement that it would take measures to formally 'apply its sovereignty' over these territories at a time of its choosing sometime after 1 July 2020.<sup>102</sup> Despite being roundly condemned internationally, as at the time of writing the occupying power appears intent on further crystallizing its annexation of the OPT in the near future.<sup>103</sup>

<sup>95</sup> Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan, Report of the Secretary-General, UN Doc. A/67/375, 18 September 2012, para. 7 ('Secretary-General's Settlements Report').

<sup>96</sup> *Ibid.*, para. 12.

<sup>97</sup> The mission cited the Israeli Central Bureau of Statistics for this figure. UN Fact-Finding Mission, *supra* note 91, para. 28.

<sup>98</sup> *Wall Advisory Opinion*, *supra* note 33, para. 122.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, para. 121.

<sup>101</sup> White House, 'Peace to Prosperity: A Vision to Improve the Lives of Palestinians and Israelis' (January 2020), available at [www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf](http://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf) ('Trump Plan'). See also Levy, 'Don't Call it a Peace Plan: Ten Ways Trump Has Launched a Relentless Assault on the Very Idea of Israeli-Palestinian Peace', *The American Prospect* (30 January 2020), available at <https://prospect.org/world/dont-call-it-a-peace-plan-israel-palestine-trump/>.

<sup>102</sup> Lazarof, 'Annexation as Early as July 1 under Netanyahu-Gantz Deal', *Jerusalem Post* (9 May 2020), available at <https://www.jpost.com/arab-israeli-conflict/annexation-as-early-as-july-1-under-netanyahu-gantz-deal-625304>.

<sup>103</sup> Federman, 'Israel Undeterred by International Opposition to Annexation', *Washington Post* (30 June 2020), available at [https://www.washingtonpost.com/world/middle\\_east/israel-undeterred-by-international-opposition-to-annexation/2020/06/30/b2b35b68-ba98-11ea-97c1-6cf116ffe26c\\_story.html](https://www.washingtonpost.com/world/middle_east/israel-undeterred-by-international-opposition-to-annexation/2020/06/30/b2b35b68-ba98-11ea-97c1-6cf116ffe26c_story.html).

## 2. *The Right of Peoples to Self-Determination*

Israel's violation of the Palestinian right to self-determination in the OPT has equally been driven by its settlement policy. According to Pictet, the prohibition on civilian settlement by an occupying power was intended to prevent demographic changes in occupied territory 'for political and racial reasons', and to frustrate attempts 'to colonize' such territory.<sup>104</sup> Yet, according to the UN record, that is precisely what has happened in the OPT since 1967. As noted by the UN Fact-Finding Mission, Israel has openly pursued a policy of 'demographic balance' envisioning a ratio of at least 60:40, Jew to Arab, in East Jerusalem.<sup>105</sup> The Fact-Finding Mission further noted that Israel's settlement of the rest of the OPT has largely followed a series of 'master plans'<sup>106</sup> envisioning settlement as means to simultaneously colonize the OPT and forestall the emergence of an independent Palestinian state in it.<sup>107</sup>

In 2012, the Secretary-General reported that 'the current configuration and attribution of [Israeli] control over the land' in the OPT 'severely impedes the possibility of the Palestinian people expressing their right to self-determination'. He noted that 'because the settlements are scattered across the West Bank, including East Jerusalem, the territory of the Palestinian people is divided into enclaves with little or no territorial contiguity', with a resulting 'fragmentation' that 'undermines the possibility of the Palestinian people realizing their right to self-determination'.<sup>108</sup> The UN Fact-Finding Mission echoed this concern over the threat the settlements pose to the 'demographic and territorial presence of the Palestinian people' in the OPT. It took issue with the fragmentation of the Palestinian territorial sphere, highlighting in particular the bisecting effect on the West Bank of the Ma'ale Adumim settlement, as well as the impediments posed by the settlements generally on Palestinian access to and control over their natural resources. It accordingly found that the Palestinian right to self-determination 'is clearly being violated through the existence and ongoing expansion of the settlements'.<sup>109</sup>

<sup>104</sup> J. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 283.

<sup>105</sup> UN Fact-Finding Mission, *supra* note 91, para. 25.

<sup>106</sup> *Ibid.*, para. 23.

<sup>107</sup> Thus, in the words of the so-called 'Drobles Plan':

The best and most effective way of removing every shadow of doubt about our intention to hold on to Judea and Samaria [i.e. the OPT] forever is by speeding up the settlement momentum in these territories. The purpose of settling the areas between and around the centers occupied by the minorities [i.e. the Palestinian majority] is to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements, the minority population will find it difficult to form a territorial and political continuity.

See Drobles, *Master Plan for the Development of Settlement in Judea and Samaria*, World Zionist Organization, Department for Rural Settlement (1978), quoted in Matar, 'Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories', in E. Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (1992), at 446.

<sup>108</sup> Secretary-General's Settlements Report, *supra* note 95, para. 11.

<sup>109</sup> UN Fact-Finding Mission, *supra* note 91, paras 33, 34, 36, 38.

These observations must be read in the context of the ICJ's 2004 finding that Israel is obligated to respect the Palestinian right to self-determination in the OPT, and that 'all states' are independently obligated to see 'that any impediment, resulting from the construction of the wall, to the exercise' of that right 'is brought to an end'.<sup>110</sup> On the many occasions the General Assembly and Security Council have affirmed the Palestinian right to self-determination, those resolutions have often been accompanied by statements qualifying settlements as 'obstacles' to peace,<sup>111</sup> thereby underscoring the nexus between the settlements and Israel's violation of Palestinian self-determination. At any rate, both the Council and the Assembly have passed resolutions recalling the ICJ's *Wall Advisory Opinion*, with the Assembly demanding Israel 'comply with its legal obligations' thereunder.<sup>112</sup>

Despite widespread belief, Israel has never formally agreed to the establishment of a Palestinian state in the OPT. In return for PLO recognition of Israel and its right 'to exist in peace and security', Israel has only recognized 'the PLO as the representative of the Palestinian people'.<sup>113</sup> While recognition of a people perforce implies recognition of its right to self-determination, Israel has consistently adopted an emaciated view of the 'sovereignty' it would allow the Palestinians, if at all. This Palestinian 'state' would be deprived of a military, control over its air space, territorial sea, borders, the Jordan valley and territorial contiguity – akin to the Bantustans of Apartheid South Africa.<sup>114</sup> Doubtless, this would fall short of the attributes of statehood under international law.<sup>115</sup> Of note, the ruling Israeli Likud party continues to reject the establishment of a Palestinian state west of the Jordan river,<sup>116</sup> and Israel's current Prime Minister, Benjamin Netanyahu, was elected in 2009 on a promise to block the establishment of

<sup>110</sup> *Wall Advisory Opinion*, *supra* note 33, paras 122, 149, 155, 159.

<sup>111</sup> SC Res. 2334, 23 December 2016; GA Res. 70/89, 15 December 2015; GA Res. 69/92, 5 December 2014; GA Res. 68/82, 11 December 2014; GA Res. 67/120, 18 December 2012.

<sup>112</sup> SC Res. 2334, 23 December 2016; GA Res. 70/89, 15 December 2015; GA Res. 69/92, 5 December 2014; GA Res. 68/82, 11 December 2014; GA Res. 67/120, 18 December 2012.

<sup>113</sup> G. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (2000), at 315–316.

<sup>114</sup> A. Le More, *International Assistance to the Palestinians After Oslo: Political Guilt, Wasted Money* (2008), at 170. See also Horovitz, 'Netanyahu Finally Speaks His Mind', *Times of Israel* (13 July 2014), available at [www.timesofisrael.com/netanyahu-finally-speaks-his-mind/](http://www.timesofisrael.com/netanyahu-finally-speaks-his-mind/), where the Israeli Prime Minister was quoted as saying, 'I think the Israeli people understand now what I always say: that there cannot be a situation, under any agreement, in which we relinquish security control of the territory west of the River Jordan'. The UN rejected the Bantustan model of 'statehood' resoundingly. See SC Res. 402, 22 December 1976; GA Res. 31/6A, 26 October 1976. In June 2020, 67 independent UN experts concluded that '[w]hat would be left of the West Bank' following Israel's formalization of its annexation under the Trump Plan 'would be a Palestinian Bantustan, islands of disconnected land completely surrounded by Israel and with no territorial connection to the outside world'. See United Nations, 'Israeli Annexation of Parts of the West Bank Would Break International Law – UN Experts Call on the International Community to Ensure Accountability' (16 June 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960&LangID=E> ('UN Experts Annexation Statement').

<sup>115</sup> Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19.

<sup>116</sup> Weiler, 'The Hateful Likud Charter Calls for Destruction of Any Palestinian State', *Informed Comment* (4 August 2014), available at [www.juancole.com/2014/08/charter-destruction-palestinian.html](http://www.juancole.com/2014/08/charter-destruction-palestinian.html).

a Palestinian state.<sup>117</sup> This was reflected in a series of 2017 statements by Netanyahu that no settlement will be uprooted in the West Bank, and that Israel will remain in the territory ‘forever’.<sup>118</sup> These views are shared widely among the Israeli governing elite and have been formally incorporated into the Trump Plan.<sup>119</sup>

### 3. *Prohibition on Racial Discrimination*

Finally, Israel’s settlement policy has introduced a system of government in the OPT that, according to the UN record, is systematically engaged in racial discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which Israel is signatory without reservation, defines ‘racial discrimination’ as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>120</sup>

Israel’s view that international human rights law, including ICERD, does not apply to the OPT has been rejected by the UN, including the ICJ.<sup>121</sup> The racial discrimination underpinning the regime Israel has erected through the imposition of exclusively Jewish settlements in the OPT is systematic and widespread.

Among the transgressions of ICERD that the settlements have engendered is the violation of the right to equal treatment before the law.<sup>122</sup> Israel’s maintenance of separate legal systems in the OPT, the applicability of which is determined by the national or ethnic origin of individuals concerned – municipal law for Jews, whether citizens of Israel or not, and military law for Palestinians – has effectively divided the population along racial lines.<sup>123</sup> Another violation is the right to security of the person.<sup>124</sup> Since 1967, thousands of Palestinians have been killed or injured by Israel

<sup>117</sup> ‘Netanyahu: No Palestinian State on My Watch’, *Times of Israel* (16 March 2015), available at [www.timesofisrael.com/netanyahu-no-palestinian-state-under-my-watch/](http://www.timesofisrael.com/netanyahu-no-palestinian-state-under-my-watch/).

<sup>118</sup> Berger, ‘Netanyahu Vows Never to Remove Israeli Settlements from West Bank: “Were Here to Stay, Forever”’, *Ha’aretz* (29 August 2017), available at [www.haaretz.com/israel-news/1.809444](http://www.haaretz.com/israel-news/1.809444).

<sup>119</sup> Foundation for Middle East Peace, ‘In Their Own Words: Israeli Officials on a Palestinian State’ (29 May 2015), available at <http://fmeep.org/blog/2015/05/in-their-own-words-israeli-officials-oppose-palestinian-state/>; see Trump Plan, *supra* note 101.

<sup>120</sup> International Convention on the Elimination of all forms of Racial Discrimination, 7 March 1966, 660 UNTS 195, Art. 1 (‘ICERD’).

<sup>121</sup> *Wall Advisory Opinion*, *supra* note 33, para. 114.

<sup>122</sup> ICERD, *supra* note 120, Art. 5.

<sup>123</sup> As the self-declared state of the ‘Jewish people’, Israeli law only recognizes Jewish, as opposed to Israeli, nationality. See *George Rafael Tamarin v. State of Israel*, 20 January 1972, 25 *Decisions of the Supreme Court of Israel* (1972) pt. 1, 197 (in Hebrew) quoted in V. Tilley (ed.), *Beyond Occupation: Apartheid, Colonialism & International Law in the Occupied Palestinian Territories* (2012), at 119. On the application of Israeli municipal law to Jewish non-citizens of Israel in the OPT, see Tilley, *supra*, at 67. On the military laws applicable to Palestinians, see Tilley, *supra*, at 64–77.

<sup>124</sup> ICERD, *supra* note 120, Art. 5.



for protesting the occupation,<sup>125</sup> including through legally sanctioned extrajudicial execution<sup>126</sup> and torture,<sup>127</sup> neither of which methods is routinely used against Israeli settlers. In addition, Israeli settlers – who, unlike Palestinian civilians, are permitted to own and bear arms – have regularly committed violence against Palestinians with impunity.<sup>128</sup> Yet another violation concerns the right to universal and equal suffrage.<sup>129</sup> While settlers possess the right to vote, participate in and stand for national Israeli elections, these rights are deprived Palestinians in the OPT despite Israel's effectively exclusive control over the whole of the territory as occupying Power.<sup>130</sup> Another violation is the right to freedom of movement.<sup>131</sup> With Palestinian space fragmented into numerous non-contiguous enclaves by Israeli settlements and related infrastructure, Palestinian movement is controlled through a costly and restrictive permit system not applicable to settlers.<sup>132</sup> Finally, another violation is the right to leave and return to one's country.<sup>133</sup> Setting aside the 1948 Palestine refugees, approximately 390,000 Palestinians were forcibly exiled from the OPT in 1967,<sup>134</sup> with return blocked by Israel despite the urging of the Security Council.<sup>135</sup> In contrast, under Israel's Law of Return (1950), any person who is Jewish is automatically entitled to take up residence in the OPT, regardless of where they were born.<sup>136</sup> These are but a representative sample of the systematic violations of ICERD arising from the settler colonial regime that Israel has imposed on the OPT since 1967.<sup>137</sup>

In its concluding observations on Israel's 2012 periodic review under ICERD, the UN Committee on the Elimination of Racial Discrimination (CERD) observed that Israeli settlements in the OPT 'are an obstacle to the enjoyment of human rights by the whole population, without distinction as to national or ethnic origin'.<sup>138</sup> It expressed

<sup>125</sup> Tilley, *supra* note 123, at 131.

<sup>126</sup> *Ibid.*, at 132–133. See also Gross, *supra* note 3, at 243–244.

<sup>127</sup> Imseis, "Moderate" Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods', 19(2) *Berkeley JIL* (2001) 328. See also B'Tselem, 'Absolute Prohibition: The Torture and Ill-treatment of Palestinian Detainees' (May 2007), available at [www.btselem.org/download/200705\\_utterly\\_forbidden\\_eng.pdf](http://www.btselem.org/download/200705_utterly_forbidden_eng.pdf).

<sup>128</sup> UN Fact-Finding Mission, *supra* note 91, paras 50–57, 107.

<sup>129</sup> ICERD, *supra* note 120, Art. 5.

<sup>130</sup> The existence of the Palestinian Authority has not vitiated Israel's status as occupying Power in the OPT. See *Wall Advisory Opinion*, *supra* note 33, para. 78; SC Res. 2334, 23 December 2016).

<sup>131</sup> ICERD, *supra* note 120, Art. 5.

<sup>132</sup> Tilley, *supra* note 123, at 151–152.

<sup>133</sup> ICERD, *supra* note 120, Art. 5.

<sup>134</sup> 300,000 were expelled during the war. See Report of the Commissioner-General of UNRWA, 1 July 1966–30 June 1967, UN Doc. A/6713, at 1. Another 90,000 expatriates were rendered refugees *sur place*. See Tilley, *supra* note 123, at 163.

<sup>135</sup> SC Res. 237, 14 June 1967.

<sup>136</sup> Law of Return (5710-1950), 5 July 1950.

<sup>137</sup> Other violations of ICERD, *supra* note 120, include the rights to: nationality, property, freedom of thought, conscience and religion, peaceful assembly and association, work and the formation of trade unions, housing, public health and education (Art. 5). Of particular concern will be the impact of the Basic Law: Israel as the Nation-State of the Jewish People, 2018, translation at [https://avidichter.co.il/wp-content/uploads/2018/07/leom\\_law\\_en\\_press\\_18.7.18.pdf](https://avidichter.co.il/wp-content/uploads/2018/07/leom_law_en_press_18.7.18.pdf).

<sup>138</sup> Concluding Observations of the Committee for the Elimination of Racial Discrimination, Israel, UN Doc. CERD/ISR/CO/14–16, 3 April 2012, para. 4.

concern with Israel's refusal to apply ICERD in the OPT and the lack of equality guarantees under Israeli law, including a prohibition on racial discrimination.<sup>139</sup> It declared 'extreme concern' with Israel's policy of '*de facto* segregation' between settlers and Palestinians in the OPT, bolstered by 'two entirely separate legal systems', and 'the hermetic character of the separation of the two groups...concretized by...a complex combination of movement restrictions that only impacts the Palestinian population'.<sup>140</sup> These findings were echoed by the UN Fact-Finding Mission, which decried the '[t]he legal regime of segregation' in the OPT, enabling 'the creation of a privileged legal space for settlements and settlers' while violating Palestinian 'rights to non-discrimination, equality before the law and equal protection of the law'.<sup>141</sup>

The racial discrimination inherent in Israel's settlement regime in the OPT has given rise to concern that it is also engaged in the crime of apartheid, a claim that for reasons of economy cannot be taken up here in any great depth.<sup>142</sup> Suffice it to say, given that the UN record establishes that Israel has imposed gross and systematic racial discrimination in the OPT, increasing numbers of studies have taken this view.<sup>143</sup> Indeed, according to 67 independent UN experts, Israel's pending *de jure* annexation under the Trump Plan portends 'a vision of a 21st century apartheid'.<sup>144</sup> As none of these studies and opinions represent the official view of the UN, the Organization has yet to make a definitive pronouncement on the matter, despite the urging of the President of the General Assembly in 2008.<sup>145</sup>

In sum, Israel's occupation of the OPT has become illegal through its systematic violation of at least three *jus cogens* norms as documented in the UN record: the prohibition on the acquisition of territory by force, the obligation to respect the right of peoples to self-determination and the obligation to refrain from imposing regimes of alien subjugation, domination and exploitation inimical to humankind, including racial discrimination. The systematic nature of these violations is rooted in a series of discrete but interconnected breaches of IHL and IHRL over an abnormally prolonged military occupation. In themselves, these discrete violations constitute internationally wrongful acts. What lends them their true normative bite, however, is that, when taken together, they constitute a composite series of actions defined in the aggregate as internationally wrongful. This situation gives rise to specific international legal consequences for both Israel and third states, the substance of which clashes with the UN's long-standing position on the OPT. This position, focused on merely documenting a

<sup>139</sup> *Ibid.*, para. 13.

<sup>140</sup> *Ibid.*, para. 24.

<sup>141</sup> UN Fact-Finding Mission, *supra* note 91, para. 49.

<sup>142</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res. 3068, UN GAOR, 28th Sess., Supp. No. 30, UN Doc. A/9030, 30 November 1973, at 75.

<sup>143</sup> Tilley, *supra* note 123, at 222–223; J. Dugard and J. Reynolds, 'Apartheid, International Law and the Occupied Palestinian Territory', 24(3) *European Journal of International Law* (2013) 867, at 912; M. Sfard, 'The Israeli Occupation of the West Bank and the Crime of Apartheid', *Yesh Din* (June 2020) available at <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf>.

<sup>144</sup> UN Experts Annexation Statement, *supra* note 114.

<sup>145</sup> UN GAOR, 63 Sess., 57th plen. mtg., UN Doc. A/63/PV.57, 24 November 2008, at 2.

range of IHL and IHRL violations while affirming that the end of the regime giving rise to those violations be contingent on negotiation, has in turn been pivotal in maintaining Palestine's subaltern condition in the UN system. In the following section, we examine these legal consequences more closely, highlighting how they differ from the negotiations condition underpinning the UN's position on the OPT, and whether they can assist in mitigating Palestine's continued contingency within the Organization.

## 5 Legal Consequences and the Mitigation of Palestine's Contingency at the UN

Under the law of state responsibility, the legal consequences of Israel's illegal occupation of the OPT are threefold. First, it must end the occupation forthwith and unconditionally. Second, it must offer appropriate guarantees of non-repetition. Third, it must make full reparation for injury caused, including any material and moral damage. Given that the occupation involves gross and systematic breaches of *jus cogens* norms, additional consequences for third states require them to cooperate to bring the occupation to an end through lawful means and to refrain from rendering aid or assistance in maintaining it. Because states may not do collectively that which they are prohibited from doing individually, these third-state obligations necessarily set the parameters of what the UN is obligated to do as an international organization.

The UN's conventional approach of conditioning the end of Israel's illegal occupation of the OPT on negotiation is problematic for at least three reasons. First, it runs counter to prevailing international law. Just as most municipal legal systems do not countenance common thieves negotiating the return of stolen property, international law does not contemplate states negotiating the terms of whether and how their internationally wrongful conduct is brought to an end. This is particularly so where the conduct is the result of a composite series of wrongful acts that violate preemptory norms. The implications of this for the UN's position conditioning the end of the illegal occupation of Palestine on negotiations are important, particularly in light of Palestine's 2012 upgrade to non-member observer state in the General Assembly. That upgrade takes the issue beyond the mere rights that accrue to protected populations under IHL and IHRL, and touches upon the rights and duties of all states to refrain from the use of force against the territorial integrity and political independence of other states.

Second, the UN's negotiations condition for ending Israel's illegal occupation of the OPT runs contrary to its own practice on foreign military occupations in other contexts. Where an occupation has been determined by the Organization to be illegal, the obligation to bring it to a speedy end has not been conditioned on negotiation, but has been unconditional in line with the law of state responsibility. The fact that the General Assembly and ECOSOC have to varying degrees affirmed the illegality of Israel's occupation of the OPT suggests that the Organization's negotiations condition is at odds with this practice. Nevertheless, because the UN has not been consistent in characterizing Israel's occupation as illegal, complications arise. The above

assessment of the legality of Israel's occupation highlights a potential remedy for this insofar as it shows, on the basis of legal determinations established by the UN itself, that the occupation has indeed become illegal for its violation of a number of *jus cogens* norms of *erga omnes* character.

Third, the UN's negotiations condition is problematic because it renders conflict resolution more difficult by providing a measure of legitimacy to Israeli claims on the OPT without full regard for its track record of bad faith, again as established by the UN itself. Given the disparity in negotiating power between occupier and occupied, it is hard to imagine how a negotiated resolution could be concluded at all, let alone 'in conformity with the principles of justice and international law' as envisioned in the Charter. In the more than a quarter of a century since negotiations began at Oslo, Israel has consolidated its hold on the OPT under a public claim that it will never relinquish it, in complete contravention of the norms underpinning the law of occupation and its treaty obligations to refrain from prejudging the outcome of negotiations. How calling for continued negotiations in such a context can be regarded as an effective form of dispute resolution, instead of an effective endorsement of the internationally wrongful acts of the hegemonic party, beggars belief.

The question arises whether it is possible for the UN to correct its position and, if so, whether this would vitiate Palestine's contingent status in the Organization. To this end, it is submitted that both the General Assembly and the ICJ should be looked to as potential sites where the illegality of the occupation of the OPT can be definitively established.

The General Assembly remains a venue where the State of Palestine enjoys widespread support. The temporal correlation between the onset of the Oslo process and the cessation of the Assembly's characterization of Israel's occupation as 'illegal' and/or in 'violation of the UN Charter' is notable. It can be reasonably assumed that this change in practice resulted from Oslo's promise that a negotiated resolution based on the two-state formula was on the horizon. Following almost 27 years of process, however, there has been little peace to show for it. On the contrary, the UN record demonstrates that Israel has used this time to consolidate its hold over the OPT through pursuance of patently illegal objectives, while paying lip service to 'peace'. Now that the peace process is dead,<sup>146</sup> the Assembly could be engaged in order to revive its position on the illegality of the occupation. This would furnish it with greater leverage to call for the unconditional and immediate end of the occupation in line with the law of state responsibility.

Another possibility would be to seek a second advisory opinion of the ICJ. The proposed question could ask: What are the legal consequences for all states and the United Nations arising from Israel's continued *de facto* and *de jure* annexation, settlement and

<sup>146</sup> The death of the Oslo process has been the subject of lamentation in the secondary literature. See E. Said, *The End of the Peace Process: Oslo and After* (2001). The December 2017 recognition by the United States of Jerusalem as Israel's capital, absent any Palestinian-Israeli peace, is confirmation of this. See Lazaroff and Wilner, 'World Leaders Warn Peace Process Doomed After Trump Announcement', *Jerusalem Post* (6 December 2017), available at [www.jpost.com/Arab-Israeli-Conflict/World-leaders-warn-peace-process-doomed-after-Trump-announcement-517234#](http://www.jpost.com/Arab-Israeli-Conflict/World-leaders-warn-peace-process-doomed-after-Trump-announcement-517234#/).

prolonged occupation of the State of Palestine, in particular whether the occupation is illegal and when and how it must come to an end, considering the rules and principles of international law, including the UN Charter, the Fourth Geneva Convention of 1949, international human rights law, relevant Security Council and General Assembly resolutions and this Court's advisory opinion of 9 July 2004? Such a question would allow arguments to be advanced that go to the illegality of Israel's occupation based on the *jus cogens* norms identified above. If, before the matter reaches the Court, previous General Assembly practice referring to the occupation as 'illegal' and in 'violation of the Charter' can be reinvigorated, this will make it easier to advance such a case.

Some have argued that seeking another advisory opinion is 'not a good idea' and that other 'available tools must be revisited', including the 2004 *Wall Advisory Opinion*.<sup>147</sup> Aside from the establishment of UNROD, there has been little follow-up by the UN on the *Wall Advisory Opinion*, so the point is well taken. Nevertheless, one problem with this view is its mistaken assumption that even robust follow-up on the *Wall Advisory Opinion* would offer a break from the rule by law inherent in the UN's conventional humanitarian/managerial approach to the OPT. What good would follow-up bring, if the only result would be to enhance the manner in which Israel maintains its over half-century occupation and colonization of the OPT?

Although the *Wall Advisory Opinion* identified various Israeli violations of international law and called upon it and third states to bring those violations to an end, ending the occupation and Israel's *de facto* and *de jure* annexations was not among them. On the contrary, although the Court made some useful references to the general prohibition on territorial conquest,<sup>148</sup> it failed to provide *any* findings regarding specific obligations of states to end the occupation and to oppose and end Israel's acts of annexation of the OPT. Instead, as noted, after pronouncing on the illegality of the wall, the Court went to pains to call for 'a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel', thereby upholding the conventional UN position.<sup>149</sup> A second advisory opinion would enable the ICJ to determine that Israel's very presence in occupied Palestine has become, in and of itself, illegal, and that its end cannot reasonably be pinned to continued negotiations between a bad faith occupant and a besieged and captive people, but can only be fulfilled through immediate, unconditional and full withdrawal in line with the law of state responsibility.

Of course, neither the General Assembly or the advisory jurisdiction of the ICJ are ordinarily endowed with authority to legally bind the international community. Therefore, neither a revival of General Assembly practice nor a second advisory opinion of the Court would in and of themselves result in ending the occupation. They would, however, help the Palestinians build further legal and political momentum in

<sup>147</sup> United Nations, 'Experts Examine "De-Palestinization" of Jerusalem, Reality on Ground at United Nations Meeting on Israeli Settlements', Press Release, UN Doc. GA/PAL/1345 (7 September 2015).

<sup>148</sup> *Wall Advisory Opinion*, *supra* note 33, paras. 75, 87, 88, 117, 121.

<sup>149</sup> *Ibid.*, para. 162.

the UN in support of their rights in line with the international rule of law, thereby mitigating the effects of their contingent position in the Organization. In this regard, the role of third states would be vital given the imbalance of power between the parties and the historical record since Oslo. In addition to requiring Israel to end its occupation forthwith and unconditionally, declaring Israel's continued presence in the State of Palestine as illegal would also enable the ICJ to require all states to cooperate to bring it to an end, to not recognize it as lawful, nor to render aid or assistance in maintaining it. Questions would arise concerning the scope of the measures that third states would be required to take in order to bring Israel's illegal regime in the OPT to an end. But, as noted by Crawford, although such measures 'must be through lawful means, the choice of which [to pursue] will depend on the circumstances of the given situation'.<sup>150</sup> Set within the context of a finding that Israel's very presence in the *state* of Palestine, as opposed to a narrower set of practices undertaken within it, has become illegal, the way will thus be open to require third States to do much more, individually and collectively, than they have been required to do until now under the conventional UN approach, given the higher order norms involved. This could include a host of targeted economic, political and cultural measures, taken individually or collectively through the UN, as was done in support of other subaltern groups in similar contexts.<sup>151</sup>

## 6 Conclusion

This article has examined the UN's handling of the legal status of Israel's 53-year military occupation of the OPT. Its claim is that the UN's failure to consistently and clearly take a more principled position on the very legality of Israel's occupation regime exposes a fundamental chasm in its position on the OPT and is ultimately demonstrative of the continuation of the rule by law in the Organization's handling of the question of Palestine post 1967.

Decolonization brought about a shift in the UN that changed the post-war late-imperial features of the Organization responsible for the 1947 plan of partition and the resulting reification of Palestinian legal subalternity in it. With most of the former Afro-Asian colonies now members of the system, the legal output of the UN became the product of a more representative community of nations than was hitherto the case. Third World empowerment gave rise to a gradual recognition by the UN of

<sup>150</sup> Crawford, *supra* note 52, at 249.

<sup>151</sup> An instructive precedent exists in the string of ICJ cases on Namibia. See *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, ICJ Reports (1950), p. 128; *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion, 7 June 1955, ICJ Reports (1955), p. 67; *Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, Advisory Opinion, 1 June 1956, ICJ Reports (1956) p. 23; *Namibia*, *supra* note 57. See also Lynk Report, *supra* note 3; Finkelstein, *supra* note 3; Koury, 'Legal Strategies at the United Nations: A Comparative Look at Namibia, Western Sahara and Palestine', in S. Akram, M. Dumper, M. Lynk and I. Scobbie (eds), *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (2011) 147.

Palestinian legal subjectivity and rights, including the right to self-determination in the OPT as part of the two-state framework. The conventional wisdom presents these developments as emblematic of the UN's commitment to uphold the international rule of law in Palestine.

Yet, despite these important changes, the circumscribed nature of Third World quasi-sovereignty persisted following decolonization. For the Palestinian people, this has manifested itself in the maintenance of Palestine's legal contingency in the system, as evidenced in the UN's adoption of a humanitarian/managerial approach to the occupation of the OPT. Under this approach, the Organization has satisfied itself merely with documenting a host of individual Israeli violations of IHL and IHRL without definitively addressing the legality of the very regime giving rise to those violations themselves, all the while insisting on negotiations as the only means through which the occupation can be brought to an end. The curiosity of this position rests in the fact that there is more than enough in the UN record to demonstrate that Israel's occupation has become illegal over time for being in violation of three *jus cogens* norms of international law: the prohibition on the acquisition of territory through force, the obligation to respect the right of peoples to self-determination and the obligation to refrain from imposing regimes of alien subjugation, domination and exploitation inimical to humankind, including racial discrimination. As an internationally wrongful act, the international law of state responsibility does not allow for negotiation as the means of ending Israel's occupation, but rather requires that it be ended forthwith and unconditionally. This is affirmed by UN practice in other cases of illegal occupation. What is more, by making the end of the occupation contingent on the chimera of negotiation between what the UN record demonstrates is a bad faith and immensely more powerful occupant and an enfeebled population held captive by it, the UN has in effect undermined its own position. It has thereby made the realization of Palestinian legal rights repeatedly affirmed by it impossible to achieve, while facilitating the consolidation of the illegal actions of the occupying power that operate to violate those rights under a cloak of legitimacy provided by the Organization.

Despite the conventional wisdom, the UN's affirmation of Palestinian legal subjectivity and rights in the OPT post 1967 can only be regarded as nominal in nature. This is because the promise of international law has been repeatedly proffered by the UN, but ultimately withheld by operation of the Organization's own failure to bring the full application of international law to bear on the situation. To be sure, the possibility for incremental positive change exists, insofar as recourse may be had to the General Assembly and ICJ to definitively establish the UN's position on the illegality of Israel's occupation regime. Although largely ignored in the literature, relevant practice exists in the Assembly going back decades in which Israel's occupation of the OPT has been qualified as illegal in itself. Were this practice revived, including through judicial affirmation of the ICJ, further strides could be made in the mitigation of Palestine's contingent position within the UN system.