
Of Tactics, Illegal Occupation and the Boundaries of Legal Capability: A Reply to Ardi Imseis

David Hughes*

Abstract

This contribution engages with Ardi Imseis's article 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020'. In reply, I contemplate whether an occupation's legal status can or should affect the requirement that an occupying power must withdraw from the territory that it controls. I consider Imseis's claim that it is necessary to declare that an occupation has become illegal to move beyond the tension that exists between the requirements of state responsibility and a political preference for negotiations. I question the effectiveness of Imseis's proposed approach, argue that the duty to terminate an occupation is a positive legal duty that exists regardless of an occupation's legal status and suggest that the negotiation process cannot be completely uncoupled from the withdrawal requirement. In conclusion, I suggest that grounding calls to terminate occupation in the principle of temporality and the international consensus prohibiting the acquisition of territory by force better reflects international law's capacity to contribute to an occupation's termination.

1 The Legal Status of Prolonged Occupation

The inaugural volume of the *European Journal of International Law* featured an exchange between James Crawford and Francis Boyle about the merits of Palestinian statehood.¹ Two international lawyers, drawing upon similar legal sources, recalling formative historical documents and events, engaged in familiar techniques and

* Trebek Postdoctoral Fellow, Faculty of Law, University of Ottawa, Canada. Email: dhughes3@uottawa.ca.

¹ Boyle, 'The Creation of the State of Palestine', 1 *European Journal of International Law (EJIL)* (1990) 301; James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?', 1 *EJIL* (1990) 307.

analysis but reached opposing conclusions. For Boyle, the 1988 *Algiers Declaration* formalized Palestinian independence which, in itself, satisfied the Montevideo criteria. Crawford believed that the traditional definition of statehood went unfulfilled. A Palestinian state, Crawford concluded, may be desirable but would require further statesmanship before becoming legally tenable.² Beyond the particularities of the respective legal claims, a subtext ran throughout the exchange: this was a tactical debate about the boundaries of legal capability.

Today, the purportedly temporary occupation of the Palestinian territories (OPT) that began in 1967 exceeds a half-century in duration. The prolonged nature of the occupation poses myriad challenges and questions to the orthodox legal engagements that have sought to influence this protracted conflict. Ardi Imseis provides a valuable intervention into a larger debate regarding the legal status of prolonged occupation.³ Imseis makes both a prescriptive and an attributive contribution to the emerging scholarship that identifies Israel's occupation of the Palestinian territories as illegal. Invoking state responsibility, Imseis builds upon the elsewhere proposed normative criteria that inform an occupation's status to describe the consequences of an illegality determination. But the United Nations, Imseis suggests, legitimizes the occupation by prioritizing bilateral negotiations, rather than the requirement to unilaterally terminate an illegal act, as the requisite means of ending the occupation.

Three propositions establish Imseis's claim. First, Israel's occupation of the OPT is illegal because it violates a series of *jus cogens* norms – the prohibition of the acquisition of territory by force; the obligation to respect the right of peoples to self-determination; and the duty to refrain from imposing regimes of alien subjugation, domination and exploitation. Second, a humanitarian or managerial approach, embraced by the international community, sufficiently documents legal violations but abdicates responsibility for ascribing consequences to the collective implication of these violations. This, in turn, legitimizes the occupation. And third, it is necessary to declare that the occupation has become illegal to move beyond this humanitarian/managerial paradigm and reconcile the resulting tension between the requirements of state responsibility (international law) and the preference for negotiations (politics).

I consider each of Imseis's contentions in turn. I suggest that, first, reliance upon the law of state responsibility to rectify a collective wrong that has been determined following the identification of several individual wrongs raises questions of effectiveness. The ability of the law of state responsibility to successfully facilitate the cessation of an illegal occupation is undermined by the inability of this body of law to curb the constitutive features – each unambiguously deemed violations of international law – that inform the illegality determination.

Second, notwithstanding the international community's tendency to preference a humanitarian/management approach, Imseis's claim that nothing within the occupation framework compels termination, and thus cessation of the *jus cogens* violations

² *Ibid.*, at 313.

³ Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020', 31 *EJIL* (2020) 1055.

that accompany the prolonged subjugation of an occupied people, reflects a common misinterpretation. It is this incomplete reading of the legal framework governing occupation that encourages application of the humanitarian/management approach that Imseis endeavours to escape. Here, I argue that the law of occupation itself imposes a positive legal duty to terminate. Imseis's call to make this requirement contingent upon an external determination of illegality introduces a criterion that is both unfeasible and, more significantly, unnecessary.

And, third, I suggest that the tension Imseis identifies between termination in accordance with the requirements of international law (whether grounded in state responsibility or a general interpretation of the law of occupation) and political calls for negotiations is tangible. However, while the realities of the occupation are inseparable from the broader conflict, the termination requirement cannot, and perhaps should not, be completely uncoupled from calls for negotiations. In reply, like Imseis, I suggest that international law can more effectively support calls to terminate a prolonged occupation. But as with the statehood debate 30 years prior, international law's ability to affect change and achieve a desired objective is limited by the boundaries of legal capability. I suggest that international law's most persuasive contribution to the process of terminating a prolonged occupation comes not from a determination of illegality but from an iteration of the view that termination is the corollary of temporariness, that it is a positive legal duty and not merely a means of remedying a legal wrong and that the law of occupation's continued relevancy vests in its ability to provide a language that reflects international consensus concerning the prohibition of the acquisition of territory by force.

2 Legal Status and Considerations of Effectiveness and Feasibility

Imseis argues that following a series of *jus cogens* violations, Israel's occupation of the OPT has become illegal. A formal determination of illegality will, Imseis describes, facilitate recourse to the law of state responsibility which, in turn, requires the cessation of the illegal act.⁴ The requirement that the state responsible for the wrongful act is under an obligation to cease that act will thus compel the occupation's termination.⁵ However, this implies that termination of occupation is predicated upon a determination of illegality that raises questions of effectiveness and feasibility that may unintentionally entrench how the international community engages with instances of prolonged occupation.

Traditional understandings of the law of occupation suppose that the imposition of foreign military control is a factual occurrence. The resulting legal framework, as

⁴ 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), art. 30.

⁵ Imseis, *supra* note 3, at 1056.

per Article 42 of the Hague Regulations, extends to the territory where such control has been established.⁶ The *de facto* recognition of an occupation, triggering the application of the law of occupation, is read as devoid of normative content.⁷ Yet as others have demonstrated, pronouncements in the General Assembly and Security Council evidence a juridical category of illegal occupation.⁸ Scholars have contributed compelling normative frameworks that prescribe criteria to assess whether facets of an occupation render the erstwhile neutral regime illegal.⁹ Notwithstanding mere rhetorical assertions of illegality, it is clear that Israel's occupation of the Palestinian territories satisfies the proposed evaluative criteria.

Such assessments are shaped by the prolonged nature of the occupation. As an occupation's duration increases, considerations of legality reflect both the subjugated status of the local population and the diminishing political interests that the framework purports to preserve. A determination of illegality often attaches to a situation that results from an unresolved tension between what Eyal Benvenisti has recognized as the foundational obligations imposed by the law of occupation – the obligation to protect the life and property of the inhabitants and the obligation to ensure the sovereign rights of the deposed government.¹⁰ A prolonged occupation becomes increasingly difficult to justify as a temporary necessity that ensures sovereign reversion and protects humanitarian interests.¹¹ The complexities of reconciling the conservationist character of the occupation framework with the needs of a population under prolonged foreign control prompted Adam Roberts to query whether the formal legal framework was relevant, formally and practically, to the particularities of prolonged occupation.¹²

Resulting attempts to regulate prolonged occupation by disparate actors – the occupying power, third states, international organizations, courts, civil society and scholars – divide between what I have elsewhere termed a management approach and an illegality approach.¹³ The management approach reflects varied efforts that collectively preference a non-normative reading of the law of occupation that holds that the framework's application is unaffected by the characteristics of the occupation. The 'manager' attempts to *better* engage with the imposed legal framework to 'mitigate the results, but not the cause, of prolonged occupation'.¹⁴ The illegality approach imbues

⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, 539 TS 631, art. 42 [hereinafter Hague Regulations].

⁷ A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017), at 3–4.

⁸ Ronen, 'Illegal Occupation and Its Consequences', 41 *Israel Law Review (ILR)* (2008) 201.

⁹ Ben-Naftali, Gross and Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkeley Journal of International Law (BJIL)* (2005) 551.

¹⁰ Benvenisti, 'The Origins of the Concept of Belligerent Occupation', 26 *Law & History Review* (2008) 621, at 622.

¹¹ Hughes, 'Moving from Management to Termination: A Case Study of Prolonged Occupation', 44 *BJIL* (2018) 109, at 118.

¹² Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', 84 *American Journal of International Law (AJIL)* (1990) 44, at 44.

¹³ Hughes, *supra* note 11, at 115, 157–164.

¹⁴ *Ibid.*, at 115.

the occupation framework with normative content. It recognizes that if an occupation becomes something other than a temporary regime that preserves sovereign interests and humanitarian considerations it no longer benefits from the legitimacy implied by the formal occupation framework.¹⁵

Subscribing to the illegality approach, Imseis poses urgent questions about the suitability of the occupation framework, traditionally understood, to effectively regulate conditions that are far removed from those that led to the framework's application in 1967. However, questions of effectiveness complicate the preferred formulation. Imseis's suggestion that the UN's failure to recognize Israel's presence in the OPT as constituting an illegality predicates consequence and, by extension the requirement to terminate, on a *formal* legal assessment.¹⁶ This imposes a potentially unachievable, and unnecessary, prerequisite. For a prescribed approach to displace conventional legal interpretations and reduce the challenges posed by a prolonged occupation that has become illegal, it must exhibit an ability to better preserve or realize the norms that inform the relevant legal regime.

Accordingly, if the requirements of state responsibility have thus far proven ineffective in allaying those uncontroversial individual violations, it is unduly optimistic to assume that this same legal toolkit will produce different results when applied to a more contentious collective determination that the occupation itself constitutes an internationally wrongful act. In its Advisory Opinion *on the Legal Consequences of a Wall*, the International Court of Justice (ICJ) held that numerous features of Israel's occupation of the OPT constituted *erga omnes* violations.¹⁷ The individual violations stemming from the wall's construction – territorial acquisition; settlement development; population transfer; failure to respect the Palestinian right to self-determination – are each constitutive features of the *jus cogens* norms that inform Imseis's determination of collective illegality. The ICJ pronounced that Israel was required to cease the internationally wrongful acts that flowed from the wall's construction, ensure restitution or provide reparations when restitution proved impossible.¹⁸ The Security Council has repeatedly noted that settlement development and population transfer – which Imseis describes as the single most important factor evidencing Israel's violation of the *jus cogens* norms that collectively lead to an illegality determination – lack legal validity and require Israel to cease and ensure against the continuation of such activities.¹⁹

Imseis's claim that an illegal occupation impugns higher-order norms than do the narrow set of practices occurring within an occupation ignores that the ICJ

¹⁵ *Ibid.*, at 159.

¹⁶ Imseis, *supra* note 3, at 1062.

¹⁷ These included the prohibition of the acquisition of territory by force, the obligation to respect the right of the Palestinian people to self-determination and various obligations under international humanitarian law. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 131, para. 155 [hereinafter *Wall Advisory Opinion*].

¹⁸ *Ibid.*, paras. 149–153.

¹⁹ SC Res. 446, 22 March 1979, para. 3; SC Res. 452, 20 July 1979, para. 3; SC Res. 465, 1 March 1980, para. 6.

and Security Council grounded calls for the cessation of violations by Israel on a similar series of *jus cogens* norms to those that inform Imseis's illegality assessment.²⁰ Additionally, the ICJ held in the *Wall* Opinion that third states are under an obligation not to recognize the illegal situation resulting from the partition's construction in the OPT and not to render aid and assistance in maintaining that situation.²¹ It is unclear how the unidentified higher-order norms that Imseis cites will motivate third states to contribute more to ensuring the occupation's termination than has previously been asked and realized through repeated invocations of foundational norms situated at the crux of the international legal order.²²

This does not suggest that pursuing an illegality determination is devoid of merit. A formal finding of illegality imposes non-recognition obligations.²³ Notwithstanding the Trump Administration's 2017 pronouncement that Jerusalem is Israel's capital, states have largely abided by the non-recognition requirement that accompanied the Security Council's denouncement of the contested city's formal annexation in 1980 and the ICJ's *Wall* Advisory Opinion.²⁴ Imseis's approach, however, compromises the progress that may accrue from an illegality determination by predicating the termination requirement on a formal legal finding that would almost certainly be resisted by influential members of the international community. This would include allies that support the Israeli Government within international organizations; states that have a vested interest in the diplomatic process and view the perceived isolation of one party as detrimental to that process; and states whose policies elsewhere would incur further scrutiny should illegality increasingly associate with instances of foreign control.

Predicating termination on illegality creates an impediment to termination that may well prove unattainable. But the most imperative limitation of this approach rests in the subversive inference that it is illegality and not the occupation framework itself that compels an occupation's termination. This introduces the same incomplete legal reasoning that animates the aforementioned management approach and which proponents of an illegality interpretation traditionally endeavour to escape.

3 Locating a Duty to Terminate Occupation

The law of state responsibility is offered to compel the illegal occupation's termination because, as Imseis argues, nothing within the 'conventional IHL/IHRL paradigm expressly compels this result'.²⁵ This limited reading of the legal framework governing

²⁰ For example, Security Council Resolution 2234 identifies the inadmissibility of the acquisition of territory by force as undergirding its denouncement of subsequent Israeli violations and calls for cessation. See SC Res. 2234, 23 December 2016, Preamble.

²¹ *Wall* Advisory Opinion, 9 July 2004, ICJ Reports (2004) 131, para. 159.

²² Imseis, *supra* note 3, at 1084.

²³ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, 53 UN GAOR Supp (No. 10), UN Doc A/56/10, art. 41(2).

²⁴ SC Res. 478, 20 August 1980, para. 5.

²⁵ Imseis, *supra* note 3, at 1064.

occupation risks propagating the view that international law 'merely operates to enhance the manner in which the occupation is administered pending its eventual end'.²⁶ This non-normative understanding of the law of occupation undergirds the prominent management or humanitarian approach that is commonly pursued in instances of prolonged occupation. I suggest that notwithstanding the prevalence of this view, the law of occupation does indeed impose a positive legal duty to terminate occupation regardless of the legal status that the occupation assumes.

In the *Wall Advisory Opinion*, Judge Elaraby observed that the 'only viable prescription to end the grave violations of international humanitarian law is to end the occupation'.²⁷ This is, however, at odds with what has become the international community's dominant approach to the Israeli-Palestinian conflict. In the OPT and beyond, instances of occupation that become prolonged or that otherwise compromise the interests that the occupation framework seeks to preserve are regularly subject to increased administrative attention. Because the legal framework developed in accordance with the belief that occupation constituted only a brief disruption of the established political order, neither the Hague Regulations nor the Fourth Geneva Convention ascribe a firm durational limit.²⁸ This neutral, non-normative reading of the occupation framework prompted an expert panel, convened by the International Committee of the Red Cross (ICRC), to conclude that 'nothing under IHL would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances'.²⁹

Ongoing efforts to reconcile a conservationist reading of the law of occupation with the growing social, economic and legislative needs of the protected population spurred queries as to whether the occupying power should be accorded additional latitude to manage prolonged occupation.³⁰ Proponents of a management approach emphasize the prominent interpretative view that occupation is non-normative, that the legal framework fails to prescribe a firm durational limit.³¹ This interpretative choice undergirds initiatives that respond to those challenges that result from an irregular form of

²⁶ *Ibid.*

²⁷ *Wall Advisory Opinion*, 9 July 2004, ICJ Reports (2004) 131, at 256 (separate opinion by Judge Elaraby, J.).

²⁸ E. Benvenisti, *The International Law of Occupation* (2nd ed., 2012), at 15–16. The principal exception is found in Article 6(4) of the Fourth Geneva Convention, which holds that the application of the Convention ceases one year after the general close of military operations but that numerous provisions contained within the Convention remain in force for the duration of the occupation. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, art. 6(4).

²⁹ International Committee of the Red Cross, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territories* (2012), at 74.

³⁰ Koutroulis, 'The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?', 94 *International Review of the Red Cross* (2012) 165, at 176.

³¹ See Dinstein, 'Arab-Israeli Conflict from the Perspective of International Law', 43 *University of New Brunswick Law Journal* (1994) 301, at 313–314; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change in International Humanitarian Law, and its Interactions with International Human Rights Law* (2009), at 46; Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *AJIL* (1970) 8.

occupation un contemplated by the applied framework.³² A non-normative reading, emphasizing the absence of a fixed durational limit, informs both the European Court of Human Rights' treatment of the Turkish occupation of Northern Cyprus and the ICJ's *Namibia* Opinion.³³ Offered in good faith, these interventions acknowledge that adaptation is necessary to better ensure local interests. However, this same reading of the occupation framework has been repeatedly invoked by Israel's High Court of Justice to endorse numerous initiatives that served to solidify Israel's control of the OPT.³⁴ It inspired Meir Shamgar, then a Justice of the Israeli Supreme Court, to reason that because occupation reflects a factual situation, it may continue indefinitely.³⁵

Imseis is correct that the widely endorsed humanitarian/managerial approach is facilitatory. By privileging efforts to document the occupying power's legal violations, Imseis tells that the approach's failure is rooted in its unwillingness to address the legality of Israel's presence within the OPT.³⁶ Whether understood as a means of monitoring compliance with the applicable legal frameworks or through efforts to adapt those frameworks to meet the exigencies of prolonged occupation, this humanitarian or management approach enables an indefinite form of occupation. Though this must be resisted, Imseis's contention that although occupation is meant to end, nothing in the conventional framework expressly compels this result contributes to the same, flawed, reasoning that incentivizes management efforts.³⁷ If international law interprets occupation as a fact devoid of normative content, if the legal framework is unresponsive to the form foreign control assumes, perpetual management and subsequently – by design or by default – perpetual occupation will become entrenched.

³² For example, the UN Conference on Trade and Development favoured an improved form of economic management that would 'encourage Israel to allow wide-ranging economic policy reform and liberalization in the OPT'. See UN Conference on Trade & Development, 'Recent Economic Developments in the Occupied Palestinian Territory', UN Doc. UNCTAD/TD/B/1221, 1989. See also Khalidi and Taghdisi-Rad, 'The Economic Dimensions of Prolonged Occupation: Continuity and Change in Israeli Policy Towards the Palestinian Economy', UN Doc. UNCTAD/GDS/2009/2, August 2009. See also Sassöli, 'Article 43 of The Hague Regulations and Peace Operations in the Twenty-First Century', Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25–27, 2004, at 15, available at <https://bit.ly/2HFDXOY>.

³³ In *Demopoulos*, the ECtHR held that 'the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances'. See ECtHR, *Demopoulos v. Turkey*, Appl. no. 46113/99, Judgment of 1 March 2010, para. 85. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 June 1971, ICJ Reports 16, para. 125 [hereinafter *Namibia* Advisory Opinion].

³⁴ In *Ja'amait Ascan*, the HCJ held that an occupation's temporariness may be 'long-term'. High Court of Justice (HCJ) 393/82, *Ja'amait Ascan v. Commander of the IDF in Judea and Samaria*, 37(4) PD 785 (1983) (Israel). See also D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002).

³⁵ Shamgar, 'Legal Concepts and Problems of the Israeli Military Government: The Initial Stage', in M. Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects* (1982) 14, at 43.

³⁶ Imseis, *supra* note 3, at 1064.

³⁷ *Ibid.*

This propagates a limited view of international law, the function of which is reduced to efforts to manage, not resolve, occupation.³⁸

However, the absence of a durational limit within the occupation framework does not support contentions that occupation may be indefinite or that international law fails to compel termination. Prolonged occupations commonly feature contested claims of historical entitlement. Ongoing events in Nagorno-Karabakh illustrate the steadfastness with which such claims are advanced and become entwined with particular legal appeals. But when disentangled from assertions of entitlement, international law provides distinguishable bright-line rules. The principle that territory cannot be acquired through force reflects a normative purpose of the law of occupation. It is a steadfast principle of the post-war international order.³⁹ And it can support the claim that the duty to terminate is an inherent feature of the law governing occupation.

This assertion is reflected within the law of occupation itself which provides that an occupation must constitute a temporary state. It is reflected in the framework's prohibition of annexation and commitment to self-determination.⁴⁰ Article 55 of the Hague Regulations holds that an occupying power assumes the status of a temporary administrator.⁴¹ The 1958 Commentary to the Fourth Geneva Convention, referencing the conservationist principle, similarly defines an occupying power as 'merely being a de facto administrator'.⁴² And the Clapham Commentaries tell that 'occupation is a temporary situation, not equivalent to annexation'.⁴³ This same sentiment informed Lassa Oppenheim's contention that 'there is not an atom of sovereignty in the authority of an occupying power'.⁴⁴ It motivated the Security Council's pronouncement that the right to self-determination was contingent upon the expeditious termination of the US and British-led occupation of Iraq.⁴⁵ It follows that if an occupation is to be distinguished from conquest, that which the non-acquisition prohibition prohibits, the occupation must remain temporary. And the non-acquisition principle links the norm of temporality to the objective of termination. If an occupation is to remain distinct from conquest by retaining a temporary character, it must terminate. Readings of the law of occupation that depart from this reasoning are thus incompatible with the purpose of the law of occupation.

³⁸ Hughes, *supra* note 11, at 170.

³⁹ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, principle 1, GA Res. 2625 (XXV), 24 October 1970.

⁴⁰ Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL* (2006) 580, at 582–585.

⁴¹ Hague Regulations, *supra* note 6, art. 55.

⁴² J. Pictet, *The Geneva Conventions of 12 August 1949, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary* (1958), at 273.

⁴³ Bothe, 'The Administration of Occupied Territory', in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 1455, at 1460.

⁴⁴ Oppenheim, 'The Legal Relations Between an Occupying Power and the Inhabitants', 33 *Law Quarterly Review* (1917) 363, at 364. See also Hughes, *supra* note 11, at 173.

⁴⁵ SC Res. 1483, 22 May 2003.

This, however, reflects an interpretative choice. Traditionally, the law of occupation is understood to form part of the *jus in bello*.⁴⁶ But this should not discount the relevancy of the *jus ad bellum*.⁴⁷ Although international law is predicated on a distinction between the *ad bellum* and *in bello* – what Rotem Giladi has termed the total separation paradigm – the law of occupation melds these considerations.⁴⁸ Bound in duality, Giladi demonstrates that the law of occupation is concerned with both the humane treatment of individuals and questions of sovereignty and governance. This requires reference to the *jus ad bellum* which is reflected in the occupation framework's prohibition of annexation.⁴⁹ To neglect the relevancy of the *jus ad bellum* in favour of a purely factual account of occupation is to underappreciate that the principle of temporality situates at the normative core of the legal framework governing occupation. The preservation of sovereignty, the protection of the local population, allowances to ensure the occupying power's security needs and initiatives to balance the competing interests of the varied parties are each constitutive purposes of the law of occupation. They are each contingent upon a termination requirement.

The legal construction of *occupatio bellica* was initially intended to regulate the interim period between hostilities and the resumption of normality.⁵⁰ To reject conquest and discount the validity of sovereign claims that historically followed *debellatio*, to distinguish between a form of foreign control that is regulated by international law and one that constitutes annexation, an occupation must end. An interpretative approach to the law of occupation that is informed by the non-acquisition principle offers salience that spans beyond a complex illegality determination or the more prominent interpretative approach that upholds management as the limit of international law's relationship with prolonged occupation. It is constitutive of the post-war legal order, expressive of the prohibition on the use of force and a *sine qua non* for the realization of adjacent interests and entitlements from the actualization of the right to self-determination to the maintenance of peace and security.

While recognizing the complementary relevancy of the *jus ad bellum* and the *jus in bello* under the law of occupation facilitates the claim that the duty to terminate is an internal feature of the law of occupation, insistence on a strict separation will reject the conclusion that it is the law of occupation *itself* that compels termination. However, whether one accepts that the duty to terminate is inherent to the law of occupation or the corollary of an uncontested external norm will not alter the conclusion that it is the principle of temporality and not an external determination of illegality that compels termination. The legal framework is silent on the corresponding chronology. But while the requirements of military necessity may delay the timing of a withdrawal, this does not alter this inherent obligation, as the duty to terminate

⁴⁶ See *In re List and Others (Hostages Trial)*, 15 Ann. Dig. 632, 637 (U.S. Military Trib. at Nuremberg 1948).

⁴⁷ See Greenwood, 'The Relationship Between Jus ad Bellum and Jus in Bello', 9 *Review of International Studies* (1983) 221.

⁴⁸ Giladi, 'The Jus Ad Bellum/Jus in Bello Distinction and the Law of Occupation', 41 *ILR* (2008) 246.

⁴⁹ *Ibid.*, at 271.

⁵⁰ Bhuta, 'The Antinomies of Transformative Occupation', 16 *EJIL* (2005) 721, at 726.

is not contingent on an occupation's legal status. It is constitutive of its purpose. Recognition that the legal framework compels termination does, however, raise tactical questions about the role of negotiations and international law's contribution to the facilitation of this process.

4 The Necessity of Negotiations

Imseis tells that this process is frustrated by a tension between the legal prescriptions of the law of state responsibility and the political will to resolve the occupation through negotiation. The prevailing rule by law framework, described by Imseis, ensures that the occupation's termination has become contingent upon 'negotiation with a bad faith and infinitely more powerful occupant . . .'.⁵¹ This frustrates Palestinian aspirations. The inconspicuous role of international law within the formal peace process, from Oslo onwards, is now well-documented.⁵² It remains an open question as to whether Security Council Resolution 242 – which entrenches the land for peace formula and premises a two-state solution – is self-executing or provides the basis for future negotiations.⁵³ Regardless, calls for negotiations continue despite mounting surety that such appeals will go unheeded. Yet calls for negotiations should also be understood as a political necessity. They are an unavoidable facet, almost certainly required to navigate a post-conflict or post-occupation reality that the law of occupation does little to address.

In the *Namibia* Opinion, the ICJ concluded that 'the qualification of a situation as illegal does not put an end to it. It can only be the first step in an endeavour to bring the illegal situation to an end'.⁵⁴ Traditionally, occupation terminates when either the fortunes of war are altered and the occupying power no longer retains control of the held territory, through the conclusion of a peace agreement between the belligerents, or by the transfer of power to an Indigenous government.⁵⁵ Negotiations are inseparable from the termination process. This is by design, and it is so because states regularly deny their formal status as an occupying power. Compliance with the legal framework lags. And, commonly, the cessation of hostilities and the withdrawal process encompass numerous issues that require resolve beyond the terms of the occupation's conclusion. Within the Middle East, as applied to the Israeli-Palestinian conflict, negotiations have guided efforts to resolve competing claims and interests since at least the Peel Commission's inaugural proposal to partition Palestine in 1937. Put simply, law cannot displace diplomacy.⁵⁶

⁵¹ Imseis, *supra* note 3, at 1059.

⁵² Dajani, 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks', 32 *Yale Journal of International Law* (2007) 61.

⁵³ *Ibid.*, at 84.

⁵⁴ *Namibia* Advisory Opinion, 21 June 1971, ICJ Reports 16, para. 111.

⁵⁵ Roberts, *supra* note 12, at 47. See also Benvenisti, *supra* note 28, at 56.

⁵⁶ Ben-Naftali et al., *supra* note 9, at 612–613.

It is thus difficult to envision a satisfactory end to the conflict – whatever form this assumes – that does not require negotiation to implement. Imseis recognizes as much.⁵⁷ But the claim that repeated references to the necessity of negotiations limit the full application of international law suggests a singular conception of law’s purpose within a protracted conflict.⁵⁸ International law alone will not actualize the lofty promises of self-determination, statehood, peace and stability. Imseis notes that termination of South Africa’s occupation of Namibia, the Soviet Union’s presence in Afghanistan and Iraq’s control of Kuwait was not contingent upon negotiation. However, Turkey’s occupation of Northern Cyprus and Morocco’s presence in Western Sahara – prolonged occupations, subject to illegality determinations, and perhaps most analogous with the current case – are each adjudicated through comprehensive negotiation processes under international auspices. A useful, if underexplored, case study was formed when Libya withdrew from the Aouzou strip following the ICJ’s ruling that Chad held sovereignty over the occupied territory.⁵⁹ While the occupation’s termination was triggered by a legal determination, the withdrawal process was conducted under the auspices of a negotiated peace agreement.⁶⁰ The most likely alternative to negotiations is not legal compliance in accordance with the law of state responsibility; it is unilateralism. The experience of the 2005 Gaza disengagement shows the complexity that follows a unilateral withdrawal. Setting aside the question of whether Gaza remains under Israel’s effective control, Israel’s unilateral actions, Hamas’s subsequent control of the Gaza Strip and the ceaseless cycle of violence that has followed show that the afterlife of a prolonged occupation is visceral. We have seen that great instability follows unilateral withdrawals that occur before necessary governance structures are established.⁶¹ Furthermore, the objective of the law of occupation – that is, the preservation of the *status quo ante* – is not in complete alignment with the objectives of peace-making.⁶² While a discussion of how the emerging field of *jus post bellum* may stretch beyond its more common application to so-called transformative occupations and contribute to a framework to transition out of prolonged occupation and ensure a just peace is beyond the current scope, it is necessary to note that much must be resolved beyond the formal termination of foreign control.

Imseis is correct that constant calls for negotiations assume a fanciful posture, that they will preference an infinitely more powerful occupant whose conduct throughout a half-century of occupation exhibits a preference for permanence not resolution. In response, international legal argument’s persuasive value reflects a tactical choice.

⁵⁷ Imseis, *supra* note 3, at 1065.

⁵⁸ *Ibid.*, at 1065-1066.

⁵⁹ See *Case Concerning the Territorial Dispute (Libya v. Chad)* [1994] ICJ Rep 6.

⁶⁰ See Agreement Between the Great Socialist People’s Libyan Arab Jamahiriya and the Rep of Chad Concerning the Practical Modalities for the Implementation of the Judgment delivered by the International Court of Justice on 3 February 1994, www.peaceagreements.org/view/237.

⁶¹ Boon, ‘The Future of the Law of Occupation’, 46 *Canadian Yearbook of International Law* (2008) 107, at 119.

⁶² Stahn, ‘“Jus ad bellum”, “jus in bello” . . . “jus post bellum”? Rethinking the Conception of the Law of Armed Force’, 17 *EJIL* (2007) 921, at 936.

I suggest that an interpretation of the occupation framework that centres calls for termination around the principle prohibiting the acquisition of territory by force better positions international law to influence the negotiation process. While the force of an international legal argument alone will not compel this occupation's termination, it can mitigate the occupying power's inherent advantage by iterating a bright-line rule that has motivated the international community's most forceful interventions into this intractable conflict.

5 Tactics and Legal Capability

During the past half-century, in moments when Israeli-Palestinian relations command international attention, the role attributed to international law varies. It has been both central and peripheral, but it is rarely absent. If we accept that negotiations, diplomacy and politics cannot be discounted, it is prudent to ask how international law can provide an effective vocabulary to buttress efforts that facilitate the occupation's termination. The call to terminate occupation evidences an interpretative choice. Preferencing an illegality approach intended to position the precision of state responsibility ahead of the uncertainty of negotiations, Imseis suggests that the occupation's conclusion can be achieved by maximizing international law's influence.⁶³ This partially aligns with the Palestinian Authority's internationalization strategy.⁶⁴ But Palestinian officials seek to orientate the conflict as a legal matter by emphasizing Palestinian rights and documenting Israeli wrongs to modify, not supplant, the inequitable dynamic that has structured continual phases of gainless negotiations.⁶⁵

If the illegality approach is beset with feasibility challenges and if a management approach perpetuates foreign control, international law's most enduring contribution vests in the bright-line rules that it articulates and that illuminate the political engagements that structure much of the international community's response to the occupation and the broader conflict. In conclusion, I suggest that grounding calls to terminate prolonged occupation in the principle prohibiting the acquisition of territory by force offers a more efficacious means of motivating the international community to push for the occupying power's withdrawal. Appeals to the non-acquisition principle facilitate the formulation of a positive legal duty that is not contingent on an occupation's status. While individual violations of the occupation framework – like the development of settlements in contravention of Article 49(6) of the Fourth Geneva Convention – may produce diplomatic rebukes, they have thus far failed to motivate the international community to forcefully call for the occupation's termination. By grounding calls to withdraw in the non-acquisition principle, legal appeals emphasize a constitutive norm of the post-war legal order that is (i) reflective of international

⁶³ Imseis, *supra* note 3, at 1062.

⁶⁴ Abbas, 'The Long Overdue Palestinian State', *New York Times* (16 May 2011), available at <https://nyti.ms/3mtHA9C>.

⁶⁵ State of Palestine Negotiations Affairs Department, 'Negotiations and Internationalization' (2 May 2016), available at <https://bit.ly/2HEqFls>.

consensus in a way that an illegality determination is not and (ii) more likely to motivate diplomatic interventions if the occupying power consistently fails to advance efforts to terminate the occupation.

First, the international community has, since 1967, consistently held that Israel must withdraw from all occupied territory. At nearly every juncture in the conflict, alongside calls for negotiations, the international community has displayed near singularity in its reiteration of the non-acquisition principle. The Security Council debate preceding adoption of Resolution 242 featured constant affirmations that Israel must withdraw from the territory occupied in the June 1967 war. The Indian delegation's statement reflected broad consensus:

[A]n overwhelming majority of Member States of the United Nations . . . had reaffirmed the principle of non-acquisition of territory by military conquest and had supported the call for the withdrawal of Israeli armed forces to the positions they held prior to the outbreak of the recent conflict On this point there was universal agreement among the membership of the United Nations.⁶⁶

Nearly every participant that spoke during the Council debate prioritized the territorial withdrawal requirement or reiterated its independent status alongside calls for the termination of a state of belligerency.⁶⁷

Six years later, following the 1973 Yom Kippur war, Council members assumed a consistent stance. Calls for negotiations emphasized the need to cease the current hostilities.⁶⁸ Implementation of Resolution 242 was a related but separate condition. Council members again reiterated the territorial withdrawal requirement.⁶⁹ The series of General Assembly resolutions, adopted in the late 1970s, that Imseis cites as evidencing the Assembly's view that the occupation has become illegal, each affirms that 'the acquisition of territory by force is inadmissible under the Charter of the United Nations and that all territories thus occupied must be returned'.⁷⁰ In the accompanying debates, states called for negotiations but accentuated that the withdrawal of Israel from the occupied territory was a 'fundamental prerequisite'.⁷¹

⁶⁶ UNSC, 1382nd Meeting, UN Doc. S/PV.1382, 22 November 1967, para. 46.

⁶⁷ See statements by Syria (*ibid.*, paras 4, 148); Ethiopia (*ibid.*, para. 33); India (*ibid.*, para. 47); United Kingdom (*ibid.*, para. 51); United States (*ibid.*, para. 64); Nigeria (*ibid.*, para. 76); USSR (*ibid.*, para. 119); Brazil (*ibid.*, para. 127); Bulgaria (*ibid.*, para. 137); Jordan (*ibid.*, para. 153); Argentina (*ibid.*, para. 156, but also see *ibid.*, paras 157, 162–163); Japan (*ibid.*, para. 173); and Mali (*ibid.*, para. 189).

⁶⁸ UNSC, 1747th Meeting, UN Doc. S/PV.1747, 22 October 1973, paras. 123, 142.

⁶⁹ See statements by France (*ibid.*, para. 66); India (*ibid.*, paras 100, 103); Kenya (*ibid.*, para. 109); Panama (*ibid.*, para. 112); Indonesia (*ibid.*, para. 119); Peru (*ibid.*, para. 123); China (*ibid.*, para. 135); Sudan (*ibid.*, para. 145); Egypt (*ibid.*, para. 160); Guinea (*ibid.*, para. 165); and Yugoslavia (para. 179).

⁷⁰ *Ibid.*, Preamble.

⁷¹ UNGA, 82nd Plenary Meeting, UN Doc. A/32/PV.82, 25 November 1977, para. 77 (Turkey). Furthermore, see statements by Yemen (*ibid.*, paras 4, 8); Sudan (*ibid.*, para. 72); Turkey (*ibid.*, paras 75, 77); Sierra Leone (*ibid.*, para. 87); Bangladesh (*ibid.*, paras 94, 96); Tunisia (*ibid.*, paras 118, 123); Botswana (*ibid.*, paras 134, 136); Finland (*ibid.*, paras 142, 146); Swaziland (*ibid.*, paras 152, 156); USSR (*ibid.*, paras 163, 166); Cuba (*ibid.*, paras 183, 184); Japan (*ibid.*, paras 207, 208); Pakistan (*ibid.*, paras 212, 222); Cyprus (*ibid.*, paras 226, 227); Portugal (*ibid.*, paras 239, 240); Morocco (*ibid.*, paras 248, 253); Norway (*ibid.*, paras 284, 286); Chile (*ibid.*, para. 291); Somalia (*ibid.*, paras 294, 295); Columbia (*ibid.*, para. 311).

Annexation was universally denounced when the Knesset passed a Basic Law declaring that Jerusalem constituted Israel's complete and united capital. Security Council Resolution 476 began by affirming the 'overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967'.⁷² Resolution 478 held that Israel's actions violated international law, do not affect the application of the law of occupation and imposed non-recognition obligations.⁷³ Similar sentiments were expressed by the states that participated in the Council debate, with the exception of the United States which, at the height of the Carter Administration's diplomatic push, remained steadfast in its commitment to the Camp David process.⁷⁴

When President Trump recognized Israel's sovereign claim to the Golan Heights, the international community reiterated its opposition. Each member of the Security Council grounded their denouncement in the non-acquisition principle.⁷⁵ The previous year, the General Assembly overwhelmingly adopted a resolution in response to the Trump Administration's decision to recognize the Israeli claim to a united Jerusalem. The resolution, opposed by only nine states, began by reaffirming the inadmissibility of the acquisition of territory by force.⁷⁶ A diverse array of states express broad consensus, repeatedly accentuating the instructive role that the non-acquisition requirement assumes within their respective foreign policies.

Second, as the international community has coalesced around the norm prohibiting the forceful acquisition of territory, potential deviations from this norm have prompted many of the strongest interventions into the conflict. When, in late January 2020, United States President Donald Trump and Israeli Prime Minister Benjamin Netanyahu announced the political framework segment of the long-touted US Peace to Prosperity plan to end the Israeli-Palestinian conflict, the prospect of annexation was heightened.⁷⁷ Following three electoral cycles, Israel's two largest political parties – *Likud* and *Kahol Lavan* – signed a coalition agreement that further raised the likelihood that Israel would coordinate with US officials to annex segments of the West Bank.⁷⁸ As Israel began to formalize annexation by its self-imposed July deadline, international opposition amassed. Israel's annexationist objectives were pre-emptively denounced by the European Union, UN officials and numerous states.⁷⁹

⁷² SC Res. 476, 30 June 1980, para. 1.

⁷³ SC Res. 478, 20 August 1980, paras 2, 5.

⁷⁴ UNSC, 2245th Meeting, UN Doc. S/PC.2245, 20 August 1980, para. 104. But see also the East German statement which summarized the majority position that a 'just and durable peace settlement in the Middle East cannot be achieved if the United Nations decisions urging Israel's withdrawal from the territories illegally taken and occupied in 1967 are not respected and implemented' (*ibid.*, para. 99).

⁷⁵ UNSC, 8495th Meeting, UN Doc. S/PV.8495, 27 March 2019. See the statements of Kuwait (*ibid.*, at 5); United Kingdom (*ibid.*, at 5); Poland (*ibid.*, at 6); Russia (*ibid.*, at 7); Peru (*ibid.*, at 8); Dominican Republic (*ibid.*, at 9); Belgium (*ibid.*, at 9); Germany (*ibid.*, at 10); South Africa (*ibid.*, at 11); China (*ibid.*, at 11); Equatorial Guinea (*ibid.*, at 12); Indonesia (*ibid.*, at 13); France (*ibid.*, at 14).

⁷⁶ GA Res. ES-10/L.22, 19 December 2017, Preamble.

⁷⁷ White House, *Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People* (January 2020), available at <https://bit.ly/34CNqiz>.

⁷⁸ Landau, 'Israel Annexation Explained: What is Netanyahu Planning for the West Bank and What Does It Mean', *Haaretz* (26 May 2020), available at <https://bit.ly/35Bh4V2>.

⁷⁹ See Landau, 'EU Members at UN Security Council: Israeli Annexation Would Violate International Law', *Haaretz* (20 March 2020), available at <https://bit.ly/37YQqi7>.

These denouncements, however, exceed the customary calls for restraint and negotiations that reflexively follow actions that are perceived to threaten the regional status quo. Germany, a reliable Israeli ally, issued a joint statement with the Palestinian Authority (PA) that condemned annexation as a clear violation of international law while noting the PA's view that unilateral actions by Israel would compel the termination of all existing cooperation agreements.⁸⁰ The EU's Foreign Affairs Council openly discussed sanctions.⁸¹ Several member states advocated for a hard-line approach to Israeli recalcitrance, which included cancelling funding and cooperation projects, the suspension of academic and research partnerships and consideration of punitive measures including economic sanction and the formal recognition of Palestinian statehood.⁸² British Prime Minister Boris Johnson, writing in Hebrew, published a front-page op-ed in Israel's largest daily newspaper that denounced annexation and pledged non-recognition. In each instance, states and officials avoided vague diplomatic language and instead identified potential measures that were presented as a response to Israel's pending violation of the norm prohibiting the forceful acquisition of territory.⁸³

Israel's annexation plans have been indefinitely suspended following agreement to normalize relations with the United Arab Emirates. Though formalization of Israeli-Emirati relations was presented as contingent upon annexation's abandonment (a questionable proposition), the international response to the annexation pledge had already begun impeding Israel's efforts to claim swaths of the West Bank.⁸⁴ Israel failed to act by its July deadline as officials in Jerusalem struggled to contain international opposition. Even the Trump Administration, which had signalled support for annexation through the Peace to Prosperity plan, began softening its backing of Israeli unilateralism.⁸⁵ Though we should generally be cautious against oversubscribing international law's role in affecting state behaviour, as Oona Hathaway and Scott Shapiro have demonstrated, when international law is most effective it does not 'induce states to act contrary to incentives; it changes those incentives themselves'.⁸⁶

Since at least the latter half of the 20th century, the international community has steadfastly supported the principle prohibiting the acquisition of territory by force. If the persuasiveness of an argument resides in the willingness of individuals to act in

⁸⁰ Federal Foreign Office, 'Joint Statement of the 5th German-Palestinian Steering Committee' (19 May 2020), available at <https://bit.ly/2HuLUqn>.

⁸¹ Landau, 'EU Discusses Sanctions Against Israeli Annexation That Will Not Require Consensus', *Haaretz* (15 May 2020), available at <https://bit.ly/3jzetzF>.

⁸² Holmes, 'European Ministers Seek Options to Stop West Bank Annexation', *The Guardian* (14 July 2020), available at <https://bit.ly/2HvFdV2>.

⁸³ See 'Global Reactions to Israel's Imminent Annexation Plans', *Al Jazeera* (1 July 2020), available at <https://bit.ly/3kAUzFJ>.

⁸⁴ Halbfinger, 'Netanyahu's Annexation Day Arrives, but All That Emerges is Delay', *New York Times* (1 July 2020), available at <https://nyti.ms/2HJGdUU>.

⁸⁵ Halbfinger and Crowley, 'Mixed Signals on Israeli Annexation Reflect Split Among Officials', *New York Times* (22 June 2020), available at <https://nyti.ms/34yBdfa>.

⁸⁶ Hathaway and Shapiro, 'International Law and its Transformation through the Outlawry of War', 95 *International Affairs* (2019) 45, at 46.

accordance with the dictates of that argument, then reiterating that prolonged occupation discounts a cornerstone of the post-war order can draw upon effective appeals to the non-acquisition principle that motivated the international community's response to formal annexation.⁸⁷ Although legal argument alone will not compel an occupation's termination, it can effectively discount ambiguous readings of the law of occupation that claim that international law envisages the oxymoronic and facilitatory notion of indefinite occupation. Amidst Beijing's continued aggression in the South China Sea and further Russian entrenchment in Crimea, grounding the legal requirement to terminate occupation in the non-acquisition principle can refute emerging claims to the notion of defensive conquest, cited by the Trump Administration when recognizing 'Israeli sovereignty over the Golan Heights' and that will now likely be cited as a precedent by states with territorial ambitions elsewhere.⁸⁸ And, it can reinforce international efforts to disincentivize the use of force by insisting that it is the fact, not the nature, of foreign control that compels termination.

The law of occupation rests at an interpretative crossroads. Ardi Imseis has identified an important tension between the legal and political responses to Israel's occupation of the OPT. But prominent engagements with this framework, discussed throughout, often fail to link the norm of temporality with the objective of termination. This undermines efforts to redress challenges posed by prolonged occupation. As with Imseis's formulation, the prohibition of the acquisition of territory by force may contribute to an illegality assessment. However, unless termination is understood as a positive legal duty that is triggered upon the imposition of foreign control, this maintains a structure in which it is the violation of the norm that compels termination and not the norm itself. Moving the non-acquisition principle from the background to the forefront positions a bright-line rule to maintain the distinction between occupation and conquest without requiring a formal finding of illegality that will strain the boundaries of legal capability. By asking less of international law, we may increase its capacity to do more.

⁸⁷ Scott, 'International Law as Ideology: Theorizing the Relationship Between International Law and Politics', 5 *EJIL* (1994) 314, at 317.

⁸⁸ Liebllich, 'The Golan Heights and the Perils of "Defensive Annexation"', *Just Security* (4 April 2019), available at <https://bit.ly/37LJRZJ>.