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Unlawful Occupations? Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms

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Abstract

In light of the United Nations (UN) General Assembly request on the legality/illegality of Israel's occupation of the occupied Palestinian territories (oPt)/State of Palestine and the existence of several occupations elsewhere that are or will be prolonged, this contribution looks to address the legality of occupations under the rules of state responsibility, including for serious breaches of peremptory norms (particularly the prohibitions on annexation, denial of the right to self-determination, and racial discrimination and apartheid). The article engages the discourse of various UN mechanisms in that regard, as well as the scholarly discourse. It stresses the importance of the separation and co-applicability of both IHL (jus in bello) and the law on the use of force (jus ad bellum) in such situations. Further, it argues against a discourse that entertains shifting duties and obligations in such situations which could, in turn, benefit an Occupying Power and provide leeway prolonged occupations which cross further into the occupation-to-annexation threshold. The article then discusses the importance of assessing the legality/illegality of occupations, including for serious breaches of peremptory norms, and the subsequent legal consequences for the Occupying Power and third States. As such, it discusses the occupation-to-annexation paradigm and the findings of international bodies on the situation in the oPt/State of Palestine.

Key words

international humanitarian law; occupation; Palestine; Israel; International Court of Justice.

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1 Introduction

The idea for this paper came several years ago around 2015 while I was working in and on Palestine. In its beginnings, the idea was to: *firstly,* discuss the legality of 'prolonged' (long-term) occupations under international humanitarian law (IHL);[1] and, *secondly,* to discuss the legality of occupations under the rules of state responsibility for serious breaches of peremptory norms of international law. As for the former, I felt it was an interesting, but unnecessary exercise.[2] As for the latter, I didn't feel it was anything extraordinary. It was simply addressing whether, in line with the rules on state responsibility, a situation of occupation could be considered 'unlawful' (or, synonymously, 'illegal') when it gives rise to serious breaches of peremptory norms. If the serious breaches are attributable to a state vis-à-vis its occupation, wouldn't the rules on state responsibility demand that said occupation end?[3]

While working in Palestine, I heard peers brand the occupation as unlawful on several occasions. Others were cautious, concerned that if an occupation was found to be unlawful, then IHL would no longer apply. This was expressed to me in clear terms, especially by third state representatives (including their legal advisers, surprisingly). There seemed to be confusion between the rules and how they interact in situations of occupation. This confusion has crept into the discourse and may, perhaps, have something to do with the way we are programmed. From a Palestinian perspective, generally speaking, the legal frameworks that we operate within have demonstrated an inability to fully encapsulate the situation of historic Palestine and its people.[4] The piecemeal treatment of addressing international law violations (by international

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[1] Namely, the occupation of '1967' Palestine (*i.e.* the oPt/State of Palestine); and as opposed to temporary, short-term occupations.

[2] Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84:1 *American Journal of International Law* 44; Iain Scobbie, 'Fourth Geneva Convention: Why the International Court Got It Wrong Substantively and Procedurally', *EJIL: Talk!* (16 June 2015), https://www.ejiltalk.org/prolonged-occupation-and-article-63-of-the-fourth-geneva-convention-why-the-international-court-got-it-wrong-substantively-and-procedurally/. However, it has been argued that occupations can be 'unlawfully prolonged'. Valentina Azarova, 'Israeli's Unlawfully Prolonged Occupation: Consequences under an Integrated Legal Framework' *European Council on Foreign Relations* (June 2017). http://www.ecfr.eu/publications/summary/israels_unlawfully_prolonged_occupation_7294.

[3] It was drafted in a form of a 'report' by a colleague and myself for an international NGO operating in Palestine. Large sections of the first part of the report were nixed for various reasons and the second part became the focus. Once a draft was circulated, the home office decided not to move forward due to the report's 'tone, content, and format'. My request for substantive feedback and reasoning was ignored, and I had little to no support from colleagues to further develop the draft. Following a separate request, I was given ownership over the draft. My supervisors and peers expressed serious concerns over, and challenging, discussions of certain peremptory norms, especially racial discrimination and apartheid. The censoring of the report (amongst other publications) was the greatest factor that led to my resignation.

[4] Birzeit University, Institute of Law, 'Advocating for Palestinian Rights in Conformity with International Law Guidelines' (May 2013), https://fada.birzeit.edu/bitstream/20.500.11889/53/1/986afcc6c9.pdf.

organizations, NGOs, and so on) constrains advocates to operating in a limited and reactionary fashion. To some extent, this article operates within those constraints.[5] Neither international law alone nor dealing with '1967' alone will provide the Palestinians emancipation, let alone justice and accountability for the historical wrongs faced from colonialism and imperialism.[6] However, this should not be seen as negating, and even undermining, Palestinians turning to international mechanisms and employing the underlying legal doctrines.[7] It is but semblance of justice and accountability, no matter how small, and for the Palestinians to debate between themselves.

As such, Palestinian and allied advocates began exploring the extent of those constraints with regard to third state and state party responsibility. Yet, even within those constraints, third states[8] – especially from the West/Global North– are averse to accepting legal determinations that increase obligations, especially for Israel. However, in light of Ukraine's similarly unfortunate situation, commencing with Russia's occupation of Crimea in 2014 and continuing today, and against the backdrop of several occupations elsewhere, it is a fitting time to discuss the legality and legal consequences of occupations that are prolonged such as Palestine, or will likely be prolonged such as Ukraine.[9] The idea was that if a situation, which happens to be one of occupation, was unlawful for its serious breaches of peremptory norms, it would mean increased obligations towards reversing the situation, which is to say, ending the occupation. Such occupations would cross the occupation threshold and become an annexation, whether or not they are prolonged. These issues have increased relevance

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[5] This piece focuses solely on Israel's occupation of '1967' Palestine, and, within those constraints, does not engage a more holistic approach concerning historic Palestine and the Palestinian people ('1948' Palestine and Palestinians, refugees, etc.). In particular, it does not fully engage the situation for what it is and what international law has failed to holistically address – 'settler-colonialism'. See, for example, Markus Gunneflo, 'Settler-colonial and Anti-colonial Legalities in Palestine' (2018) 20 *Palestine Yearbook of International Law* 171; Mazen Masri, *The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State* (Hart, 2017).

[6] Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford, 2019).

[7] Ata Hindi, 'The "Visible" and "Invisible" College of Legal Advisers' (2019-2020) 22 *Palestine Yearbook of International Law* 217.

[8] This is largely focused on third *states*, although parts are relevant for third *parties* (international organizations, businesses, etc).

[9] The situations in Palestine and Ukraine offer interesting contrasts and similarities. What is referred to as '1967' Palestine (*i.e.* the occupied Palestinian territories (oPt) or 'State of Palestine') has been occupied for over five decades, while Ukraine has experienced two waves of occupation since 2014 and 2022. Palestine is distinct in the sense that its occupier is a settler-colonial entity-turned-state. With respect to Palestine, the Global North/Western-dominated legal framework understands Palestine as being occupied by a neighboring state, Israel, both within historic Palestine. While the occupation of Palestine has been prolonged, the occupation of Ukraine is more recent where the OP – Russia – has clearly demonstrated long-term ambitions. Both states have been subject to OPs treating the territory as their own, like many other existing prolonged occupations, and both have suffered from serious breaches of peremptory norms by their OPs, particularly annexation.

given that the United Nations (UN) General Assembly (UNGA) has recently tasked the International Court of Justice (ICJ) with a request to answer a variation of this question, specifically in the Palestinian context. The ICJ's answer will have significant repercussions for international law in situations of occupation, past, present, and future.[10] This contribution addresses only specific aspects of the question put to the ICJ, while also examining broader issues on determining an occupation's legality.

This is not an attempt to argue for a new approach to IHL, occupation law, or international law applicable to situations of occupation. In many ways, much of the discourse pertaining to the oPt/State of Palestine is already doing that, the merits and flaws of which will be discussed. These assessments stray away from a traditional, doctrinal analysis and distract from the urgency of assessing the occupation's legality based on serious breaches of peremptory norms. Thus, while there may be some existing and potential worthwhile endeavors, the contemporary necessity for legal action from offending and third States still demands a turn to doctrine (and critique thereof). Further, some assessments have explored questionable and, at times, risky contours to the law applicable to situations of occupation, which should be altogether avoided. Overall, this contribution contends that if an occupation gives rise to serious breaches, then the situation should be considered unlawful outright. The serious breaches can only end by ending the occupation. That is to say, the serious breaches would not occur sans the occupation. The peremptory norms are namely the prohibitions on the forcible acquisition of territory (annexation), the denial of the right of peoples to self-determination, racial discrimination, and apartheid, and possibly others.[11]

Part 2 of the article discusses recent developments on Palestine, including at the United Nations and drawing from the scholarly discourse. Part 3 discusses IHL specifically and the notion of prolonged occupation, looking at the fundamental tenets as drawn from occupation law and the problematic discourse on shifting duties and obligations. Part 4 assesses the legality of occupations, including with regard to serious breaches of peremptory norms, by identifying the peremptory norms and then discussing the legal consequences. Part 5 discusses the situation in the oPt/State of Palestine, zeroing in on the occupation-to-annexation paradigm, and then discussing

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[10] Here, 'occupation law' (or 'law of occupation') refers to the body of IHL rules applicable to situations of occupation, as opposed to *all* international law applicable to situations of occupation.

[11] Which may include, for example, certain IHL rules, under the argument that certain IHL rules may qualify as peremptory international law norms. Ata Hindi, 'Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms' (2023) 19:2 *Loyola University Chicago International Law Review* 127.

the findings of international bodies on various international law violations that would amount to serious breaches of peremptory norms.

2 Recent Developments on Palestine and the Legality Discourse

This section will first discuss recent UN developments on Palestine and the legality of the occupation, from UN-mandated reports to the recent UNGA request for an ICJ advisory opinion. Second, it considers the scholarly discourse on the legality of occupations generally and Palestine specifically.

2.1 Recent United Nations Developments

On 30 December 2022, the UNGA requested an advisory opinion from the ICJ as follows:

> 18. *Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
>
> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?[12]

Civil society has been pushing for this sort of question for years.[13] In many ways, the question seemed to be an attempt to cover all possible inquiries, assuming that the

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[12] UNGA Res. 77/400, 14 November 2022, para. 18. For the discussions therein, see UN Doc. A/77/PV.56 (resumed).

[13] The originally intended report on which this writing is based included the idea of an ICJ advisory opinion. From the academic discourse, *see, e.g.,* John Dugard, 'Lifting the Guise of Occupation and Recourse to Action Before the ICJ and ICC' (2014) 17 *Palestine Yearbook of International Law* 9, at 18 (2014); Allegra Pacheco, 'The Israeli Supreme Court Case on Israeli Quarrying Licenses in the West Bank: Why a Second ICJ Advisory Opinion on Palestine is Needed' (2014) 17 *Palestine Yearbook of International Law* 57, at 81. In his August 2007 report, former UN special rapporteur John Dugard expressed the idea that the ICJ should assess the legal consequences of the prolonged occupation and its characteristics of apartheid and colonialism. John Dugard, 'Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/62/275, 17 August 2007, para. 8. Former UN special

more asked, the better. Ideally, a more appropriate variation on this question could have delineated a specific legal framework – the rules on state responsibility, including language on peremptory norms, and identifying those norms of particular concern[14] – and subsequent legal consequences for Israel, as the Occupying Power (OP), as well as third states. Of course, the qualification of a situation as unlawful is but a first step to bringing an unlawful situation to an end.[15] Thus, the ICJ was essentially tasked with assessing the legality of Israel's occupation (not a piecemeal analysis of Israel's violations) and the subsequent legal consequences. Assessing the occupation's legality was at the root of the question and not to be overlooked, although there are different ways about going about it.

The request rode the momentum of two recent UN-mandated reports concluding that Israel's occupation of the 'Palestinian territories' is unlawful. These reports include those of the current *Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Francesca Albanese, and the recently established *Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel*. Both reports built upon the analysis of Albanese's immediate predecessor, Michael Lynk. Building upon the work of his predecessors and some academic discourse, Lynk asked 'whether an [OP] – whose authority as occupant may have initially been lawful – can cross a bright red line into illegality because it is acting contrary to the fundamental tenets of international law dealing with the laws of occupation'.[16] He referred to this as '[a]n unresolved question in international

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rapporteur Richard Falk made a similar request that '[e]fforts be undertaken to have the [ICJ] assess allegations that the prolonged occupation of the West Bank and East Jerusalem possess elements of 'colonialism', 'apartheid' and 'ethnic cleansing' inconsistent with [IHL] in circumstances of belligerent occupation and unlawful abridgements of the right of self-determination of the Palestinian people'. Richard Falk, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/HRC/16/72, 10 January 2011, para. 32(b).

[14] While the ICJ has exercised restraint in identifying peremptory norms, it has embraced some discussion on *erga omnes* obligations, which are inherently related (further discussed below).

[15] James Crawford, *State Responsibility: The General Part* (CUP, 2013) 389.

[16] Michael Lynk, 'Prolonged Occupation of Illegal Occupant?' *EJIL: Talk!* (16 May 2018)), https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/. This is under the assumption that the initial use of force is lawful. See also Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967-2020' (2020) 31 *European Journal of International Law* 1055, at 1073; Ralph Wilde, 'The Illegality of the Israeli Occupation of the Palestinian West Bank (including East Jerusalem) and Gaza: What the International Court of Justice Will Have to Determine in its Advisory Opinion for the United Nations General Assembly', *Opinio Juris* (23 December 2022) [Wilde (2022a)], http://opiniojuris.org/2022/12/23/the-illegality-of-the-israeli-occupation-of-the-palestinian-west-bank-including-east-jerusalem-and-gaza-what-the-international-court-of-justice-will-have-to-determine-in-its-advisory-opinion-for-th/; Ralph Wilde, 'Is the Israeli Occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'Legal' or 'Illegal' in International Law?' Legal Opinion (29 November 2022) [Wilde (2022b)], https://www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_opt_legal_opinion.pdf.

humanitarian law'.[17] Lynk's conclusion was rather straightforward: 'a purposive reading of these [IHL] instruments, together with the foundational tenets of international humanitarian and human rights law, leads to the conclusion that an [OP] whose intent is to turn occupation into annexation and conquest becomes an illegal occupant'.[18] He introduced a four-part test 'to determine whether an occupier is administering the occupation in a matter consistent with international law and the laws of occupation, or whether it has exceeded its legal capacity and its rule is illegal'.[19] The four-part test include the 'fundamental tenets of international law dealing with the laws of occupation':

(i) an OP cannot annex any of the occupied territory;
(ii) an occupation is inherently temporary, and the OP must seek to end the occupation as soon as reasonably possible;
(iii) during the occupation, the OP is to act in the best interests of the people under occupation; and
(iv) the OP must act in good faith.[20]

Overall, Lynk concluded that a determination in which an OP 'has breached *one or more* of the fundamental principles – has become an illegal occupant would elevate the duty on the international community to bring the occupation to a successful and speedy close'.[21] Breaching one of these tenets would seem sufficient to determine illegality. The test is not strictly IHL (*jus in bello*)-based; each part is a 'principle' of international law applicable to situations of occupation. While Lynk included the prohibition against annexation as a principle, he did not explicitly assess legality based on an OP's serious breaches of peremptory norms, annexation or otherwise.

A few years later, Albanese built on Lynk's work.[22] Drawing from Lynk, Albanese explained that '[t]he Israeli occupation is illegal because it has proven not to be temporary, is deliberately administered against the best interests of the occupied population and has resulted in the annexation of occupied territory, breaching most

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[17] Lynk (2018). However, this is a question that goes beyond IHL (*jus in bello*) alone, as Lynk's analysis provides.

[18] Ibid. The IHL instruments referred to are Hague Convention IV, the Fourth Geneva Convention, and Additional Protocol I.

[19] Michael Lynk, 'Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/72/556, 23 October 2017, at 9.

[20] Ibid, 9-13.

[21] Lynk (2018) (emphasis added).

[22] Francesca Albanese, 'Situation of Human Rights in the Palestinian Territories Since 1967' UN Doc. A/77/356, 21 September 2022, paras. 10(a)-(b). Albanese opines that analyses on Israeli apartheid 'must address the experience of the Palestinian people in its entirety and in their unity as a people, including those who were displaced, denationalized and disposed in 1947-1949'. Ibid, para. 10(a). Further, the recent focus on apartheid 'misses the inherent illegality of the Israeli occupation of the Palestinian territory'. Ibid, para. 10(b).

obligations imposed on the occupying Power'.[23] Separately, drawing from Ardi Imseis, Albanese added that the occupation's illegality 'stems from its systematic violation of at least three peremptory norms of international law: the prohibition on the acquisition of territory through the use of force; the prohibition on imposing regimes of alien subjugation, domination and exploitation, including racial discrimination and apartheid; and the obligation of States to respect the right of peoples to self-determination'. [24] Albanese further added that the occupation 'constitutes an unjustified use of force and an act of aggression'.[25] More succinctly, these findings read as violations of four, possibly five, serious breaches of peremptory norms: the prohibitions on annexation, denial of the right to self-determination, racial discrimination, apartheid, and possibly aggression (which annexation would fall under). While Albanese scratched the surface, she stopped short of furthering her assessment on legality based on the occupation's serious breaches of peremptory norms.

The UN commission reached the same conclusion, albeit differently. It explained that '[t]here are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law due to its permanence and the Israeli Government's de-facto annexation policies'.[26] For the commission, '[i]t is unclear in international law and practice when a situation of belligerent occupation becomes unlawful'.[27] Accordingly, it is unclear whether and if the occupation is *now* unlawful as opposed to before, if unlawfulness commenced at a particular time in the past, or if it was always unlawful. Drawing from Lynk and others, the commission outlined its understanding of several 'principles' that may be used to determine an occupation's legality.[28] These include 'whether sovereignty and title are not vested in the occupying power, the occupying power is entrusted with the management of public order and civil life in the occupied territory, the people under occupation are the beneficiaries of that trust in view of their right to self-determination, and the

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[23] Ibid, para. 10(b). The reasoning is similar to, but not entirely in line with, Lynk's test.

[24] Ibid.

[25] Ibid. Annexation, amongst other acts, is considered an 'act' of aggression. See UNGA Res. 3314 (XXIX), 14 December 1974, art. 3(a) (prohibiting 'military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof').

[26] Press Release, UN HRC, 'Commission of Inquiry Finds That the Israeli Occupation is Unlawful Under International Law' (20 October 2022), https://www.ohchr.org/en/press-releases/2022/10/commission-inquiry-finds-israeli-occupation-unlawful-under-international-law. See also James Crawford, *Brownlie's Principles of Public International Law* (OUP, 9th ed., 2019) 212.

[27] 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel', UN Doc. A/77/328, 14 September 2022, para. 8.

[28] Ibid, para. 10.

occupation is temporary'.[29] The commission then shifted its analysis to focus on two 'indicators' to determine legality, being 'the permanence of the Israeli occupation … and actions amounting to annexation'.[30] The shift from 'principles' to 'indicators' transpired without elaboration of either as determinative criteria. It then found it necessary to distinguish between de jure and de facto annexation,[31] stressing the importance of distinguishing between the two while referencing language from the ICJ *Wall* advisory opinion that makes no explicit reference to, let alone define, either term.[32] The commission employed its own definitions: de jure annexation is 'the formal extension of a State's sovereignty into a territory recognized under its domestic law (but not necessarily under international law)', and de facto annexation 'is a term that was used by the [ICJ] in its advisory opinion'.[33] For the latter, the commission roughly relied on Lynk's analysis, in that:

> [de facto] annexation implies a gradual or incremental process in which it is not always clear at what point the threshold has been crossed. The transition involves establishing 'facts on the ground' that are intended to be irreversible and permanent while avoiding any formal proclamation in order to evade diplomatic and political repercussions.[34]

Based on the indicators, the commission 'finds that there are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law owing to its permanence and to actions undertaken by Israel to annex parts of the land de facto and de jure'.[35] Its conclusion was somewhat haphazard, particularly in relation to third state and party responsibility, with broad reference made to Geneva Conventions (GCs) Common Article 1 (CA1) obligations – to respect and ensure respect for the GCs – by non-recognition of violations, and non-aid and non-

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[29] Ibid.

[30] Ibid, para. 11. This is similar to Lynk's occupation-to-annexation language. Lynk (2018).

[31] Ibid, para. 12.

[32] Ibid (citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004, 136, paras. 74-78). The specific reference is found in para. 121, where the ICJ 'considers 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, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation'.

[33] Ibid.

[34] Ibid, para. 13. The 'facts on the ground' purview has largely been the language used by legal and policy stakeholders operating in/on Palestine. See Al-Haq, 'Questions and Answers: Israel's De Facto Annexation of Palestinian Territory' (25 May 2021), https://www.alhaq.org/publications/18430.html; International Commission of Jurists, 'The Road to Annexation: Israel's Maneuvers to Change the Status of the Occupied Palestinian Territory: A Briefing Paper' (2019), https://www.icj.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf.

[35] Independent International Commission of Inquiry (2022), para. 75.

assistance to their commission as drawn from the *Wall* advisory opinion,[36] and the obligation to investigate and prosecute grave breaches.[37] Unsurprisingly, the commission affirms the indicators have taken place. The Commission came close to, but also stopped short of, taking the further step of assessing whether the occupation is unlawful due to its serious breach of a peremptory norm, the prohibition on annexation, let alone other serious breaches.

All three legality assessments – Lynk, Albanese, and the commission – were similar but not entirely in sync. Broadly speaking and in their respective orders, Lynk covered non-annexation, temporariness of occupation, best interests of occupied populations, and good faith. Albanese covered temporariness, best interests, annexation, and breaching most OP obligations. The commission covered the OP not asserting sovereignty or title, OP acting as trustee of public order and civil life, the occupied territories as being the beneficiaries of the trust and having self-determination, and temporariness. The tests seem largely IHL (*jus in bello*)-based, although they also include non-IHL (*jus ad bellum*) rules such as those pertaining to annexation, self-determination, and others. The commission summarized its understanding of the test drawn up by Lynk and others but shifted its focuses to the indicators, being permanence and annexation. In that sense, the various tests and indicators may be informative.

When treated separately, acting contrary to these fundamental tenets mentioned would amount to (mostly) singular violations. However, when grouped together, they are seen not as disconnected violations, but as all together creating an unlawful situation. The three assessments are inconsistent, with each employing diverse determinative criteria and shifting between the *jus in bello* and *jus ad bellum*. One may feel the need to address these sometimes nuanced legal differences. Yet, the various criteria would probably better serve as non-exhaustive, non-cumulative factors in determining legality. Of the three, the commission's approach stands out for zeroing in on the occupation-to-annexation paradigm through its indicators. However, the key elements could have simply included whether there is an occupation and whether the OP has taken measures to annex the territory through its occupation. This would address whether the occupation-to-annexation threshold has been crossed and, if so, qualify the situation as unlawful by way of the occupier's serious breach of at least that peremptory norm. As discussed later, the occupation-to-annexation threshold does

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[36] Ibid, para. 89.

[37] Ibid, para. 90, and the recommendations in paras. 91-95. As discussed below, the expansive nature of third state and party responsibility for IHL violations has developed over time to include demands similar to, but not completely in line with, those required for serious breaches of peremptory norms.

not mean that the latter replaces the former and it is no longer a situation of occupation. Moreover, what is important is to identify whether the OP has taken steps that would amount to annexation. What has been referred to as *de jure* annexation is relatively straightforward, as is the case of East Jerusalem. What has been referred to as *de facto* annexation is problematic because it creates an ambiguous threshold. Regardless of this differentiation, the fact that Israel has already 'formally' annexed East Jerusalem would mean that it has crossed the threshold, even if it is only part of the oPt. Further, as Hoffman explains, '[a]nnexation presupposes the effective occupation of the territory in question and the clear intention to appropriate permanently'.[38] As such, certain acts by the OP should be identified as amounting to annexation regardless of an East Jerusalem-like legislative act or declaration. These would include, for example, the expansion and maintenance of the settlement enterprise and the construction of the Wall.[39]

Overall, all three forwent the opportunity to assess whether the situation is unlawful by way of the occupation's serious breaches of peremptory norms, especially the prohibition on annexation. The ICJ – and others engaged in the discussion – should not miss the opportunity to assess the legality of the occupation based on its serious breaches of peremptory norms and the legal consequences. Whether an occupation is legal should firstly be determined based on the situation the OP creates regarding its peremptory norm obligations.

2.2 Scholarly Discourse

As mentioned, the idea of seeking an ICJ advisory opinion on the occupation's legality is not new. Similarly, there has been scholarly discourse on an occupation's legality and, more specifically, the Israeli occupation's legality. As noted by Lynk, Israeli scholars have, in particular, taken part in this discourse.[40]

Eyal Benvenisti has suggested that 'an occupation regime that refuses earnestly to contribute to efforts to reach a peaceful solution should be considered illegal. Indeed, the failure to do so should be considered outright annexation'.[41] The

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[38] Rainer Hofmann, 'Annexation' *Max Planck Encyclopedia of Public International Law* (2020), para. 1.

[39] ICJ Wall Advisory Opinion (2004), para. 121.

[40] It should be said here that, unfortunately, while many aspects of this work are important, Israeli scholars have been able to build their scholarship and find willing engagement in considerably greater fashion than their Palestinian counterparts. This is an unfortunate reality that is overlooked in the international legal academy.

[41] Eyal Benvenisti, *The International Law of Occupation* (OUP, 2012) 245.

occupation would cross the occupation-to-annexation threshold by its failure to end the occupation. Benvenisti has further added that:

> no such claim of illegality would be proper as long as the occupant's conditions for peaceful settlement of the conflict are motivated by reasonable security interests … any measure aimed at creating new hurdles to the negotiations by changing the status quo in the occupied areas … is also tainted with illegality.[42]

As the situation in the oPt/State of Palestine suggests – not unlike other several occupations – arguments on the basis of security interests can be farcical, with peculiar standards advanced with the goal of prolonging the occupation.

Largely inspiring Lynk's test and others thereafter, Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli posited their arguments on an occupation's legality based on violations of the normative regime's basic tenets,[43] being: (a) occupations don't confer title; (b) occupations are obligated to acts as trustees on behalf of the occupied population; and (c) occupations are temporary, not indefinite.[44] Gross explained that:

> the idea of 'illegal occupation' does not imply that the norms binding occupiers cease to apply, but rather that once an occupier no longer manages the territory in accordance with its core principles (that it is a temporary regime that does not grant sovereignty and must be managed for the benefit of the local population) the occupation itself becomes illegal.[45]

The tenets are largely IHL (*jus in bello*)-based. Yael Ronen's earlier contribution posited a different approach.[46] Ronen remarked that 'an occupation may be considered illegal if it involves the violation of a peremptory norm of international law that operates *erga omnes* and is related to territorial status'.[47] These are occupations that 'are primarily achieved through violation of the prohibition on the use of force, or maintained in violation of the right to self-determination'.[48] Ronen shifted from *jus in bello* to *jus ad bellum* and comes closest to tackling the occupation-to-annexation paradigm. The

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[42] Ibid, 245-246.

[43] Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551.

[44] Ibid, 559-560.

[45] Aeyal Gross, 'Writing "The Writing on the Wall"' (2018) 6:2 *London Review of International Law* 303, at 303-304. As explained later, this also contends what should be a straightforward conclusion in that regardless of an occupation's determined illegality, international law applicable to situations of occupation continues to apply. See Aeyal Gross, *The Writing on the Wall* (CUP, 2017).

[46] Yael Ronen, 'Illegal Occupation and its Consequences' (2008) 41:1-2 *Israel Law Review* 201. Ronen also includes a list of past 'illegal occupations'.

[47] Ibid, at 244, 204-211.

[48] Ibid, at 244.

condition that it should be related to territorial status at first glance may be considered moot because an occupation that involves serious breaches of peremptory norms will likely be related to an OP's territorial ambitions. However, this this is not always the case, for instance if the peremptory norm in serious breach is racial discrimination or apartheid and may not necessarily have a nexus to territorial status.

Susan Power has organized the arguments into two (possibly three) categories: *jus ad bellum*, *jus in bello*, and peremptory norms.[49] Yet, much of the discourse is not organized, instead borrowing from a combination of rules from *jus ad bellum* and *jus in bello*, with rare deviation into peremptory norms analysis. The peremptory norm analysis by Imseis and, to an extent, Ronen, is convincing, as is the language of former UN-special rapporteurs John Dugard and Richard Falk. Ralph Wilde similarly posits peremptory norm arguments on a rule-by-rule basis.[50] There is noteworthy debate as concerns this categorization and the combination of rules between the two (or three) categories. However, the essential question that should be addressed is whether the occupation gives rise to serious breaches of peremptory norms, therefore creating an unlawful situation that can only be reversed by ending the occupation. Would Israel be able to commit serious breaches of peremptory norms – annexation, denial of the right to self-determination, racial discrimination, and apartheid – sans the occupation of Palestine? Would Russia in Ukraine? Other such situations? The answer is no.

3 International Humanitarian Law and Prolonged Occupation

Before assessing the legality of occupation vis-a-vis the rules on state responsibility and based on serious breaches of peremptory norms, an IHL-centered discussion is warranted. More specifically, the discourse on prolonged as opposed to temporary occupation is examined to underline that occupations that *are* prolonged or occupations that *will be* prolonged should not be seen as distinct legally. An occupation's duration has been prominent in the abovementioned and similar assessments, shaping the various criteria used. In light of this, attention should be given to the fundamental tenets of international law applicable to situations of occupation as drawn from IHL. The analysis demonstrates that the notion of prolonged occupation

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[49] Susan Power, 'UN General Assembly Committee Adopts Resolution Requesting Second Advisory Opinion from ICJ on Occupied Palestinian Territory' *EJIL: Talk!* (20 December 2022), https://www.ejiltalk.org/un-general-assembly-committee-adopts-resolution-requesting-second-advisory-opinion-from-icj-on-occupied-palestinian-territory/. For the *jus ad bellum*, this includes: Azarova (2017). For the *jus in bello* and/or peremptory norms, this includes: Lynk (2018); Imseis (2020); Ben-Naftali et al (2005); Ronen (2008).

[50] Wilde (2022a); Wilde (2022b). As explained further below, one approach, which I disagree with, may look at each international law violation as stand-alone unlawful acts.

has led to some problematic and unnecessary debate, particularly with respect to the bounds and limits of OP duties and responsibilities.

3.1 Fundamental Tenets of Occupation Law

The abovementioned assessments include a combination of *jus ad bellum* and *jus in bello* rules based on what have been referred to as fundamental tenets of international law applicable to situations of occupation, including rules drawn from conventional and customary IHL. Regardless of the legality of the occupation (or the use of force leading up to it), it is pertinent to affirm that IHL/occupation law continues to apply in its entirety.

The main part of occupation law is found in the 1907 Hague Regulations (HRs),[51] the Fourth Geneva Convention (GC4),[52] Additional Protocol I to the four Geneva Conventions (API),[53] and – drawing from these instruments – customary IHL.[54] The 1907 HRs obligate the OP to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[55] The OP cannot act as sovereign. Relatedly, the HRs stipulate certain prohibitions against various types of irreversible changes (physical and otherwise) in occupied territories. With respect to property (both public and private), the ICRC summarizes the rules as follows:

> In occupied territory: (a) movable public property that can be used for military operations may be confiscated; (b) immovable public property must be administered according to the rule of usufruct; and (c) private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity.[56]

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[51] Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277) [1907 Hague Regulations]. Many Hague Regulations provisions are reflective of customary IHL.

[52] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV)].

[53] Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII).

[54] For the ICRC's study on customary IHL rules and practice, see ICRC, IHL Database: Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[55] 1907 Hague Regulations, art. 43.

[56] ICRC, IHL Database, Customary IHL, 'Rule 51. Public and Private Property in Occupied Territory'. On movable public property, see 1907 Hague Regulations, art. 53. On immovable public property, see 1907 Hague Regulations, art. 55. On private property, see 1907 Hague Regulations, art. 46 (and the exceptions and limits in arts. 52 & 53.)

The OP cannot transfer its own civilian population into occupied territory[57] and is prohibited from collective or individual forced transfers out of and within the occupied territory.[58] Moreover, the HRs provide that '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected'.[59] A variation of this particular provision is found in the GC4, stipulating that '[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs'.[60] Under IHL, occupations are envisioned to be of a temporary nature and cannot transfer any sovereign rights in the territory to the OP. Most importantly, regardless of what the OP attempts to do with the occupied territory, occupation law continues to apply.[61] Protected Persons in occupied territory cannot renounce the rights they are guaranteed by GC4.[62] The OP cannot not curtail its IHL obligations, even in the event of annexation. These rules inspired the IHL parts of the abovementioned assessments that group together what would ordinarily constitute singular IHL violations to determine an occupation's legality. A doctrinal evaluation of these rules is required to assess whether an OP is meeting its IHL obligations.

Due to the prominence of duration in debates, attention should be given to terms of art denoting duration. These terms are drawn across all three UN reports. While prolonged occupations are not explicitly prohibited by IHL, several of its rules imply that occupations are meant to be temporary or short-term.[63] However, the legality of an occupation need not be assessed based on its duration. Many occupations either *are* or *will be* prolonged so arbitrary temporal determinations should be avoided.[64] It has been argued for the international community 'to promulgate clear time

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[57] Ibid, 'Rule 130. Transfer of Own Civilian Population into Occupied Territory' (*i.e.* settlements). This is drawn from the 1949 GC4 art. 49 para. 6 and identified as a 'grave breach' in 1977 AP1 art. 85(4)(a).

[58] Ibid, 'Rule 129. The Act of Displacement'. This is drawn from the 1949 GC4 art. 49 para. 1 and also identified as a 'grave breach' in both 1949 GC4 art. 147 and 1977 AP1 art. 85(4)(a).

[59] 1907 Hague Regulations, art. 46.

[60] 1977 GC4 art. 27, para. 1.

[61] 1949 GC4 art. 47; Jean S. Pictet, *Commentary: The Geneva Convention Relative to the Protection of Civilian Persons in the Times of War* (ICRC, 1958) 275; ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Occupied Territory' (March 2012), https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf

[62] GC4 art. 4; John Cerone, 'Expert Opinion on the Non-Renunciation of Rights Under International Humanitarian Law' *Norwegian Refugee Council* (June 2017), https://www.nrc.no/globalassets/pdf/legal-opinions/cerone.pdf.

[63] ICRC Expert Meeting (2012), at 36 (including 'prohibition of populations transfers, prohibition against requiring allegiance to the occupant, limitation on the use of the resources of the occupied territory').

[64] Roberts (1990) 47, defining prolonged occupations 'to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced'; Richard Falk, 'Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank' (1989) 2:1 *Journal of Refugee Studies* 40, at 46 (suggesting that, if an occupation lasts over ten years, some procedure is established where inhabitants exercise their right to self-determination).

limitations for the duration of an occupation, thereby offering a solution to the problem identified in, but not resolved by, Article 6 of the Fourth Geneva Convention'.[65] However, the better approach would be an assessment as to whether the occupation is 'unlawfully prolonged' by assessing whether the OP 'seeks to permanent transform the international status, government or demographic character of a foreign territory'.[66] In such an approach, duration would serve as a non-exhaustive factor. Ultimately, occupation-to-annexation is precisely the result that occupation law seeks to prevent. Nevertheless, regardless of annexation, the situation remains an occupation wherein IHL applies in entirety. The occupation's duration should not change the applicability of occupation law and for this reason utmost care should be taken to avoid creating different categories of occupation.

3.2 Shifting Duties & Obligations?

As alluded to above, '[t]he precise definition of 'prolonged occupation' is likely to be a pointless quest'.[67] While there has been scholarly debate, the definition of prolonged occupation is unaddressed in authoritative legal texts. Post-World War II, states considered – but did not fully contemplate – the consequences of indefinitely prolonged occupations when drafting either the four GCs or Additional Protocols (APs).[68] IHL does not explicitly prohibit prolonged occupations although the spirit of its rules are to safeguard against such a possibility.[69]

The prolonged occupation notion may provide some factors for determining legality but it is not necessarily determinative. Prolonged occupation does not allow for the possibility of alternative governance models vis-à-vis OP duties and obligations. While exploring questions of legality in situations of occupation that *are* or *will be* prolonged, OPs should not be given leeway to entertain such models whilst pursuing annexation ambitions. In some debates, determinations on legality and OP duties and

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[65] Naftali et al (2005) 613; 1949 GC4 art. 6; 1977 AP1 art. 3(b); Scobbie (2015) (that art. 6 'did not survive the adoption of [1977 AP1 art. 3(b)]').

[66] Azarova (2017).

[67] Roberts (1990) 47.

[68] See the exception in 1947 GC4 art. 6, in Pictet (1958), 56-64 (ensuring the application of a set of provisions after the 'general close of military operations'). Ibid, 61-62. Drafters particularly had the cases of post-WW2 Germany and Japan in mind and concerned a very limited temporal concept of prolonged occupation. Ibid, 62. However, on how art. 6 doesn't apply to the oPt. See Scobbie (2015); Ardi Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion' (2005) 99:1 *American Journal of International Law* 102, at 106; ICRC Expert Meeting (2012) 77-78.

[69] ICRC Expert Meeting (2012) 13, 55, 61, 69-78.

obligations have been at times linked; this is a linkage that should be altogether avoided.

The academic debate on prolonged occupation is scattered and not new. Adam Roberts in 1990 opined that 'prolonged occupation may be a feature of the contemporary world, but it does not necessarily mean permanent occupation'.[70] Of course, all occupations can end, but Israel's is still ongoing as are several others. Currently, there are a number of military occupations that *are* prolonged,[71] with other occupations facing the reality that they *will be*.[72] IHL neither imposes specific deadlines for an OP to withdraw from the occupied territory, nor does it distinguish between different types of occupation.[73] For IHL purposes, there is no difference between short and long-term military occupations.[74] The same IHL rules apply regardless of an occupation's duration. Simply put, occupations are meant to be temporally finite, having a beginning and an end.[75] The rules apply to everything in between.[76]

Lynk referenced the ICRC expert meeting and the (largely disregarded) idea that 'the laws of occupation may have to be modified to enable the [OP] to maintain an effective rule over the territory in light of evolving administrative needs and emerging social and economic developments'.[77] However, this 'flexible' approach is the very problem alluded to above. It furthers the possibility of justifying prolonging the occupation, with the OP acting as at least a quasi-sovereign, if not sovereign, authority. This is where Lynk found that qualifying a situation as a prolonged

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[70] Roberts (1990) 102 (referencing the examples of 'the Soviet Union in Afghanistan, Vietnam in Kampuchea, and South Africa in Namibia').

[71] Geneva Academy, *Rule of Law in Armed Conflicts*, http://www.rulac.org/browse/conflicts - including Israel's military occupation of not only the oPt/State of Palestine, but also of Lebanese and Syrian territory. Current military occupations, including those which may be considered 'prolonged' include the territories of: Moldova (by Russia since 1992), Western Sahara (by Morocco since 1975), Azerbaijan (by Armenia since 1991), Cyprus (by Turkey since 1974), amongst others. In each of these cases, the OPs do not consider the respective territories to be 'occupied'.

[72] Such as the territory of Ukraine (by Russia).

[73] Adam Roberts, *What is a Military Occupation*?, (1985) 55:1 *British Yearbook of International Law* 249; Michael Bothe, 'Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory', *Norwegian Refugee Coun*cil (June 2017) https://www.nrc.no/globalassets/pdf/legal-opinions/bothe.pdf.

[74] For more on the length of an occupation, and its effects, see ICRC Expert Meeting (2012) 13, 55.

[75] 1907 Hague Regulations art. 42; Institute of International Law, Manual on the Laws of War on Land art. 41 (9 September 1880). See also Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *International Review of the Red Cross* 133 (in particular the arguments at 146 n.44); Marco Sassoli 'The Concept and the Beginning of Occupation', in *The 1949 Geneva Conventions: A Commentary* 1455, at 1466 (Andrew Clapham, Paola Gaeta, & Marco Sassoli eds., 2015).

[76] Roberts further opines that 'in a prolonged occupation, as in a pacific one, the rights of the occupants are vastly curtailed'. Roberts (1990) 52. As Benvenisti notes, Roberts 'does, however, recognize the occupant's power to make drastic and permanent changes in the economy or system of government if such are needed'. Ibid*,* 53 (cited in Benvenisti (1990) 246, n.245).

[77] Lynk (2018).

occupation and as such, a distinct legal category, is problematic, thus triggering his four-part test.[78] As for the effects of prolonged occupations, Ben Naftali et al argue that:

> Indeed, it is not only the purpose of the regime of occupation, but also its essential nature, that may well be defied if the occupation is allowed to continue indefinitely. The occupied population under foreign control does not enjoy the full range of human rights, in the very least insofar as it is deprived of citizenship and the rights attached to that status. The prolongation of such a situation may well be in the interests of an occupying power who may rely on the provisions of the law relative to the maintenance of the status quo, as well as to its security concerns, to the detriment of the population.[79]

For Gross, in such situations, OPs enjoy a 'pick and choose' approach to occupation law, 'pretending that their *sui generis* or inconclusive nature was a logical result of the factual circumstances'.[80] It is from such a pick and choose approach that '[c]haos and complexity allowed the creation of a legal regime that gave Israel the authority of an occupier while relieving it from many of the duties and the restrictions incumbent on an occupying power'. [81] However, Ronen opines that when determining an occupation's illegality, it similarly 'may result in greater injury than benefit to the population under occupation, by making the applicable law less clear and more susceptible to manipulation'.[82] However, as discussed above, a determination of the occupation's illegality should not have any effect on the applicability of IHL rules in their entirety. Ronen concludes that:

> A formalistic approach, of applying a body of law (the law of occupation) to a situation which in practice is governed by an entirely different body of law (the domestic law of the occupant) may result in greater harm than benefit to the population. A more realistic approach would allow some flexibility in the application of the law of occupation.[83]

Following Gross's argument, harm would more likely result from flexibility in the application of the law of occupation. For this reason, such a shift in discussion that needlessly muddies the water should be avoided altogether. There should be no leeway for an OP to curtail its duties and obligations as this furthers the conditions for

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[78] Ibid ('Otherwise, the concept of prolonged occupation may well become a legal guise that masks a de facto colonial exercise and defeats the transient and exceptional nature which occupations are intended to be'.).

[79] Naftali et al. (2005) 600.

[80] Gross (2017) 263-264 (emphasis in original).

[81] Ibid.

[82] Ronen (2008) 244.

[83] Ibid, 245.

prolonged, long-term occupations. Similarly, regardless of a legality determination, occupation law applies, and the OP cannot 'pick and choose' which rules it wants to apply.

While it may help to inform the analysis, prolonged occupation is not in itself strictly relevant. An occupation does not have to be prolonged for it to be unlawful, such as in the case of Ukraine. An occupation's prolonged nature may be a factor in determining legality but is not necessarily determinative. A finding that an occupation is unlawful should not be seen as somehow shifting or negating the obligations of an OP. Occupation law does not operate on a spectrum. Prolonged occupation is not a legal category separate from ordinary occupation and does not create increased entitlements for the OP under IHL.[84] While the duration of the occupation may not be a reason for illegality in itself, its causes and effects are factors. Furthermore, IHL does not provide the means to assess a prolonged occupation's legality. Increased scholarly focus on this matter, driven by the pressing need to respond to situations of prolonged occupation and their connected international law violations, is pushing for attempting to determine an occupation's legality based on IHL.[85]

The occupation-to-annexation paradigm provides a more useful approach and it has been at the heart of advocacy for Palestinians and their allies.[86] Once the shift to annexation occurs, in any way, shape, or form, then the OP is in serious breach of at least one peremptory norm, the prohibition of annexation. Of course, this also would not necessarily mean that an unlawful occupation would have to be equated with instances of annexation alone. Rather, as explained below, the question is whether the serious breaches a peremptory norm is attributable to the state[87] and is a 'purely normative operation'.[88] The state is able to commit serious breaches by way of its occupation. If it is by way of the occupation that any of the virtually agreed upon peremptory norms are seriously breaches, then it would be equated with a determination of illegality. There is also something to be said of causation in this regard, but that analysis is more relevant for assessing damages and reparations under the rules on state responsibility.[89] The characteristics and features of the occupation –

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[84] Bothe (2017) 3.

[85] ICRC Expert Meeting (2012), 13, 55; Lynk (2018).

[86] Al-Haq, 'International Conference: The Threshold from Occupation to Annexation (3-4 October 2018)', 30 September 2018, https://www.alhaq.org/advocacy/6155.html.

[87] Thomas Weatherall, *Jus Cogens: International Law and the Social Contract* (CUP, 2015).

[88] León Castellanos-Jankiewicz, 'Causation and International State Responsibility' SHARES Research Paper 07 (2012), ACIL 2012-07, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039268, at 64.

[89] Ibid, 1, 5, 64.

in terms of all these norms – do not have to altogether combine to justify an illegality determination. Thus, priority should be given to an assessment of whether the occupation gives rise to serious breaches of peremptory norms and, if so, what the legal consequences are for the OP and third states and parties.

4 Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms

Pertinent analysis that has been largely overlooked is whether occupation gives rise to serious breaches of peremptory norms such as the prohibitions on annexation, the denial of the right to self-determination of peoples, racial discrimination, apartheid, as well as other norms. Other than Imseis and, to a lesser extent, some others, the abovementioned debates have not undertaken such an analysis.

4.1 Identifying the Peremptory Norms

It is first necessary to identify the peremptory norm, then whether there is a serious breach, and then the legal consequences for the offending state as well as third states and parties. With respect to the oPt/State of Palestine, there are four peremptory norms of concern discussed here: annexation, denial of the right to self-determination, racial discrimination, and apartheid; with the possibility of others.[90] Peremptory norms sit at the top of the hierarchy of international law rules.[91] Here, we are interested in those peremptory norms creating *erga omnes* obligations. As Eric Suy explains, 'an act or action that breaches a peremptory norm establishing an *erga omnes* obligation invokes a special responsibility of the State…*erga omnes* obligations form part of the law on the responsibility of States for internationally wrongful acts…[it] involves a breach of a peremptory norms by an act or deed'.[92] With respect to *erga omnes,* Jochen Frowein explains that '[a] rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States seem to have

[90] Imseis (2020), 1071-1081; Albanese (2022), paras. 10(a)-(b); Wilde (2022a); Wilde (2022b).

[91] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1969), 1155 UNTS 331, art. 53; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session' (2001) UN Doc. A/56/10 [43] [ARSIWA]; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10 [56, 84-85, 111-113] [ARSIWA ILC Commentaries]; ILC, 'Draft Conclusions on the Identification and Legal Consequence of Peremptory Norms of General International Law (*Jus Cogens*)' (2022) UN Doc. A/77/10 (Annex) [ILC Peremptory Norms].

[92] Eric Suy, 'Volume II, Part V: Invalidity, Termination and Suspension of the Operation of Treaties, s.2 Invalidity of Treaties, Art.53 1969 Vienna Convention', in *Vienna Conventions on the Law of Treaties*, 1226, paras. 4-5 (Olivier Corten & Pierre Klein eds., 2011).

a legal interest'.[93] While there is no comprehensive list of peremptory norms, international bodies including the ICJ, the International Law Commission (ILC), and legal scholarship have identified several.[94]

Annexation falls under the prohibition of the illegal use of force by the UN Charter and general international law,[95] and unambiguously reaffirmed by UN organs.[96] Under the *jus ad bellum*, a state's use of force is a means of last resort and is lawful only when in self-defense.[97] The use of force does not necessarily amount to annexation, although annexation may occur either through the threat or use of force.[98] Under IHL, occupations are not identified as 'lawful' nor 'unlawful' in line with the 'strict separation of *jus in bello* from *jus ad bellum*' and, as such, '[i]nternational law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory'.[99]

Self-determination is enshrined in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR). The realization of the right to self-determination 'is an essential condition for the effective guarantee and observance of individual human rights'.[100] Further, 'the principle of equal rights and self-determination of peoples' embraces the right of all peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development' as well as the duty of every State 'to respect this right in accordance with the provisions of the Charter'.[101] The 'modes' of implementing the right include 'the establishment of a sovereign and independent State, the free association or integration with an

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[93] Jochen Frowein, Obligations Erga Omnes, *Max Planck Encyclopedia of Public International Law* (December 2008), para. 3.

[94] ARSIWA ILC Commentaries; ILC Peremptory Norms; Crawford (2013), 316, 380, 692.

[95] UN Charter, art. 2(4); UNGA Res. 2625 (XXV) (24 October 1970); UNGA Res. 3314 (XXIX) (1974) art. 3(a); ICJ Wall Advisory Opinion, para. 87 (citing *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA), Judgment,* 27 June 1986, 14, paras. 187-190).

[96] UNSC Res. 242 (22 November 1967) (oPt); UNSC Res. 660 (2 August 1990) (Kuwait); UNSC Res. 662 (9 August 1990) (Kuwait).

[97] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, 226, para. 41; ICJ Nicaragua, para. 194 (June 27).

[98] UN Charter, art. 2(4).

[99] Ferraro (2012), at 135.

[100] UN Human Rights Commission, 'General Comment 12: Article 1 (The Right to Self-determination of Peoples)' UN Doc. HRI/GEN/1/Rev.9, (1984), para. 1.

[101] UNGA Res. 2625 (XXV).

independent State, or the emergence into any other political status freely determined by a people'.[102]

Racial discrimination is defined and prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD prohibits discrimination on grounds of race and terms akin to it such as color, descent, and national or ethnic origin. ICERD state parties are obligated to 'particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'.[103] The International Convention on the Suppression and Punishment of the Crime of Apartheid, which categorizes apartheid as a crime against humanity, is different from the ICERD in that it characterizes apartheid by the outcomes of a state's institutionalized racial discrimination, motivated by establishing and maintaining racial domination for one group over another or others.[104]

Several IHL rules are inspired by these preemptory norms or, more accurately, some historical variation thereof; and these IHL rules are largely reflective of challenges of their time (the post-World Wars Geneva Conventions and the anticolonial anti-imperial Additional Protocols). Several IHL rules incorporate the logic of the prohibition of annexation by,[105] for example, prohibiting demographic changes and the unlawful appropriation of property for settlements.[106] The OP continues to be bound by conventional and customary IHL, which continue to apply regardless of the unlawful situation.[107] Certain IHL rules are also meant to prevent discrimination based on race and other similar distinctions, whether through general provisions,[108] the prohibition on settlements,[109] or others.[110] Similar protections were included in API,[111] wherein policies and practices of racial discrimination and apartheid

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[102] Ibid.

[103] ICERD, art. 3.

[104] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, art. 2.

[105] Ibid*,* 1460-1461.

[106] Bothe (2017) 4-5.

[107] 1949 GC4, art. 47; Pictet (1958) 275; Sassoli (2015) 1406; Bothe (2017) 5.

[108] 1949 GC4, arts. 3, 13 & 27; Pictet (1958) 119, 206-207.

[109] 1949 GC4, art. 49, para. 6; Pictet (1958) 283.

[110] 1949 GC4, arts. 64 & 66; Pictet (1958) 335 & 340.

[111] 1977 AP1, arts. 9(1) & art. 75.

were included as grave breaches.[112] API also integrated language pertinent to self-determination with respect to anti-colonial struggles.[113]

The ICJ and ILC consider the prohibition of annexation,[114] the denial of the right to self-determination,[115] racial discrimination, and apartheid,[116] to be peremptory norms creating obligations *erga omnes*.[117] It is worth noting that racial discrimination and apartheid also may consist of 'composite acts', or a series of actions or omissions constituting a wrongful act under international law.[118] Such a breach begins with the first action or omission of the series, and lasts so long as they continue.[119] As mentioned with respect to the Apartheid Convention, apartheid is different from acts of racial discrimination, just as genocide is different from acts of ethnic or racially-motivated killing – the former is the institutionalization and systemization of the latter.[120]

Some attention should also be given to colonization, involving maintenance by force, which can be considered an example of a breach of an international obligation having a continuing character.[121] Colonial domination would constitute a breach of the peremptory norm of the right to self-determination.[122] International law sources do not provide a specific definition of colonization,[123] although its prohibition is inherently linked to the right to self-determination.[124] The UNGA, in particular, has

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[112] 1977 AP1, art. 85(4)(c).

[113] 1977 AP1, art. 1(4); Amanda Alexander, 'International Humanitarian Law, Postcolonialism, and the 1977 Geneva Protocol I' (2016) 17:1 *Melbourne Journal of International Law* 1.

[114] ARSIWA ILC Commentaries, 98, 112 n.640 & n.644, 114-115 (including aggression, which annexation falls under).

[115] Ibid, 85, 111, 112 n.641, 113, 113 n.651, 114, 120, 127.

[116] Ibid, 33, 62-63, 85, 112, 112 n.640, 113 fn 651.

[117] ILC Peremptory Norms, 89. Annexation is not mentioned, but is considered as falling under the prohibition on aggression. See, generally, ARSIWA ILC Commentaries.

[118] ARSIWA ILC Commentaries, 62 (on art. 15).

[119] Ibid.

[120] Ibid*,* 62-63.

[121] ARSIWA ILC commentaries, 60 (on art. 14).

[122] Ibid*.,* 113 (on art. 41) & 113 n.650; Robert McCorquodale, 'Rights of Peoples and Minorities', in Daniel Moeckli et al., *International Human Rights Law* (OUP, 2010) 365; Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1999) 133-140; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP, 1989) 96.

[123] Or 'colonies'. See Nishat Nishat, 'The Structure of Geneva Convention IV and the Resulting Gaps in that Convention,' in Clapham et al (2015), 1078, at 1069.

[124] John Dugard, 'Lifting the Guise of Occupation and Resource to Action before the ICJ and ICC', (2014) 17 *Palestine Yearbook of International Law* 9, at 11.

been at the forefront of condemning colonialism and colonial practices as illegal.[125] The UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples called on all States to take 'immediate steps' to 'transfer all powers to the peoples' of colonized territories.[126] It provides that '[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights … contrary to the [UN Charter]'.[127] The UNGA has called on all States to 'bring a speedy end to colonialism'.[128] Historically, before the decolonization era, the subjects of colonial practices and policies did not benefit from occupation law.[129] Over time, IHL rules developed to prohibit certain colonial policies and practices and ensure full IHL protection during occupations.[130] GC4 had already specified that '[t]he [OP] shall not deport or transfer parts of its own civilian population into the territory it occupies'.[131] This specific prohibition was adopted to 'prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories'.[132] Certainly, colonialism may violate several of the abovementioned peremptory norms.

4.2 Legal Consequences for Internationally Wrongful Acts, including Serious Breaches of Peremptory Norms

The laws of state responsibility provide a framework for legal consequences for the offending state and third states for internationally wrongful acts, including serious breaches of peremptory norms. Unlike the IHL regime, the rules on state responsibility define a more specific and stringent set of third state obligations for unlawful acts, including serious breaches of peremptory norms.[133] When a serious breach of

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[125] Ibid.

[126] UNGA Res. 1514 (XV). On the weight of this resolution, particularly on ICJ cases in the Namibia and Western Sahara cases, *see* Marco D. Oberg, 'The Legal Effects of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 15:5 *European Journal of International Law* 879.

[127] UNGA Res. 1514 (XV), art. 1. This terminology is used by Imseis (2020) & Albanese (2022).

[128] UNGA Res. 2635.

[129] Yukata Arai-Takahashi, 'Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation' (2012) 94:885 *International Review of the Red Cross* 51.

[130] 1977 API art. 1(4). Also, relatedly on the prohibition of settlements.

[131] GC4 art. 49, para. 6.

[132] Pictet (1958) 283.

[133] Hindi (2023). Most importantly, the obligation to act individually and collectively.

peremptory norms occurs,[134] the accompanying unlawful situation demands: a) non-recognition; b) non-aid or assistance; and c) cooperation to bring that serious breach to an end through lawful means.[135] These are, in turn, the *erga omnes* obligations of third states.

The obligation of non-recognition has historically been employed within the ambit of the prohibition on forcible acquisition of territory.[136] State practice on non-recognition has developed over time to include obligations on, among others, the 'right to self-determination, the prohibition of racial discrimination and apartheid and basic principles of [IHL]'.[137] Third states are obligated not to recognize, nor aid or assist, annexation.[138] They have a collective obligation of non-recognition to situations of 'attempted acquisition of sovereignty over territory through the denial of the right of self-determination of people', which 'not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition'.[139] Non-assistance extends 'not only to assistance in the commission of the breach, but assistance in maintaining an internationally unlawful situation that may result'.[140] Thus, the 'obligation not to assist the responsible State is limited to acts that would assist in preserving the situation created by the breach'.[141] Most importantly, States must collectively bring to an end, through lawful means, an unlawful situation. As Crawford notes, the qualification of a situation as unlawful is but a first step to bring an unlawful situation to an end.[142] Further, '[a]n authoritative prior determination as to the nature of the wrongful act is desirable, if not a necessity, if the obligation to cooperate is to be meaningful'.[143] Here is where, in the case of the State of Palestine/oPt, an ICJ

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134 'A breach will be considered "serious" where 'it involves a gross or systematic failure by the responsibility state to fulfil the obligation'. Crawford (2013) 381.

135 ARSIWA art. 41; Crawford (2013) 380. See, generally, Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet & Simon Olleson (eds.), *The Law of International Responsibility* (OUP, 2010) 677; Nina H. B. Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in Crawford et al (2010), 687 [Jørgensen (2010a)]; Nina H. B. Jørgensen, 'The Obligation of Cooperation' in Crawford et al (2010), 695 [Jørgensen (2010b)].

136 Dawidowicz (2010) 677, at 678.

137 Ibid.

138 ARSIWA ILC Commentaries, at 114 (as in the case of Kuwait and with reference to the Friendly Relations Declaration).

139 Ibid.

140 Crawford (2013) 385.

141 Jørgensen (2010a) 691.

142 *See* Crawford (2013) 389.

143 Jørgensen (2010b) 700.

determination would be most valuable. Nevertheless, lack of collective action should not be interpreted as exempting states from taking individual action in this regard.

If each of the above peremptory norms are not analyzed as peremptory norms but instead as stand-alone 'internationally wrongful acts', such an approach would be a shortcoming with regard to third state responsibility. There is no shortage of internationally wrongful acts by states, as opposed to serious breaches of peremptory norms. For internationally wrongful acts, third states may invoke responsibility of the offending state *only if*: '(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole'.[144] Satisfying this requirement, third states may then claim from the offending state: '(a) cessation of the … act, and assurances and guarantees of non-repetition … ; and (b) performance of the obligation of reparation … in the interest of the injured State … '.[145] In contrast, if the internationally wrongful act amounts to a serious breach of a peremptory norm, the obligations of non-repetition, non-aid and assistance, and the obligation to cooperate are demanded. As for the offending state, they are required to cease the act (if continuing),[146] offer appropriate assurances and guarantees of non-repetition,[147] and make full reparation.[148] For reparation, this includes either or all of restitution, compensation, and satisfaction.[149] Crucially, restitution demands that the offending state 're-establish the situation which existed before the wrongful act was committed'.[150]

The ICJ *Wall* advisory opinion seems to have taken an expansive approach to the rules on state responsibility in this regard. The ICJ made no mention of peremptory norms, but invoked *erga omnes* obligations, including the right to self-determination and IHL rules.[151] From this, the ICJ called for third states to perform non-recognition, non-aid and assistance, but in addition asked only that they 'should consider what further action is required to bring to an end the illegal situation resulting from the

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[144] ARSIWA, art. 48(1).

[145] Ibid, art. 48(2).

[146] Ibid, art. 30(a).

[147] Ibid, art. 30(b).

[148] Ibid, art. 31.

[149] Ibid, art. 34.

[150] Ibid, art. 35.

[151] ICJ Wall Advisory Opinion, paras. 155-160. This follows the ICJ consideration of the 'legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States'. Ibid, para. 154.

construction of the wall and the associate regime'.[152] While the ICJ's conclusions are correct, the rules on state responsibility do not necessarily tie non-recognition, and non-aid and assistance, to internationally wrongful acts. However, the relevant internationally wrongful acts in that case – denial of the right to self-determination and IHL rule violations (and annexation for that matter) – would, in fact, amount to serious breaches of peremptory norms that create *erga omnes* obligations. Moreover, the ICJ's language on the legal obligations of third states ('should consider') fell well short on what should have been clear language on the obligation to cooperate.

It must also be said that each of the peremptory norms – annexation, denial of the right to self-determination, racial discrimination, and apartheid – require an end to the occupation. There is, at this point, no possible way that Israel can make restitution while the occupation is ongoing. These peremptory norms are seriously breached *by* the occupation.[153] Maintaining the territorial integrity of the occupied territory is arguably the fundamental element of ensuring Palestinian self-determination. Without this, other freedoms are impossible.[154] Further, looking in particular to the settlement enterprise, the issue of reversing racial discrimination and apartheid cannot be seen as equating rights between settlers and the Palestinians. Rather, it entails dismantling the settlement enterprise in its entirety.[155]

5 The Situation in Palestine

Palestine here refers to the oPt/State of Palestine, that is to say the part of historic Palestine occupied by Israel in 1967. This section provides a summary of the occupation-to-annexation shift, while also covering more recent findings on serious breaches of peremptory norms in Palestine.[156]

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[152] Ibid, para. 160.

[153] Ralph Wilde, 'Expert Opinion on the Applicability of Human Rights Law to the Palestinian Territories With a Specific Focus on the Respective Responsibilities of Israel, as the Extraterritorial States, and Palestine, as the Territorial State', *Diakonia* (12 February 2018) https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/07/expert-opinion-applicability-of-human-rights-law-to-the-palestinian-territories-with-a-specific-focus-on.pdf. While Israel must secure rights to Palestinians until then, 'this does not affect Israel's obligation to give up' its control of the oPt, particularly where it prevents Palestinians from full self-administration.

[154] UNGA Res. 1514 (XV) (1960), preamble ('all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory').

[155] This was included in a legal brief on racial discrimination drafted for the same international NGO mentioned in footnote 3 above, which has since been removed online (hard and soft copy available with author).

[156] Of course, as mentioned, there are also several other situations of prolonged occupation. It would be beyond the scope of this paper to give these situations proper discussion. However, in light of the request of an ICJ advisory

5.1 Occupation-to-Annexation

As with 'forms' of occupation, international law provides no clear differentiation between 'forms' of annexation. Whether de jure or de facto, annexation is illegal.[157] A focus on the differentiation between de jure and de facto has taken a life of its own and dominated debate, including within civil society, particularly since the language of the ICJ *Wall* advisory opinion.[158] In actuality, differentiation between sorts of annexation are not legally relevant.[159] Indeed, findings of de facto annexation are not findings of annexation in its purest sense, and as such the notion produces confusion and semantic nonsense.[160]

There is no shortage of events that have evidenced the occupation-to-annexation shift in Palestine, though some should be highlighted. Immediately after occupying the Gaza Strip and the West Bank, including East Jerusalem, in 1967, Israel unilaterally annexed around 70 square kilometers of the West Bank ('East Jerusalem') into its municipal borders.[161] Through the *1980 Basic Law: Jerusalem as Capital of Israel*, the Israeli Knesset applied Israeli domestic law to the entire city of Jerusalem. The international community has never recognized Israel's annexation of East Jerusalem.[162] Throughout its occupation, Israel has continuously denied the applicability of the Fourth Geneva Convention there, but rather used a 'pick and choose' approach to IHL rules with the Israeli Supreme Court (sitting as the 'High Court of Justice' in the oPt) providing its stamp of approval in draconian fashion.[163] The international

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opinion, it is an opportune time for practitioners and scholars – particularly from those states suffering from prolonged occupation – to apply this analysis (and others) to their situations.

157 Omar Dajani, 'Israel's Creeping Annexation' (2017) 111 *AJIL Unbound* 51-56.

158 See the language in ICJ Wall Advisory Opinion, paras. 74-78.

159 Imseis (2020), 1073 ('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'.).

160 As shared with me by Luigi Daniele, 'it has ended up normalizing the abyss between facts and legal prescriptions'.

161 UNSC Res. 242, 1(i) (22 November 1967).

162 The former US Trump administration recognized Jerusalem as capital of Israel, although not clearly stating what part(s) of Jerusalem. 'Statement by President Trump on Jerusalem', White House (6 December 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/. This did not change under Joe Biden's presidency.

163 Theodor Meron, 'The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War' (2017) 111:2 *American Journal of International Law* 357 (2017); Israel Ministry of Foreign Affairs, 'Is the West Bank 'Occupied' or 'Disputed' Territory,' http://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements1.

community has consistently reaffirmed the status of 1967 Palestine as occupied, and the applicability of the Fourth Geneva Convention throughout.[164]

A declaration is not required to prove annexation.[165] Israel has 'formally' exercised sovereignty in East Jerusalem through its legislature, while the West Bank is ruled through its military and to enable its settlement enterprise there. Since 1967, Israel has transferred its civilians into the oPt building a massive settlement enterprise. While Israeli law is applied to Israeli settlers there, the Knesset is not presently authorized to automatically legislate for the occupied territory. The applicability of Israeli law to settlers in Area C still takes place in the form of promulgation by the military commander (Area C is comprised of about 61% of the West Bank which is under full Israeli control, and largely off limits for Palestinians).[166] Nevertheless, the military and judicial system operating in the oPt are fully part of Israel's legal and political order.[167]

Successive Israeli governments have openly stated Israel's long-term intentions vis-à-vis the West Bank, and so-called 'Area C' in particular. For example, recently, a draft plan was circulated to transfer power from the Israeli Civil Administration operating in the oPt to Israeli civilians.[168] Over time, annexation has taken place in calculated, incremental, as well as sometimes chaotic, fashions. A legal instrument, or unilateral declaration in that regard, is but a formality, though there has been no shortage of bills and laws evidencing Israel's overall objectives.[169] Israel's means and measures of land confiscation have included: the formal annexation of East Jerusalem; declaring closed military zones; building, expanding, and consolidating settlements; declaring natural reserves and national parks; declaring 'State land'; agricultural

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[164] Conference of High Contracting Parties to the Fourth Geneva Convention Declaration (17 December 2014), https://unispal.un.org/DPA/DPR/unispal.nsf/0/E7B8432A312475D385257DB100568AE8. See also the various, annual, resolutions of the UNGA and, more recently, UNSC Res. 2334 (23 December 2016).

[165] See the evolution of international law in this regard in Hofmann (2020).

[166] For more on this, see Association for Civil Rights in Israel (ACRI), 'One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank' (October 2014), https://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf. See also IDF MAG Corps, *Issues of Real Estate, Construction and Municipal Law*, http://www.law.idf.il/602-2385-en/Patzar.aspx; IDF *MAG Corps, FAQ*, http://www.law.idf.il/327-en/Patzar.aspx.

[167] David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2017) 94 *International Review of the Red Cross* 207.

[168] Hagar Shezaf, 'Israeli Gov't Circulates Draft Plan to Transfer Powers Over Civilian Life in the West Bank to Smotrich's Control', *Ha'aretz* (15 February 2023), https://www.haaretz.com/israel-news/2023-02-15/ty-article/.premium/smotrich-pushes-plan-to-transfer-powers-over-west-bank-civilian-life-to-finance-ministry/00000186-529d-d603-a7bf-debfb36b0000.

[169] Yesh Din, *Annexation Legislation Database,* https://www.yesh-din.org/en/legislation/; B'Tselem, *The Annexation That Was and Still Is,* https://conquer-and-divide.btselem.org/map-en.html.

landgrabs; restricting Palestinian movement; dividing the West Bank into Areas A, B, and C through the Oslo Accords; and the Wall; and among other means.[170]

The settlement enterprise has been at the core of Israel's annexation. In 2012, the Israeli government appointed an internal committee to assess the legal status of unauthorized Israeli settlement 'outposts' (those built without a permit under Israeli law) in the West Bank. The committee published the so-called 'Levy Report' which contained a series of conclusions extending far beyond questions concerning the legal status of settlement outposts in occupied territory. The Committee contended that occupation law was inapplicable to the West Bank given its 'disputed territory' status. While Israel has never officially endorsed the findings contained in the Report, it has implemented several of its recommendations,[171] which have so far included: the retroactive authorization of around a quarter of the illegal outposts present in the West Bank;[172] the establishment of a '[land] regulation committee' in order to 'outline a process for the legalization of Jewish structures and neighborhoods built in 'Judea and Samaria' (West Bank) with the involvement of the authorities'; passing of the 'Validation Law' ('Regularization Law') with the express objective to 'regularize settlement in Judea and Samaria' (West Bank) and legalize previous Israeli settlement construction by way of retroactive expropriation, planning and zoning regulations;[173] and the completion of a land survey process in the West Bank to identify which areas should be designed as 'State Land' as a vehicle for further expansion and consolidation of settlements and outposts.[174] The report's positions on the 'disputed' character of the West Bank, inapplicability of occupation law, and consequent legalization of settlement activities were even included in a note circulated to Israeli foreign missions by its Ministry of Foreign Affairs in November 2015.[175] Israel's planning and zoning regime in Area C favors settlement growth, designed to reject the vast majority of Palestinian building permit applications, in many cases mandating the demolition and seizure of

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[170] B'Tselem, *Conquer and Divide,* https://conquer-and-divide.btselem.org/map-en.html.

[171] Yesh Din, *From Occupation to Annexation: The Silent Adoption of the Levy Report on Retroactive Authorization of Illegal Construction in the West Bank* (22 February 2016) https://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/.

[172] Yesh Din, *Under the Radar: Israel's Silent Policy of Transforming Illegal Outposts Into Official Settlements* (11 March 2015), https://www.yesh-din.org/en/under-the-radar-israels-silent-policy-of-transforming-illegal-outposts-into-official-settlements-2/.

[173] Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, at: https://www.adalah.org/uploads/uploads/Settlement_Regularization_Law_English_FINAL_05032017.pdf.

[174] For a detailed analysis of each of these measures and their combined effects on the future status of the West Bank, see Yesh Din (2016), 8-30.

[175] Israeli Ministry of Foreign Affairs, *Israeli Settlements and International Law* (30 November 2015) http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx. Yesh Din (2016) 5 (for critique of this adoption).

Palestinian properties (including humanitarian and donor-funded properties).[176] As explained by Yesh Din, '[t]his institutionalization of land grab and dispossession reinforces the impression that Israel is planning to reduce the number of Palestinians in Area C, where the settlements and outposts are located, by forcing them out of the area. This raises the concern that Israel's ultimate goal is to facilitate the official annexation of Area C to Israel'.[177]

The occupation-to-annexation threshold has been crossed long ago with East Jerusalem and into the remainder of the West Bank. In such circumstances, the situation of occupation does not cease and nor does the application of occupation law. The international community has rejected annexation but how they have reacted as third states is a different matter altogether. Yet, the 'facts on the ground' are clear. Israel has, through various means and measures, annexed the oPt, in whole or in parts, and, as such, committed a serious breach of that peremptory norm. Further, these means and measures have also led to other serious breaches, including, amongst possible others, the denial of the right to self-determination, and the prohibition of racial discrimination and apartheid.

5.2 Findings of International Bodies

Of course, with respect to peremptory norms, the situation in the State of Palestine/oPt includes not only annexation, but several peremptory norms. For guidance, one may look to recent findings of several international bodies (and previous reiterations therein). While these bodies do not identify particular rules as peremptory norms, their findings could inform the analysis, including the ICJ's advisory opinion.

For example, with respect to annexation, determinations are found in various resolutions, including those of the UNSC and UNGA. In the aftermath of the Six Day War, the UNSC passed Resolution 242, emphasizing the 'inadmissibility of the acquisition of territory by war' and calling on Israel to withdraw from the occupied territories.[178] Further, in 1980, the UNSC reaffirmed the 'overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem'.[179] In response to the adoption of *1980 Basic Law: Jerusalem*, the UNSC determined that 'all legislative and administrative measures and actions taken

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[176] B'Tselem, *Planning Policy in the West Bank,* https://www.btselem.org/planning_and_building.

[177] Yesh Din (2016) 6.

[178] UNSC Res. 242 (22 November 1967), preamble & para. 1(i).

[179] UNSC Res. 476, para. 1 (30 June 1980).

by Israel, the [OP], which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith'.[180] No state has recognized Israel's sovereignty over East Jerusalem or Israel's position that Jerusalem is its 'undivided capital'. Of course, there is no shortage of annual UNGA resolutions to this effect.

With respect to racial discrimination and apartheid, several findings have been made by international bodies on the situation in the oPt. Previous UN Special Rapporteurs have made determinations on the existence of racial discrimination and apartheid within the oPt.[181] In its latest Concluding Observations on Israel, as with previous Concluding Observations, the UN Committee on the Elimination of the Racial Discrimination (CERD) identified a series of ICERD violations.[182] A number of these findings involved violations of ICERD article 3, which specifically prohibits racial segregation and apartheid.[183] The UN Human Rights Committee has identified a series of ICCPR violations by Israel, including violations of the right to self-determination.[184] In its last report, the Committee specifically calls on Israel to '[t]ake immediate steps to dismantle the wall in line with the advisory opinion of the [ICJ] on the legal consequences of the construction of the wall in the [oPt] … with a view to ensuring Palestinians' full access to their lands and livelihoods and the enjoyment of their [ICCPR] rights, including the right of self-determination'.[185] The Committee on Economic, Social, and Cultural Rights has similarly identified ICESCR violations by Israel, including violating the right to self-determination.[186] There is also no shortage of conclusions made by other UN special procedures in this regard, such as the works

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[180] UNSC Res. 478, para. 3 (20 August 1980).

[181] UN Doc. A/HRC/4/17, 28 January 2007, at 2; Richard Falk, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/65/331 (30 August 2010) para. 3.

[182] UN CERD, 'Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel' UN Doc. CERD/C/ISR/CO/17-19 (27 January 2020).

[183] Ibid, paras. 22-23.

[184] UN Human Rights Committee, 'Concluding Observations on the Fifth Periodic Report of Israel' UN Doc. CCPR/C/ISR/CO/5 (5 May 2022). On violating art. 1 (self-determination), see paras. 14, 38. On violating art. 2 (non-discrimination), see paras. 18, 22, 24, 36, 42.

[185] Ibid, para. 15(c).

[186] UN CESCR, Concluding Observations on the Fourth Periodic Report of Israel, U.N. Doc. E/C.12/ISR/CO/4 (Nov. 12, 2019). On violating art. 1 (self-determination), see paras. 16-17, 20-21. On violating art. 2 (non-discrimination), see paras. 18-19, 50-51.

of various UN special rapporteurs on the oPt, including on serious breaches of peremptory norms.[187]

Moreover, the UN fact-finding mission on settlements noted a series of discriminatory Israeli policies and practices, and called upon States 'to comply with their obligations under international law and to assume their responsibilities in their relationship to a State breaching peremptory norms of international law – specifically not to recognize an unlawful situation resulting from Israel's violations'.[188] The mission emphasized that the establishment of settlements 'is a mesh of construction and infrastructure leading to a creeping annexation that prevents the establishment of a contiguous and viable Palestinian State and undermines the right of the Palestinian people to self-determination'.[189] As mentioned, the ICJ concluded that the Wall and measures to alter the demographic composition of the oPt 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right',[190] and that 'obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law'.[191]

There is also no shortage of determinations from UN organs and bodies on Israel's various international law violations since 1967, only some of which are highlighted here. These violations equate to serious breaches of peremptory norms. As Wilde explains, peremptory norms are 'not a separate category of substantive international legal rules but is, rather, a way of characterizing certain rules as being of a special character when it comes to their interaction with other rules of international law'.[192] When looking at the various findings, the idea here is that it would be an injustice to look at each of these as standalone violations and/or as 'internationally wrongful acts'. Instead, the act should be assessed as peremptory norms having *erga omnes* obligations and, as such, the legal consequences for Israel's serious breaches of those norms.

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[187] U.N. Doc. A/HRC/4/17, para. 57 ('Israel has systematically violated peremptory norms of international law [jus cogens] in the oPt, ranging from the denial of self-determination to serious crimes against humanity'.).

[188] Ibid, para. 116.

[189] 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, U.N. Doc. A/HRC/22/63 (7 February 2013), para 101.

[190] ICJ Wall Advisory Opinion, para. 122.

[191] Ibid, para. 155.

[192] Wilde (2022a) 5.

6 Concluding Remarks

Israel's occupation of the oPt has lasted for over 55 years. It is, currently, the longest of all military occupations. The occupation should have ended long ago with Israel's complete military and civilian withdrawal from the entirety of the oPt. While conventional and customary IHL rules are numerous and detailed, IHL does not prescribe an obligation to end an occupation. It is, rather, commonsensical and implied through other conventional and customary IHL rules.

The ICJ has a unique opportunity to address the illegality of Israel's occupation of the oPt. There are, of course, several ways of going about this, through different legal frameworks and subject-matter. This article contends that it would be best to identify those rules that amount to peremptory norms and the obligations of Israel and third States upon violation of such norms. So long as the occupation gives rise to a serious breach of one or more peremptory norms, then the occupation should be considered unlawful outright. Israel's occupation is unlawful by way of its serious breaches of several peremptory norms, including, amongst possible others, the prohibition of annexation, the right to self-determination, and the prohibitions of racial discrimination and apartheid. With respect to these peremptory norms, Israel is bound to cease such acts, offer appropriate assurances and guarantees of non-repetition, and make full reparation. Most importantly, in order to make full reparation, it must make restitution by reestablishing the situation that existed before the wrongful act was committed. Thus, restitution means in effect ending the occupation in its entirety. Third states are obligated to non-recognition, non-aid and assistance, and the obligation to cooperate to bring to an end the unlawful situation.

There have been several attempts over the past two decades to assess the illegality of occupations, including Israel's occupation of the oPt. Yet, some these assessments were needlessly complicated and muddied the legal waters with harmful effects. In light of this, it is particularly important to keep in mind that the notion of prolonged occupation should not be seen determinative, though it may provide factors in determining legality. Furthermore, discussions about shifting duties and rights of the occupier are best avoided altogether. In contrast, the laws of state responsibility and peremptory norms provide a more productive way forward. Based on the principles of sovereignty and equality of States, Palestine as a recognized state should

enjoy the protections stipulated in the UN Charter against the threat or use of force against its territorial integrity and political independence.[193]

This article speaks only to the oPt/State of Palestine and the limits within that formulation, and should be seen as without prejudice to the rights of *all* Palestinians to redress for the historical wrongs that they have suffered. International law alone will not liberate Palestine. Neither would dealing with only a 'carve-out' of the historical wrongs that the Palestinians have faced. But it may give the Palestinians something – some semblance of justice and accountability. It does not cover all the interesting and important aspects of international law that may be also involved in the advisory opinion, including a deeper historical and legal analysis into each of above-mentioned peremptory norms and others, as well as issues of Palestinian sovereignty/sovereign equality, political independence, and territorial integrity.

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[193] Azarova (2017) 3. In 2012, the UNGA granted Palestine an 'upgrade' in its status from 'non-member Observer entity' to that of a 'non-member observer State' status. UNGA Res 67/19 (29 November 2012). This does have bearing on Palestine's existence as a state beforehand. The resolution reaffirmed the Palestinian right to self-determination and 'to independence in their State of Palestine on the Palestinian territory occupied since 1967'. Ibid, para. 1. Palestine had previously attempted to obtain full UN membership, although this never came to a vote due to the US and UK. See UN Doc. S/2011/705 (11 November 2011). Nevertheless, Palestine is recognized as a State from 137 UN member States. See Permanent Observer Mission of the State of Palestine the UN New York, *Diplomatic Relations*, http://palestineun.org/about-palestine/diplomatic-relations/.