



EUROPEAN
COUNCIL
ON FOREIGN
RELATIONS

ecfr.eu

POLICY
BRIEF

ISRAEL'S UNLAWFULLY PROLONGED OCCUPATION: CONSEQUENCES UNDER AN INTEGRATED LEGAL FRAMEWORK

Valentina Azarova

SUMMARY

- An unlawfully prolonged occupation arises when an occupying state seeks to permanently transform the international status, government or demographic character of a foreign territory, including through *de jure* or *de facto* annexation.
- Israel's continued use of force to prolong its occupation is not justified by military necessity, but reflects government-sanctioned policies and practices of creeping annexation. As such, Israel's occupation of Palestine has become unlawfully prolonged.
- Diligent enforcement is needed of all applicable international law, which includes international humanitarian law, international human rights law, the laws on the use of force and on the self-determination of peoples to further Israel's withdrawal from the territory.
- Third party states and international actors are legally obligated to ensure non-recognition of Israel's internationally unlawful acts. They should be at the forefront of efforts to further Israel's compliance with international law. The EU and other third parties should use the 50th year of Israel's occupation to comprehensively review their dealings with Israel and Israeli entities, to ensure that they are not recognising as lawful Israel's internationally unlawful acts.

June 2017 marks 50 years of Israel's belligerent occupation of Palestinian territory, making it the longest occupation in modern history. The maintenance and expansion of settlements and associated infrastructure in the West Bank, the exploitation of natural resources for the benefit of Israel's economy, and policies that encourage the transfer of Israeli citizens into occupied territory and result in the forcible of transfer Palestinians within and outside that territory, all point to Israel's intent to permanently change the status of Palestinian territory. Fifty years on, Israel has, in fact, undertaken the *de jure* and *de facto* annexation of large parts of occupied Palestinian territory.

Military occupation is permitted in international law only if it is temporary and based on military necessity, but in the case of Israel's occupation there is no end in sight. International law contains clear guidelines on how occupations should work: a territory must be returned to its temporarily displaced sovereign, and the Occupying Power must be able to justify its continued control over the territory at all times on the basis of military necessity. The Israeli government, however, shows no indication that it will fully withdraw from the occupied Palestinian territory and transfer control back to the Palestinian sovereign.

Governments and legal scholars alike have focused on the conflict management provisions enshrined in international humanitarian law (IHL) and international human rights law (IHRL) in their assessments of Israel's actions and their effects. But Israel's prolonged occupation of Palestinian territory has not only resulted in pervasive violations of these international laws, such as the 1949

Fourth Geneva Convention, it has been based on rejection of their applicability in the first place.¹ Attempts by third states and international actors to enforce IHL and IHRL have failed to bring about Israel's compliance because this partial legal framework neither adequately captures the legal consequences of continued occupation with the aim of acquiring the territory, nor generates appropriate remedial action for such a situation.

The situation in Israel/Palestine today is at a critical juncture. The Middle East Peace Process (MEPP) has proven a perennial failure. Meanwhile, Israel has ramped up its settlement-building activity to some of the highest levels ever seen. A more diligent application of international law norms beyond IHL and IHRL is therefore needed to ensure the effective implementation of international law in the unlawful situation created by Israel's prolonged occupation, and to mobilise, legitimise, and incentivise responses from third parties to bring the occupation to an end. This paper identifies a legal framework that foregrounds the obligations of third parties not to give legal effect to the occupation, and in doing so, may provide a way forward for ending the occupation.

UN Security Council Resolution 2334 reiterates the importance of states abstaining from recognising Israel's internationally unlawful acts. To do so, they are required to distinguish between Israeli and Palestinian territory, and exclude settlement-based entities and activities from their dealings with Israel. Third party actors – including the European Union and its member states – have taken notable, but still insufficient, steps to this effect in recent years. The EU and its member states have a deep-seated commitment to the observance of international law, on which their ability to uphold the integrity and effectiveness of their own legal order hinges. They should be at the forefront of efforts to encourage Israel's compliance with international law, and further its full withdrawal from Palestinian territory in order to bring the occupation to an end.

The legal framework identified by this paper reveals how third parties that are committed to respecting international law compromise the integrity of their internal legal orders and public policy commitments by giving effect to Israel's internationally unlawful acts in relation to Palestinian territory. The same framework may be applied to other ongoing situations of prolonged occupation that resemble annexation or otherwise permanently transform the occupied territory, including northern Cyprus, Nagorno-Karabakh, Transnistria, South Ossetia and Abkhazia,

Western Sahara, and, most recently, Crimea.²

What is occupation law?

International law recognises the military occupation of an enemy's territory as a legitimate method of warfare. The law of armed conflict, also known as IHL or *jus in bello*, regulates Occupying Powers. The rules governing belligerent or military occupation – hereafter referred to simply as 'occupation' – come into effect as soon as a situation of occupation exists, as determined by the fulfilment of a series of criteria enshrined in IHL. There is an occupation when a state, that is "not the recognised sovereign of the territory", gains "effective control" over a foreign territory by force.³ Contrary to Israel's arguments, the applicability of the law of occupation does not depend on the territory having been taken militarily from its "rightful sovereign" at the time when it was first occupied, which in the case of Palestinian territory was from Jordan and Egypt. This view was also affirmed by the International Court of Justice (ICJ).⁴ This specialised body of law only regulates the conduct of an occupying state and does not assess the legality of the force it uses during the invasion phase of the occupation, or the force it uses to maintain its presence in the occupied territory afterwards.⁵ These assessments are based on the rules on the use of interstate force, set out in the United Nations Charter, also known as the *jus ad bellum*.

The normative framework governing an Occupying Power's actions balances the military necessity of occupation with the imperative of humanitarian protection of the population in the occupied territory. The law of occupation allows the Occupying Power to use force, as long as it is for reasons of genuine military necessity. In limited circumstances, the occupier may take steps that seriously infringe the rights of the population in the occupied territory, such as temporarily reassigning people's place of residence to protect them from harm due to the occupier's ongoing military operations.⁶

2 On other occupations, see: Paul Wrangé, "Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy", European Parliament, July 2015, available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2015\)534995](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995); "Illegal Economic and Other Activities in the Occupied Territories of Azerbaijan", Azerbaijan Ministry of Foreign Affairs, March 2016, available at http://mfa.gov.az/files/file/MFA_Report_on_the_occupied_territories_March_2016_1.pdf; "Third Quarterly Report (July - September 2016) of the Ministry of Foreign Affairs of Georgia on the Human Rights Situation in the Occupied Regions of Georgia", the Ministry of Foreign Affairs of Georgia, available at http://smr.gov.ge/Uploads/VII_1bo8da4c.pdf; "Rights in Retreat: Abuses in Crimea", Human Rights Watch, 17 November 2014, available at <https://www.hrw.org/report/2014/11/17/rights-retreat/abuses-crimea>; Thomas Hammarberg, "UN Special Expert on Human Rights in the Transnistrian Region of the Republic of Moldova, Report", United Nations, 14 February 2013; "Occupation and Other Forms of Administration of Foreign Territory", the International Committee of the Red Cross, 11 June 2012, available at <https://www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting>.

3 Article 42, Hague Regulations 1907, Article 2(2), Geneva Conventions 1949; and "Commentary: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva", the International Committee of the Red Cross, 12 August 1949, pp. 115, para 324, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>.

4 "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories: Advisory Opinion, 2004", the International Court of Justice, 9 July 2004, 136, para. 78, available at <http://www.icj-cij.org/docket/index.php?pi=3&p2=4&case=131&p3=5> (hereafter, "ICJ Wall Opinion"). See also: Meron, "The West Bank and International Humanitarian Law".

5 See, John Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War*, (Cambridge: Cambridge University Press, 2013).

6 Article 41, Fourth Geneva Convention, 1949.

1 Theodor Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", *American Journal of International Law*, 10 May 2017, pp. 4-5, available at <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/west-bank-and-international-humanitarian-law-on-the-eve-of-the-fiftieth-anniversary-of-the-sixday-war/E1D4F9F5B3C43C943D9C3F31EABF79B3>. (hereafter, "Meron, 'The West Bank and International Humanitarian Law'").

But the specialised rules of occupation law also create obligations to respect and provide for the fundamental and inviolable guarantees of ‘protected persons’, i.e. the local population in the occupied territory.⁷ Having ousted the sovereign and stepped into its shoes, the Occupying Power is legally obligated to fill the governance vacuum and provide minimum protections to the population under its control. Occupation law restricts what an Occupying Power can do, with the aim of protecting individual rights, and the level of such restrictions and protections is usually higher in times of calm occupation than during active hostilities.⁸ The Occupying Power is under an obligation to ensure and maintain civil life and public order, while respecting the local laws and institutions.⁹

However, the nature of the authority exercised by the occupier in the occupied territory is purely administrative. The occupying state is forbidden from taking decisions that are expected to detrimentally affect the ability of the rightful sovereign to regain control over the territory, or the future exercise by the local population of their internationally recognised right to self-determination.

Occupation law is premised on the idea that occupations are inherently temporary, are at all times based on military necessity, and eventually involve the transfer of effective control over the territory back to the ousted sovereign at the end of hostilities. The presumption that occupation is temporary and exceptional is meant to act as a bulwark against *de jure* or *de facto* annexation.¹⁰ Attempts to annex a territory would contravene the international law prohibitions on the acquisition of territory through the use of force against the territorial integrity and political independence of the occupied territory.¹¹ An Occupying Power is required to safeguard the natural resources of the occupied territory, and permitted to exploit them only for the benefit of the local population, and exceptionally for the purpose of covering reasonable expenses of its military administration.¹² For the same reason, occupation law prohibits the occupier from artificially creating demographic changes there, for example by transferring its civilian population into the occupied territory¹³ and transferring the local population out of the territory, or forcing them to move within it.¹⁴

7 Articles 27 and 47, Fourth Geneva Convention, 1949. See also, Eyal Benvenisti, *The International Law of Occupation*, (Oxford: Oxford University Press, 2012), pp.89-103 (hereafter, Benvenisti, *The International Law of Occupation*). See also, Salvatore Nicolosi “The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty”, *Polish Yearbook of International Law*, 2011, Vol.31, pp.165-187, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2218606. (hereafter, Nicolosi, “The Law of Military Occupation”).

8 Article 1(4), Additional Protocol I to the Geneva Conventions, 1977.

9 Article 43, Hague Regulations, 1907. Article 64, Fourth Geneva Convention IV.

10 Nicolosi, “The Law of Military Occupation”.

11 Article 2(4) and (7) UN Charter, 1945; R.Y. Jennings, *The Acquisition of Territory in International Law*, (Manchester University Press, 1963). (hereafter, Jennings, *The Acquisition of Territory in International Law*).

12 Article 55, Hague Regulations 1907. See also: James Steward, “Corporate War Crimes: Prosecuting the Pillage of Natural Resources”, Open Society Justice Initiative, September 2011, available at <https://www.opensocietyfoundations.org/reports/corporate-war-crimes-prosecuting-pillage-natural-resources>.

13 Article 49(6) Fourth Geneva Convention 1949.

14 Article 49(1), Fourth Geneva Convention 1949.

The effectiveness of occupation law as a regulatory framework depends on the occupying state’s willingness to respect certain bright-line rules contained in other international law norms. Besides the prohibition of territorial acquisition by force,¹⁵ these includes the right to self-determination of peoples,¹⁶ and the prohibition on racial discrimination, as well as other causes of persecution enshrined in International Criminal Law (ICL).¹⁷ ICL provides a set of rules and procedures that facilitate the enforcement of the most serious violations of IHL and IHRL.

While occupation law grants the Occupying Power some leeway for actions required by military necessity, the rules on the interstate use of force (*jus ad bellum*) impose a different test regarding the necessity of the occupation itself. Under this body of law, the occupier must, at all times, be able to justify its continued use of force to maintain the occupation on the basis of military necessity, which must be proportionate to its legitimate military objectives.¹⁸ For instance, an occupation may be legitimate if it is required to prevent a belligerent party from launching imminent attacks in the context of active hostilities on the territory of the occupying state, if the latter were to withdraw. However, an occupying state is prohibited from prolonging an occupation solely to “impress upon the enemy the necessity of submitting to terms of peace.”¹⁹

The rules of occupation law are necessarily consistent with broader international law principles, which tightly regulate the exceptional nature of belligerent occupations in the context of international armed conflict. These bodies of law affirm the temporary nature of occupation and the duty-bound administrative role of an Occupying Power. As such, occupation law renders null and void any consent given by local representatives of the occupied population for the occupier to revise the institutions or system of government of the territory, or the international status of the territory through annexation.²⁰ It also prohibits any other measures that would permanently compromise the future rights of the local population. To protect a people’s right to self-determination, the resolution of any ‘final status’ issues, as they are referred to in the Israeli-Palestinian context, including the return of refugees and any changes to the pre-1967 borders, is deferred until the end of occupation. Relegating this process to the end of the occupation is meant to prevent the occupier from coercing local authorities into ceding territorial or other sovereign rights while under the gun.

15 Article 2(4), UN Charter. The only exceptions to the use of force are the right to self-defense (Article 51) and an explicit authorisation to that effect by the Security Council (Chapter VII).

16 Article 55, UN Charter; Articles 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR).

17 “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”; Articles 7(2)(g), Rome Statute of the ICC.

18 “Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)”, (1986) ICJ Rep. 14, 94; Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge: Cambridge University Press, 2011) para. 607 (hereafter, Dinstein, *War Aggression and Self-Defense*).

19 Hersch Lauterpacht (ed), *Oppenheim’s International Law*, 7th edition, 1948, p. 432.

20 Yoram Dinstein, *The International Law of Belligerent Occupation*, (Cambridge, Cambridge University Press, 2009), pp.55-60. (hereafter, Dinstein, *The International Law of Belligerent Occupation*).

Occupation law was codified in IHL before modern human rights treaties, which means that IHRL fills in many of the gaps left by IHL's minimal provisions on the protection of the population in occupied territory.²¹ In all cases, to protect against revisions and transformation of the territory prohibited by IHL, the application of IHRL to the population in the occupied territory must be predicated on the full implementation of IHL rules. An approach that seeks to apply IHRL without being based on respect for IHL creates protection gaps of its own.

Occupying states have used human rights to justify the adoption of transformative measures in an occupied territory that vastly exceed the narrow mandate granted to them in IHL.²² This is especially the case when it comes to an occupier's legal obligation to maintain the laws and institutions in force prior to the occupation.²³ The deployment of human rights concerns to actually further a transformative agenda through occupation can encroach on the present and future rights of the population in the occupied territory, especially when the Occupying Power has undertaken to change the territory's demographic character by transferring its own civilians there, in violation of IHL rules.

In practice Israel has done just this – using human rights-based argumentation to protect the settler population in the occupied territory. The Israeli Supreme Court applies a balancing test to adjudicate between settlers and Palestinians claims under a pretence of equal rights; treating Israeli citizens as elevated constitutional subjects and denigrating Palestinians for the alleged security threat they represent.²⁴ In so doing, Israel actively undermines the prohibition placed on its nationals' presence in the occupied territory.

When maintaining an occupation is unlawful

Occupation law can only function effectively if an Occupying Power adheres to the norms outlined in the international law on the use of force. Occupation law itself does not provide a measure for determining whether the continuation of an occupation is lawful or not. In international law, an occupation itself can neither be lawful nor unlawful; occupations are merely a matter of fact, and are regulated as such.²⁵ The legality of maintaining an occupation, however, is determined according to the legality of the continued use or threat of force

21 Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, (Martinus Nijhoff, 2009), Chapter 11.

22 This was the case, for example, following the US invasion of Iraq in 2003. See also: Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law*, Vol. 16, 2005, p.662, available at <http://ejil.org/pdfs/16/4/313.pdf>.

23 Article 43, Hague Regulations 1907 and Article 64, Fourth Geneva Convention 1949. See also: Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law*, Vol. 16, 2005, p.662, available at <http://ejil.org/pdfs/16/4/313.pdf>.

24 Aeyal Gross, "The Righting of the Law of Occupation", in Nehal Bhuta (ed.), *The Frontiers of Human Rights*, (Oxford: Oxford University Press, 2016).

25 It bears noting that the use of the term 'unlawful occupation' is misleading insofar as there is no difference between lawful and unlawful occupation in dealing with the respective duties of the occupier. See "Hostages trial" (US Military Tribunal, Nuremberg, 1948), 8 LRTWC 34, 59, available at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf. See also: Dinstein, *The International Law of Belligerent Occupation*, p.3.

by the Occupying Power to maintain the occupation.²⁶ This means that an occupation may be unlawfully prolonged and administered, but not unlawful in itself.

The legality of an occupation is determined by the underlying purpose of the occupier's use of force: whether the occupier uses force to undertake an occupation with concrete military objectives, to annex parts of the territory, or otherwise seeks the transformation of the status of the territory. This prohibition covers any use of force that might affect the local population's internationally recognised right to self-determination and sovereignty in the territory, by precluding its ability to resume control at the end of occupation. An occupation in which force is used to fulfil the goal of permanently acquiring a territory is unlawful and attracts consequences under the international law on the use of force. The emergence of such a situation also triggers the legal obligations of third states in international law to cooperate to bring the occupation to an end, while also ensuring that they do not give effect to internationally unlawful acts in their dealings with the occupying state.

The limits of occupation law

Occupations that are unlawfully prolonged through the illegal use of force in pursuit of territorial acquisition, or the territory's secession, have, over time, exposed the inherent limits of occupation law in three related areas: first, in the narrow protection mandate occupation law assigns to the occupying state, irrespective of the duration of the occupation; second, in the inadequate legal consequences it prescribes for violations of IHL; and, third, in its limited ability as special-purpose law to pursue its regulatory objectives in situations of *de facto* administration that neither resemble, nor are predicated on, respect for the norms that occupation law depends on for its effectiveness (e.g. the prohibition on territory acquisition by force).

First, occupation law offers a restricted, duty-bound mandate to the occupying state that limits the scope of its authority vis-à-vis the population of the occupied territory, for reasons outlined above. However, with each passing year of an occupation, the need increases for occupiers to make executive decisions and adopt reforms in order to fully protect the occupied population's human rights.²⁷ In other words, in cases of prolonged occupation, an Occupying Power is often trapped between the imperative to refrain from taking executive decisions lest it violate occupation law,²⁸ and the need to take them as a temporary governing authority to ensure the development of the territory and to protect its population's human rights.²⁹ The proper

26 Article 2(4), UN Charter. See also, Rotem Giladi, "The Jus ad Bellum/Jus in Bello Distinction and the Law of Occupation", *Israel Law Review*, Vol. 41, 2008.

27 See: Vaious Koutroulis, "The application of international humanitarian law and international human rights law in situations of prolonged occupation: only a matter of time?", *International Review of the Red Cross*, 31 March 2012, No. 855, available at <https://www.icrc.org/eng/resources/documents/article/review-2012/irrc-885-koutroulis.htm>.

28 See the Israeli military administration's measures to develop the quarries, later approved by the Israeli supreme court as forms of economic development permitted by an occupying power; HCJ 2164/09, *Yesh Din v. IDF Commander in the West Bank* et al., 26 December 2011.

29 Benvenisti, *The International Law of Occupation*, pp.76-87.

resolution of such a situation in which executive decisions need to be made, should be, naturally, to expedite the return of an occupied territory to the status it had prior to occupation. But with Israel's occupation of Palestinian territory that has not been the case.

Second, the proper function of occupation law depends on the occupying state's willingness and ability to respect other international law. Occupation law was never intended to account for cumulative and compounded violations of IHL such as those resulting from *de facto* or *de jure* annexation of parts of an occupied territory. Yet most contemporary occupations, including in Palestine, have become situations of *de facto* administration that transform the territory, persist long after active hostilities have ceased, and have no basis in lawful military necessity. In many cases the motive of contemporary occupiers includes acquiring rights to the territory and wrongfully benefiting from its natural resources. But because occupation law is commonly applied in isolation from other international law, the legality of the continued presence of the occupying state in the occupied territory often remains unaddressed. Such questions fall outside the scope of *jus in bello* – which governs conduct during war time, including situations of occupation. The gaps in contemporary international legal practice mean that the legal consequences occupying states should incur for prolonging their occupations remain unclear.

Third, occupation law's preoccupation with humanitarian protection,³⁰ its emphasis on conserving the laws and institutions in force before the occupation, and its minimalist approach to human rights protection, have created protection and enforcement gaps. When the international response to such situations overemphasises the occupying state's obligations under occupation law and IHRL, without the concomitant application of the law on the use of force,³¹ it risks harming the effectiveness of international law. In a situation where the Occupying Power is unwilling to end the occupation, the application of IHL and IHRL cannot alone prevent the occupying state from benefiting from its unlawful exercise of sovereign authority, or prevent abuses of the local population's rights. While occupation law continues to formally apply to the actions of an occupying state that violates the law on the use of force, such cases of occupation require diligent application of the law on the use of force to encourage an Occupying Power to withdraw from foreign territory.

30 Meron, "The West Bank and International Humanitarian Law", p.10.

31 Meron, "The West Bank and International Humanitarian Law", p.10.

Defining an unlawfully prolonged occupation

Under the criteria provided by international law, many contemporary occupations appear to be unlawfully prolonged. An occupying state that seeks the permanent transformation of the political and legal order of a territory, for instance, by supporting a proxy government or secessionist movement, or by pursuing annexation of a territory, attracts state responsibility for serious breaches of the peremptory norms of international law (also known as *jus cogens*).³²

Under the UN Charter, such an occupier is assumed to be working towards the goal of preventing the ousted sovereign from regaining control over its internationally recognised territory, and denying the population in the occupied territory the ability to, in future, exercise their internationally recognised right to self-determination of peoples. Prolonged occupations should give rise to presumptions among members of the international community that the long-term goal of the occupier is permanent alteration of the territory's status or the rights of its local population.³³

A potential consequence of determining such an objective is that the formal status enjoyed by an Occupying Power in international law – one that presumes that the occupation is being maintained on grounds of security – is undone.³⁴ While such occupying states remain bound by existing international law obligations, their primary obligation is to undertake all necessary measures to withdraw from the territory. In the interim, they are arguably precluded from lawfully availing themselves of the tactical measures they are otherwise permitted to use in active hostilities, and when faced with sporadic violence from the local population.³⁵

32 On the status of the prohibition on the use of force as peremptory norms (*jus cogens*): Dinstein, *War Aggression and Self-Defense*, p.104. See also: Robert Adams, "Transformative Military Occupation: Applying the Laws of War and Human Rights", in Michael Schmitt, Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill | Nijhoff publishers, 2005), pp.439-495.

33 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514(XV), UN General Assembly Resolution 1514(XV) adopted 14 December 1960. Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), adopted 24 October 1970. The Right of Peoples and Nations to Self-Determination, UN General Assembly Resolution 637 (VII), adopted 6 September 1952. Permanent Sovereignty over Natural Resources, UN General Assembly Resolution 1803 (XVII), adopted 14 December 1962.

34 See, for example, the UN's termination of South Africa's mandate as administrator of Namibia and placed it under UN administration: UN General Assembly Resolution 2145 (XXI), 27 October 1966.

35 Israel has used the descriptor 'an armed conflict short of war' to use lethal force in the administration of daily affairs in the territory, where more restrictive standards of IHRL on the use of force are otherwise applicable: "Sharm El Sheikh Fact-Finding Committee First Statement of the Government of Israel", 28 December 2000, para. 286, available at www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/12/Sharm%20el-Sheikh%20FactFinding%20Committee%20-%20First%20Sta.

The reasons for Israel's prolonged occupation

There is a broad consensus among states and legal experts that the Palestinian territory of the West Bank, including East Jerusalem, and the Gaza Strip, is occupied, and triggers the application of the law of occupation enshrined in IHL.³⁶ Israel, however, has long argued that the law of occupation does not apply to Palestinian territory, since there was no sovereign Palestinian state before 1967,³⁷ and that the territory's status is 'disputed'.³⁸ Israeli Supreme Court decisions have, at times, affirmed the applicability of what Israel calls the 'humanitarian provisions' of the 1949 Fourth Geneva Convention and 1907 Hague Regulations that codify the law of occupation, but have not rejected the government's claim that the 1949 Fourth Geneva Convention (a critical component of the international legal framework applicable to occupied territory) does not apply *de jure* or *en bloc*. This arbitrary standard on what to include in the 'humanitarian provisions' category gives unrestricted discretion to Israel to reject, for instance, the provision in Article 49(6) of the Fourth Geneva Convention prohibiting the transfer of civilians of the occupying state into occupied territory (i.e. one of the policies implemented by Israel to maintain and expand the settlements).³⁹

Only a few months after enacting the requirement that Israel's military administration of occupied Palestinian territory "observe the provisions of the Geneva Convention" in military law, in December 1967, the military commander rescinded that law based on the view that "[t]he territorial position [of the West Bank and Gaza] is *sui generis*", i.e. unique and under-determined, and not occupied.⁴⁰ The recent granting of formal legal status to settlement outposts under Israeli law affirms the Israeli government's long-standing position that it is not bound by occupation law.⁴¹ A host of archival material from the first few years of the occupation recently discovered by Akevot – the Institute for Israeli-Palestinian Conflict Research – demonstrates the politically premeditated character of Israeli government positions and its long-standing attempts to circumvent its obligations under IHL in disregard of the Palestinian people's rights in international law.⁴²

36 Eyal Benvenisti, "Occupation and Territorial Administration", in R Liivoja and T McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, (Routledge, 2016). See also, "Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report", ICC Office of the Prosecutor, 4 November 2014, para. 16, available at [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf).

37 This position was based on Blum's 'absent reversioner' claim; Yehuda Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", *Israel Law Review*, Vol.3, 1968, p.279. It was supported before the government by Meir Shamgar, who later became an Israeli supreme court justice; Meir Shamgar, "The Observance of International Law in the Administered Territories", *Israel Yearbook of Human Rights*, Vol.1, 1971, p.262.

38 "Is the West Bank 'Occupied' or 'Disputed' territory", Israeli Ministry of Foreign Affairs, available at http://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements1; See also: "Cautionary remarks with respect to the use of certain terms", Akevot, available at <http://akevot.org.il/en/article/comay-memo-terminology/>.

39 Meron, "The West Bank and International Humanitarian Law", pp.15-16.

40 Eyal Benvenisti, "The Missing Argument: The Article that Changed the Course of History?", *American Journal of International Law*, Vol. 111, 2017, pp.31-32.

41 Ian Fisher, "Israel Passes Provocative Law to Retroactively Legalize Settlements", the *New York Times*, 6 February 2017, available at https://www.nytimes.com/2017/02/06/world/middleeast/israel-settlement-law-palestinians-west-bank.html?mcubz=1&_r=0.

42 See: Akevot archive, available at <http://akevot.org.il/en/paperwork/>.

Even before the beginning of the occupation in 1967, a set of Israeli legislative and administrative acts compromised the sovereign status of the occupied Palestinian territory. Some were based on a law from 1948 still in force today that provides: "Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel."⁴³ Although the Ordinance has not been referred to in practice, it remains in force and can therefore be assumed to inform Israeli institutional practice.

Successive Israeli governments have, for decades, established, maintained, and expanded settlements and their infrastructure.⁴⁴ These policies and practices have led to the extensive appropriation of Palestinian land and natural resources,⁴⁵ wrongful allocation of property rights to entities established and operating in settlements, widespread displacement of Palestinian communities, and denial of their basic rights, such as access to education and healthcare, due to the location of the settlements.⁴⁶ To enable the absorption of the settlements,⁴⁷ Israel has extended its domestic legal jurisdiction into occupied territory; its domestic law mandates the operation of Israeli domestic ministries and public bodies in settlements.⁴⁸ These measures constitute systemic violations of the duty-bound authority of an Occupying Power, and the narrow remit it has as *de facto* administrator of the occupied territory, since they entail sweeping reforms to Palestinian laws and institutions, including by replacing the jurisdiction of Palestinian courts with that of Israeli military courts.⁴⁹

Israeli governments have undermined Israel's obligations as an Occupying Power under international law⁵⁰ while prejudicing the future rights of Palestinians.⁵¹ In 1968, the Israeli government decided to set aside the 'top secret' opinion by its legal adviser, Theodore Meron, later an ICJ judge, which insisted on the applicability of the 1949 Geneva

43 "Area of Jurisdiction and Powers Ordinance No 29", adopted by the Knesset September 22, 1948, available at <http://www.geocities.ws/savepalestinnow/israelaws/fulltext/areaofjurisdictionpowersord.htm>.

44 For discussion of the effects of the 'Alon Plan', the 'Drobless Plan' and the Sharon plans, see: Matityahu Drobless, *Settlement in Judea and Samaria: Strategy, Policy and Planning*, 1980, p.3; "Dispossession and Exploitation: Israel's Policy in the Jordan Valley and Northern Dead Sea", B'Tselem, May 2011, available at <http://www.btselem.org/publications/summaries/dispossession-and-exploitation-israels-policy-jordan-valley-northern-dead-sea> (hereafter, "Dispossession and Exploitation", B'Tselem).

45 "Acting the Landlord: Israel's Policy in Area C, the West Bank", B'Tselem, June 2013, available at http://www.btselem.org/publications/summaries/201306_acting_the_landlord. Edith Garwood, "Troubled Waters: Palestinians Denied Fair Access to Water", Amnesty International, October 2009, available at <http://blog.amnestyusa.org/middle-east/troubled-waters-palestinians-denied-fair-access-to-water/>.

46 "Humanitarian Impact of Settlements", United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), available at www.ochaopt.org/theme/humanitarian-impact-of-settlements.

47 Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel*, The West Bank Data Project by the Jerusalem Post, 1989.

48 "One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank", Association for Civil Rights in Israel (ACRI), November 24 2014, available at <http://www.acri.org.il/en/2014/11/24/twosysreport/> (hereafter, "One Rule, Two Legal Systems").

49 Lior Yavne, "Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories", Yesh Din, December 2007, p.43, available at http://www.hamoked.org/files/2012/8521_eng.pdf. See also, Sharon Weill, "The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories", *International Review of the Red Cross*, Vol.89, No. 866, 2007, available at https://www.icrc.org/eng/assets/files/other/irrc_866_weill.pdf.

50 See: "Geneva Convention: Blasting homes and deportation", Akevot, 12 March 1968, available at <http://akevot.org.il/en/article/theodor-meron-opinion/?full>.

51 Meron, "The West Bank and International Humanitarian Law".

Conventions to the Palestinian territory and affirmed the illegality of settlements under international law.⁵² The declassified cable – originally sent to Yitzhak Rabin who was then Israeli Ambassador in Washington, DC – acknowledges that “there is no way to reconcile [Israeli] actions in Jerusalem with the restrictions emanating from the Geneva Conventions and The Hague Regulations.”⁵³ The cable acknowledged that in order to “leave all options regarding borders open, we must not acknowledge that our status in the administered territories is simply that of an occupying power.” These documents indicate that, from the outset of the occupation, the Israeli government knew that its positions and plans violated its obligations under international law.⁵⁴

Israel’s rejection of the international law of occupation, and its deep-seated commitment to the settlement process, is mirrored by its refusal to recognise the sovereignty of the Palestinian people in the territory. Israel held firm to this position during and after the negotiation and implementation of the Israel-PLO Interim Agreement (or the Oslo Accords), which was intended to organise the administration of the territory pending the conclusion of final status negotiations.⁵⁵

From occupation to annexation

For a state’s actions towards foreign territory to be designated annexation – a violation of the cardinal prohibition on the use of force to acquire territory – the state must have demonstrated intent to acquire permanent title over the territory.⁵⁶ That intent can be either formally declared and enacted in law, and hence known as *de jure* annexation, or it can manifest *de facto* in the practices and policies of an occupying state towards the occupied territory.⁵⁷

Unlike with its *de jure* annexation of East Jerusalem, Israel has not declared its intention to annex the rest of the West Bank to Israel,⁵⁸ but, in effect, its institutional and legal practice has increasingly absorbed and integrated the settlements into Israel.⁵⁹ Through a practice of creeping annexation, Israel has effectively absorbed the 62 percent of

52 Gershon Gorenberg, “Israel Knew All Along that Settlements, Home-Demolitions Were Illegal”, *Haaretz*, 19 May 2015, available at <http://www.haaretz.com/opinion/.premium-1.657167>.

53 “The Comay-Meron Cable reveals reasons for Israeli position on applicability of 4th Geneva Convention”, Akevot, 20 March 1968, available at <http://akevot.org.il/en/article/comay-meron-cable/?full>.

54 See also, a background note issued by the Ministry of Foreign Affairs affirming the need to maintain this position due to Israel’s actions in contravention of the Convention; Position Paper in light of the visit of Victor H Umbricht, member of the Presidential Council of the ICRC, 4-8 December 1971, Sent on 31 November 1971 by A Hassin, 3-4 (unpublished; courtesy of Akevot).

55 Antonio Cassese, “The Israel-PLO Agreement and Self-Determination”, *European Journal of International Law*, Vol.4, 1993. See also: Raja Shehadeh, *From Occupation to the Interim Accords: Israel and the Palestinian Territories*, (Kluwer, 1997).

56 Rainer Hoffman, “Annexation”, in *Max Planck Encyclopedia of Public International Law*, 2011.

57 Rainer Hoffman, “Annexation”, in *Max Planck Encyclopedia of Public International Law*, 2011.

58 Proposals to this effect are under consideration by the current Israeli government. See, “Netanyahu ally: West Bank Annexation would, be a disaster”, the *Times of Israel*, 31 December 2016, available at <http://www.timesofisrael.com/netanyahu-ally-west-bank-annexation-would-be-a-disaster/>.

59 “One Rule, Two Legal Systems”; Michael Karayanni, *Conflicts in Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (Oxford: Oxford University Press, 2014). See also, Yael Ronen and Amir Paz-Fuchs, “Occupational Hazards”, *Berkeley Journal of International Law*, Vol.30, 2012, p.2.

the West Bank designated ‘Area C’ by the Oslo Accords, over which Israel in fact maintains exclusive control.⁶⁰ Israel’s intention to acquire the occupied Palestinian territory is apparent from institutional practice, including legislative and administrative acts that underpin and enable:

- Its rejection of the applicability of occupation law, and in particular the 1949 Fourth Geneva Convention, and its official position that the status of the territory in international law is ‘disputed’;
- The extension of its domestic legal jurisdiction and laws to the occupied territory;
- The imposition of administrative measures and institutional practices that further the economic, social, and political integration and absorption of occupied territory into the territory of the occupying state;
- The transfer of the occupying state’s civilian population into the territory, and the recognition of their habitual residence in that territory, often alongside the direct and indirect forcible transfer of the local Palestinian population to make way for settlements; and
- The conferral of status under the domestic laws of the occupying state to the local population in the occupied territory, and to the nationals of the occupying state transferred into the territory.

Under Israeli law, the chief Israeli military commander, who heads the Israeli Civil Administration, is authorised to appropriate Palestinian land and allocate property rights to public and private entities for the purpose of establishing and developing settlements.⁶¹ The majority of settlements, according to Israeli records, are ostensibly built on public Palestinian land,⁶² which Israeli military law places under the administration of the Israeli military custodian, who is, in turn, permitted to allocate the land, rights of possession, and control over it to Israeli entities for the construction of settlements.⁶³

Although the appropriation of land in occupied territory for the purpose of facilitating the transfer of its own civilian population is unlawful regardless of the land’s public or private ownership, Israel distinguishes between public and private land in an attempt to disguise the settlement enterprise as

60 About 42 percent of this area is land built-up with settlements, while other parts make up the jurisdictional areas of settlements or nationals parks under Israeli control, often allocated for settlement use. See, “By Hook and By Crook: Israeli Settlement Policy in the West Bank”, B’Tselem, July 2010, available at http://www.btselem.org/publications/summaries/201007_by_hook_and_by_crook. (hereafter, “By Hook and By Crook”, B’Tselem).

61 “Under the Guise of Legality: Declarations on state land in the West Bank”, B’Tselem, March 2012, available at http://www.btselem.org/publications/summaries/201203_under_the_guise_of_legality. (hereafter, “Under the Guise of Legality”, B’Tselem).

62 “Summary of the Opinion Concerning Unauthorized Outposts-Talya Sason, Adv”, the Israeli Ministry of Foreign Affairs, 10 March 2005, available at <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/summary%20of%20opinion%20concerning%20unauthorized%20outposts%20-%20talya%20sason%20adv.aspx>. (hereafter, “Opinion Concerning Unauthorized Outposts”).

63 As early as 1967, then Minister of Interior Haim-Moshe Shapira stated that settlements would be called “military strongholds”, yet this practice has been phased out over the years: “There is the question of the Arabs and the question of the Jews”, Akevot, 20 August 1967, available at <http://akevot.org.il/en/article/question-of-arabs-and-question-of-jews?full>.

lawful acts of military necessity by limiting them to publicly owned land.⁶⁴ This has been the case since the Israeli High Court of Justice, in its 1979 *Elon Moreh* judgment, prohibited the construction of settlements on privately owned Palestinian land.⁶⁵ In a 1980 legal opinion, then Attorney General Yitzhak Zamir⁶⁶ maintained that the *Elon Moreh* ruling did not foreclose “seizing” private Palestinian land, if this was done under the pretext of the military need to maintain public order through protection of the settlements.⁶⁷

To incentivise population transfers, Israeli domestic law offers individual settlers, private entities, and settlement local authorities, financial benefits and property rights to encourage their permanent relocation to the settlements.⁶⁸ Even before the recent adoption of the Law for the Regularisation of Settlement in Judea and Samaria 2017,⁶⁹ the Israeli government appears to have been quietly implementing the recommendations of the Levy Report on the ‘legal status’ of building in the West Bank, which was commissioned but never formally endorsed by the government, by offering services and informal status to outposts,⁷⁰ while also turning a blind eye to private acts of ‘land grab’ by settlers.⁷¹

By contrast, the Palestinian population of the occupied territory is subject to Israeli military law, including military courts and law enforcement authorities. The Israeli civil administration – a branch of the military – maintains the Palestinian population registry and issues Palestinian identification documents that resemble residential status.⁷² During its administration of the population registry since 1967, Israel has lowered the population of the West Bank and Gaza by at least 600,000. Many have been excluded from the Palestinian population registry, thereby preventing

64 See, for example, Justice Shamgar who stated that the claimant lacked the standing to challenge the use being made of public land that had been allocated for the construction of settlements: H CJ 277/84 Ayreiv v Appeals Committee et al. 40(2) PD 57, 1986.

65 See, for example, the fact that the Israeli supreme court accepted the military claims that the settlement of Bet El has the function of a security installation, H CJ 606/78 Suleiman Taufiq Ayub et al. v. Minister of Defense et al.; Jameel Arsam Matu’a et al. v. Minister of Defense et al, PD 33(2), 13 March 1979.

66 “AG Zamir’s Legal Opinion following *Elon Moreh* Case, reviewed by The Law in These Parts”, Akevot, 8 November 2015, available at <http://akevot.org.il/en/news-item/zamir-opinion-on-settlements/>.

67 “Under The Guise of Legality”, B’Tselem.

68 On the incentives system: “Under the Guise of Security: Routing the Separation Barrier to Enable Israeli Settlement Expansion in the West Bank”, December 2005, available at http://www.btselem.org/publications/summaries/200512_under_the_guise_of_security. In 2015 there were nearly 550,000 settlers in the West Bank settlements (including East Jerusalem), living in some 150 settlements: “Statistics on Settlements and Settler Population”, B’Tselem, 11 May 2017, available at <http://www.btselem.org/settlements/statistics>; “Land Grab: Israel’s Settlement Policy in the West Bank”, B’Tselem, May 2002, pp.72– 84, available at http://www.btselem.org/publications/summaries/200205_land_grab; “By Hook and By Crook”, B’Tselem, pp.21–35. See also: Kerem Navot, *Israeli Settlers’ Agriculture as a Means of Land Takeover in the West Bank*, RHR.org, August 2013, available at <http://rhr.org.il/heb/wp-content/uploads/Kerem-Navot.pdf>. (hereafter, Navot, *Israeli Settlers’ Agriculture*).

69 “ACRI, Peace Now and Yesh Din Petition the High Court against the Expropriation Law”, Association for Civil Rights in Israel, 5 March 2017, available at www.acri.org.il/en/2017/03/05/acri-peace-now-and-yesh-din-petition-the-high-court-against-the-expropriation-law/.

70 “From Occupation to Annexation: The Silent Adoption of the Levy Report on Retroactive Authorisation of Illegal Construction in the West Bank”, Yesh Din, February 2016, available at <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/>.

71 “Crime Without Punishment: Failure to Prosecute Israelis Involved in Illegal Construction in the West Bank”, Yesh Din, February 2017, available at www.yesh-din.org/en/crime-without-punishment.

72 Since the registry was ‘frozen’, along with any changes to residential addresses, Israel has effectively come to control residency between Gaza and the West Bank, and requires ‘permits’ for travel in either direction: “Travel between the West Bank and the Gaza Strip”, Hamoked, available at www.hamoked.org/topic.aspx?tid=sub_30.

them from remaining in or re-entering the territory.⁷³ In 2000, with no justification in military necessity, Israel froze all updates to the registry, except for children under 16 born to a resident parent and other exceptional cases.⁷⁴

International institutions have already characterised Israel’s practices as having the effect of annexation. The ICJ, in its Wall Advisory Opinion, held that the wall and its accompanying regime resulted in “a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterisation of the wall by Israel as a necessary part of security infrastructure, it would be tantamount to *de facto* annexation.”⁷⁵ Recently, the Human Rights Council’s March 2017 resolution on Israeli settlements condemned Israel’s use of “measures the express purpose of which is to facilitate and authorize the ultimate *de facto* and *de jure* annexation of Palestinian land in contravention of peremptory norms of international law, including the prohibition of acquisition of territory resulting from the use of force.”⁷⁶ These determinations, however, have not been matched by state and international actors’ responses, which, are discussed below.

Towards the enforcement of an integrated normative framework

Some critics have blamed occupation law for being ineffective, particularly but not exclusively in the case of Israel’s occupation. But it is the international practice of applying it disjointedly from other international laws on the interstate use of force and self-determination of peoples (the *jus ad bellum*) that has undermined its effectiveness. The actions of an Occupying Power in international law, however, are regulated by an integrated normative framework that includes all applicable bodies of international law, in line with the coherence and systemic integrity of the international legal system.⁷⁷ Under such a framework, an occupying state is neither absolved of its obligations under occupation law, nor permitted to breach peremptory norms of international law on the use of force and self-determination, without incurring legal consequences.⁷⁸

Israel’s occupation of Palestinian territory, and a number of other contemporary occupations, attract consequences beyond occupation law for the following internationally unlawful acts:

73 “‘Forget about Him, He’s Not There’: Israel Control Over the Palestinian Population Registry”, Human Rights Watch, 5 February 2012, footnote 8, available at <https://www.hrw.org/report/2012/02/05/forget-about-him-hes-not-here/israels-control-palestinian-residency-west-bank-and>.

74 “Perpetual Limbo: Israel’s Freeze on Unification of Palestinian Families in the Occupied Territories”, B’Tselem, July 2006, available at http://www.btselem.org/publications/summaries/200607_perpetual_limbo; “Residents Without Status”, B’Tselem, 21 July 2013, available at www.btselem.org/gaza_strip/stateless.

75 “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, International Court of Justice, 9 July 2004, para. 121, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&p3=5>.

76 Human Rights Council Resolution, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, UN Doc HRC/A/34/L.41, 21 March 2017, para 7.

77 Article 31(1)(c), Vienna Convention on the Law of Treaties, 1969.

78 On the consequences of such violations, see: Iain Scobbie, “The Invocation of Responsibility for the Breach of Obligations Under Peremptory Norms of General International Law” *European Journal of International Law*, Vol. 13, 2002, pp. 1201–1220, available at <http://www.ejil.org/pdfs/13/5/1582.pdf>; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008).

- The use of force against the territorial integrity of another sovereign;
- The establishment and maintenance of a systematic practice of racial discrimination in the occupied territory, predicated on the transfer and recognition of the habitual residence of Israeli nationals in occupied territory;⁷⁹ and
- The flagrant denial of the right to self-determination of the local population of the occupied territory.

This section considers each of the consequences for these unlawful acts in turn, as well as some of the responses they merit from third parties and international institutions.

Unlawful use of force

Israel's continued use of force through occupation of Palestinian territory attracts consequences under the UN Charter's prohibition on the acquisition of territory by force. A situation of occupation maintained in the pursuit of territorial acquisition by force, rather than for reasons of military necessity, is "no different from outright annexation".⁸⁰ Both the basis for maintaining such a situation and the effects of its maintenance and continuation on the status of the territory and the rights of its local population amount to violations of international law.

International law provides a rigorous system of disincentives for responding to such unlawfully prolonged occupations. First, third parties have an obligation to put an end to an occupier's violations through collective and unilateral measures.⁸¹ To this end, States are expected to adopt and further determinations by international institutions commensurate with the gravity of the conduct. Following Russia's activities in Crimea in March 2014, for example, the EU and United States adopted firm positions on the unlawful character of Russia's use of force against the territorial integrity and the political independence of Ukraine.⁸²

Second, the UN Security Council may act in accordance with its authority under the UN Charter to determine that such acts are 'crimes against peace' which therefore constitute an international threat to peace and security. The Council may even go so far as to state that they amount to acts of aggression, which, according to UN General Assembly Resolution 3314, includes acts of "military occupation, however temporary, resulting from such invasion or attack,

79 "Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel", UN Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/ISR/CO/14-16, 9 March 2012, para. 24, available at www2.ohchr.org/english/bodies/ceerd/docs/CERD.C.ISR.CO.14-16.pdf.

80 Benvenisti, *The International Law of Occupation*, p.349.

81 Article 29, Vienna Convention on the Law of Treaties 1969. See also: *Council v. Front Polisario*, Judgment of the European Court of Justice, Grand Chamber Judgment, C-104/16 P, 21 December 2016, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=186489&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=871140>.

82 For discussion of these positions, see: Antonello Tancredi, "The Russian Annexation of Crimea: Questions Relating to the Use of Force", *Questions of International Law*, 11 May 2014, available at <http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/>.

or any annexation by the use of force of the territory of another State or part thereof."⁸³

The UN General Assembly could also request the ICJ to provide an advisory opinion on the effects of Israel's continued presence in Palestinian territory, and the legality of its use of force to maintain the occupation. The ICJ assessed the legality of prolonging an occupation in its 1971 Advisory Opinion on South Africa's continued presence in Namibia. The court concluded that the effect of prolonging the occupation of Namibia was that South Africa eroded the occupied people's right to self-determination, thereby creating an "illegal situation".⁸⁴ That opinion led the UN Security Council and the UN General Assembly to impose smart and targeted sanctions on South African entities with the aim of bringing the prolonged occupation to an end.

Third, because Israel's prolonged occupation is unlawful, many of its actions in the administration of the territory are deemed invalid as a result of them being predicated on its illegal use and threat of force, i.e. in violation of the peremptory norm of international law prohibiting the acquisition of territory by force.⁸⁵ Third states should closely scrutinise them to be sure that they are not given effect. Diligently upholding a standard of non-recognition could also make it less difficult to reverse such effects after the end of the occupation. Measures that are likely to be invalidated by international law include: those excluding Palestinians and other members of the protected population (e.g. foreign spouses of Palestinians) from the territory; assigning different residency status and rights of movement to individuals in the West Bank, Gaza Strip, and East Jerusalem; and appropriating Palestinian land and allocating rights to property for the settlement enterprise.

The compounded effects of continued foreign occupation beyond IHL and IHRL were examined by the European Court of Human Rights in *Cyprus v Turkey*. It found that violations of the European Convention on Human Rights were caused by Turkey operating an unlawful administrative regime – the Turkish Republic of Northern Cyprus – that left no available route through which to end the property rights violations suffered by Cypriots.⁸⁶ The monetary award of damages for these serious human rights violations, amounting to €90 million payable by Turkey to Cyprus, was heralded by the court as "punishment for unjust war and its tragic consequences in Europe."⁸⁷ Although Israel is not subject to the European Court's jurisdiction, the

83 Article 3, UNGA Resolution 3314 (XXIX). Yoram Dinstein, "Aggression", *Max Planck Encyclopaedia of International Law*, September 2015.

84 "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)", International Court of Justice, 21 June 1971, pp.12-14; Stephanie Koury, "Legal Strategies at the United Nations: A Comparative Look at Namibia, Western Sahara, and Palestine", in Susan M. Akram, Michael Dumper, Michael Lynk, Iain Scobbie (eds), *International Law and the Israeli-Palestinian Conflict* (Routledge, 2010).

85 The principle of invalidity is a customary rule applicable to violations of *jus cogens*, and codified in relation in Article 53, Vienna Convention on the Law of Treaties 1969. See: Christos L Rozakis, "The Law on Invalidity of Treaties", *Archiv des Völkerrechts*, Vol.16, No. 2, 1974, available at <http://www.jstor.org/stable/140036026>.

86 Concurring judges noted that "the present judgment heralds a new era in the enforcement of human rights": *Cyprus v Turkey*, the European Court of Human Rights 14 May 2014, available at <https://lovdata.no/static/EMDN/emd-1994-025781-3.pdf>. (hereafter, *Cyprus v Turkey*).

87 *Cyprus v Turkey*, para 24.

precedent set by this ruling indicates the gravity of such violations and the response they merit from third parties and international institutions. The UN Security Council similarly upheld Iraq's "liability under international law for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait".⁸⁸ These decisions affirm the importance of offering reparations, including monetary compensation, to victims of the serious human rights violations they cause.⁸⁹

Structural abuses of human rights and discrimination

The relationship between IHL and IHRL is complementary: Israel's occupation, which is based on continuous violations of IHL, entails systemic abuses of Palestinian human rights.⁹⁰ Israel rejects the extraterritorial application of IHRL to the occupied Palestinian territory as mandated by international law.⁹¹ However, all international bodies that have addressed the issue have found that Israel's obligations under the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights, to which it is a State party, apply to territory that remains subject to its effective control and *de facto* jurisdiction through occupation.⁹²

As discussed above, the application of IHRL to the occupied territory must, at all times, be predicated on the full implementation of IHL rules. The Israeli policy is to settle its own citizens on the occupied territory, through state encouragement, organisation, material and budgetary incentives,⁹³ and the protection of their right to reside there as Israeli citizens subject to Israel's domestic jurisdiction.⁹⁴

It is then Israeli authorities and courts that adjudicate Palestinian rights claims, under Israeli law, creating a bifurcated legal system that pits Palestinian rights against those of Israeli settlers, who enjoy the full gamut of rights granted to other Israeli citizens.⁹⁵ The basis for this judicial practice is Israel's formal government-sanctioned policy of recognising the habitual residence of settlers in the occupied territory, which is contrary to the most fundamental dictates

88 Security Council Resolution 686 (1991) on the end of hostilities in the Gulf region, UN Doc. S/RES/686(1991), 2 March 1991.

89 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations Human Rights Office of the High Commissioner, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

90 "International Fact-Finding Mission on Settlements and their Impact on the Civil, Political, Economic, Social, and Cultural Rights of Occupied Palestinian Territory", United Nations Human Rights Office of the High Commissioner, 29 June 2012, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session19/Pages/IsraeliSettlementsInTheOPT.aspx> (hereafter, "UN Fact-Finding Mission Report on Settlements"). See also: "Arrested Development: The Long Term Impact of the Separation Barrier", B'Tselem, 2012, available at http://www.btselem.org/download/201210-arrested_development_eng.pdf.

91 "ICJ Wall Opinion", pp. 187–189, paras 127–131, and pp.191–192, para 134.

92 "Concluding observations on the fourth periodic report of Israel", United Nations Human Rights Committee, UN Doc. CCRP/C/ISR/CO/4, 21 November 2014, para 5, available at <https://goo.gl/YOOG9h>.

93 "Under The Guise of Security", B'Tselem.

94 HCJ 1661/05, *Gaza Coast Regional Council v Knesset*, PD 59(2) 481 (2005) 524; Meron, "The West Bank and International Humanitarian Law" p.17.

95 Aeyal Gross, *The Writing on the Wall: Rethinking the Law of Occupation* (Cambridge University Press, 2017), Chapter 5.

of IHL. As such, Israel's protection of settler rights in occupied territory cannot be considered as a lawful basis for justifying the limitations placed on Palestinian rights in the same territory.⁹⁶

The legal and administrative system Israel maintains in the Palestinian territory of the West Bank, including East Jerusalem, applies one set of rules for Palestinians and another for Israelis residing in the territory.⁹⁷ By establishing two separate systems for Israelis and Palestinians, Israeli authorities also violate the international law prohibition on discrimination.⁹⁸

In sum, Israel's prolonged occupation creates a situation of serious human rights violations and unbearable living conditions, in which communities and individuals see no other option but to relocate.⁹⁹ This is in contravention of the absolute prohibition on forcible transfer of the population in the occupied territory inside or out of that territory.¹⁰⁰ The forcible transfer of Palestinian communities undermines their economic and social development,¹⁰¹ which Israel is obligated to respect.

Such actions, intended to further Israel's settlement policy, may amount to persecution, which is defined as a crime against humanity under the Rome Statute of the International Criminal Court (ICC).¹⁰² The ICC Office of the Prosecutor is therefore arguably expected to consider the implications of these actions in its preliminary examination of the 'situation of Palestine' that began in January 2015.¹⁰³

Self-determination

The right of the Palestinian people to exercise self-determination through independence and sovereignty is

96 The first measure to be considered is their removal from that place, and the only measures to protect them in the interim should be temporary: David Kretzmer, "Settlements in the Supreme Court of Israel", *American Journal of International Law*, Unbound Vol.111, 2017, p.44, available at <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/settlements-in-the-supreme-court-of-israel/E92B28F7078F2A969B93A0450292775E>.

97 "UN Fact-Finding Mission Report on Settlements"; "Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories", Human Rights Watch, December 2010, available at https://www.hrw.org/sites/default/files/reports/fopt1210webwcover_o.pdf.

98 Article 1, UN Charter. Article 2, International Covenant on the Elimination of all forms of Racial Discrimination.

99 "Forced Displacement: 2015 Overview", UN OCHA, 3 June 2016, available at www.ochaopt.org/content/2015-overview-forced-displacement.

100 Article 49, Fourth Geneva Convention, 1949.

101 "Area C and the Future of the Palestinian Economy", the World Bank, October 2013, available at <http://documents.worldbank.org/curated/en/137111468329419171/West-Bank-and-Gaza-Area-C-and-the-future-of-the-Palestinian-economy>.

102 "Customary International Humanitarian Law, Rule 156: Definition of War Crimes", International Committee of the Red Cross, available at <http://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>; FIDH, "Investigate Persecution Arising out of Ongoing Gaza Closure, Palestinian Human Rights Organizations Urge ICC Prosecutor", FIDH, 21 November 2016, available at www.fidh.org/en/region/north-africa-middle-east/israel-palestine/investigate-persecution-arising-out-of-ongoing-gaza-closure.

103 "Preliminary Examination of the Situation of Palestine", ICC Office of the Prosecutor, 16 January 2015, available at www.icc-cpi.int/palestine; Valentina Azarova, "Palestine's day in court? The Unexpected Effects of ICC Action", Al-Shabaka, 1 April 2015, available at <http://al-shabaka.org/briefs/palestines-day-in-court-the-unexpected-effects-of-icc-action/>.

internationally recognised.¹⁰⁴ As a peremptory norm of international law, self-determination is both a general principle enshrined in the UN Charter,¹⁰⁵ and a collective human right of a people to “determine its own political economic and social order, according to its own practices and procedures of governance, rather than having these kinds of decisions determined by a foreign power in the course of an occupation”.¹⁰⁶

The right to self-determination is a corollary to the prohibition on the acquisition of territory by force, because the right protects the link that a self-determining people maintains with a given territory.¹⁰⁷ Its premise is also affirmed by the IHL prohibition on the transformation of the occupied territory’s government, legal status, and demographic characteristics. Israel’s rejection of Palestinian self-determination and sovereignty in the territory, therefore, is probative of its underlying intent to pursue the permanent acquisition of Palestinian territory.

To protect the collective right to self-determination of the local population in the occupied territory, occupation law suspends certain decision-making processes (placing them in what is called a state of ‘abeyance’) until the return of the rightful sovereign – in addition to prohibiting the representatives of the local population of the occupied territory from waiving the law’s protections, as noted above.¹⁰⁸ Israel has made repeated attempts to gain Palestinian consent and international recognition for ‘land swaps’ between occupied territory and Israeli territory. However, a treaty that cedes title to territory is deemed void from the outset if it is signed under coercion that results from the unlawful use of force.¹⁰⁹

While the representatives of the population in the occupied territory maintain a degree of agency and are able to enter into special agreements with the occupier during occupation for the purpose of facilitating the territory’s administration, such agreements cannot absolve the occupying state of its IHL obligations.¹¹⁰ The Oslo Accords are therefore special agreements for the interim administration of the occupied territory that establish the Palestinian National Authority as a subordinate authority of the Occupying Power. The Accords neither absolve Israel of its IHL obligations as an Occupying Power,¹¹¹ nor constitute an act of consent by Palestinian representatives to waive rights that have been subsequently

104 UN General Assembly Resolution 3236 (XXIX), adopted 22 November 1974, recognised the Palestinian people’s right to self-determination, established official United Nations contact with the Palestine Liberation Organisation and added the “Question of Palestine” to the UN Agenda.

105 James Crawford, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press, 2013), p.595.

106 Articles 1, ICCPR and ICESCR.

107 On the components of the right to self-determination, see: Catriona Drew, “The East Timor Story: International Law on Trial”, *European Journal of International Law*, Vol.12, No.4, 2001, available at <http://ejil.org/pdfs/12/4/1539.pdf>.

108 Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, *American Journal of International Law*, Vol.100, No.3, 2006.

109 Jennings, *The Acquisition of Territory in International Law*, pp.74-76.

110 Article 47, Fourth Geneva Convention, 1949.

111 Articles 7 and 8 to the Geneva Conventions. The ICRC 2016 Commentary on Convention (I) states that this article is a safeguard to ensure that a state cannot excuse its failure to respect its obligations under the Conventions on the grounds that it is based on the will of the protected persons (361, para. 988). Meron, “The West Bank and International Humanitarian Law”, p.12.

undermined by Israeli violations of international law.¹¹²

Effects on Europe

Israel’s illegal use of force to prolong its occupation has created an unlawful situation that third party states are tasked to bring to an end under the international law on state responsibility. Doing so will require the EU and its member states to rethink a failed peace-making model that has, in many cases, acquiesced to Israel’s practice and policies, and that fail to effectively challenge the underlying basis for its continued occupation of Palestinian territory. Europe should align its positions and actions with the full gamut of international law-based consequences and promote their rigorous enforcement in furtherance of the end of occupation, both bilaterally and in multilateral fora.

At a minimum, third states are under a responsibility in international law to act cohesively and vigorously to ensure the non-recognition of the unlawful situation and deny it effectiveness. The proximity of the EU and its member states to Israel through interstate relations and dealings that may extend to the settlements places them in an uneasy situation. The EU is also necessitated by its internal legal order to ensure that it does not give legal effect to Israel’s internationally unlawful acts in the context of their mutual relations. Building relations with Israel without regard to these imperatives threatens the integrity of the EU’s own internal legal order.

Non-recognition

All states have an obligation to uphold the international rule of law, and to endeavour, through international cooperation, to bring an end to serious breaches of peremptory norms of international law,¹¹³ and to ‘ensure respect’ for IHL.¹¹⁴ At a minimum, all states must abstain from recognising such violations as lawful, or aiding or assisting them; a customary norm that is codified in the 2001 International Law Commission’s (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts.¹¹⁵ The ILC referred specifically to territorial acquisition through unlawful force, and the denial of self-determination, as cases covered by this obligation,¹¹⁶ which is also a corollary of the principle of *ex injuria jus non oritur*, intended to prevent a wrongdoer from benefiting

112 Dinstein, *The International Law of Belligerent Occupation*, p.58.

113 Article 41(1), “ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts”, 2001. See also: Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law*, (Brill I Nijhoff publishers, 1990).

114 See: Common Article 1 to the Geneva Convention, Rule 144, Ensuring Respect for International Humanitarian Law *Erga Omnes*, ICRC’s Customary IHL Study; Marco Sassoli and Theo Boutruche, “Expert Opinion on Third States’ Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions”, November 2016, available at www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf.

115 Articles 40 and 41(2) ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001; Stefan Talmon, “The Duty not to recognize as Lawful a Situation Created by the Illegal Use of Force or Other Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?”, in C. Tomuschat, J.M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill I Nijhoff publishers, 2005).

116 “International Law Commission, Report on the Work of Its Fifty-Third Session”, UN GAOR, 56th Session, Supplement No 10, 114, para. 5.

from its wrongful acts.¹¹⁷

In the case of *de facto* annexation of foreign territory, non-recognition is also necessitated by the law of treaties, codified in the 1969 and 1986 Vienna Convention on the Law of Treaties. It provides that agreements between states, as well as those between states and international organisations may not be applied in a manner that affects the rights and obligations of a third-party sovereign without its consent.¹¹⁸ In other words, third states and international organisations cannot enter into agreements with Israel in relation to Palestinian territory that have not received the consent of the Palestinian representatives or that affect existing agreements with them.

With the aforementioned provisions in mind, UN Security Council Resolution 2334 calls on all states and international actors to “distinguish, in their relevant dealings, between the territory of the state of Israel, and territories occupied since 1967.”¹¹⁹

Third states that violate their obligations to ensure that wrongdoers do not benefit from their wrongs, compromise their own commitments to respect international law and contribute to its observance by their partner countries. Such states may also run afoul of the obligation not to give legal effect to internationally unlawful acts occurring in situations of unlawfully prolonged occupation. By giving effect to such unlawful acts, some third parties may also compromise the implementation of their domestic law and public policy by relying on the other’s non-corresponding wrongful practice and interpretations of international law.

The very reason that non-recognition is identified as a norm of customary international law is that it is deeply embedded in national systems. The imperative of non-recognition as lawful of the internationally unlawful acts of other states is a function of states’ ability to uphold the integrity and effectiveness of their domestic legal orders. To do so, states must guarantee their ability to rely on the practice of a partner country for the implementation of an instrument of privileged bilateral dealings. For this reason, states’ observance of the principle of non-recognition can take the form of interstate enforcement measures intended to correct the partner country’s practice as a condition for its relations with the third state. Recent corrective measures by the EU and its member states to their dealings with Israel are driven by a form of this internal imperative.¹²⁰

EU legal necessity

Over the past few years the EU has consolidated its commitment to non-recognition and developed a specific

117 Martin Dawidowicz, “The Obligation of Non-Recognition of an Unlawful Situation”, in James Crawford (ed), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp.677-686.

118 Articles 29 and 34, Vienna Convention on the Law of Treaties, 1969 and 1986. See its application in, *Council v. Front Polisario*, Judgment of the European Court of Justice, Grand Chamber Judgment, C-104/16 P, 21 December 2016.

119 UN Security Council Resolution 2334 (2016), para 5.

120 Krassimir Nikolov, “Ashton’s Second Hat: The EU Funding Guidelines on Israel as a Post- Lisbon Instrument of European Foreign Policy”, *Diplomacy*, 6 October 2014, available at <http://diplomacy.bg/archives/12992?lang=en>.

position on the non-recognition of Israeli sovereignty over Palestinian territory. This has led it to exclude public and private entities based or operating in the settlements from its relations and dealings with Israel and Israeli entities. Since 2012, the EU’s Foreign Affairs Council has adopted a set of key positions in its Conclusions that affirm the need to adopt such ‘differentiation’ measures in all areas of EU-Israel relations. These include reaffirming the EU’s commitment “to ensure continued, full and effective implementation of existing EU legislation and bilateral arrangements applicable to settlement products,”¹²¹ and mandating that “in line with international law – all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967.”¹²²

The need to differentiate between Israeli and occupied Palestinian territory is an imperative of EU law and policy that is needed to enable the full and effective implementation of EU and member states’ domestic laws. The EU and its institutions are legally bound under the Lisbon Treaty to ensure respect for international law in the exercise of their powers.¹²³ The EU also has an interest in preventing and resolving ongoing conflicts, and to this end is committed to encouraging the observance of international law by its partner countries, particularly those involved in armed conflicts. This aspect of the EU’s Common Foreign and Security Policy is also reflected in the EU’s Guidelines for Promoting Compliance with IHL.¹²⁴

The EU’s commitment to the imperative of non-recognition can be traced back to the European Community’s 1991 declaration on the recognition of new states, which states that “[t]he Community and its Member States will not recognise entities which are the result of aggression”, and notes that the commitment to the principles of the UN Charter and the inviolability of all frontiers, *inter alia*, need to be “laid down in agreements”.¹²⁵ In a statement to the Sixth Committee of the General Assembly, on 30 October 2007, the European Commission affirmed that:

“[...] international organisations [such as the EU] are also (like States) under an obligation not to recognise as lawful a situation created by a serious breach (draft Article 45 paragraph 2). In this respect the SR [Special Rapporteur] rightly mentions the declaration of the Community and its Member States of 1991. It should be pointed out that this was a joint statement of the international organisation and its

121 “Council Conclusions on the Middle East Peace Process”, the European Council, 20 July 2015, available at www.consilium.europa.eu/en/press/press-releases/2015/07/20-fac-mepp-conclusions/.

122 “Council conclusions on the Middle East Peace Process”, the European Council, 18 January 2016, available at www.consilium.europa.eu/en/press/press-releases/2016/01/18-fac-conclusions-mepp/.

123 See, for example: *Anklagemyndigheden v. Poulsen and Diva Navigation Corp.*, Case C-286/90, 24 November 1992, para. 9.

124 “European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL)”, the European Commission, www.consilium.europa.eu/uedocs/cms_data/docs/hr/news53.pdf.

125 “Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union”, adopted at an Extraordinary EPC Ministerial Meeting at Brussels on 16 December 1991; text in *European Journal of International Law*, Vol.4, No.72, 1993.

members. It therefore also forms part of the practice of the European Community as an international organisation.¹²⁶

The EU's Lisbon Treaty also requires that consistency is maintained between the EU's policy positions and its activities, including its external relations. This is a fundamental obligation of "unassailable necessity" to the EU's legal order.¹²⁷ The European External Action Service is charged with ensuring that the EU's external relations do not disrupt its ability to fully implement EU law, including instruments of privileged dealings, consistently with EU public policy, in order to protect the integrity of the *acquis communautaire*.¹²⁸

The EU has begun to apply its internalised non-recognition imperative to its relations with Israel and Israeli entities. It significantly furthered the implementation of this imperative to these relations with the European Commission's July 2013 guidelines on the implementation of the EU's financial legislation,¹²⁹ which set out the parameters of Israel's participation in EU programmes such as Horizon2020 and which prohibit EU funding of Israeli entities based or operating in the settlements.

Need for coherence

The EU needs to act more diligently to implement non-recognition in the context of its relations with Israel, as well as in other contexts of unlawfully prolonged occupations. Where the EU and member states have failed to apply the principle of non-recognition, they have harmed the EU's legal order and undermined its ability to protect EU nationals, including corporate entities, from the reputational, economic and legal risks associated with Israel's internationally wrongful acts. The revisions undertaken by the EU to ensure non-recognition of Israel's sovereignty over Palestinian territory has arguably benefited Israel in the long run by facilitating the EU and its member states' risk-free dealings with Israel and Israeli entities in a manner that does not give effect to Israel's internationally unlawful acts. However, proposals to this effect are opposed by some EU member states.

The EU and member states have not yet devised a coherent policy and process for proactively detecting and correcting dealings with Israel and Israeli entities that are predicated on its unlawful acts. Instead, the revision of EU-Israeli dealings

¹²⁶ Cited in Charles Shamas, "EU-Third Country contractual engagements under the European Neighbourhood Policy: Improving the EU's Normative Housekeeping through Ex-Ante Conditionality and Safeguard Provisions", in *Building a Neighbourhood on Shared Values: Do the EU and its Member States have legal obligations to ensure that agreements with partner countries are not implemented in violation of fundamental principles of international law?*, Brussels, 27 November 2007, (unpublished). (hereafter, Shamas, "EU-Third Country contractual engagements").

¹²⁷ See, Armin von Bogdandy, "Founding Principles", in A von Bogdandy, J Bast (eds), *Principles of European Constitutional Law*, 2011, pp.11-54.

¹²⁸ Shamas, "EU-Third Country contractual engagements"; Patrick Muller and Peter Słominski, "The Role of Law in EU Foreign Policy-making: Legal Integrity, Legal Spillover, and the EU Policy of Differentiation towards Israel", *Journal of Common Market Studies*, 2016, p.6.

¹²⁹ "Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards", *Official Journal of the European Union*, 19 July 2013, available at http://ceas.europa.eu/archives/delegations/israel/documents/related-links/20130719_guidelines_on_eligibility_of_israeli_entities_en.pdf.

has been piecemeal, and includes numerous cases where the implementation of EU law remains deficient.¹³⁰ The EU's dealings with other partner countries that wrongfully maintain occupations of foreign territory, for example Morocco, suffer from similarly deficient approaches to the implementation of non-recognition. But here, too, growing awareness of the risks that such relations represent to its legal order has begun to raise the EU's awareness of the need to correct its interstate relations and private dealings with Moroccan entities. In a 21 December 2016 judgment, the European Court of Justice Grand Chamber upheld that Morocco, arguably with EU acquiescence, was wrongfully applying the EU-Morocco Association Agreement to the territory of the Western Sahara, without the consent of the Sahrawi people or their internationally recognised representative, the Polisario Front.¹³¹

The EU's observance of international law through non-recognition can contribute to bringing about Israel's respect for its international law obligations. UN Security Council Resolution 2334 arguably appreciates the prospects of furthering the enforcement of international law through non-recognition by calling on all states to uphold the territorial distinction between Israeli and Palestinian territory.¹³²

The EU is also well positioned to encourage other third states and international actors, including regional organisations and blocs such as the European Free Trade Association and Mercosur, whose member countries engage in relations and dealings with Israel and Israeli entities to review their dealings and correct them as necessary to ensure the non-recognition of Israel's internationally unlawful acts.

To activate such restrictive and corrective measures of non-recognition, their significance for the internal legal orders of states and the harmful consequences of their non-implementation should be transparently and publicly communicated to both nationals and domestic regulatory authorities. A transparent process for the adoption of non-recognition measures would also minimise attempts to obstruct such measures through political pressure and undermine their significance for states' internal legal orders.

¹³⁰ Hugh Lovatt, "EU differentiation and the push for peace in Israel-Palestine", the European Council on Foreign Relations, 31 October 2016, available at http://www.ecfr.eu/publications/summary/eu_differentiation_and_the_push_for_peace_in_israel_palestine7163.

¹³¹ CJEU C-104/16 P, *Council v. Front Polisario*, Grand Chamber, Judgment of 21 December 2016.

¹³² UN Security Council Resolution 2334 (2016), para 5.

Charting a way forward

Israel's continued occupation of Palestinian territory attracts legal consequences beyond occupation law. The demonstrated effects of Israel's actions in bringing about the annexation of large parts of the Palestinian territory violate the prohibition on the use of force to acquire territory, and the internationally recognised right to self-determination of the Palestinian people. Occupation law alone does not offer a sufficient remedial course of action for these serious breaches of peremptory norms of international law.

There is broad consensus about the applicability of occupation law to Israeli actions in relation to Palestinian territory, yet few third states and international actors have adopted positions and measures directed at Israel's unlawful exercise of sovereign authority in the occupied Palestinian territory. Even fewer third parties have adopted positions on the consequences of its actions under the law on the use of interstate force, let alone taken active measures to require and compel Israel to bring an end to its unlawfully prolonged occupation of Palestinian territory through full and effective withdrawal from the territory that returns effective control to the Palestinian sovereign.

International law provides a rigorous system of disincentives that is commensurate with the gravity of Israel's acts. However, not all relevant international law norms have been applied diligently to this situation of unlawfully prolonged occupation. All states should appraise the nature and effects of unlawful Israeli acts in view of the threat they pose to international peace and security, and should ensure they do not recognise as lawful these acts, their effects, and the rights and benefits they purport to create. This is a requirement for all states participating in the observance of international law, which requires states to cooperate through international mechanisms – such as the United Nations General Assembly and Security Council, the ICC, and ICJ – to further measures that could alleviate the harms suffered by victims and incentivise the wrongdoing authorities to cease and desist from their unlawful acts.

The EU and its member states must ensure, in line with their own laws and policy, the non-recognition of Israel's internationally unlawful acts. Ensuring non-recognition is a legal necessity as it enables the full and effective implementation of EU law and guarantees protection for EU nationals and companies. Accordingly, the EU and its member states are required to exclude unlawful Israeli activities outside the 1967 borders, as well as other internationally unlawful acts engaged in by Israeli authorities (e.g. intelligence gathering in contravention of human rights and international law standards), from their dealings with Israel and Israeli entities. To proceed in their relations and dealings with Israel and Israeli entities, the EU and its member states must ensure that Israel is willing to respect and align its conduct with the positions of the EU and its member states' on the correct application of international law, or to effectively exclude its activities in the occupied territory from the scope of such dealings.

The EU and its member states are also required, under their domestic law, to regulate their businesses' operations in, and in relation to, Israeli settlements. Some 18 member states have issued advisories alerting EU-based companies of the risks of such activities.¹³³ Yet, these notices should be coupled with domestic compliance measures; those that inform businesses and other domestic subjects of the risks such activities entail under domestic laws, and that concomitantly instruct domestic regulatory authorities about the correct implementation of domestic law to such transnational activities. To this end, and in adherence to their obligations as 'home-states' under the UN Guiding Principles on Business and Human Rights,¹³⁴ EU states should also support the work of the UN to establish a database of businesses operating in settlements, pursuant to Human Rights Council Resolution 31/36 of March 2016.

To guarantee the coherence and transparency of its decisions, the EU should comprehensively assess its dealings with Israel and Israeli entities, in line with its legal necessity to ensure the non-recognition as lawful of internationally unlawful acts, and with its policy commitment to the implementation of 'differentiation' measures in the Israeli/Palestinian context. The EU and its member states should also be looking to review their dealings in and policy positions on other contexts of unlawfully prolonged occupation. The reasons and basis for such measures should be openly communicated by the EU on behalf of its member states to establish a unified position on the need to adopt measures to protect the EU legal order and to avert against attempts to disrupt their implementation.

¹³³ "EU member state business advisories on Israeli settlements", the European Council on Foreign Relations, November 2016, available at <http://www.ecfr.eu/article/eu-member-state-business-advisories-on-israel-settlements>.

¹³⁴ "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", United Nations Global Compact, A/HRC/17/31, 21 March 2011, Principle I: State Duty to Protect, available at <https://www.unglobalcompact.org/library/2>.

Glossary

Unlawfully prolonged occupation

The term ‘unlawfully prolonged occupation’ is not a technical term or legal category of international law; it is a descriptive term used in this paper. An unlawfully prolonged occupation arises when an occupying state seeks to permanently transform the status of a territory, its government, or its demographic characteristics. This includes the pursuit of the *de facto* or *de jure* annexation of the occupied territory, or support for a proxy government or secessionist movement. Such actions by an occupying state amount to violations of occupation law and constitute serious breaches of the peremptory norms of international law (*jus cogens*), notably those on the use of interstate force.

Jus cogens

Jus cogens (Latin for ‘compelling law’) is an international legal term that refers to the peremptory norms of international law from which no derogation is permitted, and from which states cannot opt out. These norms are recognised by the international community as foundational and fundamental to the maintenance of an international legal order. While there is some disagreement among states about the content of *jus cogens*, it authoritatively includes the prohibition on the use of interstate force, the prohibition of racial discrimination, and the right to self-determination. Violations of *jus cogens* attract the consequence of invalidity of such acts and the rights and benefits they constitute, and trigger third states and international organisations’ obligations to not recognise such acts as lawful, and to cooperate to bring them to an end.

Jus ad bellum

Jus ad bellum refers to the conditions under which states may resort to armed force in international relations. The prohibition against the use of interstate force enshrined in the 1945 UN Charter, which prohibits states from resorting to force against the territorial integrity or political independence of any state or self-determining people’s territory, is a core element of this body of rules. According to this body of law, a state can maintain an occupation, which requires its continuous use and threat of force, only if such force is justified on grounds of military necessity and proportionate to its lawful military objectives. The acquisition of territory by force, or attempts to force the territory’s secession, amount to violations of the *jus ad bellum*, and trigger consequences of invalidity of the acts and benefits they create, as well as the responsibilities of third states (see *jus cogens*).

Jus in bello

Jus in bello – synonymous with international humanitarian law (IHL) or the law of armed conflict – regulates the conduct of parties engaged in an armed conflict and occupation. IHL seeks to minimise suffering in armed conflicts, including by protecting victims of armed conflict and offering special protection to vulnerable populations such as ‘protected persons’, i.e. the local population in the occupied territory. To ensure the protection of all civilians, and guarantee compliance by belligerents, IHL applies equally to all belligerent parties irrespective of the legality of their reasons for engaging in war. The rules on occupation enshrined in the two main instruments on the law of occupation – the 1949 Fourth Geneva Convention and 1907 Hague Regulations – safeguard the welfare of the population, and protect its political and legal order from sweeping transformation by the occupying state. *Jus in bello* is regarded as being applicable independently from *jus ad bellum*.

International human rights law

International human rights law (IHRL) is a set of international norms enshrined in a series of international treaties, including the two human rights covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), as well as a list of specialised human rights treaties. Many IHRL norms are customary and thereby binding on all states and non-state actors. IHRL continues to apply in times of armed conflict and occupation of foreign territory (the occupying state’s obligations apply extraterritorially). States are permitted to derogate from their IHRL obligations if their actions accord with IHL. In time of occupation, particularly when hostilities have subsided, the application of IHRL is likely to overtake that of IHL, to ensure more protection for civilians when the Occupying Power acts in the capacity of a *de facto* administrator, akin to a civilian (non-military) authority. The application of IHRL to the occupied territory is conditional on the occupying state’s full implementation of IHL, which prohibits the occupying state from transferring its population into the occupied territory and treating it as part of the local population.

International criminal law

International criminal law is a body of public international law that provides a body of rules that defines international crimes – the most heinous acts that offend humanity and harm the fundamental interests of the whole international community. Such acts include the most serious violations of IHL and IHRL and, in such manner, facilitate their enforcement. ICL provides the basis for adjudicating the individual liability of alleged perpetrators of acts defined as international crimes in the 1998 Rome Statute of the International Criminal Court (ICC), through international prosecution. Since 2001, the ICC has been charged with jurisdiction over its State Parties, given certain prerequisites, which since 2015 include Palestine (the preliminary

examination of Palestine by the ICC Office of the Prosecutor remains underway since January 2015). States party to the 1949 Fourth Geneva Convention are also required to enact laws and seek the prosecution or extradition of individuals suspected of committing a grave breach of the Conventions (synonymous with war crimes), irrespective of nationality.

Right to self-determination of people

The right to self-determination of people is the right of a people to freely determine, without external interference, their political status and to pursue their economic, social, and cultural development. It is a customary norm of international law, considered to have the status of a peremptory norm of international law (*jus cogens*). This collective human right is enshrined in the two main human rights covenants (see IHRL). It is also a principle of international law, enshrined in Articles 1 and 55 of the 1945 UN Charter and in a series of United Nations General Assembly resolutions, notably the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

About the author

Dr. Valentina Azarova is an international law researcher and practitioner with a focus on the Israel/Palestine context. She is currently based at the Center for Global Public Law, Koç University, Istanbul. She also advises the Global Legal Action Network (GLAN). She has undertaken research on the law of occupation and ongoing situations of occupation since 2007 and has published on these issues. Her current research also looks at states' obligations of abstention and non-recognition in international law, and the role of domestic regulatory processes in the enforcement of international law.

Acknowledgements

I would like to thank the team at ECFR without whom this publication would not have been possible. I am particularly indebted to Hugh Lovatt and Gareth Davies. Most of all, I would like to thank the many experts, academics and practitioners, who offered insight on the issues covered in this paper. While some remain anonymous, I owe a special debt of gratitude to Omar Dajani, Lina Fattom, Ata Hindi, and Iain Scobbie. Needless to say, I remain entirely responsible for any mistakes or omissions, and bear sole responsibility for the content.

ECFR is grateful to the Open Society Foundations for making this project possible. We would also like to extend our ongoing thanks to the governments of Norway and Sweden for their support of ECFR's Middle East and North Africa Programme.

This page has been left intentionally blank

This page has been left intentionally blank

ABOUT ECFR

The **European Council on Foreign Relations** (ECFR) is the first pan-European think-tank. Launched in 2007, its objective is to conduct cutting-edge research, build coalitions for change, and promote informed debate on the development of coherent, effective and values-based European foreign policy.

ECFR has developed a strategy with three distinctive elements that define its activities:

- **A pan-European Council.** ECFR has brought together a distinguished Council of over 250 members – politicians, decision makers, thinkers and business people from the EU's member states and candidate countries – which meets once a year. Through regular geographical and thematic task forces, members provide ECFR staff with advice and feedback on policy ideas and help with ECFR's activities in their own countries. The Council is chaired by Carl Bildt, Emma Bonino and Mabel van Oranje.
- **A physical presence in the main EU member states.** Uniquely among European think-tanks, ECFR has offices in Berlin, London, Madrid, Paris, Rome, Sofia and Warsaw, allowing the organisation to channel the opinions and perspectives of a wide range of EU member states. Our pan-European presence puts us at the centre of policy debates in European capitals, and provides a platform for research, debate, advocacy and communications.
- **Developing contagious ideas that get people talking.** ECFR has brought together a team of distinguished researchers and practitioners from all over Europe to carry out innovative research and policy development projects with a pan-European focus. ECFR produces original research; publishes policy reports; hosts private meetings, public debates, and "friends of ECFR" gatherings in EU capitals; and reaches out to strategic media outlets.

ECFR is a registered charity funded by charitable foundations, national governments, companies and private individuals. These donors allow us to publish our ideas and advocate for a values-based EU foreign policy. ECFR works in partnership with other think-tanks and organisations but does not make grants to individuals or institutions.

www.ecfr.eu

The European Council on Foreign Relations does not take collective positions. This paper, like all publications of the European Council on Foreign Relations, represents only the views of its authors.

Copyright of this publication is held by the European Council on Foreign Relations. You may not copy, reproduce, republish or circulate in any way the content from this publication except for your own personal and non-commercial use. Any other use requires the prior written permission of the European Council on Foreign Relations

© ECFR June 2017

ISBN: 978-1-911544-16-6

Published by the European Council on Foreign Relations (ECFR),
7th Floor, Kings Buildings,
16 Smith Square, London,
SW1p 3HQ, United Kingdom

london@ecfr.eu