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Israeli Territorial Annexation in Occupied Palestinian Territory: The Ambivalence of International Law

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Abstract

The enactment of Israeli policy on the occupied Palestinian territory has shown the development of the annexation of Israel—from the “de facto” annexation, which seized and occupied the Palestinian territory, to “de jure” annexation by enacting legislations. The dispute between these two entities arises the question of the role of international law, including the position of international law in protecting the right to self-determination and sovereignty of the annexed Palestinian territory. Hence, it is crucial to understand the Israeli practice in the matter of territorial annexation to picture the legal framework provided under international law regarding such issue, within the historical and legal context of the Palestinian case. This research argues that the international law is ambivalent. While many United Nations resolutions and legal scholars, including the advisory opinion of the International Court of Justice, have concluded the wrongfulness of the annexation of the Palestinian territory, the recognitions of other states and the difficulty in requesting state responsibility disable the access of Palestinians to justice. As such, it is necessary to focus on the tools provided by the international criminal law to prosecute war criminals and perpetrators of crimes against humanity against the Palestinian people from the Israeli political and military elites.

Keywords: Occupied Palestinian Territory; Israel; Territorial Annexation; International Law; Sovereignty.

Introduction

From the annexation of Manchuria by Japan in 1932, to the annexation of Jerusalem in 1980 and of the Syrian Golan Heights in 1981, the unilateral act of annexation was considered to be unacceptable and illegal internationally. Annexation refers to the acquisition of territorial rights by force and, as such, violates international law. It therefore constitutes a theft of what belongs to others, as Luxembourg Foreign Minister, Jean Asselborn, says in his comment on the legal proposal. The proposal was submitted by the previous Israeli government (2020), headed by Benjamin Netanyahu,

to annex parts of the West Bank and the Jordan Valley area, with the support of the administration of the former US President Donald Trump.¹ In his latest report, the Special Rapporteur on Human Rights in Occupied Palestinian Territory, Michael Lynk, states that the new government headed by Naftali Bennett does not differ from its predecessor in terms of its position on the settlements. These settlements are at the core of the issue of territorial annexation and describes Israel as an “occupying state with a bad faith” because of its disregard for international law and UN resolutions.²

States must commit themselves not to recognize what is inconsistent with international law. This obligation dates back to the period of the occupation of Manchuria (1932), and is known as the Stimson principle, in reference to the United States Secretary of State at that time. For Théodore Christakis, this commitment to non-recognition has real, not merely symbolic, effects. In the case of the Baltic states, which were recognized by Western countries and then annexed by the Soviet Union, this annexation did not change their recognition. After the collapse of the Soviet Union, the states reaffirmed their recognition, but did not submit a new one. The obligation not to recognize what is illegal immeasurably contributed to keeping apartheid in South Africa an illegal issue.³ Regarding Palestine, the International Court of Justice in its advisory opinion on the wall, affirmed that “states are obligated not to recognize the illegal situation resulting from the construction of the wall, and not to render aid and assistance to maintain the situation resulting from the construction of the wall”.⁴

¹ Markus Becker, ‘Annexation Is a Gross Violation of International Law’ *Spiegel International* (Brussels, 12 June 2020) <<https://www.spiegel.de/international/world/jean-asselborn-on-israel-s-plan-annexation-is-a-gross-violation-of-international-law-a-7f11734d-2f04-4587-809f-11b3b877141f>>.

² UNHR, ‘A/76/433: Report on the Situation of Human Rights in the Palestinian Territories Occupied since 1967’ (2021) <<https://www.ohchr.org/en/documents/country-reports/a76433-report-situation-human-rights-palestinian-territories-occupied>> accessed.[33-36].

³ Christakis Theodore, ‘L’obligation de Non Reconnaissance Des Situations Créées Par Le Recours Illicite à La Force Ou d’autres Actes Enfreignant Des Règles Fondamentales in The Fundamental Rules of International Legal Order, Jus Cogens and Obligations Erga Omnes. Tomuschat C. & Thouvenin JM’ (Martinus Nijhoff Publishers, 2006).[127-166].

⁴ Cour Internationale de Justice, ‘Conséquences Juridiques de l’édification d’un Mur Dans Le Territoire Palestinien Occupé’ (2004).[35].

Since the beginning of its occupation of the Arab and Palestinian territories, Israel has practiced the so-called ‘*de facto*’ annexation in East Jerusalem and the West Bank. With its eastern part being in the Jordan Valley, and its western part along the Green Line (the 1949 armistice line) that separates the territories of 1948 and 1967. What is happening in the western region of the West Bank, specifically between the Green Line and the wall, is very similar to what is happening in the Jordan Valley. The process is as follows: certain areas are seized under the pretext that they are closed military areas, and later are converted into areas for Jewish settlement, they are then expanded to include areas of influence. Settlements occupy 1.7% in terms of built lands, but in terms of their areas of influence they control 41.9% of the West Bank.⁵ On the other hand, the occupation authorities work to restrict the movement of the Palestinians. In the Jordan Valley, only those who have papers proving their residence in the villages of the Jordan Valley are allowed to be in the area. As for the rest of the Palestinians, they must obtain a permit to work or be on their lands. In the western region of the West Bank, the access of Palestinians to their fields, work, schools, and places is restricted.

The development of Israeli policy toward the West Bank that we are witnessing in recent years refers to the transition from ‘*de facto*’ or ‘creeping’ annexation to ‘*de jure*’ annexation, in the sense that it is based on domestic legislation. There is no difference between the two types of annexation, *de facto* and *de jure*, from the international law point of view. They are all illegal acts condemned by international law and the Charter of the United Nations. Territorial annexation is rejected, whether it results from official decisions, or laws, or from ‘*de facto*’ steps, taken in order to support sovereign claims in the occupied territory.⁶ Thus, preventing annexation aims to prevent the imposition of state sovereignty over a specific territory in which it has effective control. Preventing ‘*de facto*’ annexation aims to control the powers

⁵ ‘Land Grab: Israel’s Settlement Policy in the West Bank’ *B’Tselem* (May 2002) <https://www.btselem.org/arabic/publications/summaries/200205_land_grab>.

⁶ Report of the Geneva Commission of International Jurists 2018 <<https://www.icj.org/israel-palestine-illegal-settlements-further-annexation-of-the-west-bank-and-apartheid-system-in-the-occupied-palestinian-territory/>>.

of an occupying power in a way that does not allow it to deviate from its powers and change the legal status of the territory.

In this paper, I will adopt an inductive approach from the particular to the general. Meaning, I will try to describe the Israeli practice in the matter of territorial annexation in order to move to the legal framework. Additionally, I will discuss the ability of international law to provide protection for the people who are under occupation or the ability of the powerful party to use it to advance its interests, which requires discussing this law within the historical and legal context of the Palestinian case.

The Israeli Practice of Territorial Annexation

Immediately after the end of the 1967 war, the Israeli Ministry of Defense issued a set of emergency regulations to be applied to the occupied “territories,”⁷ which included the West Bank, the Gaza Strip, the Golan Heights, and the Sinai. The Knesset (the Israeli parliament) extends these regulations annually. The application of these regulations stopped with regard to Sinai because of the agreement with Egypt, and with regard to East Jerusalem because of the “Basic Law: Jerusalem as the Unified and Eternal Capital of the State of Israel” (1980). It appears that the Israeli practice of annexation was very cautious in the beginning, fearing the reaction of the international community. Israel opted for *de facto* annexation in the sense of building settlements and applying Israeli law, to move later to explicit and *de jure* annexation by the law on Jerusalem (1980) and on the Golan Heights (1981).

After the 1967 war, the Israeli governments headed by the Labor Party, justified the policy of ‘*de facto*’ annexation by supporting settlements in the Golan Heights, the Jordan Valley and Sinai (the Yigal Allon Plan 1970).⁷ However, in the 1970s the settlement process took on an ideological and religious dimension under the Likud government headed by Menachem Begin (1977), which would practice the ‘*de jure*’

⁷ Geoffrey Aronson, ‘Settlement Monitor’ (2011) 41 Journal of Palestine Studies.[189]

annexation of East Jerusalem (1980) and the Golan Heights (1981). In addition to the ‘*de facto*’ annexation of the West Bank through settlement construction and the application of Israeli law. Michael Galchinsky mentions that the number of settlers at the time the Likud party came to power in 1977 was 3,200, and in 1983, under the second government of Menachem Begin, it reached 28,400. This growth is also due to the inducements offered by the right-wing government in terms of loans, grants, and tax exemptions.⁸ Whether it be the Camp David talks between Israel and Egypt at the end of the 1970s or the Oslo talks between Israel and the Palestinians in the 1990s, peace talks did not prevent this increasing growth of settlements in the Palestinian territories. According to the statistics of the Israeli association for the defense of human rights, B’Tselem, which were updated on January 16, 2019, there are 622,670 settlers in the West Bank and East Jerusalem. These settlers were distributed among 131 settlements recognized by the Israeli government, and 110 outpost settlements not recognized by the government. This does not mean that outpost settlements did not receive assistance from the government. In addition to these settlements are 11 residential neighborhoods in the city of Jerusalem, whose area of influence was expanded to include Gush Etzion, the cluster of settlements adjacent to Bethlehem, the Psagot settlement near Ramallah, the Latrun area in the west and Ma’ale Adumim settlement in the east.⁹ In the aforementioned report of the Special Rapporteur for Human Rights, the number of Jewish settlers in the occupied Palestinian territories had reached nearly 700,000. Of course, after Israel withdrew from the Gaza Strip in 2005, there were no more settlers. This number of settlers exceeds the number of Jews who established the state of Israel in 1948. Therefore, it is not surprising that former Secretary-General Ban Ki-moon emphasized that Israel’s policy of ‘*de facto*’ annexation through the construction of settlements since

8 Michael Galchinsky, ‘The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence’ (2004) 9 Israel studies.[115].

9 The Israeli Information Center for Human Rights in the Occupied Territories, ‘Statistics on Settlements and Settler Population’ B’Tselem (16 January 2019) <<https://www.btselem.org/settlements/statistics>> accessed.

1967 has reached a point where a two-state solution is no longer possible.¹⁰

There is no difference between the annexation of Palestinian lands (the West Bank and East Jerusalem) and Arab lands that were not part of historical Palestine (the Syrian Golan Heights). The distinction made by the Israeli Knesset Law No. 5708 of 1948 between the territory of a part of historical Palestine and that which is outside it is not significant.¹¹ Since the borders of the State of Israel were drawn in the Partition Resolution, General Assembly Resolution No. 181 (1947), and Prime Minister Menachem Begin himself, in his speech in the Knesset in support of the law to annex the Golan Heights on December 14, 1981, transcended this difference and considered that this area falls within the historical borders of what he calls the Land of Israel.¹²

In recent years, the annexation discourse has become explicit, public, and supported by the Israeli political elite. The impact of the US position under the Trump administration and its unprecedented support for the positions of the Israeli right cannot be ignored. This contributed to turning the issue of annexation into a consensus issue within the Israeli elite and changing the pace of practices aimed at annexing Palestinian territories occupied since 1967 and subjecting them to Israeli sovereignty. For example, former President Reuven Rivlin proposed the complete annexation of the West Bank while granting Palestinians permanent residence in the West Bank. As is the case with the Palestinians of Jerusalem, in order to preserve the Jewish character of the state. The alternate Prime Minister, Naftali Bennett, has adopted a partial annexation plan based mainly on the Yigal Alon plan. This includes the annexation of the Jordan Valley and 'all Area C', which includes Israeli settlements, in addition to granting the Palestinians of Area C Israeli citizenship. Contrary to what Israeli jurist Yoram Dinstein said about territorial annexation automatically including the grant of citizenship to residents

¹⁰ UNHR (n 2).

¹¹ Joel Beinin and Lisa Hajjar, 'Palestine, Israel and the Arab-Israeli Conflict' [2014] Middle East: The Middle East Research and Information Project.

¹² Asher Maoz, 'Application of Israeli Law to the Golan Heights Is Annexation' (1993) 20 Brook. J. Int'l L. [355].

of the area, Israeli citizenship was not granted to the people of the Golan and of Jerusalem. As the Minister of Interior was given the authority to grant citizenship to each person from these areas who does or does not contribute to the economy and security of the State of Israel.

These positions were put forward within the development of Israeli legislation regarding the application of Israeli law to the settlements, which means the annexation of these settlements, even if international law considers it a grave violation of Article 49 of the Fourth Geneva Convention of 1949, and, therefore, a war crime. These legislations represented a change of pace, not a change in approach or practice. The project to annex the Jordan Valley and Jewish settlements in the West Bank (2020) repeats the experience of the city of Jerusalem and the Golan Heights (from *de facto* to *de jure* annexation).

This change of momentum was highlighted in legislation such as the 2017 Regularization Law, which aims to legalize informal Israeli settlements in the hills. As well as the Nationality Law 2018, which holds that in the land of historic Palestine, the Jewish people have the exclusive right to self-determination, and that the country's natural resources must be harnessed for the benefit of the Jewish majority. Additionally, the law on the Higher Education Council 2018 was extended to the University of the settlement of Ariel, and there is now no difference between it and other Israeli universities such as Tel Aviv University or Haifa University. Likewise, amendments related to the administrative judiciary were introduced and on the institutional side, a subcommittee was developed for Judea and Samaria that works on legal proposals related to the annexation of the city of Ariel or the Hebron region or others.

Regarding the position of the Israeli Supreme Court, it considers the Palestinian territories to be occupied lands, and it implemented The Hague Convention in its resolution (606/78) 1979, especially Article 43, and specified the relationship between the occupying state and the local population in its resolution (69/81) 1983. The Court supports that the issue of the settlements is not a legal and justiciable issue and considered it a political issue in its resolution (4481/91) 1993. It also

applied the Fourth Geneva Convention, belatedly, in its resolution (4969/04) 2005, *de facto* rather than *de jure*.

The Regularization Law (2017) is in contradiction to the position of the Israeli Supreme Court (*Dwikat v Government of Israel*) in *Elon Moreh Settlement Case 390/79 (1979)*: “According to the method of our legal system, the individual’s right to property is a fundamental legal norm in criminal law...” This position was affirmed in the *Amona Settlement Resolution No. 9949/08 (2014)*. It should be noted that most of the outpost settlements are located on private Palestinian land and that 30% of the settlements were built on private Palestinian land.¹³ The Regularization Law also violates Article 56 of The Hague Convention that states that “Private property cannot be expropriated” and Article 8(2)(a)(iv) of the 1998 Treaty of Rome. It proposes expropriating private land and granting it to the use of other individuals (settlers), which does not consistent with military necessity or the interest of the local population. Furthermore, the law also proposes paying the owners of the land or giving them alternative land, but here it is necessary to recall the judicial effort of the Nuremberg Tribunal (1945) that suggests the “payment of the price or any other appropriate consideration shall not, under these conditions (conditions of occupation), override an act of an illegal nature. Likewise, when a legal person is a party to an unlawful confiscation of public or private property...”.

In a recent decision by Judge Alex Stein in February 28, 2022, the Israeli Supreme Court returned to the security basis and legitimation of settlements. A Palestinian complaint regarding the expansion of a residential neighborhood, *Hezkiahu*, in the city of Hebron was dismissed. Considering the settlements as necessary for security and the army is contradicting the court’s jurisprudence in the *Elon Moreh settlement case* and the *Amona settlement case*. By its recent decision, the court here goes back to its earlier jurisprudence, the *Bethel Decision of 1978*, and to the position of the Judge Alfred Witkon. Judge Witkon considered that “one

¹³ ‘Talia Sasson Report on Settlements’ (2004) <https://www.keremnavot.org/_files/ugd/cdb1a7_186b2c924618436b81b0269fd3bf04e7.pdf %0Dhttp://uri.mitkadem.co.il/sason/SasonReport.html%0D> accessed.

need not be an expert in military and security affairs to realize that subversive elements may operate more easily in a region inhabited only by a local population, indifferent or sympathetic to the enemy, from a region where there are people who monitor these sabotage elements and inform the authorities of every suspicious step. In these areas, saboteurs do not find hideouts, assistance or weapons”.¹⁴

The aforementioned laws perpetuate the apartheid system where the interests of the settlers dominate, and dominate at the expense of the Palestinians, the persons protected by humanitarian law. However, according to the Israeli association B’Tselem,¹⁵ and Amnesty International,¹⁶ this system goes beyond the 1967 territories to include all Palestinians. Whether they are citizens of the state or permanent residents as it is in East Jerusalem or are non-citizens in the West Bank or belong to a hostile entity in the Gaza Strip. The Israeli apartheid regime extends over all historic Palestine.

Now, what is international law in the matter of territorial annexation? What tools does it provide to protect the Palestinians from annexation and settlement?.

International Law Protection from Territorial Annexation

Since territorial annexation is illegal, the international community represented by the United Nations, has rejected the Israeli practice. General Assembly resolutions such as Resolution 2253 (1967) and Security Council resolutions such as 252 (1968), 267 (1969) and 298 (1971) aimed at the illegal *de facto* annexation of East Jerusalem. They considered that the steps taken by the Israeli administration is null and void and has no legal effect at the international level. In Resolution 478 (1980) of the Security Council, the Knesset Basic Law regarding Jerusalem as the capital

¹⁴ Shaul Arieli, ‘The Judge Stein Goes Us Back 40 Years’ *Ha’aretz* (11 March 2022).[20].

¹⁵ ‘A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid’ *B’Tselem* (12 January 2021) <https://www.btselem.org/publications/fulltext/202101_this_is_apartheid>.

¹⁶ Agnès Callamard, ‘Israel’s Apartheid against Palestinians: A Cruel System of Domination and a Crime against Humanity’ *Amnesty* (1 February 2022) <<https://www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/>>.

of Israel was rejected, and in its Resolution 497 (1981), the law on the application of Israeli law in the Golan Heights was also rejected.

The International Court of Justice invoked these resolutions in its 2004 Wall Advisory Opinion to condemn Israel's practice of territorial annexation:

On November 22, 1967, the Security Council unanimously adopted Resolution 242 (1967), which stressed the inadmissibility of the acquisition of territory by war and called for the withdrawal of the Israeli armed forces from the territories occupied since 1967. The Security Council, after recalling on several occasions that "the principle of the inadmissibility of the acquisition of territory by military conquest," condemned these actions and affirmed in Resolution No. 298 of September 25, 1971 the following: that all legislative and administrative measures taken by Israel to change the status of the City of Jerusalem, including confiscation of land and immovable property, population transfer and legislation aimed at annexing the occupied part, are completely null and void and cannot change the status of the City. Subsequently, after Israel adopted on 30 July 1980 the Basic Law making Jerusalem the "complete and united" capital of Israel, the Security Council, by Resolution 478 (1980) of 20 August 1980, made it clear that the adoption of this law constitutes a violation of the law and that "all legislative and administrative measures and regulations taken by Israel, the occupying power, which have modified or aimed at modifying the character and status of the City of Jerusalem are null and void."¹⁷

Another important and recent resolution is Security Council Resolution 2334 (2016), in which the following points were reiterated:

The Israeli settlements established in the Palestinian territories occupied since 1967, including East Jerusalem, are illegal under international law and constitute a major obstacle to achieving a two-state solution and a just, lasting, and comprehensive peace. The Security Council also reiterates its demand for Israel, the occupying Power, to immediately and completely cease all settlement activities in the Occupied Palestinian Territory, including East Jerusalem, and to fully respect all its legal obligations in this area. It affirms that it will not recognize any changes to the pre-1967 borders, including with regard to Jerusalem, except as it will have agreed upon by both parties. The Security Council believes that stopping all Israeli settlement activities is necessary to save the two-state solution and calls for taking proven steps to reverse the negative trends on the ground that endanger the two-state solution. It also calls on all countries not to provide any assistance to Israel that is used specifically for settlement activities.

¹⁷ de Justice (n 4).[34-35].

Moreover, the Court stressed the right of self-determination of the Palestinian people and considered that the 1967 territory is a territory reserved for this right (the importance of this decision is the interpretation of Article 242 of the Security Council in the sense of withdrawal from all occupied territories). We must note that whoever sees territorial annexation as a threat to the two-state solution considers the reference of Security Council Resolution 242 (1967) to the peace process in the 1990s: the withdrawal of the occupying forces from the occupied territory based on the principle of non-acceptance of acquiring lands by war and force.

Israel's territorial annexation constitutes a violation of peremptory rules such as those linked to the foundations of the international system as a whole. Including the right to self-determination, but also Article 49 of the Fourth Geneva Convention of 1949 mentioned above. In addition to Article 47 which states that institutional amendments do not change the protection granted to the local population. Moreover, territorial annexation contravenes the law on the use of force. In the opinion of the jurist Michael Bothe, the separation between the law of conflict management (*jus in bello*) and the law on the use of force (*jus ad bellum*) aims to ensure equal treatment between the parties to the conflict without caring about who used the law legally or illegally. In the Palestinian case, which is a state of long-term occupation, Michael Bothe considers that, in addition to the two laws *jus in bello* and *jus ad bellum*, there is the right to self-determination, as the continuation of the occupation constitutes a violation of the right to self-determination.¹⁸ The texts that spoke of aggression, such as General Assembly Resolution 3314 (1974), territory shall not be owned by force, and those that spoke of the right to self-determination, such as General Assembly Resolution 2625 (1970), confirm the same principle.

These violations raise the responsibility of the state according to the draft articles of state responsibility in 2001, which include binding customary rules. This

¹⁸ Michael Bothe, 'Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory' (Retrieved from Norwegian Refugee Council: [https://www.nrc.no/resources ...](https://www.nrc.no/resources...), 2017), George P Fletcher, E Örcü and D Nelken, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law' [2009] *The Oxford Companion to International Criminal Justice*. [104].

draft stipulates that the state is obligated to stop the violation and to compensate for the damage caused to the civil population. Violation of *jus cogens* also raises the responsibility of third countries, according to the Stimson principle, which requires other countries not to recognize what is illegal. Article 1 of the Geneva Conventions, which are agreements whose the number of adherents is not less than the number of adherents to the United Nations Charter, affirms that states must abide by and ensure the respect of Geneva Conventions.

Perhaps it is worth mentioning here Security Council Resolution 662 (1990) regarding Kuwait, where the Council affirmed that the annexation of Kuwait by Iraq under any form or pretext does not have any legal effect and is considered null and void. In addition, the resolution affirmed the obligation of third countries not to recognize the annexation and to refrain from any action that could be interpreted as an indirect recognition of the annexation. The Council also worked hard to establish a compensation committee to cover the damages inflicted on the people of Kuwait by the Iraqi occupation.

On the issue of Israel's annexation of East Jerusalem and the Golan Heights, the General Assembly adopted Resolution 36/266/A (1981), in which it condemned the Israeli policy of annexation and demanded the Security Council to oblige Israel to respect international resolutions and international law by taking appropriate steps under Chapter VII, which means economic embargo, severing trade relations and even use of military force. In Resolution ES-9/1 1982, the General Assembly re-condemned the negative voice by referring to the American veto against the use of appropriate steps to force Israel to respect Security Council Resolution 497 (1981). It also condemned the continuity of support carried out by some countries, which encourages Israel to continue committing aggressive acts, including its annexation of occupied Palestinian and Arab lands.

With regard to the State Responsibility under the international law, the tools presented are traditional tools such as economic embargo and even military response. These tools are difficult to activate for the Palestinian people, and this is what any observer of the reaction to the current conflict in Ukraine notes, due to the position

of the United States as a hegemonic force on the international decision-making. Therefore, attention must be paid to the law of individual criminal responsibility, which allows the Palestinians to activate new tools, such as the International Criminal Court, in the matter of international crimes committed against them, examples being war crimes and crimes against humanity. This means that the act of territorial annexation raises, in addition to the responsibility of the state, individual criminal responsibility for members of the Israeli political elite, specifically for those who participated in the decision-making process for annexation, its implementation and financing. There is no doubt that this law pushes toward the commitment, “If justice will not be the same for all of us, then there is no justice”.¹⁹

Territorial Annexation and the Crime of Aggression

The British jurist, Elihu Lauterpacht, suggested a distinction between an occupation resulting from an aggressive act and an occupation resulting from a practice of self-defense, as well as limiting the illegality of territorial annexation only if the occupation resulted from an aggressive act. Based on this position, the professor of international law at the Hebrew University, Yehuda Blum, justified Israel’s right to sovereignty over the territories occupied since 1967. In his opinion, Jordan lost sovereignty over these lands because it carried out aggression with other Arab countries against Israel, which defended itself and later found itself controlling these lands with “undefined sovereignty,” so Israel is more entitled than others to exercise sovereignty over them.²⁰ Once again, we find a similar position in Judge Edmund Levy’s report, dated July 8, 2012, which refers to “disputed territories” and not occupied territories.

In any case, it is necessary to point out here that the 1967 war was not a defensive war but an aggression against Egypt and the Arab countries. Historically, documents from the State archives and the army archives, which have become available to the

¹⁹ Marco Sassòli, ‘Humanitarian Law and International Criminal Law’ (2009) The Oxford companion to international criminal justice.[111].

²⁰ Maoz (n 12) [104-110].

public in recent years, reveal that there were preparations by the army to administer lands that might be occupied, which, of course, contradicts the idea that the war was a fortuitous and unexpected result. In studying these documents, the historian Adam Raz, who is the main historian in the Akevot Foundation that deals with documents related to the Israeli-Arab conflict, supports that these preparations indicate the existence of a clear strategic vision for the control of new territories. Preparations began since the beginning of the sixties, based on a document entitled, “A Proposal for Regulating Military Government” submitted by the Operations Department in June 1960 to the Chief of Staff. Then again later in August 1963 was prepared by the same department, which was run by Yitzhak Rabin before he became chief to the General Staff, “Ordering the army to organize military government in a state of emergency”. This order stipulated that the Israeli army’s ambition to make war within enemy territory would inevitably lead to the expansion and occupation of areas outside the borders of the state. Also, in these preparations, the experience of the military rule that was practiced on the Palestinians of the Interior during the period 1948-1966 was used. To the extent that the unit that ran the military government inside was transformed into the “Military Governance and Regional Security Department,” which will later be known as the “Office of the Coordinator of Government Activities in the occupied Territories”.²¹

The Israeli archive documents supports studies that confirm the 1967 war was not accidental, but actually, well planned and prepared by the Israeli elite. In his book *The 1967 War and the Dismantling of the Middle East*, Guy Laron considered that the war came with the aim of Israeli territorial expansion. In his commentary on this book, Thomas Ehrlich Reifer points out the importance of the part on expanding the borders of the Israeli state. He emphasizes the will of the military elite to occupy new territories such as the West Bank and the Gaza Strip and their readiness for a preemptive war. To add to this, the Arab forces were directed inward, to protect the regime, while the Israeli forces were directed towards regional expansion, and

²¹ Adam Raz, ‘Israel Claimed Its 1967 Land Conquests Weren’t Planned’: Declassified Documents Reveal Otherwise’ *Haaretz* (21 June 2021).

this was reflected in the preparations and training.²² This was also supported by the French researcher, Mikhael Elbaz, in his social and strategic analysis. In his opinion, the 1967 war represented a territorial expansion in the sense of economic expansion and in the sense of access to cheap labor, natural resources, and a consumer market. This war highlighted the close connection between economic capital and the military elite. After this war, the army became more visible, and its standards became the standards of Israeli society.²³

In studies of international relations, we find a parallel position, as Israel is considered a regional superpower from the moment of its birth and did not become so,²⁴ and that the 1967 war was nothing but a confirmation of its hegemony, as Marcel Serr asserts in his analysis of this war based on the model of offensive realism. As a hegemon, Israel tends to be aggressive in order to maintain its hegemony. The Israeli army outnumbered all the Arab armies. In terms of numbers, compared to 279,000 Israeli soldiers after the general mobilization, there were 190,000 Egyptian soldiers (but Egypt was unable to mobilize more than 100,000 soldiers due to its military presence in Yemen), 50,000 Syrian soldiers, and 55,000 Jordanian soldiers.²⁵ In terms of training, organization and equipment, the Israeli army distinguished itself in its capabilities. According to a US intelligence report at the end of May 1967, there is a prevailing position that the 1967 war was strategic and ideologically important, but the wars that came later were aimed at maintaining the Israeli presence and control in the occupied Palestinian territories.

What we support is that the 1967 war itself came to maintain Israeli hegemony and control in the regional system. Of course, the war, as it became clear above, aimed to break the radical force represented in Abdel Nasser's Egypt, because he

²² Guy Laron, *The Six Day War: The Breaking of the Middle East* (Yale University Press 2017).

²³ Mikhael Elbaz, 'L'hégémonie Des Militaires Sur La Société Civile. Le Cas Israélien' (1983) 7 *Anthropologie et Sociétés*. [115-133].

²⁴ John Mearsheimer and Stephen Walt, 'The Israel Lobby' (2006) 28 *London Review of Books*. [23].

²⁵ Marcel Serr, 'Struggle for Existence or Urge for Expansion? A Reappraisal of the Six-Day War Through the Prism of Defensive and Offensive Realism' (2017) 11 *Israel Journal of Foreign Affairs*. [4-5].

wanted to reconsider the Israeli hegemony.

It is clear that Israel used force illegally and in contravention of the Charter of the United Nations. The Soviet Union tried to obtain resolutions from the Security Council and the General Assembly to condemn Israel and hold it responsible for its aggression, but the Western countries shifted the discussion from the responsibility of the aggression to resolving the Israeli-Arab conflict in general (as we see with Security Council Resolution 242 (1967)). This is what was mentioned by the American jurist, John Quigley, who saw that the United Nations institutions, even if they did not recognize the right of self-defense of Israel, did not condemn it for its aggression and its occupation of Arab and Palestinian lands. In his opinion, and according to the documents related to the administration of President Lyndon Johnson that were revealed, the United States and Britain knew that the Israeli version of the war was incorrect, and that the truth was an Israeli aggression against Egypt, which required solidarity by other Arab countries such as Jordan. Which means that the occupation of the West Bank, East Jerusalem, and the Gaza Strip is illegal, and Israel must bear the responsibility for the aggression that Western countries have obliterated in diverting the debate within the United Nations from the responsibility of aggression to resolving the conflict in general.²⁶ It is worth mentioning here the reaction of the United Nations towards Kuwait in 1990, when considering Article 3 of the General Assembly Resolution 3314 (1974), which considered territorial annexation as part of the acts of aggression that one state may commit against another state or people. What happened inside the United Nations, the interaction between the General Assembly and the Security Council, towards Kuwait was not previously found in the United Nations reaction to the entry of Israeli forces into Lebanon in 1982 or toward the 1967 war.

In light of the development of the Israeli narrative of the 1967 war, I believe that the link between the law on the use of force and *jus in bello* should be in the

²⁶ John Quigley, 'What the Western Powers Knew Before the Six-Day War' *Cambridge Press* (6 February 2013) <<https://www.cambridgeblog.org/2013/02/what-the-western-powers-knew-before-the-six-day-war/>>.

direction indicated by the interim judge Joe Verhoeven in the Congo v Uganda case before the International Court of Justice 2005. Judge Verhoeven considered that the obligation of an occupying state to respect and to ensure the respect of international humanitarian law and human rights law that are enforceable even if the occupation was carried out in a manner that does not contradict the *jus ad bellum*, because the protection of persons under these two laws differs from the legality or illegality of the use of force. When a certain state uses force illegally (not in self-defense), it has a duty to take responsibility for all the consequences of an act of occupation that is inconsistent with the Charter of the United Nations. Failure to respect the law of waging war has consequences for all the actions and chaos it leads to. The *jus in bello* violations cannot be stopped only by adhering to the law of occupation without the occupation itself and its consequences.²⁷

Territorial Annexation and the Nature of the Israeli Regime

In studying territorial annexation, it may be necessary to go beyond considering it as a mere violation of the rules of international law to what this practice might reflect on the Israeli regime itself, and that it is essentially an immoral and illegal regime (this is what B'Tselem and Amnesty International reports on the Israeli apartheid regime). The practice of territorial annexation raises in particular the colonial and settlement character of the Israeli regime. Like the researcher Smadar Ben-Natan, University of Washington in Seattle, it can be said that the occupation is not a passing practice in the Israeli experience, but rather what distinguishes it. Since, in addition to the Israeli democratic system, occupation and military rule have been practiced on the Palestinians who are under its control, whether they were in the lands of 1948 (1948-1966) or in the lands of 1967 (since 54 years).²⁸ Smadar Ben-Natan mentions that the military courts have worked since the fifties

²⁷ ICJ, 'Reports of Judgments, Advisory Opinions and Orders, Case Concerning Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda). Judgment of 19 December 2005. Declaration of Judge Ad Hoc Verhoeven' (2005).[195].

²⁸ Smadar Ben-Natan, 'Temporary as Indefinite: Horizons of the Future in 1967' (University of Washington 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960758>.

and continued to operate until the year 2000 against the Palestinian of the Interior, because there is no paradigm that justifies their work within the borders of the state. While in the West Bank, the paradigm of occupation justifies and allows the work of military courts, the most important tool in Israeli occupation regime.

What Smadar Ben Natan supports goes hand in hand with what was mentioned above regarding the Israeli preparation for the 1967 war and supports it. In her opinion, the preparation was not only military, but also legal, and the army lawyer at the time, Meir Shamgar, who would later be appointed the legal advisor to the government and later a judge in the Israeli Supreme Court, stood out in this preparation.²⁹ A legal team was formed, led by Shamgar, with the aim of laying down a legal basis in the case of controlling new territories and their residents. It was completed in 1963 under the so-called “Manual of Military Legal Offices in the Military Rule of the Occupied Territory.” What the team formulated had the greatest impact on the position of the Israeli establishment and even on the position of the Israeli Supreme Court which, even though it adopted the discourse of occupation, did not take into account the 1949 Geneva Conventions in dealing with issues related to the occupied Arab lands. After initial hesitation by the court, the occupation regime was adopted because it facilitates the organization and administration of the occupied Palestinian territory. However, the Geneva system was neutralized by the court regarding settlements on the grounds that it is a political issue, and the Fourth Geneva Convention was neutralized because the settlements under Article 49 are a war crime.

While the Palestinians were subjugated after 1967 to the military commander, according to the occupation regime, the settlers were actually subject to Israeli law. The court granted the military commander and itself the role of arbiter between different interests, whether it is for the local population, the army, or the settlers. Thus, it behaves as if it were a sovereign government and did not take into account the most important point in the law of occupation, which is the contradiction between a

²⁹ Theodor Meron, ‘The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War’ (2017) 111 *American Journal of International Law*. [357-375].

temporary administration exercised by the occupying state and the sovereign rights of the local population and those who are protected in accordance with international law humanitarian. For Martii Koskenniemi:

a law that fails to recognize the radicality of this difference and pretends that it is all only a matter of calculating the pros and cons, a law that, in the words of the Beit Sourik judgment, thinks a zone of occupation can be a zone of reasonableness, is a law not possibly worth having.³⁰

In addition to its aggressive nature, the Israeli annexation projects highlight the colonialism of the Israeli regime. This can be seen by the control of an external group over an indigenous group and is founded mainly on a racist structure, as evidenced by the discussion about the status of the Palestinians in the areas that it intends to annex. They are either subject to exclusion, second- or third-class citizens, or to expulsion. The practice of annexation continues despite the two-state discourse. This does not mean that the path will be South African or one state, because it can develop according to the Irish model, where the rise of a Palestinian state will be after a historical period of territorial annexation, as confirmed by Jan Lustek since 2013.³¹

Of course, it cannot be ignored that the annexations have repercussions on the territorial aspect in demanding the right to self-determination of the Palestinian people (territoriality and self-determination). The recent developments including the events of Sheikh Jarrah in East Jerusalem and ‘the popular uprising of May 2021’ showed that the logic of occupation that Smadar Ben-Natan talks about is the same in the mixed cities such as Lod, Ramle, Jaffa and East Jerusalem. The settlement approach threatens every neighborhood and every house within the 1948 lands and in East Jerusalem occupied since 1967. The events of May 2021 also brought the Israeli-Palestinian civil war—as called by the Israeli historian, Motti Golani, which has been going on for more than a hundred years and which has known various stages, including the Arab-Israeli wars—³² to the starting point

³⁰ Martti Koskenniemi, ‘Occupied Zone—“A Zone of Reasonableness”?’ (2008) 41 *Israel Law Review*. [13-40].

³¹ Yan Lustik, ‘The Two-State Solution’ *The New York Times* (14 September 2013).

³² Motti Golani, ‘From Civil War to Interstate War and Back Again. The War over Israel/Palestine, 1945–2000’ (2005) 2 *Zeithistorische Forschungen—Studies in Contemporary History* [54].

and to the confrontation between the two groups, Jews and Palestinians, inside historical Palestine.

Here, it is necessary to take into account the ambivalent concept of law. The law has a negative side and a positive side, as it may contribute to concealing and justifying injustice and may contribute to the realization and illumination of justice. In other words, the law may contain a statement that is necessary to justify the social and economic hierarchy and may include a statement of resistance when we want to subject power to the rule of law. The law cannot be completely just and in most cases, it is unjust, but it remains a condition for the achievement of justice.³³ International law may justify the occupation, but at the same time it provides the weak party with a moral basis to confront tyranny and abuse. This is what Israel and the United States realize when they deny the Palestinians access to a future that has been formulated by international resolutions since Partition Resolution 181 (1947) and General Assembly Resolution 194 on the right of return for refugees, and even recent resolutions such as Security Council Resolution 2334 in 2016.

Conclusion

The current regional and international context allows Israel to continue the *de facto* annexation of the occupied Palestinian and Arab lands and the construction of settlements. Therefore, we can rely only on the internal level, which has once again characterized the “Israeli-Palestinian civil war” with the popular uprising of May 2021, in addition to international law for the legal tools it provides and moral support for the Palestinian position.

It is not sufficient to demand non-recognition of the territorial annexation practiced by Israel and to demand that measures be taken against it by the international community, which is not easy in the current circumstances. It is necessary to focus on the tools provided by the international criminal law to prosecute war criminals and perpetrators of crimes against humanity against the Palestinian people from the

³³ Jack M Balkin, ‘Critical Legal Theory Today’ (2008) On Philosophy in American Law. [64]. In: Francis J Mootz (ed.).

Israeli political and military elites. Palestine ratified the amendments to the 1998 Rome Convention on the crime of aggression on June 29, 2016, and according to the Article 8, annexation was considered part of the crime of aggression.

International law did not prevent it from being instrumentalized for the purposes of Israeli territorial and colonial expansion (the legal team led by Meir Shamgar before the 1967 war). At the same time, international law took a liberator turn with the right to self-determination and an emphasis on the sovereign rights of peoples under the occupation regime. What the resolutions of the General Assembly and the Security Council show as well as the *travaux préparatoires* for the amendments to the Rome Convention, is that annexation is itself a crime. On the moral level, we are witnessing a shift by global civil society in its position on the Israeli-Palestinian conflict, as we saw with the reports of B'Tselem and Amnesty International, and this matter is very important as the battle is also a battle of legitimacy. It is not surprising, then, that the Australian expert on indigenous peoples, Tom Rowse, stresses the moral obligation in the international community. In his opinion:

“A state that is morally illegitimate is either the state whose roots are linked to the looting of indigenous peoples and the looting of their property, and in which the descendants of these peoples continue to suffer from this, and importantly, or the state that has unresolvable demands towards other states, or the state that continues practices of racial discrimination that may threaten the continuity of indigenous peoples’ presence in its border”.³⁴

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³⁴ Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, vol 92 (Cambridge University Press 2003).[141].

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