Can Occupation Resulting from a War of Self-Defense Become Illegal?

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Abstract

Illegal occupation gives rise to a duty of the occupant to withdraw from the occupied territory immediately and unconditionally. International law has long recognized the illegality of occupation that results from an unlawful use of force by the occupying state. An emerging approach among international lawyers holds that occupation resulting from a lawful use of force by a state, in self-defense, may also become illegal. Proponents of this approach link the illegality of the occupation to the occupant's violation of the prohibition on the use of force or of the right of peoples to self-determination. These violations result from the occupant's policies which amount to *de facto* annexation of the occupied territory, manifested in refusal to engage in good-faith negotiations to end the occupation or in actions aimed at perpetuating the occupation (e.g., enabling the settlement of the occupant's citizens in the occupied territory). Arguments that such conduct renders the occupation illegal have largely focused on the occupation of Arab territories by Israel.

This article argues that the purview of the notion of illegal occupation in international law does not extend to occupation resulting from the lawful use of force by a state in self-defense ("lawfully created occupation"). The article reviews the various theories presented in support of such an extension, but shows that state practice does not support the existence of a rule of customary international law providing that a lawfully created occupation may subsequently become illegal.

The author subscribes to the view that a policy of *de facto* annexation pursued by an occupant violates the right to self-determination, and possibly the prohibition on the use of force.

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Such violation leads to legal consequences, but these do not include the illegality of occupation. This article examines the rules of international law that determine the legal consequences of state conduct that violates international law, and shows that these rules do not accommodate an extension of the notion of illegal occupation to lawfully created occupation.

The article proceeds to argue that the introduction of a rule of customary international law providing that a lawfully created occupation may subsequently become illegal is inadvisable because such a norm would be full of uncertainty.

I. INTRODUCTION

"Might is right" is a proposition that has little appeal. This sentiment seems to underlie an emerging approach among international lawyers who hold that international law is never silent on the question of whether or not an occupation is legal.[1] At first, this position appears self-evident. The absence of rules setting limits to the legality of occupation could be easily perceived as a feature of past, best forgotten, international law, which left states free to embark on a war of aggression[2] and

1. *See, e.g.* Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, ¶ 8, U.N. Doc. A/62/275 (Aug. 17, 2007) (by John Dugard) (citing "the argument that Israel's occupation has over the years become tainted with illegality," the Special Rapporteur proposed "that the International Court of Justice be asked to give a further advisory opinion[] on the legal consequences of prolonged occupation," and contemplated whether the Israeli occupation has "ceased to be a lawful regime, particularly in respect of 'measures aimed at the 'occupant's own interests.'"); *see generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 349 (2012); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 55, 99 (1995); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 551–56 (2005); Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L. J. 799, 810 (2010); Salvatore Fabio Nicolosi, *The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty*, 31 POLISH Y. B. INT'L L. 165, 184 (2011); Yael Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 210, 218 (2008); Timothy William Waters, *Plucky* Little *Russia: Misreading the Georgian War Through the Distorting Lens of Aggression*, 49 STAN. J. INT'L L. 176, 198–99 (2013).

2. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 78 (2011) ("[I]n the nineteen century, the predominant conviction was that every State had a right – namely, an interest protected by international law – to embark upon war whenever it pleased.") (citation omitted).

considered the use of force a legitimate means of acquiring title to territory.[3]

An extensive body of international legal rules, referred to as the international law of occupation, regulates the conduct of an occupant *during* an occupation. But commentators caution that restricting the interaction between international law and occupation to the branch of international humanitarian law, without regulating the legality of occupation itself, would "generate . . . troubling results: international law becomes an apology for power, and the very phenomenon of occupation is excluded from a critical legal review. Such exclusion is an invitation for excessive power."[4] In other words, leaving a state free to maintain an occupation as long as it has the military means to do so would bring international law dangerously close to "might is right."

International law has long recognized the illegality of occupation resulting from an unlawful use of force by the occupying state.[5] The illegality of such occupation stems from the general obligation of states under customary international law to cease internationally wrongful conduct and eliminate its consequences.[6] The novelty of recent illegal occupation theories concerns the extension of the notion of illegal occupation to certain occupations resulting from the lawful use of force by a state in self-defense.[7] Commentators advocating such extension have largely focused on the occupation of Arab territories by Israel since 1967, which is currently the only prolonged occupation resulting, by most accounts, from a war of self-defense.[8] This article refers to an occupation resulting from the

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3. *See* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 271 (2009) ("In the past, a treaty of cession could have the function of rubber-stamping the successful results of a war of aggression.") (footnote omitted).

4. Ben-Naftali et al., *supra* note 1, at 553 (footnote omitted).

5. *See infra* notes 49–65, and accompanying text.

6. *See infra* notes 122–131, and accompanying text.

7. *See* sources cited *supra* note 1.

8. *See e.g.*, DINSTEIN, *supra* note 2, at 206–07; THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 105 (2002); GEOFFREY R. WATSON, THE OSLO ACCORDS 30 (2000); GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 20–21 (1988); Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 491–92 (1998–1999) ("The United Nations appeared to recognize the right of anticipatory self-defense when Israel launched a preemptory airstrike against

lawful use of force in self-defense as "lawfully created occupation," and unless otherwise stated, it refers to the notion of illegal occupation only with regard to such occupation.

It is widely agreed that the phenomenon of occupation is not illegal per se.[9] Most proponents of the notion of illegal occupation link the illegality of an occupation to an occupant's violation of either the prohibition on the use of force or of the right of peoples to self-determination.[10] Such violations result from the occupant's policies which amount to *de facto* annexation of the occupied territory, manifested in refusal to engage in good-faith negotiations toward ending the occupation or in actions aimed at perpetuating the occupation (e.g., enabling the settlement of the occupant's citizens in the occupied territory).[11]

Occupation is defined under customary international law as "effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory."[12] The test for the existence of occupation is thus a factual one.[13] An occupation ends whenever the foreign power no longer exercises effective control over the territory.[14] The *illegality* of occupation imposes

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Egypt, precipitating the 1967 'Six Day War.' Many countries supported Israel's right to conduct defensive strikes prior to armed attack and draft resolutions condemning the Israeli action were soundly defeated in the Security Council and the General Assembly."). *But see* John Quigley, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreement*, 25 SUFFOLK TRANSNAT'L L. REV. 73, 81 (2001) ("Israel's claim of self-defense in the 1967 war is factually implausible.").

9. *See* sources cited *supra* note 1; *see also* DINSTEIN, *supra* note 3, at 2 (Observing that "international law – far from stigmatizing belligerent occupation with illegality – recognizes its frequency and regulates its application.").

10. *See infra* Part II.

11. *See* BENVENISTI, *supra* note 1, at 245–46; Ben-Naftali et al., *supra* note 1, at 579, 601–05.

12. BENVENISTI, *supra* note 1, at 43. This definition derives from Article 42 of the Hague Regulations, which states that "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." *See* Annex to the Hague Convention Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2295.

13. *See* Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 HARV. J. L. & PUB. POL'Y 843, 845 (2004); Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L. Q. 27, 47 (2005).

14. *See* BENVENISTI, *supra* note 1, at 56.

a duty on the occupant to terminate its effective control over the territory. Customary international law requires a state responsible for an internationally wrongful act to first cease the violation.[15] Because in cases of illegal occupation "the violation goes to the very existence of the occupation, the cessation of violation necessarily means termination of the occupation . . . an illegal occupation must, under the general laws of state responsibility, be terminated immediately and without prior negotiations."[16]

The sway of the notion of illegal occupation lies in the elimination of the distinction between legitimate and illegitimate interests of the occupant. A policy aimed at affecting *de facto* annexation of an occupied territory clearly advances the latter.[17] But circumstances underlying a lawful use of force in self-defense which results in an occupation also give rise to a set of national security interests that an occupant may legitimately promote by maintaining the occupation and negotiating the terms of its termination.[18] The determination that an occupation is illegal renders such interests legally immaterial. Illegality of the occupation imposes, quite simply, a duty on the occupant to withdraw immediately and unconditionally, "without prior negotiations,"[19] regardless of grave risks to its national security and to the safety of its civilian population, which may result from such withdrawal.[20]

The main legal question arising in relation to the notion of illegal occupation may thus be formulated as follows: does an occupant that pursues *illegitimate interests* with regard to *de facto* annexation of the occupied territory thereby forfeit its otherwise *legitimate interests* concerning the terms of ending the occupation? What does the occupant stand to lose – in the currency of legitimate interests – by attempting to perpetuate

15. *See* Oliver Corten, *The Obligation of Cessation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 545 (James Crawford, Alain Pellet & Simon Olleson eds., 2010); *infra* notes 125–127 and accompanying text.

16. Ronen, *supra* note 1, at 228 (footnote omitted).

17. *See* BENVENISTI, *supra* note 1, at 6 ("The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorized by the sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty.").

18. *See infra* notes 143–169 and accompanying text.

19. Ronen, *supra* note 1, at 228.

20. *See infra* Part IV(B) for a discussion of these risks.

the occupation?

This article argues that the purview of the notion of illegal occupation in customary international law does not extend to lawfully created occupation. The author subscribes to the view that a policy of *de facto* annexation pursued by an occupant violates the right to self-determination, and possibly the prohibition on the use of force. Such violation carries legal consequences, but those consequences do not characterize the occupation as illegal.

Part II reviews the various theories underlying the notion of illegal occupation. Part III shows that state practice does not support the existence of a rule of customary international law providing that a prolonged occupation resulting from a lawful use of force may become illegal.

Part IV examines the rules of customary international law regarding the responsibility of states for internationally wrongful acts ("State Responsibility Rules"), which determine the legal consequences of state conduct that violates international law. Analysis of State Responsibility Rules demonstrates that violations of the right to self-determination and of the prohibition on the use of force, manifested in conduct by the occupant that amounts to *de facto* annexation of the occupied territory, do not give rise to a duty of the occupant to withdraw from the occupied territory. In other words, State Responsibility Rules do not accommodate an extension of the notion of illegal occupation to lawfully created occupation. This conclusion relies, among others, on a review of the interests an occupant may legitimately pursue in maintaining the occupation and negotiating the terms of its termination.

Part V argues that a rule of customary international law, which provides for the illegality of certain lawfully created occupations, is undesirable as a matter of *lex ferenda*, because application of such a norm would be heavily burdened by uncertainty and greatly increase indeterminacy in the law.

II. THEORIES OF ILLEGAL OCCUPATION

The norms most often invoked as basis for the illegality of certain lawfully created occupations are the prohibition on the use of force by states and the right of peoples to self-determination, both considered peremptory norms of customary

international law.[21] Submitting that "an occupation regime that refuses earnestly to contribute to efforts to reach a peaceful solution should be considered illegal," [22] Eyal Benvenisti explains:

> The occupant has a duty under international law to conduct negotiations in good faith for a peaceful solution. It would seem that an occupant which proposes unreasonable conditions, or otherwise obstructs negotiations for peace for the purpose of retaining control over the occupied territory, could be considered a violator of international law.[23]

This violation of international law concerns the prohibition on the use of force. Hence, Benvenisti proposes to "view the continued rule of the recalcitrant occupant as an aggression."[24] Bad-faith efforts on the part of an occupant to prolong the occupation, which violate the prohibition on the use of force and therefore taint the occupation with illegality, may also include "any measure aimed at creating new hurdles to the negotiations by changing the status quo in the occupied areas (for example, by enabling the migration of its own citizens into the occupied territory").[25]

According to Benvenisti, international law allows a state to occupy foreign territory as an extension of the self-defense exception to the prohibition on the use of force.[26] Hence, "the subjection of the right to self-defense to the necessity requirement . . . could imply that the occupation becomes an act of aggression when it no longer serves the initial purpose of

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21. *See* Military and Paramilitary Activities in and Against Nicaragua (Merits) (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 189, 212 (the International Court of Justice recognized the prohibition on the use of force as a peremptory norm); DINSTEIN, *supra* note **Error! Bookmark not defined.**, at 105 (discussing the peremptory nature of the prohibition on the use of force); Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 11–12, n.29 (2008) (observing that "[i]n the opinion of many jurists and writers, self-determination is not only a binding rule of international law, but enjoys the status of a peremptory norm (jus cogens)."); *see generally* CASSESE, *supra* note **Error! Bookmark not defined.**, at 133–40.

22. BENVENISTI, *supra* note 1, at 245.

23. *Id.*

24. *Id.* at 349.

25. *Id.* at 246.

26. *Id.* at 17.

defending against the aggressor who has been defeated."[27]

Benvenisti supports this construction of the prohibition on the use of force by citing the right of peoples to self-determination,[28] which holds that all peoples are entitled to "freely determine their political status and freely pursue their economic, social and cultural development."[29] Applied to a people under occupation, this right is incompatible with a view that does not limit the liberty of an occupant to prolong the occupation.[30]

Antonio Cassese maintains that prolonged occupations amount to a violation of the prohibition on the use of force, which in turn gives rise to a violation of the right to self-determination.[31] Cassese explains that any military occupation amounts to "grave breach" of the right to self-determination unless "it is justified by Article 51 of the UN Charter [i.e., the self-defense exception to the prohibition on the use of force – A.Z.] and, therefore, being restricted to the need to repel an act of aggression, is limited in duration."[32] Hence, according to Cassese the illegality of prolonged occupations is rooted in both the prohibition on the use of force and in the right to self-determination.

Orna Ben-Naftali, Aeyal Gross and Keren Michaeli advance a notion of illegal occupation that relies on a well-established principle of the international law of occupation concerning the temporary nature of occupation.[33] It is widely

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27. *Id.*

28. *Id.* at 349.

29. International Covenant on Civil and Political Rights, art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 171.

30. *See* BENVENISTI, *supra* note 1, at 349.

31. CASSESE, *supra* note 1, at 55, 99.

32. *Id.* at 55; *see also* Bhuta, *supra* note 1, at 812 ("A straightforward extension of the concept of external self-determination is that it is violated by military occupation or other forms of 'alien domination,' except where the use of force was justified under article 51 of the UN Charter *and* the occupation is restricted to the time period and extent necessary to repel aggression.").

33. Ben-Naftali et al., *supra* note 1, at 592. Regarding the temporary nature of occupation, see generally BENVENISTI, *supra* note **Error! Bookmark not defined.**, at 6; INT'L COM. OF THE RED CROSS, COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 275 (Jean S. Pictet ed., 1958) ("The occupation of territory in wartime is essentially a temporary, de facto situation."); Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 236-37 (2005); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 582 (2006) (observing the temporary nature of occupation). The Supreme Court of Israel

agreed that the temporary nature of occupation affects the duties and privileges of an occupant *during* occupation.[34] Ben-Naftali, Gross, and Michaeli argue, however, that the purview of the temporality principle extends also to the question of the legality of the occupation itself.[35]

This argument relies on two fundamental principles of the law of occupation. The first is the principle of the inalienability of sovereignty through actual or threatened use of force, which holds, *inter alia*, that sovereignty and title in an occupied territory are not vested in the occupant but rather in the population under occupation.[36] The second principle holds that an occupation is a form of trust and that "in view of the principle of self-determination, the people under occupation are the beneficiaries of this trust."[37] Ben-Naftali, Gross, and Michaeli subscribe to the view, espoused by the International Court of Justice (ICJ), that the "ultimate objective"[38] of an occupation as a form of trust is to promote the realization of the right to self-determination of peoples under occupation.[39] Ben-Naftali, Gross, and Michaeli contend that these two basic principles of the law of occupation "generate the third principle of occupation: its temporality. Indeed, the very essence of occupation is founded on this idea."[40]

Applying the constraint of temporality as a limit on the legality of occupation, Ben-Naftali, Gross, and Michaeli argue

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has recognized the temporary nature of occupation. *See Coop. Soc'y Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region et al.*, HCJ 393/82, 37(4) PD 785, 802–07 [1984] (Isr.), *translated in* 14 ISR. Y. HUM. RTS. 301 (1984) [hereinafter *Judea and Samaria*].

34. *See e.g.*, *Judea and Samaria*, *supra* note 33, at 802–07 (holding that the temporary nature of the occupation bears on the scope of the occupant's executive and legislative powers); BENVENISTI, *supra* note 1, at 6; Roberts, *Transformative Military Occupation*, *supra* note 33, at 582 ("The assumption that, the occupant's role being temporary, any alteration of the existing order in occupied territory should be minimal lies at the heart of the provisions on military occupation in the laws of war.").

35. Ben-Naftali et al., *supra* note 1, at 555, 592–605.

36. *See id.* at 554; *see also* BENVENISTI, *supra* note 1, at 6 (describing the principle of inalienability of sovereignty through unilateral action of a foreign power as "the foundation upon which the entire law of occupation is based").

37. Ben-Naftali et al., *supra* note 1, at 555.

38. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 88 [hereinafter Legal Consequences of the Construction of a Wall].

39. *See id.*; Ben-Naftali et al., *supra* note 1, at 577.

40. Ben-Naftali et al., *supra* note 1, at 592.

that "the concrete time limit is determined by the legal construct of 'reasonable time,' deriving from the legal principle of 'reasonableness.'"[41] The "reasonable time" limit does not necessarily preclude prolonged occupations. Rather, "what is a reasonable time for an action depends on the nature, purpose, and circumstances of the action."[42] The purpose of occupation as a form of trust is to bring about, through peaceful means, a political change that would end the occupation and realize the right to self-determination.[43] If an occupant operates over a prolonged period of time contrary to this purpose, the prolongation of the occupation constitutes a violation of the "reasonable time" limitation, rendering the existence of the occupation illegal.[44]

According to Ben-Naftali, Gross, and Michaeli, "the most relevant circumstances to be examined in this respect are whether the occupying power has annexed the occupied territory or has otherwise indicated an intention to retain its presence there indefinitely."[45] Concluding that the policy pursued by Israel with regard to the Palestinian occupied territory, consisting mainly in the establishment of Israeli settlements and the construction of a wall separating certain parts of the occupied territory from others, suggests such an intention,[46] Ben-Naftali, Gross, and Michaeli argue that the Israeli occupation "has exceeded its reasonable duration"[47] and should therefore be considered illegal.[48]

41. *Id.* at 599 (footnote omitted).

42. *Id.* (footnote omitted).

43. *See id.* at 600 ("It is clear that the purpose of the regime of occupation is to manage the situation in a manner designed to bring about political change and to generate a resumption of the normal order of international society. Relevant international norms further decree that this change should come about by peaceful means and realize the principle of self-determination.") (footnotes omitted).

44. *Id.* at 605.

45. *Id.* at 601.

46. *See id.* at 601, 605.

47. *Id.* at 604.

48. *Id.* at 605.

III. DOES STATE PRACTICE SUPPORT THE NOTION OF ILLEGAL OCCUPATION?

A. OCCUPATION RESULTING FROM AN UNLAWFUL USE OF FORCE

International law clearly recognizes the notion of illegal occupation created through an unlawful use of force. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States,[49] adopted by consensus by the UN General Assembly, states that "the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter."[50] Similarly, an amendment to the Rome Statute of the International Criminal Court, adopted by consensus in 2010, provides that one of the acts that qualify as an "act of aggression" is "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack."[51]

The UN Security Council has thus noted the illegality of the occupation of Kuwait by Iraq in August 1990,[52] widely perceived as the result of an illegal use of force on the part of Iraq.[53] The ICJ concluded that the occupation of the Congolese province of Ituri by Uganda, which resulted from an unlawful use of force on the part of Uganda,[54] "violated the principle of

49. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess. Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970).

50. *Id.* ¶ 10. The International Court of Justice ("ICJ") held that this General Assembly resolution is indicative of customary international law. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 188, 191 (June 27).

51. Resolution RC/Res.6 of the Review Conference of the Rome Statute, Amendments to the Rome Statute of the International Criminal Court, art. 8*bis*(2), June 11, 2010, *available at* https://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf.

52. S.C. Res. 674, ¶ 8, U.N. Doc. S/RES/674 (Oct. 29, 1990) (The UN Security Council warned Iraq that "it is liable 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 by Iraq").

53. S.C. Res. 661, preamble, U.N. Doc. S/RES/661 (Aug. 6, 1990).

54. Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 165, 171 (Dec. 19, 2005); *see also* Ronen, *supra*

non-use of force in international relations and the principle of non-intervention."[55] Similarly, the European Court of Human Rights has recently termed the occupation of Northern Cyprus by Turkey, widely perceived as resulting from an unlawful invasion of the Turkish army of Cyprus, [56] an "illegal occupation."[57]

International law has recognized the notion of illegal occupation also regarding occupation that resulted from a state's refusal to withdraw its military forces from a territory over which it lost legal title. In view of UN General Assembly and Security Council resolutions that terminated South Africa's mandate over Namibia,[58] the ICJ determined in its 1971 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia that the continued presence of South Africa in Namibia amounted to occupation.[59] Implying that the occupation was illegal, the ICJ stated that "by maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities . . . ."[60]

Similarly, the refusal of Portugal to terminate its colonial rule over Guinea-Bissau in the wake of the latter's declaration of independence has prompted the UN General Assembly to adopt Resolution 3061 (1973), which "strongly condemns the policies of the Government of Portugal in perpetuating its illegal occupation of certain sectors of the Republic of Guinea-Bissau."[61]

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note 1, at 224 ("[T]he occupation of Ituri is a simple case of aggressive use of force.").

55. Armed Activities in the Territory of the Congo, *supra* note 54, ¶ 345.

56. Thomas D. Grant, *Review Essay: Martin van Creveld, The Rise and Decline of the State*, 9 J. TRANSNAT'L L. & POL'Y 309, 318 (2000) ("The Turkish Republic of Northern Cyprus (TRNC), declared as such in 1984, came into being through a chain of events beginning in July 1974 and connected with use of force by Turkey. The use of force has been widely, if not universally, characterized as illegal."); Elena Katselli, *The Ankara Agreement, Turkey and the EU*, 55 INT'L COMP. L. Q. 705, 714 (2006).

57. Demopoulos v. Turkey, App. no. 46113/99, paras. 94, 96 (March 1, 2010).

58. G.A. Res. 2145 (XXI), U.N. Doc. A/6316 (Oct. 27, 1966); S.C. Res. 264, U.N. Doc. S/RES/264 (Mar. 20, 1969); S.C. Res. 276, U.N. Doc. S/RES/276 (Jan. 30, 1970).

59. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21, 1971).

60. *Id.* ¶ 118.

61. G.A. Res. 3061 (XXVIII), U.N. GAOR, 28th Sess. Supp. No. 30, U.N.

Yael Ronen correctly observed that:

> [I]n Namibia and Guinea-Bissau . . . the foreign forces (of South Africa and Portugal, respectively) had initially exercised effective control over the territory under an internationally-recognized title (colonial holding by Portugal and a mandate by the League of Nations to South Africa). The two territories became occupied once the controlling states lost the titles they had held.[62]

The occupations of Namibia and Guinea-Bissau did not result from foreign military invasion. However, those occupations were *created* through illegal use of force consisting in the refusal on the part of South Africa and Portugal to withdraw their military forces from the territory upon loss of title.[63] Such circumstances are indistinguishable from an occupation resulting from the refusal of a foreign army, initially invited to a territory by the legitimate sovereign, to withdraw from that territory after the invitation has expired.[64] International law considers such refusal an act of aggression.[65]

A review of state practice reveals, however, that the purview of the notion of illegal occupation in customary international law is limited to occupations resulting from an unlawful use of force on the part of the occupant; it does not extend to occupations created as a result of the use of force in self-defense by the occupying state.

B. OCCUPATION RESULTING FROM A LAWFUL USE OF FORCE

Pronouncing the traditional approach of international law toward lawfully created occupations, Oppenheim observed:

Doc. A/9030 (Nov. 2, 1973).

62. Ronen, *supra* note 1, at 215.

63. *Id.* at 216 (regarding the cases of Namibia and Guinea-Bissau, "the prohibition on the use of force covers not only entry into a territory, but also failure to leave it").

64. *Id.* at 216, n. 64.

65. Resolution RC/Res.6, *supra* note 51, art. 8*bis*(2) (providing that one of the acts that qualify as an "act of aggression" is "the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement"); *see also* Definition of Aggression, G.A. Res. 3314 (XXIX), ¶¶ 3(e) of annex, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974); DINSTEIN, *supra* note 2, at 202.

> If a belligerent succeeds in occupying the whole, or even a part, of enemy territory, he has realized a very important aim of warfare. He can now not only use the resources of the enemy country for military purposes, but can also keep it for the time being as a pledge of his military success, and thereby impress upon the enemy the necessity of submitting to terms of peace.[66]

Rosalyn Higgins, a former judge at the ICJ, similarly noted that "there is nothing in either the [U.N.] Charter or general international law which leads one to suppose that military occupation, pending a peace treaty, is illegal."[67] Former Israeli Chief Justice, Meir Shamgar, also rejected the notion of "illegal occupation," stating that "pending an alternative political or military solution [occupation] . . . could, from a legal point of view, continue indefinitely."[68] Other commentators share this view.[69] A review of conventional international law reveals no treaty provision that refutes these statements of law. Proponents of the "illegal occupation" notion have acknowledged that "neither the Hague Regulations nor the Fourth Geneva Convention limits the duration of the occupation or requires the occupant to restore the territories to the sovereign before a peace treaty is signed."[70]

Although the practice of the UN Security Council ("SC") may at times be inconsistent with norms of customary

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66. OPPENHEIM'S INTERNATIONAL LAW 432 (7th ed. 1948) (cited in BENVENISTI, *supra* note 1, at 245).

67. Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 8 (1970).

68. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980 – THE LEGAL ASPECTS 13, 43 (Meir Shamgar ed., 1982).

69. DINSTEIN, *supra* note 3, at 2 ("[A] myth surrounding the legal regime of belligerent occupation is that it is, or becomes in time, inherently illegal under international law."); YORAM DINSTEIN, *The International Legal Dimensions of the Arab-Israeli Conflict*, *in* ISRAEL AMONG THE NATIONS 137, 150 (Alfred E. Kellermann, Kurt Siehr & Talia Einhorn eds., 1998) ("While belligerent occupation does not transfer title (sovereignty), it does mean that the occupying Power has a temporary right of possession (which can continue as long as peace is not concluded)."); Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L. J. 457, 464–65 (1991) ("Israel is legally entitled to remain in the territory it now holds and to protect its security interests therein until new boundaries are drawn in a peace settlement.").

70. BENVENISTI, *supra* note 1, at 245.

international law,[71] it is often perceived as evidence of such norms.[72] SC resolutions do not provide any support for the view that the notion of "illegal occupation" may extend to occupation resulting from a lawful use of force.[73] Indeed, the practice of the SC points to the contrary.

SC Resolution 242 (1967) adopted in the wake of the 1967 war that resulted in the Israeli occupation of the West Bank, Gaza Strip, Golan Heights, and Sinai peninsula, tied Israel's withdrawal from occupied territories to the realization of the challenging aim of establishing "a just and lasting peace."[74] It has been noted that upon its adoption Resolution 242 was widely accepted as being consistent with the traditional position of international law on occupation, pronounced by Oppenheim,[75] "as it linked the withdrawal from occupied territories with the establishment of a just and lasting peace."[76] The language of Resolution 242 seems inconsistent at least with the theory of illegal occupation advanced by Cassese, which holds that an occupation resulting from a lawful use of force in self-defense may not continue after the armed attack against the occupant has been repelled.[77]

Moreover, a series of SC resolutions suggest unwillingness on the part of the SC to link attempts on the part of an occupant to annex the occupied territory to the notion of "illegal

71. On the legal limitations on Security Council (SC) powers, see Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law*, 12 CHI. J. INT'L L. 605 (2012).

72. *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Former Yugoslavia Since 1991, ¶¶ 133–34 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (relying on SC resolutions as evidence of customary international law); Colin Warbrick, *The United Nations System: A Place for Criminal Courts?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 237 (1995).

73. Robbie Sabel, *The Palestine Question in International Law*, 42 ISR. L. REV. 628, 631 (2009) (reviewing VICTOR KATTAN, THE PALESTINE QUESTION IN INTERNATIONAL LAW (2008)) ("It is noteworthy that the UN Security Council, over a period of some forty years, has never designated the Israeli occupation as illegal.").

74. S.C. Res. 242, ¶ 1, U.N. Doc. S/RES/242 (Nov. 22, 1967).

75. *See supra* note 66.

76. BENVENISTI, *supra* note 1, at 245; *see also* Curtis, *supra* note 69, at 492 ("[Resolution 242] does not require withdrawal by Israel until the establishment of a just and lasting peace through negotiations.").

77. CASSESE, *supra* notes 31–32 and accompanying text.

occupation." In June 1967, the Israeli Government issued an order expanding the application of "Israeli law, jurisdiction and administration" to East Jerusalem, which is part of the Palestinian occupied territories.[78] The order also placed East Jerusalem under the existing Israeli municipality of (West) Jerusalem.[79] In 1980, the Israeli legislature enacted "Basic Law: Jerusalem the Capital of Israel," which provided that "Jerusalem, complete and united, is the capital of Israel."[80] Although Israel did not present those measures as annexation, "internationally . . . these measures were understood as attempts to annex East Jerusalem, and were criticized accordingly."[81]

In response to the 1967 act, the SC adopted Resolution 252, which affirmed "that acquisition of territory by military conquest is inadmissible"[82] and considered "that all legislative and administrative measures and actions taken by Israel . . . which tend to change the status of Jerusalem are invalid."[83] Responding to the 1980 Basic Law, the SC adopted Resolution 478, reaffirming "the inadmissibility of acquisition of territory by force."[84] The SC censured the enactment of the Basic Law "in the strongest terms"[85] as a "violation of international law."[86] But although the SC viewed Israel's legislative measures as an attempt to acquire territory by force[87] (i.e., to annex East Jerusalem), neither SC resolution referred to the occupation of East Jerusalem as illegal.

A similar legislative measure was taken by Israel in relation to the Syrian territory occupied by Israel in 1967, the Golan Heights. In 1981, Israel enacted the Golan Heights Law, which provides that "the law, jurisdiction and administration of

78. Law and Administration Order, 5727–1967, SH 499 (1967) (Isr.).

79. *Id.*

80. Basic Law: Jerusalem the Capital of Israel, 5740–1980, SH 980 (1980) (Isr.).

81. BENVENISTI, *supra* note 1, at 205; *see also* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 60 (1990) ("East Jerusalem and the Golan Heights have been brought directly under Israeli law, by acts that amount to annexation.").

82. S.C. Res. 252, preamble, U.N. Doc. S/RES/252 (May 21, 1968).

83. *Id.* ¶ 2.

84. S.C. Res. 478, preamble, U.N. Doc. S/RES/478 (Aug. 20, 1980).

85. *Id.* ¶ 1.

86. *Id.* ¶ 2.

87. *Id.*, preamble.

the state shall apply to the area of the Golan Heights."[88] This legislative measure was widely perceived by the international community as amounting to annexation of the Golan Heights, although Israel did not present it as such.[89] In response to this legislative measure, the SC passed Resolution 497 (1981), declaring that "the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void"[90] and once more reaffirming the inadmissibility of the "acquisition of territory by force."[91] The notion that a conduct by an occupant aimed at the "acquisition of territory by force"[92] bears on the legality of the occupation itself finds no support in the language of the Resolution, however.

The SC seems to have taken the view that the unlawfulness of a policy aimed at annexing an occupied territory is limited to the *manifestations* of such policy (*i.e.*, the legislative measures taken by Israel) and does not extend to the occupation itself. This approach arguably pertains also to a policy of veiled annexation manifested in efforts to establish facts on the ground, or in refusal on the part of an occupant to engage in good-faith negotiations aimed at ending the occupation.

In contrast with SC practice, several UN General Assembly resolutions specifically addressing the Israeli occupation of Arab territories referred to the occupation as "illegal."[93] Similarly, General Assembly resolutions condemned "Israel's continued occupation of Arab territories, in violation of the Charter of the United Nations, the principles of

88. Golan Heights Law, 5742-1981, 36 LSI 7(1981-1982) (Isr.).

89. Asher Maoz, *The Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 355, 384–89 (1994) (reviewing the response of the international community to the Israeli legislation).

90. S.C. Res. 497, ¶ 1, U.N. Doc. S/RES/497 (Dec. 17, 1981).

91. *Id.*, preamble.

92. *Id.*

93. General Assembly Resolution 32/20 on the situation in the Middle East, adopted in 1977, pronounced deep concern "that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights." G.A. Res. 32/20, pmbl. ¶ 4 & operative ¶ 1, U.N. GAOR, 32nd. Sess., Supp. No. 45, U.N. Doc. A/RES/32/20 (Nov. 25, 1977). Subsequent resolutions include virtually identical language. *See* G.A. Res. 33/29, pmbl. ¶ 4, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/RES/33/29 (Dec. 7, 1978); G.A. Res. 34/70, pmbl. ¶ 5, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/70 (Dec. 6, 1979).

international law, and repeated resolutions of the United Nations . . . ."[94] One of the resolutions condemning the Israeli occupation as illegal also cited "those principles of international law which prohibit the occupation . . . of territory by the use of force and which consider any military occupation, however temporary, or any forcible annexation of such territory, or part thereof, as an act of aggression."[95]

These resolutions provide little support for extending the notion of "illegal occupation" to lawfully created occupations for two reasons. First, it is highly doubtful that the resolutions reflect a perception of the Israeli occupation as lawfully created. It has been observed that the resolutions "should probably be read as a reflection of the position of Arab and other states, namely that Israel had acted aggressively in 1967."[96] Second, to the extent that the resolutions represent state practice that pertains to lawfully created occupations, such practice carries little weight in ascertaining the state of customary international law.

It is widely agreed that in themselves, UN General Assembly resolutions are not legally binding upon states.[97] But there is an unsettled debate concerning the weight of General

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94. G.A. Res. 32/20, *supra* note 93, ¶ 1. For General Assembly resolutions with similar language, see G.A. Res. 45/83A, ¶ 5, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/83A, at 35 (Dec. 13, 1990); G.A. Res. 44/40A, ¶ 5, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/40A, at 42 (Dec. 4, 1989); G.A. Res. 43/54A, ¶ 5, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/RES/43/54A, at 57 (Dec. 6, 1988); G.A. Res. 40/168A, ¶ 5, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/168A, at 58 (Dec. 16, 1985); G.A. Res. 36/226A, ¶ 1, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/RES/36/226A, at 48 (Dec. 17, 1981); G.A. Res. 34/70, *supra* note **Error! Bookmark not defined.**, at 21; G.A. Res. 33/29, *supra* note **Error! Bookmark not defined.**, at 18; G.A. Res. 3414 (XXX), ¶ 2, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at 7 (Dec. 5, 1975).

95. G.A. Res. 3414, *supra* note 94, pmbl. ¶ 2.

96. Ronen, *supra* note 1, at 218.

97. South West Africa Voting Procedure Advisory Opinion, 1955 I.C.J. 67, at 115 (H. Lauterpacht, J., concurring) (stating that while "decisions of the General Assembly are endowed with full legal effect in some spheres of U.N. activity . . . generally they are not legally binding upon the Members of the United Nations . . . [but] are in the nature of recommendations."); Scott W. Lyons, *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict*, 47 WAKE FOREST L. REV. 799, 810, n. 59 (2012); Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301, 301 (1979) ("[T]he General Assembly of the United Nations lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members of the United Nations or binding in international law at large.").

Assembly resolutions as *evidence* of customary international law or as state practice contributing to the formation of customary law.[98] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation[,]"[99] referred to as *opinio juris*. A United States Court of Appeals has concluded that resolutions of the General Assembly "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations."[100]

By contrast, most commentators take the view that General Assembly resolutions can possibly serve as evidence of customary international law to the extent that they are indicative of *opinio juris*.[101] According to this view, the UN General Assembly "serves as the most convenient forum within which countries assert their views about the wide range of world events—assertions that can directly contribute to both the objective and subjective criteria founding customary international law."[102] This view finds support in ICJ jurisprudence, which regarded certain resolutions adopted by

98. For a review of this debate, see Schwebel, *supra* note 97.

99. Restatement (Third) of Foreign Relations Law § 102(2) (1987).

100. Flores v. S. Peru Copper Co., 414 F.3d 233, 259 (2d Cir. 2003); *see also* José A. Cabranes, *Customary International Law: What it is and What it is Not*, 22 DUKE J. COMP. & INT'L L. 143, 150 (2011) ("It is tempting to look to statements by the United Nations General Assembly or other international agencies or conferences for expressions of customary international law. Yet . . . repeated adoption of such non-binding resolutions of international organizations cannot, by miraculous alchemy, transform those resolutions into "law"—in international affairs, as in basic arithmetic, one hundred times zero, is, alas, zero.").

101. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5–7 (1963); Lyons, *supra* note 97, at 810, n. 59 ("Most commentators do not suggest that General Assembly resolutions create binding norms of international law but instead suggest that they may possibly be evidence of *opinio juris*."); David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1231 (2009) ("A UNGA resolution—depending on how it is worded, what the drafters' intentions are, and how overwhelmingly it is supported—can constitute strong evidence of the existence and content of a putative CIL [customary international law] rule."); Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq*, 13 EUR. J. INT'L L. 21, 31 (2002) ("[M]any non-industrialized states and a significant number of writers have asserted that resolutions are important forms of practice which are potentially creative, or at least indicative, of rules of customary international law.").

102. Koplow, *supra* note 101.

the General Assembly as evidence of customary international law.[103]

Yet "it is generally agreed that the legal effect varies with the intent, nature and content of the [General Assembly] resolution and also with the nature of the support received . . . ."[104] Hence, the weight of a General Assembly resolution as evidence of the existence and content of a rule of customary international law depends largely on "how overwhelmingly it is supported."[105] A review of the voting records shows that none of the Western democracies supported the resolutions asserting the illegality of the Israeli occupation.[106] Although adoption by consensus is not a necessary requirement for a General Assembly resolution to be regarded as evidence of customary international law,[107] denial of support for a resolution by a significant segment of the international community substantially detracts from its weight as such evidence.

The weight attributed to General Assembly resolutions

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103. *See Nicaragua*, 1986 I.C.J. 14, ¶¶ 188, 191.

104. C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22, 34, n. 48 (1992).

105. Koplow, *supra* note 101, at 1231. Indeed, the General Assembly resolution adopting the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, which was recognized by the ICJ as evidence of customary international law, was adopted by the General Assembly by consensus. *See Nicaragua*, 1986 I.C.J. 14, ¶ 191.

106. *See* General Assembly of the United Nations, Voting Records, *available at* http://www.un.org/en/ga/documents/voting.asp. It is noteworthy that states initially supporting such resolutions have subsequently revised their position upon transition from a totalitarian regime to democracy. These states include Spain and Eastern European states. This is evident after studying G.A. Res. 45/83A, *supra* note **Error! Bookmark not defined.**, at 35; G.A. Res. 44/40A, *supra* note **Error! Bookmark not defined.**, at 42; G.A. Res. 43/54A, *supra* note **Error! Bookmark not defined.**, at 57; G.A. Res. 40/168A, *supra* note **Error! Bookmark not defined.**, at 58; G.A. Res. 36/226A, *supra* note **Error! Bookmark not defined.**, at 48; G.A. Res. 34/70, *supra* note **Error! Bookmark not defined.**, at 21; G.A. Res. 33/29, *supra* note **Error! Bookmark not defined.**, at 18; G.A. Res. 32/20, *supra* note **Error! Bookmark not defined.**, operative ¶ 1, at 24; G.A. Res. 3414 (XXX), *supra* note **Error! Bookmark not defined.**, at 7. *See* UNITED NATIONS BIBLIOGRAPHIC INFO. SYS., Voting Records – Keyword Search Indexes, http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=142281M90C5A3.33614&profile=voting&lang=eng&logout=true&startover=true (search by "UN Resolution Symbol"; type in UN Resolution Symbol for the UN Resolution of interest; then click the red circle with the white arrow to the right of the search box).

107. HIGGINS, *supra* note 101, at 6.

also depends on "what the drafters' intentions are . . . ."[108] It has been observed that the political nature of the General Assembly "reduces even the capacity to evaluate the strength of *opinio juris* shown in the resolutions."[109] The nature of a General Assembly resolution as a product of an intense political controversy significantly diminishes its weight as evidence of customary international law. There can be little doubt that such circumstances underlie the General Assembly resolutions characterizing the Israeli occupation as "illegal," as manifested in the divide between Western and non-Western states, the latter commanding a majority within the General Assembly.[110]

Official statements on the part of states constitute another form of state practice contributing to customary international law and indicative of it.[111] Official statements on the part of Western states concerning the Israeli occupation of the Palestinian territories, including statements condemning Israel's illegal settlement activity, do not refer to the Israeli *occupation* as "illegal." A recent statement on the part of the European Union (EU), speaking for twenty-eight member states, is instructive. In June 2013, the European Commission adopted a Notice containing guidelines regarding the ineligibility of Israeli entities located within the territories occupied by Israel since June 1967 for grants, prizes, and financial instruments funded by the EU.[112] The notice

108. Koplow, *supra* note 101, at 1231.

109. Lyons, *supra* note 97, at 810, n. 59; *see also* Schwebel, *supra* note 97, at 302 ("The members of the General Assembly typically vote in response to political not legal considerations."); HIGGINS, *supra* note 101, at 6 ("[V]oting patterns to some extent conform to political pressures rather than to legal beliefs.").

110. *See* David L. Breau, *The World Court's Advisory Function: "Not Legally Well-Founded,"* 14 MIAMI INT'L & COMP. L. REV. 185, 201–02 (2006) (observing that "Israel's opponents are generally able to muster a majority for General Assembly resolutions condemning Israel," and that the General Assembly "has a long history of singling out Israel for rebuke and excluding it from participation in various U.N. functions."); Curtis, *supra* note 69, at 486 ("Any realistic appraisal of the relationship of U.N. activity to international law cannot discount the constant animus against Israel.").

111. Peter B. Rutledge, *Medellin, Delegation and Conflicts (of Law)*, 17 GEO. MASON L. REV. 191, 197 (2009) ("Customary international law derives . . . from the consistent practices of states as evidenced in their official statements, judicial decisions, international agreements and other diplomatic actions.").

112. Guidelines on the Eligibility of Israeli Entities and Their Activities in the Territories Occupied by Israel Since June 1967 for Grants, Prizes and

reaffirmed "the non-recognition by the EU of Israel's sovereignty over the territories occupied by Israel since June 1967 . . . irrespective of their legal status under domestic Israeli law,"[113] and was accompanied by further statements on the part of the EU reaffirming "the EU's longstanding position that Israeli settlements are illegal under international law . . . ."[114] Yet those statements, or any other statement issued by the EU,[115] do not suggest that in the view of the EU the Israeli occupation is contrary to international law.

Therefore, international practice does not sufficiently support the existence of a rule of customary international law providing that a prolonged occupation resulting from a lawful use of force may become illegal. Commentators advocating such rule imply that the ICJ has missed an opportunity to address this matter in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[116] The Court, "while critical of both this construction and the related settlement enterprise, and decreeing their illegality, still focused on specific actions by Israel without questioning the legality of the occupation regime as such."[117] The author subscribes to the view that the silence of the ICJ is telling.[118]

Financial Instruments Funded by the EU from 2014 Onwards (EC), No. 2013/C 205/05, 56 O.J. 9 (July 19, 2013), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:205:FULL:EN:PDF.

113. *Id.* ¶¶ 1, 3.

114. *Statement by the Delegation of the European Union to the State of Israel on the European Commission Notice (16/07/2013)*, EUROPEAN EXTERNAL ACTION SERVICE (Jul. 7, 2013), *available at* http://eeas.europa.eu/delegations/israel/press_corner/all_news/news/2013/20131607_02_en.htm.

115. *See e.g.*, Statement by EU High Representative Catherine Ashton on the Expansion of Israeli Settlements, Brussels (Dec. 19, 2012).

116. Legal Consequences of the Construction of a Wall, *supra* note 38.

117. Ben-Naftali et al., *supra* note 1, at 552.

118. Sabel, *supra* note 73, at 631 ("It is . . . telling that the International Court of Justice in its advisory opinion on the Legal Consequences of the Wall, an opinion which dealt at length with the status of the West Bank, refrained from characterizing the Israeli occupation as 'illegal.'").

IV. DO THE RULES REGARDING THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS SUPPORT THE ILLEGALITY OF OCCUPATION?

A. THE OBLIGATIONS OF A STATE RESPONSIBLE FOR A VIOLATION OF INTERNATIONAL LAW

The contention that conduct on the part of an occupant aimed at prolonging the occupation may amount to *de facto* annexation and thereby violate the right to self-determination is hardly disputable. Such conduct possibly violates the prohibition on the use of force as well,[119] although the application of *jus ad bellum* to determine the obligations of an occupant in the case of a lawfully created occupation is not entirely consonant with state practice,[120] and is likely to increase existing vagueness in *jus ad bellum*.[121] But these

119. An amendment to the Rome Statute of the International Criminal Court, adopted by consensus in 2010, provides that "any annexation by the use of force of the territory of another State or part thereof" constitutes an "act of aggression." Resolution RC/Res.6, *supra* note 51, art. 8*bis*(2). Particularly grave acts of aggression constitute the "crime of aggression." *Id.*, art. 8*bis*(1). Commenting on this provision, Eyal Benvenisti observed, "a question will arise whether the occupant, which had seized control in a lawful war of self-defense but refuses to negotiate withdrawal would have criminal responsibility." BENVENISTI, *supra* note 1, at 340. Benvenisti opines that *de facto* annexation of the occupied territory "might pass the two thresholds of an 'act of aggression' and a 'crime of aggression.'" *Id.*

120. Security Council Resolution 242 and other state practice seem to suggest that the interests that an occupant may legitimately promote in negotiating the end of occupation extend beyond security measures on the ground. *See infra* notes 160–167 and accompanying text. This practice seems inconsistent with the view that recognizes occupation not authorized by a Security Council resolution to be legal only as an extension of the self-defense exception to the prohibition on the use of force. *See* U.N. Charter art. 51.

121. Under *jus ad bellum*, any use of force that is not authorized by a Security Council resolution must meet the requirements of Article 51 of the UN Charter, which contains the self-defense exception to the prohibition on the use of force. It is possible to argue that Article 51 is ill suited to govern peace negotiations toward a political solution that would end the occupation. The application of Article 51 to such negotiations is likely to increase the existing vagueness of the requirements of necessity and proportionality in the law of self-defense. Addressing the application of *jus ad bellum* to such negotiations, Benvenisti suggests that "[i]n many instances . . . it would not be too difficult to conclude that there is, beyond reasonable doubt, bad faith on the part of the occupant." BENVENISTI, *supra* note 1, at 349. Benvenisti recognizes, however, that "there is a fine line between reasonable bargaining and obstinate holdout, a line that is very difficult to draw and one upon which

violations of international law do not give rise to illegality of the occupation resulting in the duty of the occupant to unconditionally withdraw from the occupied territory.

International law recognizes the fundamental distinction "between primary norms that define rights and obligations and secondary norms that define the consequences of the breach of primary norms."[122] State Responsibility Rules are "a body of secondary norms that sets out to explore the consequences of breaching primary norms."[123] The legal consequences of state conduct that violates the right to self-determination or the prohibition on the use of force are thus determined by State Responsibility Rules.[124]

State Responsibility Rules require a state to first cease its internationally wrongful conduct, if it is continuing.[125] This obligation applies regardless of whether the unlawful conduct is an action or an omission.[126] It has been noted that "the obligation to cease the unlawful act entails respect for the primary obligation that is being violated. The consequences of this obligation must therefore be determined by reference to the content of the obligation being breached."[127]

The violation of the right to self-determination arises from the refusal of an occupant to earnestly negotiate the end of occupation and from actions on the ground aimed at perpetuating the occupation (e.g., enabling the settlement of the occupant's nationals within the occupied territory).[128] The obligation of cessation pertains to *these* unlawful conducts, and entails a duty of the occupant to negotiate in good faith a political solution that would end the occupation and to cease all actions on the ground aimed at perpetuating the occupation.

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there would sometimes be more disagreement than consent." *Id.*

122. BENVENISTI, *supra* note 1, at 307.

123. *Id.* at 308.

124. *See generally* Rep. of the Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, With Commentary, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (specifying State Responsibility Rules and providing a commentary on these Rules).

125. *Id.* at 88 (Draft Article 30); *see also* Corten, *supra* note 15, at 545.

126. Draft Articles on the Responsibility of States, *supra* note 124, at 88 (Commentary to Article 30, ¶ 2).

127. Corten, *supra* note 15, at 548.

128. BENVENISTI, *supra* note 1, at 245-46; Ben-Naftali et al., *supra* note 1, at 579, 601–05.

Such duties are by no means tantamount to an obligation to withdraw from the occupied territory unconditionally.

Similarly, to the extent that a policy aimed at perpetuating a lawfully created occupation violates the prohibition on the use of force, the obligation to cease such violation does not translate into a duty to unconditionally end the occupation. An occupant that gained control over the occupied territory in a war of self-defense may legitimately promote a range of national security interests concerning the terms of ending the occupation.[129] State practice does not support a construction of the primary norms of *jus ad bellum*, which holds that an occupant forfeits these legitimate interests if it also pursues other, illegitimate ones, concerning the prolongation of occupation.[130] The conduct that exceeds the boundaries of self-defense and thus violates the prohibition on the use of force consists of the refusal of an occupant to earnestly negotiate the end of occupation and of actions on the ground aimed at prolonging the occupation. The obligation of cessation pertains only to *these* unlawful conducts.[131]

In addition to the obligation of cessation, State Responsibility Rules require a state "to make full reparation for the injury caused by the internationally wrongful act."[132] The primary form of reparation is restitution.[133] It has been observed that "[t]he concept of restitution is not uniformly

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129. *See infra* Part IV(B).

130. *See supra* Part III(B).

131. An analogy to *jus ad bellum* analysis that does not involve occupation seems instructive. Consider the case of a state that has lawfully resorted to war having sustained an armed attack. Any military operations undertaken during the war by the attacked state, which aim to promote interests that are alien to the law of self-defense, amount to a violation of the prohibition on the use of force and generate legal consequences under State Responsibility Rules. But this violation does not give rise to a duty of the attacked state to cease all military efforts, including those necessary to achieve the legitimate ends of self-defense. *See, e.g.*, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), para. 33 (citing the view that "*each use of force* during a conflict must be measured by whether or not it complies with the necessity and proportionality requirements of self defence") (emphasis added).

132. Draft Articles on the Responsibility of States, *supra* note 124, at 91 (Draft Article 31).

133. *Id.* at 95 (Draft Article 34); Christine Gray, *The Different Forms of Reparation: Restitution*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 589 (James Crawford, Alain Pellet & Simon Olleson eds., 2010) ("Restitution is often affirmed to be the primary remedy in international law and this is the position taken by the ILC in its Articles on Responsibility of States for Internationally Wrongful Acts.").

defined."[134] According to the definition adopted by the UN International Law Commission, the obligation to make restitution consists in a duty "to re-establish the situation which existed before the wrongful act was committed . . . ."[135] This definition does not support a duty of an occupant to withdraw from the occupied territory where the occupation has been established before the violation of international law by the occupant. Restitution concerns the re-establishing of the *status quo ante* that existed during the state of occupation and before the wrongful act. Hence, an attempt on the part of an occupant to *de facto* annex the occupied territory, a conduct that follows the establishment of occupation, does not result in a duty of the occupant to end the occupation, although restitution may require the occupant to remove the consequences of actions on the ground aimed at perpetuating the occupation (e.g., illegally established settlements).[136]

A wider definition of restitution, adopted by the Permanent Court of International Justice in the 1928 *Factory of Chorzow* case,[137] states that restitution is the establishment or re-establishment of "the situation which would, in all probability, have existed if [the illegal] act had not been committed."[138] This approach to restitution, which could in theory support the duty of an occupant to end the occupation in view of its previous efforts to prolong it, was rejected by the UN International Law Commission.[139] The Commission reasoned that this wider definition would require engaging in an undesirable "hypothetical inquiry into what the situation would have been if the wrongful act had not been committed."[140] Such an inquiry was considered problematic because of its speculative nature.[141]

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134. Draft Articles on the Responsibility of States, *supra* note 124, at 96 (Commentary to Article 35, ¶ 2).

135. *Id.* (Draft Article 35).

136. State Responsibility Rules recognize two exceptions to the obligation to make restitution. Restitution is not required if it is "materially impossible" or involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation." *Id.* An inquiry whether any of these exceptions pertains to the removal of settlements established by Israel in the occupied Palestinian territory is beyond the scope of this article.

137. *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 2, at 47.

138. *Id.*

139. Draft Articles on the Responsibility of States, *supra* note 124, at 96 (Commentary to Article 35, ¶ 2).

140. *Id.*

141. Gray, *supra* note 133, at 590 ("The wider and more problematic definition is that restitution must 'reestablish the situation which would . . .

The ICJ has also been careful not to engage in this type of hypothetical inquiries, and has never derived from the obligation to make restitution a duty that cannot be supported by the narrow definition of restitution adopted by the International Law Commission.

Even assuming that the wider definition of restitution represents customary international law, it seems that the remedy of restitution does not give rise to a duty of the occupant to end a lawfully created occupation. Review of the interests that may be legitimately pursued by an occupant in maintaining a lawfully created occupation and negotiating its termination reveals that the occupant can legitimately present substantial demands in negotiating the termination of the occupation. Under these circumstances, it is not possible to determine that the prolongation of the occupation resulted, "in all probability,"[142] from the violation of international law on the part of the occupant.

B. THE LEGITIMATE INTERESTS OF AN OCCUPANT

Some commentators have argued that international law allows a state to occupy foreign territory as an extension of the right to self-defense afforded to a state under Article 51 of the UN Charter,[143] and that the legality of occupation is therefore subject to the requirements of necessity and proportionality that delineate the contours of the right to self-defense.[144] According to this view, the interests an occupant may legitimately pursue in maintaining the occupation and negotiating its termination are restricted to those security objectives that a state may promote in a war of self-defense.[145]

Yet commentators have pointed out a substantial uncertainty concerning the legitimate ends of war, that is, the range of security interests that a state may pursue in a war of

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have existed if [the illegal] act had not been committed' . . . but it necessarily involves speculation as to what would have been the situation if the illegal act had not occurred.").

142. *See supra* note 138 and accompanying text.

143. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

144. CASSESE, *supra* note 1, at 55, 99; BENVENISTI, *supra* note 1, at 17.

145. *Supra* note 144.

self-defense.[146] Some commentators have argued that the use of force in self-defense must be limited to halting and repelling the armed attack that triggered the right to use force, and that the aims of war may not extend to the creation of permanent conditions of security.[147] Enzo Cannizzaro thus maintained that the use of force in self-defense "must necessarily be commensurate with the concrete need to repel the current attack, and not with the need to produce the level of security sought by the attacked state."[148] This view has been criticized as "removed from reality."[149] The prevailing view seems to hold that "unless the armed attack is limited, localized, and unconnected to a previous 'accumulation of events' or war-threatening situation,"[150] the victim state may use force to eliminate or at least significantly reduce reasonably foreseeable future threats.[151]

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146. David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum*, 24 Eur. J. Int'l L. 235, 239 (2013) ("All accept that a state acting in self-defence may halt and repel an ongoing armed attack, but there is a singular lack of agreement on whether it may also act to prevent or deter further armed attacks from the same enemy.").

147. ANTONIO CASSESE, INTERNATIONAL LAW 355 (2d ed. 2005) ("Self-defence must limit itself to rejecting the armed attack; it must not go beyond this purpose."); Enzo Cannizzaro, *Contextualizing Proportionality: jus ad bellum and jus in bello in the Lebanese War*, 88 INT'L REV. RED CROSS 779, 785 (2006).

148. *Id.*

149. Kretzmer, *supra* note 146, at 262. Observing the failure of the collective security mechanism operated by the UN Security Council to provide effective protection for states, Kretzmer submits, "[i]n these conditions it does not seem reasonable to demand that the victim state restrict its response to halting and repelling the attack, even when it has well-founded fears that the aggressor may well mount another attack in the future." *Id.*

150. *Id.* at 270.

151. *Id.*; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 157 (2004) ("There is support for the view that the legitimate aims of self-defense include the right to restore the security of the State after an armed attack."); Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, THE MARSHALL CENTER PAPERS, No. 5, Nov. 2002, at 20 (justifying the use of force in self-defense that is "no more than necessary to defeat the armed attack and remove the threat of reasonably foreseeable future attacks."); Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345 (1970). Yoram Dinstein argues that a state that suffered a massive armed attack may use the force necessary to secure complete surrender of the aggressing state. DINSTEIN, *supra* note 2, at 265 ("[A] war of self-defense – once lawfully started – can be fought to the finish . . . .Thus, notwithstanding the condition of proportionality, a war of self-defence may be carried out until it brings about the complete collapse of the enemy Belligerent Party."). Gabriella Blum suggested the possibility that the evolving norms of the law of occupation now allow an occupant, which

Linking the legitimate ends of war with those of occupation, Stephen Schwebel has thus observed:

> A state acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense. As a condition of its withdrawal from such territory, that state may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it of such a nature as to justify exercise of self-defense.[152]

Importantly, some proponents of the notion of illegal occupation concede that an occupant may "use the occupation as a bargaining chip"[153] in negotiating its termination, and that "no . . . claim of illegality would be proper as long as the occupant's conditions for peaceful settlement of the conflict are motivated by reasonable security interests."[154] This position suggests that an occupant may use the occupation to promote security interest beyond repelling an armed attack that has already occurred.

Regarding the occupation of the Palestinian territories, there is little doubt that Israel's most pressing security concern to be addressed in negotiations to end the occupation involves the potential rocket and missile threat posed by state forces and non-state actors. The severity of this threat has become apparent since the withdrawal of the Israeli military from the Gaza Strip in 2005, with thousands of rockets launched at Israel from the Gaza Strip.[155] In contrast with the Gaza Strip, the West Bank is located in great proximity to Israel's largest

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gained control over an occupied country in a war of self-defense, to insist *in its self-interest* on the transformation of the occupied country into a democracy, as a legitimate aim of occupation. This view clearly relies on an immensely broad perception of the occupant's security interests. Gabriella Blum, *The Fog of Victory*, 24 Eur. J. Int'l L. 391, 405–06 (2013).

152. Schwebel, *supra* note 151, at 345.

153. BENVENISTI, *supra* note 1, at 245.

154. *Id.* at 245–46; *see also* Ben-Naftali et al., *supra* note 1, at 602 (implying that an occupant may use the occupied territory "as a negotiation card to be returned in exchange for peace").

155. *See, e.g.*, *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks*, HUM. RTS. WATCH (Aug. 2009), at 1, *available at* http://www.hrw.org/sites/default/files/reports/ioptqassam0809webwcover.pdf

population centers as well as to Israel's main airport. The emergence of a rocket and missile threat from the West Bank in the wake of an Israeli withdrawal ending the occupation would greatly jeopardize the personal safety of most Israelis, and render a devastating blow to the Israeli economy and civil life. As noted by Israeli Major-General Giora Eiland:

> Rockets and missiles positioned throughout the West Bank would easily cover the entire State of Israel. Advanced anti-aircraft missiles would be capable of shooting down not only large passenger aircraft flying into Ben-Gurion International Airport, but also helicopters and even fighter planes. Anti-tank missiles that are highly effective up to a range of 5 km. can easily cover not only strategic positions such as Israel's north-south Highway 6, but well beyond.[156]

Because a substantial rocket and missile threat may be posed by both state forces and terrorist organizations, an agreement concerning the demilitarization of the future Palestinian state would not suffice. As noted by Eiland, "[t]he common denominator among all of these [types of missiles] is the ease of smuggling and clandestine manufacture, as is taking place today in Gaza. No monitoring system that may be established will be able to prevent this. Only effective control of the Jordan Valley . . . can prevent the smuggling of these types of weapons."[157] Israel therefore insists on maintaining a military presence, which could be reviewed over time, in the Jordan Valley along the eastern border of a future Palestinian state.[158] The Palestinians have so far rejected this position.[159]

May an occupant legitimately pursue, in negotiating the end of occupation, certain interests that extend beyond security measures? SC Resolution 242 (1967) seems to answer this question in the affirmative, as it indicates that *political* measures such as a formal recognition on the part of Arab

156. Giora Eiland, *How the Changing Nature of Threats to Israel Affects Vital Security Arrangements*, JERUSALEM ISSUE BRIEFS, Vol. 10, No. 10, Oct. 26, 2010, *available at* http://jcpa.org/article/how-the-changing-nature-of-threats-to-israel-affects-vital-security-arrangements/.

157. *Id.*

158. The Associated Press, *Israel Could Reconsider Presence in Jordan Valley*, HAARETZ (Oct. 13, 2010), http://www.haaretz.com/news/diplomacy-defense/israel-could-reconsider-presence-in-jordan-valley-1.318887.

159. *Id.*

countries of Israel's right to exist may be legitimately required by Israel as a condition to ending the occupation.[160] The language of the Resolution, which ties a withdrawal of Israel from occupied territories to the "establishment of a just and lasting peace in the Middle East,"[161] further implies that the occupant may legitimately link the end of occupation to the settlement of disputes that are otherwise likely to trigger future violence. A conspicuous example of such dispute concerns the controversy between Israel and the Palestinians regarding the claim of Palestinian refugees to a right of return to the territory of Israel proper. The controversy surrounding this claim concerns both its legal soundness and its feasibility,[162] and it is perceived to be "one of the major stumbling blocks to Israeli-Palestinian reconciliation."[163] Indeed, the position taken by Israel, holding that a withdrawal from occupied territories must be part of a comprehensive political settlement that marks the "end of all claims,"[164] including the settlement of the Palestinian claim to the right of return, seems to have been accepted by large segments of the international community.[165]

Yoram Dinstein has suggested that in negotiating the terms of a peace treaty ending the occupation an occupant may

160. S.C. Res. 242, *supra* note 74, ¶ 1 ("The Security Council . . . [a]ffirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East[,] which should include . . . [w]ithdrawal of Israel armed forces from territories occupied in the recent conflict; [and t]ermination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.").

161. *Id.*

162. *See, e.g.*, Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 Am. J. Int'l L. 295, 312, 321–29 (1995).

163. *Id.* at 295.

164. *Statement by PM Netanyahu on Address by US President Obama*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (May 19, 2011), *available at* http://mfa.gov.il/MFA/PressRoom/2011/Pages/PM_Netanyahu_US_President_Obama_speech_19-May-2011.aspx.

165. *See e.g.*, European Union, Joint Statement by the EU High Representative Catherine Ashton and the Foreign Minister of the Russian Federation Sergey Lavrov on Middle East Peace Process (Dec.21, 2012), para. 1, *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134545.pdf ("The parties must engage in direct and substantial negotiations without preconditions in order to achieve a lasting solution to the Israeli-Palestinian conflict, ending all claims.").

insist on the vindication of state interests that seem remote from the sphere of security considerations, such as the payment of reparations to the occupant by the sovereign of the occupied territory.[166] The scope of interests transcending security considerations, which an occupant may legitimately pursue in maintaining the occupation or negotiating its termination, remains unclear. Addressing the uncertainty concerning the range of legitimate interests that may be pursued by an occupant, Gabriella Blum observed that "ultimately, the only uniform restraint upon present-day occupations seems to be the ban on annexation."[167]

C. SUMMARY: STATE RESPONSIBILITY RULES AND THE ABSENCE OF A DUTY TO END A LAWFULLY CREATED OCCUPATION

The obligation of cessation of violations of international law committed by the occupant during the occupation does not require the occupant to terminate a lawfully created occupation. Nor can such a requirement stem from the prevailing, narrow definition of the obligation of restitution, which requires a state in violation of international law "to re-establish the situation that existed before the wrongful act was committed."[168] It seems that even the broader construction of the remedy of restitution does not spell a duty to end a lawfully created occupation. In negotiating the termination of a lawfully created occupation, an occupant may legitimately present substantial demands pertaining to its national security and possibly to other state interests as well. Under such circumstances, it is typically impossible to conclude that the prolongation of the occupation did not result from the occupant's pursuit of its legitimate interests, but rather from the violation of international law on its part.

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166. DINSTEIN, *supra* note 3, at 270 ("The treaty of peace may even permit future return of armed forces of the (formerly) Occupying Power to at least a portion of what used to be an occupied territory, in response to a material breach of its provisions by the restored sovereign. Article 430 of the Treaty of Versailles permitted such reoccupation as a countermeasure against Germany's possible failure to observe its obligations in the sphere of reparations. In the event, France and Belgium actually reoccupied the Ruhr Valley on that basis in 1923 . . . .").

167. Blum, *supra* note 151, at 405.

168. Draft Articles on the Responsibility of States, *supra* note 124, at 96 (Draft Article 35).

Forms of reparation other than restitution (e.g., monetary compensation) stipulated in State Responsibility Rules [169] clearly do not give rise to a duty of an occupant to withdraw from the occupied territory. It appears, therefore, that State Responsibility Rules do not accommodate an extension of the notion of illegal occupation to lawfully created occupation.

D. STATE RESPONSIBILITY RULES AND THE "REASONABLE TIME LIMIT" ADVANCED BY BEN-NAFTALI, GROSS AND MICHAELI

Concerns regarding the circumvention of State Responsibility Rules also arise with regard to the "reasonable time limitation" on the duration of occupation advanced by Ben-Naftali, Gross, and Michaeli. This proposed norm turns largely on the right to self-determination. [170] It has been observed that:

> [T]he objective of the law of occupation, embodied in the basic tenets elaborated by Ben-Naftali, Gross and Michaeli—namely the vesting of sovereignty in the population; the occupant's obligation of trust toward the population; and the temporary nature of occupation—is to safeguard the sovereignty of the ousted or prospective sovereign, or, in modern-day parlance, the right to self-determination of the local population.[171]

The "reasonable time limit" provides that the illegality of occupation results from the actions of an occupant that "has annexed the occupied territory or has otherwise indicated an intention to retain its presence there indefinitely."[172] Therefore, the "reasonable time limit" is a means of ensuring that actions taken by an occupant in breach of the right to self-determination (i.e., the formal or veiled annexation of the occupied territory) generate legal consequences that adequately

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169. *Id.* at 95 (Draft Article 34).

170. *See supra* notes 36–40 and accompanying text; *see also* Ronen, *supra* note 1, at 208 (questioning whether the theory of illegal occupation advanced by Ben-Naftali, Gross, and Michaeli constitutes a separate ground for illegality, and submitting that the unlawful conduct giving rise to the illegality of occupation under this theory "is ultimately a violation of the right to self-determination").

171. Ronen, *supra* note 1, at 208.

172. Ben-Naftali et al., *supra* note 1, at 601.

safeguard this right, namely, a duty to end the occupation.

In view of its nature as a norm regulating the consequences of state conduct violating the right to self-determination, the "reasonable time limitation" advanced by Ben-Naftali, Gross, and Michaeli stands in tension with State Responsibility Rules. Any violation of the right to self-determination triggers the application of State Responsibility Rules. The discussion above demonstrates that these rules do not provide that a violation of the right to self-determination, manifested in actions of the occupant that amount to veiled or overt annexation, gives rise to a duty of the occupant to withdraw from the occupied territory. The effort to support a *primary rule* of international law that provides for a duty to end an occupation in view of conduct violating the right to self-determination can be viewed as an attempt to circumvent the *secondary rules* of international law (i.e., State Responsibility Rules), which determine the consequences of violating this right.

V. *LEX FERENDA*: REGULATING THE LEGALITY OF OCCUPATION IN THE ABSENCE OF TREATY GUIDANCE?

Is a rule of customary international law, which provides for the illegality of certain lawfully created occupations, desirable as a matter of *lex ferenda*? I believe it is not, because the application of such a customary norm would be heavily burdened by uncertainty. Given the absence of any treaty-law guidance, the illegality of occupation would have to be determined on the basis of a case-by-case balancing analysis, taking into account the right of the people under occupation to self-determination on one hand and the legitimate interests of the occupant on the other. Reliance on such balancing of interests is problematic, however.

Customary international law is already highly vulnerable to the dangers of uncertainty in the law.[173] Commentators have

173. Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L. J. 941, 996–97 (2012) ("Concerns about freelance lawmaking are greatest with respect to the identification of customary international law . . . .In many cases, the ambiguous mixture of law and policy that pervades international relations fosters doubt over the very existence of legal rules. The disordered, fluid process for addressing these consequent doubts through judicial interpretation only deepens and prolongs the indeterminacy. Even the evidentiary standards

noted "the surprising area of uncertainty of rules in the body of international law and the particularly grave consequences of this in a system of law which lacks compulsory third party settlement and leaves disputants free to rest on extreme positions which tend to aggravate uncertainties still further."[174] The indeterminacy inherent in balancing of interests would further exacerbate the problem of uncertainty in international law.[175] Therefore, international law appears to avoid the balancing of competing claims in the international arena. Commentators have observed that "although a balancing procedure is often used in the context of U.S. Constitutional law, there is no equivalent in international law and limited authority for introducing a balancing approach into international law."[176]

The scope of interests that an occupant may legitimately pursue in maintaining the occupation or negotiating its termination remains unclear.[177] Moreover, international law does not provide any guidance on how such interests should be weighed against the right to self-determination. The absence of clearly articulated standards for applying the legal norm, that could be implemented objectively, creates a high risk of

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are unclear, for international law sanctions resorting to 'any relevant material or source' in identifying the content of the law.")

174. Julius Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16, 38 (1957); *see also* Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597, 606 (2002) (addressing the current state of customary international law regarding the exceptions to the prohibition on the use of force, Joyner observes, "Customary international law rules . . . suffer from ambiguity, as they often lack sure existence and are interpretively unclear in many instances. Any element of the international legal regime governed by customary international law is therefore compromised by the inherent uncertainty of the form of law upon which it is predicated").

175. *See e.g.* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 221 (1992) (observing that "balancing tends not to work so well in practice," because "[t]he considerations being weighed are usually imprecise enough to permit several answers, and to dictate none." Hence, "there is no greater certainty about the correctness of particular outcomes--only more uncertainty about what these outcomes are likely to be").

176. Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 326, n. 246 (1997); *see also* Laker Airways v. Sabena, 731 F.2d 909, 950 (D.C. Cir. 1984) ("This court is ill-equipped to 'balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate.'").

177. *See supra* Part IV(B).

arbitrary and politically motivated decision-making. Uncertainty in the content of international legal rules prevents them from providing meaningful guidance.[178] It has been observed that "some elementary formal law-ascertainment in international law [is] a necessary condition to preserve the normative character of international law."[179]

Proponents of the illegal occupation approach avoid the difficulties of balancing interests by assuming that a policy of *de facto* annexation pursued by an occupant in violation of international law precludes any further consideration of the interests of the occupant. Having determined that an occupant's behavior amounts to *de facto* annexation, they immediately proceed – with a courteous nod to the occupant's security interests[180] – to conclude that the occupation is illegal. But nothing in the rules on which the illegal occupation approach is based – the prohibition on the use of force and the right to self-determination – indicates that the price of violating these rules is the occupant's forfeiture of all legitimate interests associated with the occupation, regardless of their importance.

Proponents of the illegal occupation approach warn that the alternative to such a norm is legal void filled by the catch-all freedom principle.[181] The latter is a principle of customary international law – explicated by the Permanent Court of International Justice in the *Lotus* Case[182] – holding that "when no restriction can be authoritatively established, a state is seen as free to act."[183] It is argued that the application of the freedom principle to prolonged occupations amounting to veiled annexation would render "the very phenomenon of occupation . . . excluded from a critical legal review. Such exclusion is an invitation for excessive power."[184] In truth, however, the absence of a norm determining the illegality of occupation brings the freedom principle into play in a far more

178. Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* 29–30 (2011).

179. *Id.*

180. Ben-Naftali et al, *supra* note 1, at 609 ("It is beyond dispute that terrorist attacks present a major challenge to the conduct of normal life. This has become painfully evident in many parts of the world following 9/11.").

181. *Id.* at 553.

182. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 19 (Sept. 7).

183. Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT'L L. 91, 98 (2003).

184. Ben-Naftali et al., *supra* note 1, at 553.

limited manner. A web of international legal norms pertains to bad-faith conduct by an occupant aimed at prolonging the occupation. As noted above, such conduct amounts to a violation of the right to self-determination and possibly of the prohibition on the use of force, both peremptory norms of customary international law. Furthermore, bad-faith conduct of the occupant aimed at prolonging the occupation is typically manifested in violations of rules of international humanitarian law.[185]

The void that concerns proponents of the notion of illegal occupation turns on the alleged insufficiency of the remedies currently provided under State Responsibility Rules, namely, the missing remedy of an occupant's duty to unconditionally withdraw from the occupied territory. One of the implications of the freedom principle is that a violation of international law subjects a state only to those obligations authoritatively established under State Responsibility Rules. Commenting on the freedom principle, Curtis Bradely and Mitu Gulati observed, however, that "in situations in which it is problematic to allow for such freedom of action, one might expect that nations will have a strong incentive to develop a treaty to address the issue."[186] The absence of a treaty provision requiring an occupant that attempted to prolong the occupation to unconditionally withdraw from the occupied territory may reflect recognition on the part of the international community that such requirement is unrealistic – in so far as it entails the forfeiture of essential security interests of the occupant – and that its justness is far from self-evident.

VI. CONCLUSION

Neither treaty law nor state practice as evidence of customary international law suggests that an occupant that pursues *illegitimate interests* concerning *de facto* annexation of

185. The main manifestation of a policy of *de facto* annexation, the establishment of settlements by the occupant within the occupied territory, constitutes violation of international humanitarian law. *See* Legal Consequences of the Construction of a Wall, *supra* note 38, ¶ 120; *see also* Ben-Naftali et al., *supra* note 1, at 579–92, 601–06 (reviewing violations of international humanitarian law on the part of Israel that amount to de facto annexation of the Palestinian occupied territories).

186. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202, 272 (2010).

an occupied territory thereby forfeits its otherwise *legitimate interests* concerning the terms of ending the occupation. Moreover, although the veiled or overt annexation of an occupied territory violates international law, the extension of the notion of illegal occupation to lawfully created occupations cannot be inferred from State Responsibility Rules. It appears, therefore, that the illegality of occupation under international law is restricted to occupations created as a result of unlawful use of force.