



PALESTINE AND THE LAW OF NATIONS

The International Community Bears the Responsibility of Enforcing International Law and UN Resolutions Condemning Israel's Occupation of Palestinian Territory

By Nabil Elaraby

In our contemporary world, the affected parties in the Arab-Israeli conflict are not only Palestine and Israel, or Israel and the Arab World. The international community as a whole is threatened by such egregious and blatant violations of the post-Second World War international legal order perpetuated by Israel's fifty-year occupation of the Palestinian territories; it is a test of whether international law exists and applies to all states equally. Israel's policies and practices in the occupied Palestinian territories contravene the Charter of the United Nations, alongside other principles of international law, governing military occupation, non-annexation of territory, and self-determination.

The legal history of the conflict is critical to appreciate the international community's responsibility in addressing the major violations that characterize the prolonged Israeli occupation. The first consideration is understanding the legal history of the land and the right of Palestinians to self-determination and independence. The Palestinian territories formed part of a mandate entrusted to Great Britain by the League of Nations following the First World War. Britain was entrusted with administering the territory in a way as to give effect to its "sacred trust of civilization," which was to uphold the principle of non-annexation and ensure the "well-being and development" of the peoples under the mandate "until such time as they are able to stand alone" as stipulated in Article 22 of the Covenant of the League of Nations.¹

On April 1, 1947, Britain announced its intention to relinquish its mandate over Palestine and called upon the United Nations General Assembly to decide the future of Palestine. On November 29, 1947, the General Assembly passed Resolution 181 proposing the partition of the Palestine Mandate into two independent states, one Jewish and one Arab, after a transitional period. Yet, the partition resolution remained unfulfilled following the

◁ *Palestinians try to block the convoy of United Nations Secretary-General António Guterres, Gaza Strip, August 30, 2017.*
Ibraheem Abu Mustafa/ Reuters

outbreak of war between Israel and its Arab neighbors. Because an independent Palestinian state has not yet been achieved, the transition period referred to in Resolution 181 is still in effect. This transitional period serves as a legal nexus with the Mandate System and as such, it carries with it the responsibilities from the mandate to the present. In its 1971 Advisory Opinion on the *Legal Consequences of the Continued Presence of South Africa in Namibia*, the International Court of Justice (ICJ) held that the concept of the “sacred trust of civilization” applied to all mandated territories not yet independent and “cannot be presumed to lapse before the achievement of its purpose.” Thus, it remains incumbent upon the United Nations to prevent the annexation of Palestinian territory and promote the “well-being and development” of the Palestinian people. The United Nations’ special legal responsibility toward the fulfillment of the Palestine Mandate as a “sacred trust of civilization” cannot be considered complete until the transition period is ended following the self-determination and independence of the whole of Palestine.

The international community has repeatedly confirmed that Israel’s policies and practices of occupation, and de facto annexation, are a breach of its obligation to respect the principles of self-determination and non-annexation enshrined in Palestine’s status as a sacred trust. Self-determination is a principle enshrined in the Charter of the United Nations. It is a right or obligation toward all, *erga omnes*, that provides for a people to determine its own political economic and social order, according to its own practices and procedures of governance.² United Nations resolutions have repeatedly reaffirmed the right of the Palestinian people to “self-determination, national independence, territorial integrity and national unity, and sovereignty without external interference.”³ Yet, the international community has failed to undertake serious action to honor the sacred trust conferred upon it by the Mandate System, thus undermining the credibility of the international legal order.

The prolonged occupation of territory is not accepted under the United Nations Charter or the relevant rules of international law. The ICJ has held that with respect to mandated territories “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form a ‘sacred trust of civilization.’” Moreover, international law provides numerous obligations and responsibilities for the temporary military occupation of a territory. Under conventions such as the 1907 Hague Regulations and the 1949 Fourth Geneva Convention, an occupying power is prohibited from acquiring territory by force or from permanently altering the status of the occupied territory in such a way that prejudices the future exercise of the local population’s right to self-determination.⁴ The occupying power must also provide for the fundamental rights of the local population and maintain civil life and public order, while respecting the local laws and institutions.⁵

Legal Obligations Ignored

Israel's actions during its five decades as an occupying power directly contradict these responsibilities and duties. After seizing the Gaza Strip, the West Bank, and East Jerusalem during the Six-Day War in 1967, Israel instituted a system of dispossession and oppression toward the Palestinian population. This system of occupation is inherently discriminatory, creates a new demographic reality, and severely fragments the Palestinian territory.⁶ Although the international community has repeatedly condemned the occupation, it persists. In reality, Israel's policy of de facto annexation has advanced and expanded such that when an independent state of Palestine is created it will be confined to just 22 percent of historic Mandate Palestine. According to the 1947 UN Partition Resolution, which Israel has accepted, the Palestinian state was accorded 44 percent of mandated Palestine. The persistent expansion of Israeli settlements into Palestinian territory threatens the viability of a future Palestinian state. Today, there are approximately 600,000 Israelis living in settlements on Palestinian land.⁷ Over 50,000 Palestinian homes and structures have been demolished since the beginning of the occupation.⁸

Each territorial addition to Israel's 1967 borders has been accomplished through the use of force, contrary to the dictates of international law. An interdiction on the "use of force against the territorial integrity or political independence of any state" is enshrined in Article 2 of the Charter of the United Nations. Both the General Assembly and the Security Council have, with regard to the occupied Palestinian territories, made specific reference to the "inadmissibility of the acquisition of territory by war" and called upon Israel to withdraw from the occupied territories. Just as Israel is under an obligation to terminate its breaches of international law, the international community must not recognize as legal any territorial acquisition resulting from the threat or use of force.⁹

The legal status of occupied Palestinian territory cannot be fully appreciated without an examination of Israel's responsibilities to respect Palestinian territorial integrity, and to withdraw from the occupied territories. These obligations are based, in part, on Security Council Resolution 242 (1967), which is universally considered the basis for a just, viable, and comprehensive settlement. Resolution 242 is a multi-dimensional resolution, which addresses various aspects of the Arab-Israeli dispute. The resolution contained two basic principles defining the status of the territories occupied in 1967, and confirmed that such territories have to be "de-occupied." The resolution emphasized the inadmissibility of acquisition of territory by war, thus prohibiting the annexation of the territories occupied in the 1967 conquest. It called for the withdrawal of Israeli armed forces from the territories occupied in the conflict. On October 22, 1973, the Security Council adopted Resolution 338 (1973) which reiterated the necessity to implement Resolution 242 "in all of its parts."¹⁰

Following Resolution 242 in 1967, Israel made several other legally binding and contractual undertakings to end the Israeli military occupation, while preserving the territorial integrity of the West Bank and Gaza. At the 1978 Camp David Accords, Israel agreed that the basis for a peaceful settlement of the conflict with its neighbors is Resolution 242 in all its parts. The Oslo Accord, signed September 13, 1993, between Israel and Palestine provides that “the two sides view the West Bank and the Gaza Strip as a single territorial unit whose integrity will be preserved during the interim period.” The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington, D.C. on September 28, 1995, reiterated the commitment to respect the integrity and status of the territory during the interim period. In addition, Article XXXI (7) provided that “[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.” Thus, Israel undertook to carry out the following obligations: to withdraw in conformity with Resolution 242; to respect the territorial integrity of the West Bank and the Gaza Strip; and to refrain from taking any step that would change the status of the West Bank and Gaza.

Israel’s Land Grab

The creation of the settlement enterprise and its associated infrastructure in the West Bank and East Jerusalem demonstrate Israel’s intent to permanently alter the status of Palestinian territory through prolonged occupation and *de facto* annexation. In 2004, the ICJ issued an Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. It ruled that the establishment of settlements and construction of a separation barrier in the West Bank and East Jerusalem constitute a violation of the Fourth Geneva Convention because they were likely to create a *fait accompli* on the ground that was “tantamount to *de facto* annexation.”¹¹ Most recently, in 2016, the Security Council passed Resolution 2334 calling the settlements “a flagrant violation under international law and a major obstacle to the achievement of the two-state solution and a just, lasting and comprehensive peace.”¹² The future of a two-state solution and the exercise of the Palestinian right to self-determination is further threatened by the construction of an expansive network of settler-only roads and checkpoints that fragment Palestinian territory, contribute to demographic change,¹³ and severely “impede liberty of movement.”¹⁴

A new form of apartheid is practiced in the occupied territories. As an occupying power, Israel is prohibited from acting in a way that does not respect the rights and livelihood of the local population.¹⁵ According to Article 43 of The Hague Regulations, an occupying power is obliged to exercise its powers for the benefit of the occupied population and refrain from considering its own economic and social

interests.¹⁶ However, from the beginning of the occupation, Israel introduced a variety of policies and actions that unfairly gave advantage to the Israeli population. Israel's creation of a bifurcated legal system with separate rights for Palestinians and Israelis, and its appropriation of the natural resources of the occupied territory for the benefit of the settler population, institutionalized a discriminatory system of occupation. This contravenes the principle of equality enshrined in the International Covenant on Civil and Political Rights, which contends that all persons are "entitled without any discrimination to the equal protection of the law."¹⁷ The continuation of the Israeli military occupation and its discriminatory regime challenges the very norms recognized as fundamental to the maintenance of the international legal order.

The third issue requiring elaboration is whether military conquest and occupation provide title to territory. Under international law, military occupation is permitted only if it is temporary and based on military necessity. It is presupposed that belligerent occupation will end following the cessation of hostilities or upon the conclusion of a peace agreement. Any other outcome is precluded by the norms of international law, which prohibit the acquisition of territory through the use of force. The 1907 Hague Regulations and the Fourth Geneva Convention both prohibit the annexation of occupied territory, or undertaking actions that permanently alter its status.¹⁸ These principles are considered peremptory norms, known as *jus cogens*, that are regarded as fundamental to the maintenance of the international legal order and as such, no derogation is permitted.¹⁹ It is apparent from Israel's actions since 1967 that it does not consider the occupation of Palestine as temporary. This is evident from increasingly vocal Israeli officials advocating the outright annexation of the West Bank and the government's continued support of the settlement enterprise and the construction of the separation wall. However, based on the legal provisions prohibiting the acquisition of territory by force and the premise that military occupation must be inherently temporary, what has been occupied by Israel must be de-occupied.

Yet, the Palestinians continue to languish under an oppressive and prolonged occupation. Following the signing of various armistice agreements and peace treaties with its Arab neighbors, Israel's continued use of force to maintain the occupation, now in its fifth decade of existence, is not justified by military necessity. Instead, the Israeli occupation's administrative and legal regime underpin a policy of de facto annexation designed to permanently transform the status of the occupied territory, in violation of the rules of *jus cogens*. Israel has not given any indication that it plans to withdraw from the occupied territories, or transfer full control to the Palestinian Authority. In 1980, Israel purported to annex East Jerusalem, declaring a "complete and united" Jerusalem its capital."²⁰ In recognition of the inadmissibility of the annexation of territory by force, the Security Council censured this announcement

by passing Resolution 478 (1980), declaring the annexation and any future acts aimed at altering the permanent status of Palestinian land invalid under international law.²¹ By virtue of its own Declaration of Independence, which Israel proclaimed on May 14, 1948 “on the strength of the resolution of the United Nations General Assembly [181],” and according to the principle of *estoppel* (the legal bar to doing what is contrary to previous actions), Israel is legally barred from claiming territory in addition to the boundaries contained in the partition resolution of 1947.²² Therefore, Israel’s acquisition of significantly more land than originally allotted under Resolution 181 contravenes international law and its own declaration of independence.²³

A Global Responsibility

Finally, what is the responsibility of the international community in ending the occupation? As articulated in its Charter, the United Nations is responsible for the maintenance of international peace and security “in conformity with the principles of justice and international law.”²⁴ As such, it must uphold the rule of law by ensuring the non-recognition of any unlawful situation and cooperating to bring it to an end. Despite identifying Israel’s increasingly serious violations of human rights, humanitarian abuses, and breaches of international law as threats to peace, the United Nations has failed to engender a comprehensive and lasting resolution to the conflict. This is a dereliction of the international community’s responsibility toward the sacred trust of Palestine and a significant threat to peace.

In the fifty years since 1967, no other issue has witnessed as many international conferences, resolutions, and agreements made in its name than the question of Palestine. Similarly, there has been no other issue that has seen so many efforts yield so few results. Although the Security Council first called for Israeli withdrawal from the occupied Palestinian territories in 1967, none of its resolutions and their corresponding obligations regarding the illegality of Israeli occupation have been implemented, fostering an environment of impunity. Unable to justify its policies and actions in the Palestinian territories, the Israeli position has been to distract and defame as it transformed the peace process into one of conflict management rather than conflict resolution.

Since the 1991 Madrid Peace Conference, Israel has successfully used the pretense of negotiations as a smokescreen to delay a comprehensive agreement. This practice has enabled Israel to advance a policy of occupation that is whittling away at Palestinian prospects for a viable, independent state. There are growing concerns that a two-state solution will not be feasible in the near future and the Palestinian Authority’s recent overtures toward the United Nations and its organs for recognition demonstrate a loss of faith in the traditional peace process.²⁵ In the current

context, the resumption of negotiations is a non-starter. For Israel, gaining time is a strategic objective. At present and in the absence of a credible peace process, Israel has made strategic use of time to change the facts on the ground through the expansion of settlements, the demolition of Palestinian homes, and the construction of a settler-only road system.

In the face of a crumbling two-state solution, it is necessary for the international community to end the culture of complicity and appeasement in favor of decisive action designed to bring an end to the conflict. The focus must be on ending, not managing, the conflict. To do this, a date for the end of occupation must be set. This remains the only way to achieve lasting peace and security. Occupation, as an illegal and prolonged situation, is at the heart of the problem.

The international community bears a legal, political, humanitarian, and moral responsibility to end the prolonged Israeli occupation, enabling both Palestinians and Israelis to live in peace and security. It must act to revitalize and steer the long-dormant quest for peace by overseeing the full implementation of each party's corresponding obligations under international law. Members of the international community must exercise their collective influence to facilitate the establishment of a "just and lasting peace" based on the principles found in Security Council Resolutions 242 and 338.²⁶ The United States, as the only power able to influence the Israeli government, bears a special historic responsibility in this regard. This is necessary to end the suffering of the Palestinian people, bring about a peaceful resolution to the conflict, and prevent the weakening of the foundations of international law. Only once Israeli forces have withdrawn from Palestinian land and the occupation has ended can the ultimate objective of the sacred trust and independence of the Palestinian people be fulfilled. The responsibility to resolve the Palestinian problem falls squarely on the shoulders of the international community to carry out the United Nations collective security system's first purpose "to take effective collective measure for the prevention and removal of threats to the peace."

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- 14 International Court of Justice (2004).
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- 16 The Hague Regulations (1907). *Respecting the Laws and Customs of War on Land*, Article 43.
- 17 General Assembly (1966). *International Covenant on Civil and Political Rights*, Articles 2, 26.
- 18 The Hague Regulations (1907), *Respecting the Laws and Customs of War on Land*, Articles 2, 42–56; Fourth Geneva Convention (1949), *Protection of Civilian Persons in Time of War*, Articles 55, 56, 59 and 60; United Nations (1945). *Charter of the United Nations*, Article 2.
- 19 Although Israel is not a formal party to the 1907 Hague Convention, its regulations are now considered to be customary law and thus are binding on all states. Israel became a party to the Fourth Geneva Convention on July 6, 1951 and so, is legally bound by its provisions governing the actions of an Occupying Power.
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