

## SYMPOSIUM ON REVISITING ISRAEL'S SETTLEMENTS

### ISRAEL'S CREEPING ANNEXATION

*Omar M. Dajani\**

A raft of legislative proposals introduced in the Knesset over the last several years has raised the specter of Israeli annexation of additional West Bank territory. [One bill](#) would provide for nearly automatic application of new Knesset legislation to Israelis residing in the West Bank.<sup>1</sup> [A second](#) would authorize the expropriation under certain circumstances of privately-owned Palestinian land for incorporation into Israeli settlements, extending the Knesset's reach to the regulation of West Bank land use by non-Israelis.<sup>2</sup> A third, entitled the "[Maale Adumim Annexation Law](#)," provides for the full application of Israeli law in Israel's largest West Bank settlement, as well as in an adjacent twelve square kilometer area called the "E1 Zone,"<sup>3</sup> one of the few remaining land reserves available for the development of Palestinian East Jerusalem.

Whether these proposals will become law, and survive constitutional challenges, is far from assured. Whatever their fate, however, their advocates have expressed determination to press ahead with a legislative agenda focused on incremental annexation of West Bank territory. As former Jewish Home Member of Knesset [Orit Struk](#) explained in 2014, the aim is "the application of Israeli sovereignty gradually over the areas of settlement in Judea and Samaria, ... in keeping with the idea that the entire process of Zionism is a gradual process."<sup>4</sup>

This incremental approach presents international lawyers with difficult legal and strategic questions. How should a process of "creeping" annexation—in which a putative acquisition of territory is undertaken not in one fell swoop, but gradually through a pattern of oblique and sometimes informal measures—be characterized under international law? Does the sum of its parts rise beyond a violation of the *jus in bello* to contravene the *jus ad bellum*? What kinds of responses should it elicit from the international community?

As we mark a half century of Israeli occupation and settlement in the West Bank, I submit that Israel's annexation of parts of the West Bank is not merely a specter or an implausible scheme by fringe elements on the far right of Israel's political spectrum. It is already reality—in fact if not, fully, in law—and it should be treated accordingly by the international community. This essay begins by exploring the concept of de facto annexation in international law. I then consider the extent to which it is an appropriate way to characterize Israel's presence in the West Bank and outline its implications with respect to third state responsibility.

\* *Professor of Law and Co-Director, Global Center for Business and Development, McGeorge School of Law, University of the Pacific.*

<sup>1</sup> See Jonathan Lis & Chaim Levinson, [Justice Minister Ayelet Shaked Pushes Plan to Apply Israeli Law in West Bank Settlements](#), HA'ARETZ (May 2, 2016).

<sup>2</sup> See Ruth Levush, [Israel: Law for the Regulation of Settlement in Judea and Samaria, 5777-2017](#), LIBRARY OF CONGRESS (Feb. 2017).

<sup>3</sup> See Tamar Pileggi, [Coalition MKs to Renew Push for Maale Adumim Annexation](#), TIMES OF ISRAEL (Mar. 2, 2017).

<sup>4</sup> [Is Israel Moving Closer to Full Sovereignty in Judea-Samaria?](#), ARUTZ SHEVA (Oct. 20, 2014).

*De Facto Annexation in International Law*

In its [Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), the International Court of Justice raised the concern that Israel's West Bank wall and accompanying regime were creating "a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation."<sup>5</sup> The Court, however, left critical questions unanswered: how one might assess whether the "fait accompli" had become "permanent," how "de facto annexation" might be defined, and what are the legal implications. Since then, the term has been used by [prominent legal scholars](#) to characterize the consequences of Israel's West Bank barrier and, more broadly, of its settlement enterprise, but they too have offered little exposition of the concept.<sup>6</sup>

International law today has more to say about the legal consequences of an annexation than about what qualifies as one, but it was not always so. During the period when conquest remained a lawful means of acquiring territory, jurists paid [closer attention](#) to how to distinguish belligerent occupation, on the one hand, from subjugation and annexation, on the other.<sup>7</sup> [Two elements](#) were considered pertinent to determine whether annexation had occurred, namely whether "effective possession of the territory" had taken place and whether the conquering state clearly manifested its "intention to hold the territory permanently under its dominion."<sup>8</sup> According to one early-twentieth century treatise, the latter could be manifested either explicitly, "by some formal act," or implicitly, by exercising functions of government over an extended time.<sup>9</sup>

The legal test for an effective annexation cannot, however, be transposed from pre-Charter law governing the acquisition of territory to the post-Charter law of state responsibility without some consideration of context. When states could lawfully acquire territory through conquest, they had an incentive to declare their acquisition early and with maximal clarity. After all, while a state's rights in a territory following annexation were "unlimited," the rights possessed by a mere occupant were significantly constrained, as they are today: the occupant was obliged, *inter alia*, to minimize interference with local law, to administer finite resources as a usufructuary, and to refrain from appropriating private property.<sup>10</sup> Thus, the problem of "premature annexation"—in which a state declared a territory annexed before it had effectively consolidated possession of it on the battlefield—was far more common than the converse situation. To be sure, even today a government may see political benefit, domestically and even internationally, to declaring that it has annexed contested territory. However, today's legal prohibition of conquest creates an incentive for states to obfuscate the reality of annexation that did not exist when such actions were lawful.

<sup>5</sup> [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 2004 ICJ REP 131, para. 121 (July 9).

<sup>6</sup> See James Crawford, [Trades Union Cong., Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories](#) 29 (Jan. 24, 2012); Victor Kattan, [The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice](#), 40 VAND. J. TRANSNAT'L L. 1425, 1448 (2007); Orna Ben-Naftali et al., [Illegal Occupation: Framing the Occupied Palestinian Territory](#), 23 BERKELEY J. INT'L L. 551, 602–603 (2005).

<sup>7</sup> See, e.g., MATTHEW MARK MCMAHON, [CONQUEST AND MODERN INTERNATIONAL LAW](#) 8 (1940); COLEMAN PHILLIPSON, [TERMINATION OF WAR AND TREATIES OF PEACE](#) 9–19 (1916).

<sup>8</sup> PHILLIPSON, [supra note 7](#), at 9; see also AMOS S. HERSHEY, [THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION](#) 277 (1930) (observing that incorporation of subjugated territory "must be shown by some act showing intention (such as a decree of annexation) and ability to maintain permanent possession").

<sup>9</sup> PHILLIPSON, [supra note 7](#), at 10.

<sup>10</sup> [Id.](#) at 10–11.

Excessive formalism, accordingly, seems misplaced when assessing whether a state has manifested an intention to hold a territory “under its dominion” with sufficient clarity to constitute an unlawful annexation. Indeed, state practice offers no shortage of examples in which the international community has looked past a state’s formal characterization of its actions when evaluating their lawfulness for this purpose—most recently in relation to [Russia’s annexation of Crimea](#).<sup>11</sup> Accordingly, while a formal act of annexation is powerful evidence of intent, the lack of one is by no means dispositive.

What other kinds of acts signal such an intention? As noted above, it may be signaled by a state’s exercise, for a prolonged time, of the kinds of governmental functions typically reserved to a sovereign. An occupant’s refusal to accept the law of occupation’s applicability would seem probative for drawing this conclusion—as would a refusal to comply with duties under that law that relate specifically to distinguishing the rights of an occupant from those of a sovereign. For example, sweeping alteration of the laws previously in force in a territory is likely to reveal more about the occupant’s intent to annex than, say, a violation of the prohibitions of willful killing or collective punishment, serious as those latter breaches may be.

In this regard, it is difficult to conceive of a measure more indicative of a state’s intent to annex territory—short of a declaration to that effect—than its establishment of civilian settlements upon the territory. After all, [Article 49 \(6\)](#) of the Fourth Geneva Convention, which prohibits such measures, was conceived in part as a means of preventing the use of population transfers as a prelude to the annexation (or “coloniz[ation]”) of occupied territories, based on the recognition that imposed demographic transformations would impair the right to self-determination of the native population.<sup>12</sup> While not every individual settlement established in violation of Article 49(6) necessarily evidences an intent to acquire territory, the greater the investment in such settlements and in infrastructure linking them back to the occupant state, the stronger the nexus with annexation.

### *Characterizing Israel’s Presence in the West Bank*

The Government of Israel makes no secret of its [claim to title](#) over the West Bank,<sup>13</sup> which it generally calls Judea and Samaria. It avers, however, that it is committed to resolving the competing claims over the land through negotiation.<sup>14</sup> The question is whether the character, scale, and duration of Israel’s West Bank settlement enterprise reveal an intent to acquire the territory, notwithstanding this claimed commitment.

Consideration of that question requires some attention to the jurisdictional framework established by Israel and the Palestine Liberation Organization in the Oslo Agreements. In the 1995 Israeli-Palestinian Interim Agreement, the Palestinian Authority (“PA”) was assigned civil and security jurisdiction over most of the West Bank’s pre-existing Palestinian urban areas (excluding East Jerusalem and parts of Hebron) and civil jurisdiction over areas of semiurban sprawl, small towns, and villages. [By 2000](#), these areas, designated Areas A and B, together comprised around 36 percent of West Bank territory.<sup>15</sup> The 1995 Interim Agreement provided that the PA would gradually assume jurisdiction over the remainder of West Bank territory, designated Area C, “except for the issues that will be negotiated in permanent status negotiations”—an oblique reference to settlements, military areas, and

<sup>11</sup> See [GA Res. 68/262](#), para. 5 (Apr. 1, 2014) (emphasizing legal invalidity of the referendum held in Crimea as basis for altering region’s status).

<sup>12</sup> [COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR](#) 283 (Jean S. Pictet ed., 1958).

<sup>13</sup> See Israel Ministry of Foreign Affairs, [Israeli Settlements and International Law](#) (Nov. 30, 2015).

<sup>14</sup> [Id.](#)

<sup>15</sup> United Nations Office for the Coordination of Humanitarian Affairs, [Restricting Space: The Planning Regime Applied to Area C of the West Bank](#) 5 (Dec. 2009).

Jerusalem. Israel insisted, however, that it had the right under the agreements [unilaterally to define the territorial scope](#) of these exceptions,<sup>16</sup> and it has retained full control over more than 60 percent of the West Bank.

With [some prominent exceptions](#),<sup>17</sup> few Israelis seek to exercise sovereignty over the roughly 2.3 million Palestinians who live in Areas A and B. Such a step, it is argued, would weaken—and perhaps eventually threaten—the state’s Jewish majority. From almost the inception of its occupation, however, Israel has taken steps to facilitate its acquisition of West Bank land outside of Palestinian population centers. Indeed, as graphically illustrated by one [recent Israeli study](#), Oslo’s now-ossified jurisdictional framework was erected on a map shaped by planning blueprints conceived decades earlier with the specific intention of thwarting Palestinian sovereignty and consolidating Israel’s hold on territory deemed to serve its strategic interests.<sup>18</sup> These intentions were candidly acknowledged by late [Prime Minister Ariel Sharon](#), a leading architect of these plans: asked in 2001 if it was possible that Israel would eventually withdraw from its West Bank settlements, he responded, “Is it possible today to concede control of the hill aquifer, which supplies a third of our water? Is it possible to cede the buffer zone in the Jordan Rift Valley? You know, it’s not by accident that the settlements are located where they are.”<sup>19</sup>

According to the [Office of the UN High Commissioner for Human Rights](#), some 594,000 Israelis now reside in West Bank settlements, including approximately 208,000 in East Jerusalem.<sup>20</sup> Israel imposes onerous restrictions on Palestinian use of—and access to—[Area C](#), reserving 68 percent of the territory for Israeli settlements, 21 percent for closed military zones, and 9 percent for nature reserves.<sup>21</sup> In the less than one percent of Area C that Israeli authorities have designated for Palestinian use, “it is virtually impossible for Palestinians to obtain construction permits for residential or economic purposes.”<sup>22</sup> In contrast, approximately \$18 billion (USD) has been invested in the construction of Israeli settlement housing and related infrastructure over the last fifty years.<sup>23</sup> [The West Bank road network](#), which previously was organized along a north-south axis connecting Palestinian communities, is now dominated by east-west roads that link settlements to one another and to Israel, often disrupting transportation between Palestinian cities and towns.<sup>24</sup> Similarly, the West Bank’s [water system](#) has been integrated into Israel’s, and ownership over it was formally transferred to Mekorot, Israel’s national water company, in 1982.<sup>25</sup> [The vast majority](#) of water extracted from the mountain aquifer, a watercourse shared by Israel and the West Bank, is consumed by Israelis.<sup>26</sup>

The legal infrastructure Israel has erected in the West Bank is also probative of intent. Although Israel [initially recognized](#) the applicability of the Fourth Geneva Convention to its occupation of the West Bank, it quickly reversed its position, pledging to apply only what it calls the “humanitarian” provisions of the Convention—i.e., those

<sup>16</sup> See [Interview with Joel Singer, Israel Defense Forces Legal Counsel](#), KOL ISRAEL RADIO (Mar. 11, 1997).

<sup>17</sup> See, e.g., Marissa Newman, [Rivlin backs annexation with full rights for Palestinians](#), TIMES OF ISRAEL (Feb. 13, 2017) (describing support of Israel’s President Reuven Rivlin for annexation of entire West Bank).

<sup>18</sup> See generally Shaul Arieli et al., [Historical Political and Economic Impact of Jewish Settlements in the Occupied Territories](#), ISRAELI EUROPEAN POLICY NETWORK (2009).

<sup>19</sup> Peter Hirschberg, [Blow to efforts to renew security cooperation, as Sharon outlines contours of future settlement](#), HA’ARETZ (Apr. 14, 2001).

<sup>20</sup> Human Rights Council, [Human rights situation in Palestine and other occupied Arab territories](#), para. 11, UN Doc. A/HRC/34/39 (Mar. 13, 2017).

<sup>21</sup> World Bank, [Area C and the Future of the Palestinian Economy](#) 4 (Oct. 2, 2013).

<sup>22</sup> *Id.*

<sup>23</sup> Arieli et al., *supra* note 18, at 6.

<sup>24</sup> United Nations Office for the Coordination of Humanitarian Affairs, [The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank](#) (July 2007).

<sup>25</sup> Al Haq, [Water for One People Only](#) 33–35 (2013).

<sup>26</sup> See Amnesty International, [Troubled Waters: Palestinians Denied Fair Access to Water](#) 12 (Oct. 2009).

conceived to protect the population in the territory, as opposed to the rights of the ousted sovereign.<sup>27</sup> It is on this basis that Israel considers itself unconstrained by the Convention's prohibition of civilian settlement in occupied territory. In addition, Israel has gradually extended its legal system to [Israeli settlers](#) in the West Bank, who presently "are subject to Israeli law and enjoy the benefits and budgets granted by Israeli legislation."<sup>28</sup>

To be sure, Israeli officials often express readiness to negotiate peace without preconditions. In negotiations regarding territorial issues, however, they have never departed from the "red line" that Palestinians cede the territory on which 80 percent of the settler population resides, along with surrounding areas. Of the three major efforts to conclude a Palestinian-Israeli "permanent status" agreement, the negotiations between Prime Minister Olmert and Palestinian President Mahmoud Abbas from 2006 to 2008 progressed furthest toward a territorial compromise, but [even Olmert](#) insisted that Palestinians cede the territory on which all of Israel's settlement blocs were built, including those jutting far into the West Bank.<sup>29</sup> In the most recent round of talks, moreover, [Prime Minister Netanyahu](#) expressed unwillingness "to evacuate any settlements or uproot a single Israeli."<sup>30</sup>

How should one characterize the sum of these parts? As described above, Israeli planners for decades have expressly targeted areas of the West Bank that are not already densely inhabited by Palestinians for acquisition. Israel has refused to cede jurisdiction over those areas to the PA and strictly restricted Palestinian development of them. In addition, it has invested billions of dollars not only in settling hundreds of thousands of its citizens in these areas, but also in building infrastructure cementing their connection to Israel, under whose laws the settlers already live. Over fifteen years of permanent status negotiations, moreover, Israeli negotiators have hewed firmly to the position that Israel's settlement blocs are non-negotiable. In these circumstances, surely the international community need not wait for a formal act of annexation to consider that it has occurred.

#### *Legal Implications of Israel's De Facto Annexation*

Concluding that Israel has annexed de facto the territory it has seized for settlements—and arguably all or most of Area C—[does not alter Israel's duties](#) under the law of occupation.<sup>31</sup> It does, however, help to illuminate the duties of third states.

The United Nations Charter's prohibition of the use of force is a cornerstone of the post-World War II international legal order and widely acknowledged to be a peremptory norm of international law, as is the right of peoples to self-determination. The obligation of states not to recognize as legal an acquisition of territory by force (i.e., an annexation) is, in turn, a crucial means of enforcing both of these norms. Indeed, in its commentary on the [2001 Draft Articles on State Responsibility](#), the International Law Commission referred specifically to "attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples" as a situation to which the obligation of nonrecognition applies, adding that the obligation bars not only "formal recognition of these situations," but also "acts which would imply such recognition."<sup>32</sup> In a system where centralized

<sup>27</sup> See DAVID KRETZMER, [THE OCCUPATION OF JUSTICE](#) 32–33 (2002); Eyal Benvenisti, [The Missing Argument: The Article that Changed the Course of History?](#), 111 AJIL UNBOUND 41 (2017).

<sup>28</sup> Association for Civil Rights in Israel, [One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank](#) 6 (Oct. 2014).

<sup>29</sup> See Bernard Avishai, [A Plan for Peace That Can Still Be](#), N.Y. TIMES (Feb. 7, 2011).

<sup>30</sup> Mark Langfan, [Netanyahu 'won't Uproot Any Settlements, Anywhere'](#), ARUTZ SHEVA 7 (Jan. 26, 2014).

<sup>31</sup> See [Geneva Convention Relative to the Protection of Civilian Persons in Time of War](#) art. 47, Aug. 12, 1949, 75 UNTS 287 (providing that annexation of all or part of territory would not deprive protected persons there of Convention's protection).

<sup>32</sup> Int'l Law Comm'n, [Report on the Work of Its Fifty-Third Session](#), UN GAOR, 56th Sess., Supp. No. 10, at 114, para. 5, UN Doc. A/56/10 (2001).

enforcement (for example, through UN Security Council action) tends to be a rare event, moreover, coordinated nonrecognition may be the best available means of promoting adherence to the law.

It would, accordingly, be useful for the UN General Assembly to elaborate upon the practical contours of third states' duty of nonrecognition in relation to Israel's de facto annexation. Such guidance could also help states to comply with the Security Council's call, in [Resolution 2334](#), for them to "distinguish in their relevant dealings, between the territory of Israel and the territories occupied since 1967."<sup>33</sup> In this regard, the far-reaching nonrecognition regime implemented by the United States and the European Union in response to Russia's annexation of Crimea offers a model worthy of emulation. Conversely, the uncertainty wrought by unclear policy statements by the Trump administration regarding Israel's settlement enterprise highlights the urgency of intergovernmental dialogue regarding the scope of third states' duties under international law.

<sup>33</sup> [SC Res. 2334](#) para. 5 (Dec. 23, 2016).