

Taking the Land without the People: The 1967 Story as Told by the Law



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This paper seeks to show how Israel has deployed Occupation Law in strategic ways to incrementally take the land of Palestine without its people. It argues that Israel has used UN Security Council Resolution 242 to retroactively legitimate those colonial takings in a political framework shaped by U.S. intervention. In themselves, the constituent pieces of the argument are not new and they have been extensively discussed in legal, political science, and historical literature. Rather than consider them as the sum of their parts, this paper attempts to view the issues that have been kept distinct and separate within disciplinary silos as a mutually reinforcing whole, demonstrating that the United States' political position made an otherwise bankrupt legal argument effective and showing how the Security Council's deliberations gave Israel ample room for maneuver in spite of the drafting parties' original intent. In examining the relationship between law and political power, the article points to the ways in which the balance of power bears upon the meaning and significance of law in international conflict. Thus, the failure of Occupation Law to regulate the occupation of the Palestinian territories ultimately reflects the outcome of a political, not a legal, contest: Israel's legal argumentation that the territories are merely under its administration would have no value were it not for the power politics that shape international relations in the region.

ON 11 JUNE 1967, the second Arab-Israeli war came to a close. The war lasted only six days but it indelibly changed the balance of power in the Middle East. Israel emerged as the unequivocal victor, establishing itself not only as a formidable military power but as the United States' most strategic ally in the Cold War struggle for regional hegemony. It also became the military occupier of Arab lands whose jurisdiction now extended across Egypt's Sinai Peninsula and Syria's Golan Heights, as well as the West Bank and the Gaza Strip.

For nineteen years after its official establishment, Israel was regarded by the Arab states as a foreign colony created by the collusion of imperial powers. In the anti-colonial fervor that animated much of the globe at the time, these states refused to recognize Israel as a Jewish homeland. They demanded that Palestinian refugees be allowed to return and be given the right to govern themselves as promised by Great Britain, the League of Nations Mandate system, as well as

the United Nations Charter (see some of the other pieces in this special issue marking one hundred years since the Balfour Declaration). The June 1967 war severely blunted these demands and created new claims of dispossession.

Deliberations at the United Nations following the 1967 war did not adequately address Arab concerns. Instead, UN Security Council Resolution (UNSCR) 242 enshrined a land-for-peace framework that predicated the return of Arab lands on permanent peace with Israel. Although the United Kingdom, which drafted the final text of the resolution, insisted it was a compromise between Israeli and Arab positions, UNSCR 242 marked a significant failure for Palestinians: the resolution reified the elision of Palestinian peoplehood and their right to self-determination marked by Israel's establishment in 1948.

In legal terms, Israel had justified its right to statehood by drawing upon UN General Assembly Resolution 181 of 1947, also known as the Partition Plan, stipulating that Mandatory Palestine should be partitioned into an Arab and a Jewish state without prejudice to the "civil and religious rights" of their minority populations. When Israel declared its establishment in May 1948, it denied that Arab Palestinians had a similar right to statehood as the Jews because the Arab countries had rejected the Partition Plan. The final language of UNSCR 242 did not correct the failure to realize Palestinian self-determination, referring merely to the "refugee problem."¹ Egypt and Jordan, which sought to regain their territories and believed that Israel was there to stay, voted in favor of Resolution 242. The failure was a catalyst for the post-1967 Palestinian national movement, which took the helm of the Palestinian Liberation Organization (PLO) in 1968 and insisted upon defending its own cause as more than a mere derivative concern of pan-Arabism.

The elision of Palestinian peoplehood remains central to the ongoing conflict as well as to Israel's settler-colonial mechanisms of dispossession, removal, and concentration of the native population. It is upon the fiction of Palestinian nonexistence that Israel has been able to construct a legal argument denying the *de jure* occupation of the West Bank and the Gaza Strip. Following the 1967 war, Israel argued that given the sovereign void in the West Bank and the Gaza Strip the territories were neither occupied nor not occupied, but *sui generis*, a legal concept describing unique distinction in law. As such, Israel claimed that the West Bank and the Gaza Strip were, and remain, subject to military control but not to strict adherence to the international legal regime known as Occupation Law, which governs military occupation. As the military power in control, Israel would retain the latitude to determine which laws in the body of Occupation Law applied. It has used this latitude to steadily grab Palestinian land without absorbing the Palestinians on the land. Doing so has enabled it both to avoid censure for outright territorial conquest, and more importantly perhaps, to build up its Jewish demographic majority. Between June and November 1967, Israel worked fastidiously at the United Nations to scuttle the drafting of a Security Council resolution that would mandate its withdrawal from Arab territories occupied in the course of the June 1967 war. It preferred no resolution at all, but as a suboptimal outcome it ensured that the final language of the measure would be vague enough to allow for strategic legal and political maneuver to enable its retention of as much territory as possible. Israel's attempts to evade legal regulation of its occupation were not unique. Nearly every occupying power has attempted to avoid such regulation, but only the most powerful states have been successful.² Israel's success is widely attributed to U.S. intervention since beginning in 1967,

the United States has consistently used its political, economic, and military prowess to systematically shield Israel from international legal accountability and to help normalize its legal arguments as part of a tenable political framework. Taken together, these factors constitute a comprehensive legal and political machinery that has enabled Israel to incrementally annex Palestinian land without serious political or legal consequence.

This paper aims to show how Israel strategically deployed Occupation Law to incrementally take the land without the people of Palestine and has applied UNSCR 242 to retroactively legitimate those colonial takings in a political framework shaped by U.S. intervention. Severally, these factors (that is, the application of Occupation Law, the meaning of UNSCR 242, and U.S. involvement as a dishonest broker) are not new concepts and have been extensively discussed in legal,³ political science,⁴ and historical literature.⁵ What this discussion attempts to do is to consider them as a mutually reinforcing whole as opposed to a sum of their parts. In doing so, the article examines the relationship between law and power and, specifically, the ways in which the balance of power bears upon the meaning and significance of law in international conflict. The failure of Occupation Law to regulate the occupation of the Palestinian Territories ultimately reflects the outcome of a political contest; Israel's legal argumentation would have no value were it not for the power politics that continue to shape international relations regarding the Middle East.

To show how Israel has deployed such legal and political machinery to steadily achieve its territorial ambitions within a rule-of-law framework, part 1 of this paper will examine the June 1967 war. Part 2 will discuss the drafting history of UNSCR 242 to show both the intent of the state parties involved as well as the legal loopholes and vague language that made the resolution's wording vulnerable to broad interpretation. Part 3 will consider Israel's legal argument that the West Bank and the Gaza Strip are not occupied as a matter of law, thus enabling its steady and systematic encroachment of the territories. Part 4 will demonstrate that the United States' dual commitment to Israel's qualitative military edge and a land-for-peace framework has helped retool UNSCR 242 into a retroactive cover for Israel's colonial takings. The article will conclude with a reflection on the ways in which the law has been a cornerstone of Israel's expansionist policies rather than an impediment to them and how the law's indeterminacy should shape Palestinian and international responses to this condition.

I. 1967 War and International Law

Israel framed the start of war against Egypt as a defensive or preemptive measure but in the weeks before the outbreak of hostilities and in the aggressive attacks that characterized the war, it was clear that Israel welcomed hostilities in its efforts to capture more territory. As a legal matter, whether the attack was preemptively defensive or an act of aggression⁶ can be debated, but as a policy matter, historiography has settled that Israel's attack was not a measure of final resort.⁷ Its considerable territorial ambitions notwithstanding, even Israel was surprised by the amount of territory it was able to capture.⁸

Initially, the Israeli cabinet had only approved conquest of the West Bank's high grounds and minor border modifications for strategic military purposes.⁹ Upon discovering the weakness of

Jordan's armed forces, the Israeli army "rolled forward all the way to the Dead Sea and the Jordan River, taking the entire West Bank."¹⁰ When the war ended and the dust settled revealing Israel's expanded holdings, 98 and 95 percent of Israelis polled supported the retention of the West Bank and the Gaza Strip, respectively.¹¹ Israel's political establishment did not need much cajoling.

Israel had contemplated the scope of its military jurisdiction ever since its four-month occupation of the Gaza Strip in 1956 during the so-called Suez Crisis. Then, and in the context of the Cold War, U.S. president Dwight D. Eisenhower had urged Britain, France, and Israel to withdraw from the Sinai Peninsula and Gaza in order to reduce the risk of direct military confrontation with the Soviet Union and mitigate the impression of Western aggression against the Arab world.¹² The occupying forces withdrew without concessions. Lyndon B. Johnson, who was at the time the Senate majority leader, believed that Israel should have been able to retain the territories as leverage for establishing peace.¹³ By 1967, when Johnson had become the U.S. president, the Israelis were adamant not to withdraw from Arab territory again without more reliable guarantees that its frontiers would be protected. For the mass majority of Israelis, however, security was incidental. Most Israelis considered these lands part of Greater (Eretz) Israel.

Although Israel made repeated assurances to the United States that it had no territorial ambitions, it began planning its permanent settlement of the newly occupied territories on the fourth day of the 1967 war.¹⁴ There was only one problem: it wanted the land but not the Palestinians on it. If it annexed the territories, it would have to absorb the Palestinian population, thereby disrupting its demographic majority project and transforming Israel into a binational state. It preferred to empty the territories of their Palestinian natives and to replace them with Jewish Israelis.¹⁵ Such colonial ambitions, however, contravened existing international law as well as human rights norms that had crystallized after World War II.

International law had last articulated a victor's right to territorial conquest in the late eighteenth century.¹⁶ This right ultimately extinguished as the dual international norms of self-determination and the prohibition on the use of force emerged in the twentieth century. Upon the establishment of the United Nations in 1945, the nascent international community proscribed territorial conquest and the use of force against other states, except for the purpose of individual or collective self-defense as enshrined in the UN Charter.¹⁷ In response to atrocities that had been committed during World War II, state parties convened in 1949 to further regulate armed conflict. Because of Nazi actions during the war, state plenipotentiaries enshrined the prohibition on the forcible transfer of populations in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War (henceforth FGC). Article 49 of the FGC expressly forbids the individual or mass forcible transfer of protected persons from occupied territory as well as the transfer or deportation of its civilian population into the territory that is occupied.¹⁸ The state parties explicitly sought to prohibit any future occupying power from using their authority to fulfill racial, political, or colonial ambitions they might nurture.¹⁹

The FGC together with the Hague Regulations of 1907, as well as parts of Additional Protocol I (1977) and customary law, constitute a broader body of law known as Occupation Law. Occupation Law permits the occupying power to be a temporary governing authority and requires it to protect the local population and maintain the territory's political and geographic integrity. In pursuit of these goals, the occupying power assumes authority of law enforcement until such time

as it withdraws from the territory concerned and authority reverts to the rightful sovereign.²⁰ Such occupation is intended to be short-term and utilitarian. Occupation Law forbids the occupying power from altering the territorial, legal, and demographic status quo ante other than in limited circumstances of exceptional military necessity. In no circumstances can the occupying power acquire title to the territory over which its jurisdiction extends. Occupation Law together with Articles 1 and 2 of the UN Charter unequivocally affirm an international consensus against the conquest of territories and their outright colonization.

In 1967, Israel knew it faced a serious challenge to its colonial aspirations. On the one hand, it could not legally annex the territories, even if it wanted to, and on the other hand, it could not remove the Palestinian population from, nor implant its own civilians in, the West Bank and the Gaza Strip. Moreover, since the UN Security Council was already in session during the 1967 war, it immediately began to address Israel's occupation of Arab territories. Although the Council had the authority to mandate Israel's withdrawal from the territories and diminish the prospect of territorial retention, Israel was able to deploy the necessary political maneuvers and legal strategies to overcome these obstacles and embark on a campaign to acquire the land without the people.

II. Deliberating UN Security Council Resolution 242

Cognizant that a Security Council resolution could undermine its expansionist ambitions, Israel worked diligently to ensure that, if it did pass, the measure would not be unequivocally prohibitive. The leading figure in this effort was Abba Eban, then Israel's foreign minister. Both a scholar and a politician, Eban established close relationships with central figures in the Johnson administration, which staunchly supported Israel throughout the Security Council's deliberations. Johnson's primary concern in the international arena was to contain communism and, to this end, his backing for Israel aligned with his favorable stance toward other pro-Western Middle Eastern states. This two-pronged approach constituted the logic of the United States' stalemate policy of arming both Israel and so-called conservative Arab states.²¹ The 1967 war revealed the futility of this approach and informed Johnson's revised Middle East policy in two ways.

First, its overwhelming victory in June 1967 demonstrated Israel's ability to secure its interests without U.S. intervention and vindicated Johnson's valuation of the country as a Cold War asset. Going forward, the U.S. president (and his successors) would pursue a policy aimed at ensuring that Israel maintained a qualitative military edge (QME) over its neighbors.²² Second, Johnson sought to provide Israel with negotiating leverage to normalize its relations in the Middle East without simultaneously alienating the United States' pro-Western allies in the region. In line with the U.S. stance during the 1956 Suez Crisis, Johnson believed that Israel should not be forced to withdraw from Arab lands as a matter of legal obligation but, instead, should use those lands as leverage to negotiate a contractual peace with Egypt, Syria, and Jordan, thereby establishing the land-for-peace framework that ultimately guided the Security Council deliberations in response to Israel's 1967 occupation.

The deliberations over the precise language of Resolution 242 lasted for five months. The Soviet Union, Arab states, and the Non-Aligned Movement, made up of mostly former European colonies in Asia and Africa that banded together to resist Western domination, pressed for a resolution that

condemned Israel's war as "aggression" and an unjustified use of force, and demanded the immediate withdrawal of Israel from the Arab territories it occupied without precondition. If the United Nations framed the war as an act of aggression, Israel would be obligated to immediately withdraw from any territories it had occupied as a matter of law.²³ Omitting such language would not sanction Israeli conquest but it would provide Israel with the authority of an occupying power in the territories. The United States together with the United Kingdom lobbied for a text that framed Israel's use of force as legitimate in order to enable Israel to maintain the territories as consideration in exchange for permanent peace.

The United States as well as the Soviet Union each proposed resolutions that starkly articulated these competing positions.²⁴ However, they were also both aware that their drafts would not achieve majority support, and neither of them submitted their texts for a vote. Subsequent draft resolutions reflected these competing positions, albeit less starkly. In late June 1967, a Latin American bloc submitted a resolution at the General Assembly emphasizing Israeli withdrawal as well as the establishment of permanent peace without specifying the sequence of the two.²⁵ This ambiguity diminished Arab and Soviet support for the Latin American resolution and divided the General Assembly. In contrast, the United States voted in favor.²⁶ The vote indicated controversy over the terms of a permanent peace but unequivocal support for Israeli withdrawal to the 1949 armistice lines.

Based on the failed Latin American resolution, the U.S. and Soviet ambassadors proposed a compromise measure. Arab states rejected it because it required recognizing Israel's right to exist without addressing the national rights of the Palestinians or the right of refugees to return. Israel rejected it because it mandated the return of all the territories occupied. Eban described the proposal as a "terrifying moment" and argued that the inadmissibility of territory by conquest was "a doubtful principle."²⁷ No one agreed with him, not even Israel's most strident allies.

In late June 1967, one week before Israel's unilateral annexation of East Jerusalem, UK foreign minister George Brown warned the government of Israel that "if they purport to annex the Old City or legislate for its annexation, [the Israelis] will be taking a step which will not only isolate them from world opinion, but will also lose them the sympathy that they have."²⁸ Maintaining that any peace settlement must be based upon UN Charter principles, Brown went on to explain: "Here the words 'territorial integrity' have a direct bearing on the question of withdrawal, on which much has been said in previous speeches. I see no two ways about this; and I can state our position very clearly. In my view, it follows from the words in the Charter that war should not lead to territorial aggrandizement."²⁹

For its part, the U.S. government was contemplating minor border adjustments to rectify what Johnson himself described as "only fragile and violated truce lines for twenty years,"³⁰ trusting Israel's repeated assurances that it would withdraw from the territories it had occupied in exchange for peace.³¹ It was upon this firm basis that the United States vehemently opposed Soviet and Arab demands for comprehensive withdrawal from the territories as a matter of fiat in Security Council deliberations. Although the United States received several early indications that Israel would retain the territories, Johnson believed that "Israel would become more moderate and flexible once the euphoria of victory had worn off."³²

When Israel annexed East Jerusalem on 28 June 1967, in full daylight and during the course of international diplomatic debates, the General Assembly unanimously passed two resolutions

condemning the annexation and demanding that Israel rescind all actions taken to alter the status of Jerusalem.³³ The United Kingdom voted for both resolutions and the United States abstained, indicating its opposition to territorial expansion. In protest at the Israeli annexation of the eastern part of the city, both the United States and Britain refused to move their embassies from Tel Aviv to Jerusalem. As to Britain's harsh warnings and the biting resolutions, Israel simply ignored them.

In mid-November 1967, the United Kingdom introduced a draft resolution at the Security Council that sought to achieve a compromise on the territories occupied in the June 1967 war.³⁴ The measure called for the restoration of seized Arab lands to their rightful people and to ensure Israel's existence in the Middle East based on negotiations to be overseen by a UN envoy. UN member states responded positively to the draft resolution although controversy persisted on the question of Israel's withdrawal. The draft mandated that Israel withdraw "from territories occupied in the recent conflict,"³⁵ notably excluding the definite article "the" or "all the" to describe the scope of the territories in question. The omission was deliberate and reflected U.S. and British support for minor rectifications to the 1949 armistice lines in order to establish viable borders. To ensure that the omission not be read as sanction for Israeli territorial expansion, and in order to garner Arab support, Lord Caradon, then UK ambassador to the UN, emphasized the "inadmissibility of the acquisition of territory by war" in the preambular text.³⁶ Caradon also added the qualifying words, "in the recent conflict" after "territories occupied" to specify the scope of the territories.³⁷

During the final stage of Security Council proceedings, a considerable number of states clarified their support for the UK draft as establishing a *quid pro quo* formula that mandated Israeli withdrawal from all the territories occupied in exchange for peace. State after state repeated their understanding that the scope of territorial withdrawal was comprehensive. India, which along with Mali and Nigeria had proposed their own draft resolution, explained: "It is our understanding that the draft resolution, if approved by the Council, will commit it to the application of the principle of total withdrawal of Israel forces from the territories—I repeat, all the territories—occupied by Israel as a result of the conflict which began on 5 June 1967."³⁸

Keen to evade strict legal regulation, Israel responded forthrightly, "For us, the resolution says what it says. It does not say that which it has specifically and consciously avoided saying."³⁹ That Israel sought to use the ambiguity of the text to achieve its expansionist ambitions was not lost on the state parties. Syria was particularly vehement in its opposition because the final text afforded Israel undue faith that it would comply with the resolution and did nothing to affirm the Palestinian right to self-determination.⁴⁰

President Johnson, eager to pass a resolution favorable to both Israel and the United States' pro-Western Arab allies, successfully solicited Soviet support for the British draft.⁴¹ As for Arab support, Egypt and Jordan believed that the British draft ensured their interests in a complete withdrawal despite the missing definite article.⁴² The resolution passed by unanimous vote on 22 November 1967.

Despite the Security Council's intent to achieve a balanced formula, Palestinians rejected the resolution. The ambiguity of the terms of withdrawal, the failure to mention Palestinians once, and the nonreciprocal terms of recognition made it unacceptable. Walid Khalidi, Palestinian historian and advisor to the Iraqi delegation during the UN proceedings, explained that the

“dictates of power were already being displayed.” Palestinians had no input of any kind and the resolution gave “Israel a free hand and allowed it to dictate the terms of withdrawal at the pace that it wanted. It made the fate of the Occupied Territories, whether the Golan Heights or the West Bank, a hostage to the balance of power. . . . The PLO could not accept it because it even allowed for the occupation of Jerusalem . . . after its passage, we clung to the preamble that prohibited the acquisition of territories [by force]. Like a drowning person, we clung onto it and exaggerated that.”⁴³

Palestinian insight proved correct.

III. *Sui Generis*: Annexing the Land without the People

When, in mid-September 1967, Israeli prime minister Levi Eshkol sought to establish a civilian settlement near Bethlehem, he was aware of legal proscriptions on civilian settlement in occupied territory. He thus asked Theodor Meron, then legal adviser to the Ministry of Foreign Affairs, whether such legal mandates applied to the West Bank. Internally, Israel already claimed that the territories were not “normal” and should therefore not be subject to Occupation Law’s strictures.⁴⁴

In a top-secret legal memo submitted to the prime minister, Meron rejected Eshkol’s argument, concluding with the statement that Article 49 of the FGC categorically prohibited the establishment of permanent civilian settlements in the occupied Palestinian territories (oPt).⁴⁵ Meron also pointed out that Israel’s own actions contradicted its claims that the territories were not subject to the Geneva conventions. He quoted Israel’s Military Proclamation Number 3, issued on 6 July 1967, instructing military courts in the West Bank to apply the FGC.⁴⁶ Finally, the legal adviser reminded Eshkol that international policy and consensus also rebuffed Israel’s expansionist ambitions.⁴⁷

Meron’s legal advice did not deter Eshkol—in fact it gave him a way forward. In his memo, Meron had indicated that Occupation Law permits encampments of a temporary nature established to meet a pressing military need. Therefore, should Israel choose to build a civilian settlement, Meron advised that it be built “in the framework of camps and [be], on the face of it, of a temporary rather than permanent nature.”⁴⁸ Heeding Meron’s advice, Eshkol instructed the army to establish paramilitary outposts in the oPt to create the veneer of temporality. When settlers arrived at the settlement at the end of September, Israel publicly referred to them as soldiers despite their civilian status.⁴⁹ This afforded Israel the benefit of appearing law-abiding and spared it diplomatic censure while not hampering its expansionist ambitions.

In 1968, Hebrew University law professor Yehuda Zvi Blum articulated the legal argument that Israel could not be considered an occupier in the territories as a matter of law and consecrated what the Israeli government had already established informally. In his article, Blum goes to great lengths to demonstrate the absence of any sovereign power in the West Bank in 1967, arguing that Jordan was not a rightful sovereign. He concludes, “the legal standing of Israel in the territories in question is thus that of a State which is lawfully in control of territory in respect of which no other State can show better title.”⁵⁰ As such, “the rules protecting the reversionary rights of the legitimate sovereign find no application,” thus relieving Israel of the duty to maintain the sovereign rights of a nation under occupation. In effect, the territory was administered, not occupied, and therefore

not subject to the strict regulation of Occupation Law, most notably Article 49 of the FGC prohibiting forced transfer of populations as well as the establishment of civilian settlements.

This conclusion stood in marked contrast to Meron's advice in 1967 but Israel had classified the information and made the legal advisor's memo unavailable to the public. When Menachem Begin assumed Israel's premiership ten years later, he adopted Blum's argument as official policy and appointed Blum to be Israel's ambassador to the United Nations. Blum's *sui generis*, or "unto its own," argument represented the epitome of good lawyering: shaping the meaning of the law to suit a client's needs. As a legal matter, however, the argument has not withstood analytical scrutiny.

Blum's conclusion was predicated on the assumption that sovereign rights did not vest in the Palestinians themselves. In fact, he did not even consider this possibility. In blatant disregard of Article 22 (4) of the League of Nations Mandate that recognized the provisional independence of Palestine in 1919 by categorizing it a Class A mandate, Israel claimed there was no sovereign in the territories.⁵¹ With the exception of Palestine, all other Class A mandates had attained independence by 1946. While it lacked formal statehood, Palestine had all the attributes of a state, and the only reason it was denied independence was in order to facilitate the establishment of a national home for Jews, not because Palestinians lacked a nationality or the right to self-determination.⁵²

While self-determination had not been established as a customary right by 1949, Palestinian self-determination had been repeatedly iterated both across time and space, including in the Mandatory System (1919); the Peel Partition Plan (1937); the White Paper (1939); the UN Partition Plan (1947); and the UN draft Trusteeship Agreement (1948). Therefore, when the British Mandate expired in May 1948, sovereignty vested in the people of Palestine.⁵³ Arguing otherwise would make the territory vulnerable to conquest by whomever could invade it first and thus contradict "the whole *raison d'être* of the mandate system."⁵⁴ To argue that Palestinians were merely a polity of Arabs who happened to be in a territory where no sufficient title could be shown, and not a nation with a right to self-determination, belied the empirical evidence.

Additionally, the drafters of the Geneva Conventions were well aware of historical attempts made by invading armies to negate a territory's sovereignty in order to justify their conquests.⁵⁵ In order to close that loophole in the drafting process, they stated that the Conventions should apply "in all circumstances" regardless of a territory's status.⁵⁶ The FGC regulates conflict arising between two or more of its High Contracting Parties, and applies to any territory occupied in the course of conflict. Since Israel, Jordan, and Egypt were all state parties to the Geneva Conventions during the 1967 war, the conventions' provisions applied to their respective territories.⁵⁷ To state otherwise would render populations finding themselves under foreign domination extremely vulnerable and "defeat the purpose of the Fourth Geneva Convention, which is aimed principally at the protection of the civilian population and not the rights of the displaced power."⁵⁸ One final point needs noting with respect to Blum's argument that a belligerent could lay claim to territory if its use of force was defensive: the defensive conquest argument has no basis in modern international law.⁵⁹

Beyond the legal arguments, Israel's policies were also rife with contradictions. Israel did not apply Occupation Law in the Egyptian Sinai or the Syrian Golan Heights where sovereignty was not contested. There, Israel blatantly disregarded the law but made no attempt to respond to the relevance of the FGC because its ambitions for civilian settlement were less pronounced.

Had this been merely a legal matter, it would have had no consequence. Leading international and multilateral legal institutions, including the UN Security Council, the General Assembly, the International Court of Justice, the International Committee of the Red Cross, as well as several international human rights organizations have all refuted Israel's argument and repeatedly affirmed the *de jure* applicability of Occupation Law to the West Bank and the Gaza Strip.⁶⁰ As explained by George Washington University law professor W. T. Mallison at a U.S. Congressional hearing on the settlements in 1977, the "thesis developed by Dr. Blum and acted upon by Mr. Begin is defective in law, although no one can doubt its effectiveness, thus far, as a matter of power politics. As a substantive matter it does not merit serious consideration but, because it has been acted upon by the Government of Israel, it will now be considered."⁶¹

Mallison's observation highlights the significance of state action in international law. There is no reliable enforcement mechanism in the international sphere. State compliance is almost always voluntary, and noncompliance is met with sanction as a result of political will, not legal obligation. Collective enforcement lies within the limited purview of the UN Security Council. Chapter 6 of the UN Charter allows the Security Council to impose sanctions on a state and chapter 7 empowers other states to use force as a measure of coercion. Strong states, chiefly the Security Council's five permanent members, will not allow such remedies to be used against themselves or their allies. In effect, enforcement of Occupation Law reflects the measure of political will and the balance of power.

While the United States has remained opposed to Israeli settlement expansion as a matter of law and policy, it has simultaneously remained committed to maintaining Israel's qualitative military edge as well as achieving a negotiated settlement. This commitment has driven it to shield Israel from meaningful international censure and impeded its application of any significant pressure on its ally.⁶² Given this framework, when Israel makes a legal argument that is rejected by international consensus, the international community's opposition does not change the political value of Israel's claims. So long as it faces no meaningful censure, Israel can wage a long-lasting challenge to the law and simultaneously deploy that legal challenge to advance its political goals. It has done precisely that in its domestic courts with great efficacy.

As the Israeli army's top lawyer, and later High Court Chief Justice, Meir Shamgar went on to flesh out Blum's argument into an expedient legal regime. Under his leadership, the High Court of Justice (HCJ) developed the legal framework for regulating Israel's presence in the oPt in piecemeal fashion. In order to retain the veneer of legality and to avoid having to absorb the Palestinian population, the legal system was careful to never treat the territories as the state's holdings. Instead, the HCJ insisted that Israel was merely administering the territories until such time as a political settlement was reached. At that point, the state would remove its settlers where demanded by the political agreement.⁶³

But what limits were there on achieving a political resolution? Whereas under Occupation Law occupation is intended to be short-term, Shamgar claimed that the law did not circumscribe its duration. He claimed that factual conditions determined its length and that if there were no political resolution, there would be no end to the occupation. The occupation could be indefinite so long as it was not permanent.⁶⁴ This legal sleight-of-hand has allowed Israel to continue with its settlement enterprise under the auspices of temporality, which is invoked to demonstrate intent

not to annex the land without the corollary duty to withdraw from it. Rather than impede Israel's territorial ambitions, Occupation Law has been the basis upon which the state's judicial branch has justified Israel's actions in the territory.

Similarly, military necessity under Occupation Law has in fact provided another legal basis for Israel to acquire land for the purposes of civilian settlement.⁶⁵ Between 1968 and 1979, the phrase "required for essential and urgent military needs" became the Israeli army's refrain to justify its requisition of land in the West Bank.⁶⁶ And the HCJ acted as a consistent force in perpetuating the legal fiction of military necessity while simultaneously blocking any efforts to challenge the contradictions posed by International Humanitarian Law requirements and raised by Palestinians.⁶⁷ This obtained until 1979 when the HCJ ruled that the establishment of the Elon Moreh settlement did not contribute to the state's security objectives, and thereby established a precedent prohibiting the confiscation of private Palestinian lands.⁶⁸

The HCJ decision did not prove an insurmountable challenge, however. In 1967, the Knesset had established a legal regime to facilitate the expropriation of Palestinian lands. For example, the 1967 Order Regarding Abandoned Property expanded the concept of "state land" to include lands that lay fallow and/or whose claimants were "absent."⁶⁹ Under Israel's legal regime, however, the State prohibited Palestinian landowners who had fled the war from returning to establish their presence.⁷⁰ The legal regime established by the Knesset went further and authorized the Custodian of Absentee Property to regulate and manage such land, including for the purpose of establishing civilian settlements.⁷¹

The model for the land acquisition scheme in the oPt was initially developed and deployed within the 1949 armistice lines following the establishment of the state of Israel in 1948, when martial law was decreed, but only pertaining to Israel's Palestinian population. The 1950 Absentee Property Law targeted the lands of Palestinians who had fled across the border and become refugees as well as those who were internally displaced within the newly established state.⁷² The Absentee Property Law normalized the removal of the native population and confiscated the land without compensation to its Palestinian owners. Using a similar tactic, military commanders in the territories that were occupied in 1967 used their emergency powers to declare "closed areas" at their discretion.⁷³ The arbitrary edict prevented Palestinians from cultivating their agricultural lands rendering them "waste lands" under another Emergency Regulation Cultivation of Waste Lands, 5709-1948.⁷⁴ All the land expropriations that took place following 1948 were retroactively legalized in 1953, when the Knesset passed the Land Acquisition Law.⁷⁵ Then, in 1960, Israel enacted legislation that prohibited Palestinians from "owning, leasing, or working on 97 percent of state-held land."⁷⁶ Together, these regulations along with a series of other land-related laws⁷⁷ worked to dispossess Palestinians, both refugees, as well as those displaced who had remained inside the 1949 lines, of their homes, businesses, and approximately two million acres of arable land.⁷⁸ By 1950, some 72 percent of Israel's state land was *formerly* Arab-owned. And by 1953, Israel had created 350 of 370 new Jewish settlements on land owned by Palestinians.⁷⁹ Israel lifted martial law on its Palestinian citizens in 1966, and proceeded to apply it in the West Bank and the Gaza Strip after its occupation of the territories one year later.

Whereas Israel used the veneer of Occupation Law in the oPt as cover for its actions, within the 1949 armistice lines, it used the principle of sovereign authority; in both contexts, it applied martial

law as an exceptional legal regime to achieve its territorial ambitions. The HCJ, as well as other branches of government in Israel, have insisted that all such measures in the oPt do not amount to creeping annexation. It has argued that this condition could be reversed, or endorsed, by a political solution under UNSCR 242's land-for-peace framework.⁸⁰ In effect, the argument is that Israel is not a colonial power taking the land, it is merely an administrator of disputed land that belonged to no sovereign until such time as it enters into a political agreement to resolve the conflict. Thus, the land acquisition scheme has been both a legal and political strategy.

IV. UNSCR 242: Retroactive Cover for Colonial Takings

Despite the international consensus on withdrawal that underpinned UNSCR 242, Israel has consistently used the resolution's lack of specificity to retroactively justify its settlement expansion. It has argued that the omission of the definite article "the" leaves it to interpretation and political negotiation to determine which territories are to be exchanged for peace. Under such terms, Israel does not have to return all of the West Bank but can theoretically return a fraction of it, and moreover, its security needs will dictate the scope of the territory to be returned.

Yigal Allon, Israel's deputy prime minister during the 1967 war, developed a doctrine of "defensible borders" to justify Israel's settlement expansion project in security terms. In an article published in 1976, Allon explains, "the purpose of defensible borders is . . . to provide Israel with the requisite minimal strategic depth, as well as lines which have topographical strategic significance."⁸¹ Israel's defensible borders amounted to control over almost all of the West Bank, the Gaza Strip, as well as the Golan Heights. And adherence to them would ipso facto undermine the land-for-peace formula. Assuming, for the sake of argument, that Israel retained those territories to incentivize a negotiated agreement, the proliferation of civilian settlements belies the argument that its presence in the territories serves a temporary and military function. Not only do civilian settlements suggest permanency but the use of civilians to achieve a military goal amounts to human shielding, an outright prohibition under International Humanitarian Law.⁸² Israel has nevertheless effectively deployed this security framework even in the face of direct opposition from its primary patron, the United States.

In July 1977, and upon Prime Minister Begin's return from a visit to Washington, Israel's Ministerial Committee on Settlements conferred legal status on three settlements.⁸³ The Carter administration immediately expressed its disappointment and stated in unequivocal terms that Israeli settlements violated the FGC and undermined peace.⁸⁴ In response, Begin delivered an address to the Knesset denouncing the U.S. statement, saying, "Jewish settlement does not in any way or under any circumstances do harm to the Arabs of Eretz Yisrael. We have not dispossessed, and will not dispossess, any Arab from his land."⁸⁵

Using the veneer of Occupation Law, Begin claimed the settlements were temporary and thus not a seizure of land. Rather than combat these maneuvers as altogether illegitimate, engagement in a narrow legal inquiry about Israel's compliance with Occupation Law reduced the debate to detailed technicalities that lost the forest in the face of a single tree. Indeed, at a press conference two days after Begin's remarks, President Carter reiterated the illegal nature of the settlements, characterized them as an obstacle to peace, but added that they were "not an insurmountable

problem.”⁸⁶ Carter went so far as to defend Begin and to further Israel’s legal fictions by insisting that “the Israeli Government has never claimed that these settlements are permanent. What they have done is to say that they are legal at the present time.”⁸⁷

Thus, the legal fiction of temporality and military necessity allowed Israel to steadily poach Palestinian lands, redefining and deploying Resolution 242 to justify its expansion into oPt. The logic was that if Jordan or the Palestinians voluntarily ceded the territories in a peace agreement, then Israel had never acquired title through conquest: it would simply be exchanging some of the land for peace as mandated by the Security Council. Far from shepherding peace, however, the Security Council resolution has been manipulated by Israel to retroactively legitimate its colonial takings. Still, and despite the United States’ allegiance to Israel within the Security Council, administrations, beginning with that of Lyndon B. Johnson in 1967 and to the present day, have insisted that Israel withdraw from all of the territories with minor border adjustments.

After the 1967 war, the United States felt particularly obligated to its ally, King Hussein of Jordan, and repeatedly pressured Israel into entering into talks with him to return the West Bank in exchange for peace.⁸⁸ Israel had no such intent; at most it would return noncontiguous Arab population blocs surrounded by Israeli military and civilian jurisdiction. However, because Israel became exclusively dependent on the United States for military aid after the war, it could not be so blatantly dismissive of U.S. demands. Instead, Israel embarked on what historian Avi Raz has described as a foreign “policy of deception.” It adopted “a series of cabinet resolutions and ad hoc government decisions and actions [that] added up to a consistent policy of deception, the aim of which was to mislead the international community—first and foremost the U.S.—into thinking that Israel was seriously seeking a peaceful settlement with its Arab neighbors.”⁸⁹

Immediately following the war and for several years thereafter, King Hussein had made repeated overtures to establish peace with Israel. In response, Israel maintained what Eban described as a “futile discussion” with the Jordanian monarch, explaining that Israel’s political strategy was “to insert a sufficient number of obstacles into any American document [about an Arab-Israeli settlement] so that the Arabs could not accept it.”⁹⁰

In 1969, and when Israeli ambitions to keep the West Bank and the Gaza Strip became undeniable, the United States confronted Israel about its repeated disavowal of territorial ambitions. Eban shrugged his shoulders and simply told his baffled U.S. counterparts, “We changed our minds.”⁹¹ While the Johnson administration may not have taken this lightly, at the time, it was constrained by its deep involvement in the Vietnam War and did not have the capacity to turn its full attention to the Middle East. With the Soviet Union’s growing penetration of the Middle East and the rise of Palestinian guerrilla attacks at that time, in addition to President Johnson’s own personal commitment to protect Israel, the United States did little more than issue a series of empty condemnations and frustrated diplomatic cables.⁹²

In the five decades since that time, the United States *has* on occasion tried to leverage its patronage to shape Israel’s behavior. In those instances where a U.S. administration has been willing to place meaningful pressure on Israel, it has been unable to do so because of Congressional opposition.⁹³ Congress’s susceptibility to pressure by the Israel lobby has made it a formidable obstacle to executive branch efforts to regulate Israeli behavior.⁹⁴ As a result, a succession of administrations have been powerless to effectively restrain the United States’ “most unique ally,” even when they

have attempted to do so.⁹⁵ In most cases, however, Washington has been unwilling to act and has facilitated Israel's expansionism through unequivocal economic, military, and diplomatic aid.

The Enduring Efficacy Of Israel's 1967-Era Legal And Political Machinery

Today, fifty years since the establishment of its legal and political machinery aimed at incremental annexation, Israel's settlement enterprise has carved up the West Bank into more than twenty noncontiguous landmasses separating Palestinians from one another and undermining any sense of territorial or national cohesion. As of late 2015, the settler population had reached six hundred thousand, a 300 percent expansion since the advent of the Oslo Accords in 1993 and a 4,000 percent increase since 1976.⁹⁶ Israel has faced little to no legal accountability for entrenching its settler-colonial enterprise despite the international consensus that civilian settlement in the oPt violates Occupation Law; its incremental annexation within a rule-of-law framework continues to function well.

The efficacy of this machinery was on full display most recently when, in February 2017, the Knesset passed the so-called Regularization Law, retroactively authorizing the expropriation of Palestinian private lands by Israeli settlers in violation of Israel's own *Elon Moreh* ruling of 1979.⁹⁷ The measure legalizes approximately four thousand housing units and the confiscation of approximately two thousand acres of private Palestinian land.⁹⁸ Israel's center and center-right political establishment condemned the legislation.⁹⁹ Germany canceled a high-level meeting with the Israeli government in protest.¹⁰⁰ Britain, Turkey, Jordan, and France also condemned the law.¹⁰¹ The UN secretary-general described it as a violation of international law, and the UN's coordinator for the Middle East peace process said the legislation "opens the floodgates to the potential annexation of the West Bank."¹⁰²

In the same two-week period when the Regularization Law was being enacted, Israel also announced it would build approximately six thousand new settler housing units in the West Bank, including East Jerusalem.¹⁰³ There was hardly a peep of protest, whether from Israelis or the international community, despite the fact that the newly announced units exceeded by 30 percent the number to be retroactively authorized by the Regularization Law. The disparate responses to the Regularization Law and to the official announcement of new settler units are even more curious within the broader context of the oPt as the reality of settlement sprawl and the dramatic increase in the settler population clearly point to the demise of a possible two-state solution.¹⁰⁴ Why did the new legislation suddenly trigger concern for international law and the looming threat of annexation while the announcement of illegal settlement units aroused a seemingly nonchalant acceptance of a factually more troubling status quo?

The Regularization Law has broken with Israel's internal logic and thus threatens to unravel the legal and political machinery that has steadily enabled it to achieve its territorial ambitions. Whereas Begin and Shamgar conceded that there was an occupation but that it was so unique as to be exempt from strict legal regulation, the Regularization Law is premised upon the assumption that there is no occupation at all. If that is the case, Israel would be considered sovereign in the oPt, and as a sovereign it becomes a *de jure* apartheid regime since it does not extend citizenship to its

Palestinian population. Israel's settler movement, which currently holds sway in the Knesset, has insisted upon this reality regardless of the international repercussions likely to follow.¹⁰⁵ The settler-dominated Israeli Knesset has effectively removed the emperor's clothes.

There is a very thin line between the fiction of a *sui generis* occupation and no occupation at all. Strict adherence to Occupation Law today is in fact facilitating, rather than impeding, Israel's land grab by maintaining the fiction of Israel's controversial compliance with the law; it is a counterproductive exercise that legitimizes Israel's behavior as a series of transgressions rather than outright conquest. Reversing these conditions would necessitate transcending the narrow framework of Occupation Law and certainly the bounds of the imaginary Green Line (the 1949 armistice lines), which has functioned as a false and utilitarian partition.¹⁰⁶

International law is indeterminate and yields to power. If it is to be used as an effective tool of resistance, it must aim to recalibrate the balance of power, which in this instance, means directly challenging the United States' provision of political immunity to Israel. Since 1993, the Palestinian leadership has pursued legal strategies that narrowly confront Israel's settler enterprise: these include the investigation into the separation wall by the International Court of Justice (2004); the Palestinian Authority's UN General Assembly statehood bid (2012); and joining the International Criminal Court (2014). But since these legal strategies do not avert the requirement of U.S. patronage, such tactics remain symbolic, at best, and counterproductive, at worst.

Israel is on the cusp of achieving the territorial ambitions it articulated within the first weeks of its occupation of the Palestinian territories in 1967. The Regularization Law indicates that Israel's current government is ready to take a risky leap to consecrate its vision. The global backlash against the recent measure and the concurrent normalization of the status quo in the oPt indicate that the international community is willing to deliver Israel's territorial ambitions under the semblance of peacemaking. Avoiding both outcomes requires that the Palestinian leadership exercise political resolve and ingenuity. In particular, this means breaking with U.S. patronage, which has enabled Israel to retool UNSCR 242 into an instrument of conquest. By systematically deploying its veto power in the Security Council to shield Israel from international legal accountability, the United States has incapacitated international opposition to Israel's *sui generis* argument regarding its occupation of Palestinian territories. To wage an effective legal challenge to Israel's flagrant settler-colonial expansion, the Palestinian leadership must pursue a political path that highlights the destructive role of the U.S. in the region and isolates, rather than accommodates, Israel's ongoing settler-colonial project.

About the Author

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- 89 Raz, *Dodging the Perils of Peace*, p. 8.
- 90 Minutes, KFASC, 16 and 29 April 1969, both in A-8162/5, ISA as quoted in Raz, *Dodging the Perils of Peace*, p. 10.
- 91 Dean Rusk, *As I Saw It: A Secretary of State's Memoirs* (London: I.B.Tauris, 1991), p. 332, as quoted in Raz, *Dodging the Perils of Peace*, p. 12.
- 92 Sohns, "Lyndon Baines Johnson," p. 220.
- 93 For example, in 1975, U.S. president Gerald Ford and Secretary of State Henry Kissinger acknowledged that the Middle East was in "potentially grave danger" and that it was necessary to pressure Israel over the stalled Egyptian-Israeli peace talks. Ford and Kissinger believed they needed a formal implementation of a reassessment of U.S. policy in the Middle East, including the relationship with Israel. The American Israel Public Affairs Committee (AIPAC) mobilized seventy-six senators to send a letter to President Ford demanding that "the White House halt its threatened reassessment of relations with Israel" and "the Administration maintain its economic and military aid to Israel." Many of the signatories admitted they were pressured by the lobby to take such action and sign the "Letter of 76." Senator Daniel Inouye stated, "It's easier to sign one letter than to answer five thousand," and Senator John Culver admitted "the pressure was just too great. I caved." See supra n. 62.
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