



BOOK REVIEW; PROLONGED OCCUPATION AND INTERNATIONAL LAW: ISRAEL AND PALESTINE (EDITED BY NADA KISWANSON AND SUSAN POWER)

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ABSTRACT

This review examines “Prolonged Occupation and International Law: Israel and Palestine”, a 2023 collection of essays, offering an in-depth analysis of the protracted Israeli occupation of Palestinian territory. The book is structured into two thematic sections. “Legal Frameworks and Characterizations” critically evaluates historical narratives and legal classifications, including debates on colonialism and apartheid. “Legal Responsibilities and Accountability” investigates the obligations of states, corporations, and individuals, with particular attention to the International Criminal Court’s (ICC) role in addressing Israeli war crimes and crimes against humanity. The central argument of the book is about the inherent illegality of the occupation and its profound impact on Palestinian rights. By incorporating critical assessment from Michael Lynk and referencing the 2024 ICJ Advisory Opinion, this review addresses the complex legal implications of this long-lasting occupation. This book is lauded for its contribution to international legal discourse and its potential to contribute to addressing historical injustices, while acknowledging the ongoing debate regarding the occupation’s legal status.

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Introduction

“Prolonged Occupation and International Law”, published in late March 2023 by Brill Publishing House, is a landmark collection of essays on the Israeli regime's protracted occupation of Palestinian territory. The 16-chapter book is a treasure trove of valuable contributions from eminent scholars, professors, lawyers, practitioners, and policymakers, including former UN Special Rapporteurs. The book has received acclaim from several legal scholars, including William A. Schabas, Professor of International Law, School of Law, Middlesex University, who has offered a glowing review, stating: “Scholarly and comprehensive, this impressive collection of essays by renowned experts...offers a tour d'horizon of the fundamental legal issues raised by Israel's prolonged occupation of Palestine as well as potential remedies that can confront the illegalities.”¹ The book intends to draw international attention to the extraordinary length of the occupation of the Palestinian territory by Israel, which has now lasted more than half a century. Chapters in this book cover a broad spectrum of topics related to the prolonged occupation and Israel's control, ranging from colonialism to apartheid. Authors unanimously assert the illegality of the occupation from day one, and emphasize that indefinite occupation and colonialism collide with the foundational requirement under international humanitarian law that the occupied territory be returned to the occupied population. The miscellany also underscores the critical importance of historical analysis in comprehending the root causes that have propelled Israel onto its current trajectory of apartheid, colonialism, and annexation. Unfolding the past - the book argues- is essential for addressing the intergenerational trauma and injustice inflicted upon the Palestinian people and ultimately achieving a just and durable resolution. This brief analysis will summarize the book's principal arguments and evaluate its key themes presented in two parts, followed by a critical assessment.

¹ Retrieved from <https://brill.com/edcollbook/title/61385?language=en>, last accessed on September 20, 2024.



1. Legal Frameworks and Characterizations

The book's first part titled "Legal Frameworks and Characterizations" examines the historical narratives around the occupation of the Palestinian territory. John Quigley introduces the discussion in the first part. As mentioned in the introduction section of the book, "His chapter uncovers Israel's targeted strategy to take control over Palestine before the 1967 war erupted and Israel's orchestrated use of pre-emptive self-defense."

In Chapter 2, Vito Todeschini, however, discusses that the passage of time renders the occupation illegal. He makes a distinction between the *jus ad bellum* and *jus in bello* frameworks and concludes that "a belligerent occupation that lasts for a period of time exceeding the necessities of self-defense becomes unlawful because it breaches the principles of necessity and proportionality and, by implication, the prohibition on the use of force enshrined in the UN Charter and customary international law".

Chapter 3 is penned by Ray Murphy, Anita Ferrara, and Susan Power who question the applicability of today's international rules governing occupation to the current situation in the occupied Palestinian land, employing the "Third World Approaches to International Law" perspective. The authors argue that the traditional rules of international law were not meant to handle a situation where an occupation has persisted for such an extended period and that the way these laws are applied may be biased towards the interests of the occupying power.

Aeyal Gross is the author of Chapter 4. He argues that despite the so-called "disengagement plan",¹ Israel's occupation of Gaza persists and that the regime has rebranded its control as a "remotely controlled occupation" to disguise the ongoing nature of its dominance.

Chapter 5 moves out of the scope of international humanitarian law of occupation. In this chapter, John Reynolds views Israel's "apartheid system as a core feature of settler-colonial rule in Palestine since the Nakba and – more recently – as an increasingly central focus of international legal analysis of the Palestinian reality". Reynolds argues that in order for us to truly understand Palestinians' long ordeals, we need to acknowledge how Palestinians themselves see their situation "as one of apartheid". He also emphasizes that this apartheid is deeply connected to the history of colonialism.

In Chapter 6, Rimona Afana also addresses colonialism and its legal context. She holds that the regime uses occupation as "a tool of and smokescreen for colonialism".

Sarah Francis in Chapter 7 views Israel's judicial military system as an "annexationist tool". She expands on "Israel's use of military orders and military courts to mass-incarcerate, punish, and silence Palestinians as a means to cement its control over the occupied territory."

Chapter 8 is a posthumous publication based on the writings of late Suha Jarrar, who was a member of the Palestinian human rights community and a pioneer in the field of environmental law under occupation. "While adapting to climate change, Palestinians living in environmentally and politically vulnerable areas, simultaneously endure coercive environments created by Israel to drive Palestinian displacement and forcible transfer. Future climate change projections for the OPT

1 In 2005, Israel unilaterally dismantled 21 settlements in the Gaza Strip and four in the West Bank. Israeli settlers and military forces withdrew from the Gaza Strip, with the army repositioning along the border. This disengagement was carried out without coordination or an orderly transfer of control to the Palestinian Authority. Despite the withdrawal, the Gaza Strip is still regarded as occupied under international law.



(Occupied Palestinian Territory) entail an increase in annual temperatures and a decline in rainfall. Consequently, the urgent need for proper climate change adaptation will continue to rise,” she notes.

2. Legal Responsibilities and Accountability

Part 2 of this book delves into the legal responsibilities and involvement of individuals, corporations, and Third States. John Dugard is the author of Chapter 9 which mainly focuses on peremptory norms of international law and States’ responsibilities. Dugard comparatively looks into the international community’s responses to apartheid South Africa and Palestine. He “asks imperative questions around States’ selective approaches to breaches of peremptory norms and highlights the powers that States can harness to end unlawful behavior. He demonstrates how States, unilaterally and collectively, have failed to challenge Israel and hold it accountable for its violation of a host of peremptory norms.” Dugard concludes that this failure has “weakened respect for human rights and humanitarian law”, as well as “brought international law into disrepute and given rise to cynicism about the respect States have for international law”.

In Chapter 10, Manuel Devers and Tom Moerenhout examine the legal obligations and roles of third states in the context of the European Union. This chapter stresses that “non-recognition and non-assistance are trade measures under EU law and makes a compelling case for why the EU must act where peremptory norms are breached, or else its Member States will violate their international law obligations. States are not the only actors relevant to Israel’s occupation.”

The focus of Chapters 11 through 14 is on individual criminal responsibility and the functions of the International Criminal Court (ICC). In Chapter 11, Nada Kiswanson, a Swedish lawyer specializing in international criminal and human rights law, addresses three parts. “The first part will present the developments in the Situation in Palestine at the ICC. The second part will introduce the Rome Statute’s complementarity framework. It will then analyze the Israeli High Court of Justice’s approach to international law and discuss the structural, substantive, and procedural characteristics of the Israeli military justice system. The third and final part will present the ICC as the only international judicial institution mandated to investigate, prosecute, and punish Israelis responsible for committing war crimes and crimes against humanity on the Palestinian territory,” according to the introduction section of the book.

Shane Darcy, a senior lecturer at the Irish Centre for Human Rights in the National University of Ireland Galway, examines the individual criminal legal responsibility of private sector actors in Chapter 12, with a specific focus on their potential involvement in the mistreatment of Palestinian detainees and prisoners. He explores various modes of liability and identifies potential avenues for prosecution under international criminal law and policies.

Chapter 13 by Susan Power views the systematic economic exploitation of the Palestinian territory within the meaning of the war crime of pillaging. She contemplates on the prosecution of pillage at international trials related to World War II and scrutinizes the potential for modern-day prosecutions under the Rome Statute.

Chapter 14, authored by Halla Shoaibi and Asem Khalil, examines the ICC’s jurisdiction and sovereignty in the context of the Israeli occupation. They argue that the occupation does not diminish an occupied State’s sovereignty, enabling it to grant the ICC jurisdiction over Rome



Statute crimes committed within its territory. Furthermore, they contend that the Oslo Accords do not preclude ICC jurisdiction, as these agreements conflict with Palestine's right to self-determination and its obligations under the Geneva Conventions.

Marya Farah and Maha Abdallah in Chapter 15 demonstrate how the businesses working under the auspices of Israel have exerted control over crucial Palestinian infrastructure, including water, telecommunications, and electricity systems. This control has significantly altered the Occupied Palestinian Territory, impacting its physical environment, economy, and population distribution in ways that violently contravene international law.

The last chapter is penned by Thomas Hammarberg, who is a Swedish diplomat and human rights defender. In Chapter 16, he “examines the historical context of the Palestinian conflict, recalling the ethnic cleansing of Palestinian communities during the establishment of Israel. It highlights the ongoing plight of Palestinian refugees and underscores their continued right to return,” according to the introduction section of the book. The roles and responsibilities of the UN, particularly UNRWA, have been also addressed in this piece. Chapter 16 attaches importance to “understanding the historical roots of the conflict—including apartheid, colonialism, and annexation— to address the intergenerational trauma and injustice experienced by the Palestinian people.”

3. Critical Assessment

“Prolonged Occupation and International Law” serves as a powerful reminder of how international law, seen by some as “ineffective”, can still be a dynamic force in the pursuit of global justice. This volume of essays shows how, through creative engagement and collaborative efforts with social movements, international law can be a driving force for safeguarding human rights and addressing injustices like occupation, not only in Palestine but also everywhere across the globe.

However, Michael Lynk, former Special Rapporteur on the situation of human rights in the Palestinian territory, in a piece¹ titled “Prolonged Occupation or Illegal Occupant?” refers to the concept of prolonged occupation and its potential illegality, arguing “An unresolved question in international humanitarian law is whether an occupying power – whose authority as occupant may have initially been lawful – can cross a bright red line into illegality because it is acting contrary to the fundamental tenets of international law dealing with the laws of occupation. This question has become especially relevant in light of several prolonged occupations in the modern world, including the 50-year-old Israeli occupation of the Palestinian territory.”

He further stresses that occupation is inherently temporary, and the occupying power has a fiduciary duty to act in the best interests of the occupied population.

“Occupation is by definition a temporary and exceptional situation where the occupying power assumes the role of a de facto administrator of the territory until conditions allow for the return of the territory to the sovereign,” Lynk notes.

He draws parallels to the Namibia Advisory Opinion, where South Africa's illegal occupation was determined based on its annexationist goals, failure to act as a trustee, and breach of fundamental obligations.

¹ See <https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/>, last accessed on January 13, 2025.



“In 1971, the International Court of Justice, in its Namibia Advisory Opinion, stated that annexation by a mandatory power is illegal, the mandatory must act as a trustee for the benefit of the peoples of the territory, it must fulfill its obligations in good faith, and the end result of the mandate must be self-determination and independence. It also held that the breach of the mandatory power’s fundamental obligations under international law can render its continuing presence in the mandate territory illegal, notwithstanding that the Covenant of the League of Nations (Article 22) was silent on this issue. The ICJ found South Africa to have become an illegal mandatory as a result of its aspirations for annexation, its prolonged stay, its failure as a trustee, and its bad faith administration.”

In the conclusion part of his commentary, Lynk contends that declaring Israel an "illegal occupant" would strengthen the international community's responsibility to end the occupation and pave the way for a just and lasting resolution of the Israeli-Palestinian conflict.

Consequently, it would be a good idea to replace “illegal occupant” with “prolonged occupation” so that the international community would feel the urgency to put an end to the protracted occupation once and for all.

Another point to consider here, in light of the previous discussion, is the International Court of Justice (ICJ) 2024 Advisory Opinion¹ on the “Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem”.

The opinion - from paragraphs 104 to 110- addresses the issue of prolonged occupation.² Paragraph 109 stipulates: “The fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law. Although premised on the temporary character of the occupation, the law of occupation does not set temporal limits that would, as such, alter the legal status of the occupation. Instead, the legality of the occupying Power’s presence in the occupied territory must be assessed in light of other rules. In particular, occupation consists of the exercise by a State of effective control in foreign territory (see paragraphs 91-92 above). In order to be permissible, therefore, such exercise of effective control must at all times be consistent with the rules concerning the prohibition of the threat or use of force, including the prohibition of territorial acquisition resulting from the threat or use of force, as well as with the right to self-determination. Therefore, the fact that an occupation is prolonged may have a bearing on the justification under international law of the occupying Power’s continued presence in the occupied territory.”³

Therefore, the ICJ holds that, although the length of an occupation does not fundamentally change its legal status, a prolonged occupation requires justification and its permissibility depends on adherence to core international law principles, including the prohibition of force and territorial acquisition, and the right to self-determination.

1 Retrieved from <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>, last accessed on January 15, 2025.

2 Ibid, 33-34.

3 Ibid, 34.