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> "There are currently about 2.75 million Palestinians living under military occupation in the West Bank, most of them in Areas A and B – 40 percent of the West Bank – where they have limited autonomy. They are restricted in their daily movements by a web of checkpoints and unable to travel into or out of the West Bank without a permit from the Israelis. So if there is only one state, you would have millions of Palestinians permanently living in segregated enclaves in the middle of the West Bank, with no real political rights, separate legal, education and transportation systems, vast income disparities, under a permanent military occupation that deprives them of the most basic freedoms. Separate and unequal is what you would have. And nobody can explain how that works. Would an Israeli accept living that way? Would an American accept living that way? Will the world accept it?"
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> — John Kerry, 28 December 2016[1]

INTRODUCTION

Route 5 begins at the Mediterranean coast, north of Tel Aviv, and journeys east through the Sharon Plain and toward the Jordan Valley. The scenery rapidly transforms from the affluent villas and dense apartment blocks of Ramat HaSharon and Petah Tikva to the arid, rolling hills that mark entry into the West Bank. The road is well-traveled by many who live in the growing communities outside of Israel's commercial and

1. Speech by John Kerry, U.S. Sec'y of State, Remarks on Middle East Peace (Dec. 28, 2016), *available at* https://www.state.gov/secretary/remarks/2016/12/266119.htm.

economic core and who use the highway for direct access into and from the city.

Continue east, twelve miles past the Green Line, and one arrives in Ariel. This large Israeli settlement is located in the heart of the West Bank. To many, the appeal of Ariel echoes that of the North American suburb. Its residents typically prioritize space and affordability above increasingly expensive urban lifestyles. The ostensible normality of daily life in Ariel is convoluted. Despite its proximity to Tel Aviv, Ariel was developed on occupied territory. It has since grown into one of the largest Israeli settlements in the West Bank.[2] Most often, its residents do not evoke the image of the nationalist settler, whose ideological commitment to a Greater Israel is unwavering. Yet, its presence, beyond the Green Line, places Ariel near the geographic and symbolic center of the land Palestinians claim for a future state, which some Israeli leaders view as integral to their own, and which the international community recognizes as under belligerent occupation.[3]

Accordingly, in Ariel and throughout Israel's many West Bank settlements, the mundanities of daily life and local affairs can arouse global interest and ignite regional tension. Yet, Ariel remains a city, otherwise conventional. An Israeli can work, buy a home, attend university, and enjoy the comforts of a suburban life. While its legal status as a settlement, in violation of international law, has negligible influence on the daily routines of its residents, it is a primary facet of the Israeli-Palestinian conflict. It is a space that embodies a prolonged occupation, where legal narratives unfold and bear witness to competing uses of international law.

Settlements like Ariel present a paradox. Their existence, and the normality of daily life within, repudiates the very legal framework that is intended to govern the conflict and enable its

2. GERSHON SHAFIR, A HALF CENTURY OF OCCUPATION: ISRAEL, PALESTINE, AND THE WORLD'S MOST INTRACTABLE CONFLICT 1, 188–90 (2017).

3. *See, e.g.*, S.C. Res. 446, ¶ 3 (Mar. 22, 1979). *See also* G.A. Res. 32/20, ¶ 1 (Nov. 25 1977) (affirming that Israel's presence within the West Bank constitutes a belligerent occupation). *See also* Grant T. Harris, *Human Rights, Israel, and the Political Realities of Occupation*, 41 ISR. L. REV. 87, 94–95 (2008).

resolution. The Israeli occupation of the West Bank has now surpassed its fiftieth year.[4] As the conflict's landscape becomes increasingly legalized, agreement as to how international law may effectively govern prolonged occupation eludes consensus. Traditionally, occupation is understood as a neutral phenomenon. Military control of foreign territory operationalizes the occupation framework—that is, the various legal instruments that regulate occupation.[5] The framework's application is commonly understood as a counteraction to the factual recognition of foreign control.[6] As prominently interpreted, international law's relationship with occupation is devoid of normative content.[7]

Eyal Benvenisti explains that the drafters of the legal framework regulating occupation "took pains to emphasize that the regime of occupation is a de facto regime that conveys to the occupant only circumscribed rights and obligations for the limited duration of the occupation."[8] The resulting legal treatment is premised upon the assumption that foreign control is temporary.[9] Although occupation was envisioned in brief intervals and

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4. The occupation of the West Bank, East Jerusalem, and the Gaza Strip (as well as other territories) began in June 1967. *See generally* IDITH ZERTAL & AKIVA ELDAR, LORDS OF THE LAND: THE WAR OVER ISRAEL'S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967–2007 (2007).

5. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 539 T.S. 631 [hereinafter Hague Convention (IV)]. The term occupation framework includes treaty-based provisions, primarily the Hague Regulations and the Fourth Geneva Convention, as well as the various interpretations that have evolved around these. *See also* Yutaka Arai-Takahashi, *Preoccupied With Occupation: Critical Examinations of the Historical Development of the Law of Occupation*, 94 INT'L REV. RED CROSS 51 (2012) (For an overview of the occupation framework's historical development) [hereinafter Arai-Takahashi, *Preoccupied With Occupation*].

6. *See* Prosecutor v. Naletilic, IT-98-34-T, Trial Chamber Judgment, ¶ 211 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003). *See also* Marco Sassòli, *The Concept of Belligerent Occupation*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1390, 1393 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

7. AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 3–4 (2017) [hereinafter GROSS, WRITING ON THE WALL].

8. *See* EYAL BENVENISTI, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 15–16 (2d ed. 2012) (Benvenisti notes that, "as part of the jus in bello, the lawfulness of the occupation regime or its authorities did not depend on the jus ad bellum issues that led to the invasion and the occupation.").

9. Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 726 (2005).

regulated accordingly, the legal framework does not set firm durational requirements. Instead, it protects the inalienability of sovereignty. It strictly regulates the occupying power's ability to alter the territory's legal or political status. Thus, the legal framework is structurally conservationist.[10]

Prolonged occupation presents myriad challenges. These emanate from the occupation's extended duration. They derive from the structural inability of the occupation framework to provide more than temporary consideration to a population that faces extended subjugation. The framework's ephemeral conception of occupation is ill-suited to regulate the enduring needs of a population bereft of self-governance. This incompatibility between international law's conservationist orientation and the reality of prolonged occupation has long provoked questions regarding the appropriateness of the legal framework.[11] Throughout the West Bank, a legal regime that is understood as exceptional and temporal continues to regulate an occupation that has now exceeded a half-century in duration. International law is persistently employed to govern a fait accompli—evidenced by the prevailing normality of life in the settlements—whose continuation is partially facilitated by appeals to international law.

As an occupation's length increases, year-by-year, its challenges become further embedded and the associated framework further exposed. Most commonly, responses to these challenges are grounded within an interpretative approach that favors a factual or non-normative understanding of occupation.[12] This prominent reading recognizes a temporary conception of occupation, but accepts that the framework's application is not disrupted by duration. Although international humanitarian law (IHL) envisions occupation as a temporary state, both in accordance with its historical origins and as a requisite means of preserving sovereignty, the prominent interpretative approach ac-

10. Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 199 (2005).

11. *See generally* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 47 (1990) [hereinafter Roberts, *Prolonged Occupation*].

12. *See, e.g.*, U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 28–29 (2004) [hereinafter U.K. Military Manual]. *See also* Kristen E. Boon, *The Future of the Law of Occupation*, 46 CAN. Y.B. INT'L L. 107, 116 (2008).

centuates the legal framework's absence of a durational limitation. The resulting de-emphasis of the framework's innate temporality projects a conception of IHL that is constrained in its treatment of prolonged occupation. Temporariness, when juxtaposed with the framework's lax durational requirements, becomes intangible. It becomes a concept devoid of meaning or precision.[13]

Occupation is undesirable. Factually conceived and legally acknowledged, occupation is regulated because it is an inherent characteristic of war. Yet when an occupation becomes prolonged, it is less likely to serve a necessary military need. The means and character of the occupation alters. The interests of the occupying power depart from the purpose of the occupation framework. Commonly, however, the legal treatment of occupation does not respond to the altered form of foreign control. It continues to regulate a situation that threatens permanence through a legal framework that provides provisional respite. As prominently interpreted, it fails to articulate a clear legal basis as to why occupation, despite its undesirability, must be terminated.

Prolonged occupation should not be exclusively defined by an occupation's duration. The principle of temporality is not only contingent upon the passage of time. It is also illustrative of the conditions that exist and the form that the occupation has assumed. An occupation will become prolonged when it shifts from a regulated phase that preserves sovereignty and ensures uninterrupted humanitarian consideration to a form of foreign control that threatens to become permanent. By adopting a non-normative interpretation of occupation and fixating on the challenges that stem from an occupation's duration, the legal framework engages with the daily administration of the occupation but neglects the fundamental purposes of this legal regime.

This article explores international law's efficacy. Attempts to remedy the challenges emanating from the occupation framework's inapposite relationship with prolonged occupation result from an interpretative choice. This is between the prominent, non-normative reading of the occupation framework, which re-

13. The Hague Regulations did not consider the likelihood of a prolonged occupation and operated under the assumption that a peace treaty between the occupying power and the occupied government would be expedited. *See* BENVENISTI, *supra* note 8, at 144–45.

sponds to the challenges caused by a prolonged occupation's duration, and a normative approach that wishes to engage with the causes of this altered form of foreign control. Corresponding efforts may be both benevolent and necessary. Yet, when grounded within the prominent interpretative approach, responses to prolonged occupation are limited. In accordance with this interpretative approach, the user seeks to *better* employ the law. The prominent interpretation purports to more effectively regulate the occupying power's ability to respond to the challenges of prolonged occupation. Additionally, however, these efforts provide the occupying power with an opportunity to justify initiatives that entrench its control. Ostensibly, these are presented as compensating for the occupation framework's incomplete conception of occupation.

The following pages trace and engage with debates concerning the legal regulation of prolonged occupation. They query how the prominent, non-normative interpretation of the occupation framework influences or enables responses to the challenges posed by prolonged occupation. Though these challenges evoke a diverse array of responses, this article identifies a commonality. Collectively, responses premised upon a non-normative interpretation of the occupation framework are limited by an understanding of international law that only allows efforts promoting the better management of occupation. Whether the 'manager' is attempting to externally address the challenges presented by prolonged occupation or internally operate within the framework's confines, this management approach is motivated by an unconstrained notion of occupation. It neglects the occupying power's intentions. Ignoring the new form of control that the prolonged occupation establishes, the user seeks to *better* engage with various provisions of the legal framework to mitigate the results, but not the cause, of prolonged occupation.

What is characterized here as the management approach is derived from a non-normative interpretation of the occupation framework. It refers to the diverse and preferred methods of regulating prolonged occupation. Commonly, the management approach is prioritized by state actors, courts, and international lawyers. It accompanies a shift from a formal occupation, premised in necessity and based on temporality, to a quasi-permanent administrative relationship. Various actors, each with distinct motivations, apply the management approach in several forms. An occupying power or an international actor may appeal to this

approach to justify a benevolent policy intended to serve the occupied population.[14] The occupying power may also appeal to the management approach to legitimize measures that fortify its control of, or interests in, the occupied territory. This approach, however, derives from an interpretation of the legal framework that accentuates occupation's factual character and lax temporal requirements. Upon an interpretation that accepts the framework's application, and neglects a holistic conception of temporality, management becomes either the only or the preferred method of addressing prolonged occupation.

This article begins from the assumption that in 1967, following war between Israel and neighboring Arab states, the West Bank, East Jerusalem, the Gaza Strip, the Sinai Peninsula, and the Golan Heights came under Israeli control.[15] These events triggered the application of the occupation framework. The following sections, however, do not directly address the occupation or legal status of the Gaza Strip. This omission is not a commentary on Gaza's post-disengagement status. Neither, is it an assertion that there is a legal or political distinction between Gaza and the West Bank.[16] The focus of this article is on the legal framework governing instances of prolonged occupation. Gaza cannot be ignored within the context of the Israeli-Palestinian conflict. But to understand the implications and inadequacies of the occupation framework for the purpose of governing prolonged occupation, this article limits its observations to the West Bank. It is

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14. JAMES PETTIFER & MIRANDA VICKERS, THE ALBANIAN QUESTION: RESHAPING THE BALKANS 236 (2007).

15. *See generally* MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST (2003).

16. Following Israel's unilateral disengagement from the Gaza Strip in 2005, there has been significant debate as to whether Gaza remains under formal Israeli occupation. In 2008, the Israeli Supreme Court held in *Bassiouni* that Gaza, following Israel's disengagement, was no longer occupied (though it held that Israel still owed limited humanitarian duties to the Gazan population). *See* HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister (2008) (Isr.). For a variety of views on Gaza's status, see Geoffrey Aronson, *Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip,* 34 J. PALESTINE STUD. 49 (2004-2005); Elizabeth Samson, *Is Gaza Occupied? Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915 (2010); Marko Milanovic, *Is Gaza Still Occupied by Israel?*, EJIL: TALK! (Mar. 1 2009), http://www.ejiltalk.org/is-gaza-still-occupied-by-israel/; Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. INT'L HUM. L. 369 (2006).

here that the Israeli presence is greatest and most entrenched.[17] Extensive settlement developments mark the West Bank and continue to expand.[18] Again, this does not suggest that Gaza holds a separate territorial status, but instead recognizes that the issues regarding the current occupation of Gaza are less concerned with the particular challenges presented by prolonged occupation.

The following considers how international law is employed in response to and in furtherance of prolonged occupation. Part I provides a brief overview of the occupation framework. It reviews the well-established challenges that manifest during prolonged occupation. This begins with the pioneering work of Adam Roberts and describes how, due to the occupation framework's conservationist structure, prolonged occupation is understood to require particular forms of administration.

Part II traces the implications of these responses. It queries how the prominent, non-normative interpretation influences the regulation of prolonged occupation. This section demonstrates that widespread appeals to the occupation framework, as traditionally conceived, facilitate continued recourse to the management approach**.** Set within the West Bank, this section assesses state engagements, juridical interventions, and scholarly debates. Though the desire to better manage a prolonged occupation may be compelling, this section demonstrates how perpetual management threatens to entrench occupation and forsake the requirement of temporality.

Part III considers alternative interpretations of the occupation framework. These reject the prominent, non-normative readings that permeate much of the discourse. They increasingly feature within debates regarding the effective legal treatment of prolonged occupation and raise important questions regarding the legal status of this form of occupation.

Finally, Part IV offers a third interpretative approach. Drawing upon identified sources of international law, this article proposes a novel, normative interpretation of the occupation framework. This accentuates the requirement of temporality. Conceived holistically, this interpretation considers not only the

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17. *See generally* GERSHOM GORENBERG, THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS 1967–1977 (2006). [hereinafter GORENBERG, ACCIDENTAL EMPIRE].

18. *See generally* YEHEZKEL LEIN & EYAL WEIZMAN, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK (Yael Stein ed., 2002).

length of an occupation, but also the form that an occupation has assumed. Engagements with the framework, responses to the challenges presented by prolonged occupation, may pivot from a limiting interpretative approach that professes neutrality and emphasizes durational neglect. This will nurture attempts to end, not simply manage or better endure, prolonged occupation. The proposed interpretative approach will require an occupying power to satisfy a good faith obligation to refrain from actions that facilitate or perpetuate occupation. Once an occupation can no longer be justified as a temporary necessity that preserves sovereignty and provides humanitarian consideration, it abandons its legal purpose and must terminate. The proposed interpretative approach is more consistent with the spirit of IHL. It better matches the ethos of the occupation framework. And it will better align the purpose of the occupation framework with diplomatic and state-building initiatives that are grounded in the principle of self-determination.

Identifying the motive of management as a causal factor, this article argues that common responses to prolonged occupation may be necessary, but when taken within the occupation framework's traditional, non-normative confines, they risk perpetuating occupation. They entrench a legal framework that is understood to neglect duration and curtail the requirement of temporality. This interpretation of the occupation framework becomes susceptible to manipulation. The proposed approach, offered here, shifts the interpretative focus of the occupation framework. It emphasizes a temporary conception of occupation and facilitates efforts to end the occupation. This is not a complete theory or reimagining of the law of occupation. Instead, this article offers an alternative point of departure and seeks to shift the discourse that accompanies prolonged occupation from management to termination.

I. THE OCCUPATION FRAMEWORK AND THE CHALLENGES OF PROLONGED OCCUPATION

Article 42 of the Hague Regulations denotes when territory becomes occupied.[19] It supports the widely-assumed position that since the 1967 War, the West Bank and other territory captured by Israel, was or remains under occupation. The article states that "[t]erritory is considered occupied when it is actually placed

19. Hague Convention (IV), *supra* note 5, art. 42.

under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[20] Accordingly, as prominently interpreted, international law conceives of occupation as a neutral phenomenon. With scant consideration for the jus ad bellum, the legal framework accepts the existence of an occupation.[21] The occupying power may be waging a war of aggression or it may be the victim of aggression. Although the jus ad bellum distinguishes between these origins and attaches the label of illegality to the former, the legal framework is commonly interpreted to accept the existence of occupation. Regardless of cause or duration, occupation is viewed as a neutral, non-normative, fact.[22]

War's inevitability prompts occupation's regulation. The occupation framework is founded upon the principle of the inalienability of sovereignty.[23] Its early development and codification was influenced by a nineteenth century European desire to preserve sovereign prerogative.[24] International law became a placeholder. Upon the factual existence of an occupation, the occupation framework preserves the status quo ante bellum.[25] Regardless of cause, it operates to manage the spatial problem that results from the suspension of sovereignty and the imposition of foreign control.[26] Article 43 of the Hague Regulations compels the occupying power to, "restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country."[27]

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20. *Id.* art. 42.

21. *See* Rotem Giladi, *The Jus Ad Bellum/Jus in Bello Distinction and the Law of Occupation*, 41 ISR. L. REV. 246, 269–72 (2008). *See also* In re List and Others (Hostages Trial), 15 Ann. Dig. 632, 637 (U.S. Military Trib. at Nuremberg 1948) [hereinafter Hostages Trial]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 306, ¶ 58 (Dec. 19) (separate opinion of Judge Kooijmans).

22. YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 2–3 (2009) [hereinafter DINSTEIN, BELLIGERENT OCCUPATION]. *See also* BENVENISTI, *supra* note 8, at 15–16; YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 5 (2009) [hereinafter ARAI-TAKAHASHI, LAW OF OCCUPATION].

23. BENVENISTI, *supra* note 8, at 6.

24. Bhuta, *supra* note 9, at 729–30.

25. Fox, *supra* note 10, at 230. *See also* BENVENISTI, *supra* note 8, at 1–2.

26. *Id.* at 1.

27. Hague Convention (IV), *supra* note 5, art. 43.

The Hague Regulations, however, conveyed minimal regard for the interests of the occupied population. They sought to preserve state prerogatives, protect property rights, and deny sovereignty by conquest.[28] Despite its selective Eurocentric origins, the occupation framework's subsequent development corresponded with international law's growing humanitarian overtures.[29] Alongside the Hague Regulations, the Fourth Geneva Convention would form the core of IHL. Historically, upon the imposition of foreign control, territory was either subsumed or neglected.[30] Resigned to war, the occupation framework acknowledges that foreign control often accompanies or succeeds hostilities.[31] The occupation framework intends to protect sovereign interests from annexation and safeguard the local population from disregard.[32] The Fourth Geneva Convention expanded upon the Hague formulation.[33] Article 64 prescribes, that while subject to notable exceptions, "[t]he penal laws of the occupied territory shall remain in force. . . ."[34] This is understood to expand upon Article 43's preservationist character. It shifts emphasis from political to humanitarian interests and provides the occupying power with a further, yet still limited, duty to proactively regulate the territory.[35]

The occupation framework was now informed by humanitarian intentions. Yet, as codified by Articles 43 and 64, the legal framework's primary purpose continued to ensure that an occupying power may not acquire sovereignty. With limited exceptions, the legal and political foundations of the occupied territory

28. BENVENISTI, *supra* note 8, at 29. *See also* Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations"*, 51 N.Y.L SCH. L. REV. 498, 506–507 (2006–2007).

29. Fox, *supra* note 10, at 229. *See generally* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000); Cohen, *supra* note 28, at 502–13.

30. *See generally* SHARON KORMAN, THE RIGHT TO CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE (1988).

31. Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 251 (1984) [hereinafter Roberts, *Military Occupation*].

32. Fox, *supra* note 10, at 229–30.

33. *Id.* at 235.

34. Geneva Convention Relative to the Protection of Civilian Persons in Time Of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

35. BENVENISTI, *supra* note 8, at 72–74.

would be preserved.[36] Collectively, these provisions establish the conservationist principle.[37] The legal framework, however, maintained a nineteenth century conception of occupation. Within, "occupations were of relatively short duration, during which occupants, by and large, retained existing legislation as much as possible."[38]

Although occupation is clearly understood to be a temporary regime, international law is largely silent on questions of duration. The prominent interpretative approach seizes upon this. A meeting of legal experts, convened by the International Committee of the Red Cross (ICRC), agreed that IHL did not impose formal limits on the length of an occupation. Based upon a non-normative reading—focused exclusively on duration and neglecting the altered form of control that accompanies prolonged occupation—the expert panel accentuated the framework's failure to denote a temporal limitation. The group stated that, "nothing under IHL would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances."[39]

The framework's efforts to regulate the tripartite relationship between local inhabitants, the displaced sovereign government, and the occupying power developed alongside the presumption that the triggering conflict would be of limited duration.[40] Promptly, upon the establishment of peace, normality would revert.[41] In accordance, an occupation was understood to end in one of two ways: (1) either the fortunes of war are altered and the occupying power loses military control of the territory it formally held, or (2) the occupation is brought to an end through a

36. Fox, *supra* note 10, at 236.

37. *Id.* at 235–36.

38. BENVENISTI, *supra* 8, at 70.

39. Rep. of the Int'l Comm. of the Red Cross [ICRC], *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territories*, at 74 (2012). [hereinafter ICRC Expert Meeting].

40. Michael Bothe, *The Administration of Occupied Territory*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1455, 1456 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

41. BENVENISTI, *supra* note 8, at 28. *See* Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393 (1952) (For a general history of the drafting and development of the Fourth Geneva Convention.).

negotiated agreement.[42] Often, however, both historical and contemporary occupations failed to match the paradigmatic vision that informed the legal framework.[43]

As a result, protection gaps and structural discrepancies emerged. In as early as 1949, the inconsistencies between observed manifestations of occupation and the newly formulated occupation framework's ability to effectively govern prolonged occupation were considered. The crux of the critique provided by Doris Appel Graber was direct. Graber plainly asserted that the existing legal treatment appeared fragmented. The legal framework had developed within and was influenced by a non-analogous historical period of relative peace. This was not suited to govern the complexity of contemporary occupations.[44]

The conservationist principle prohibits an occupying power from imposing enduring or fundamental changes. Yet as any society evolves, effective regulation requires political, economic, social, and legal development. Often, these needs appeared in tension with the occupation framework's preservationist character. Adam Roberts's defining work on prolonged occupation advances this notion. Roberts demonstrated that an inherent inconsistency existed between the legal framework's treatment of occupation as constituting a provisional state and contemporary manifestations of occupation.[45] In response to this apparent incompatibility, Roberts asked, "To what extent are international legal rules formally applicable, and practically relevant, to a prolonged military occupation?"[46] Writing over a quarter-century

42. Roberts, *Prolonged Occupation*, *supra* note 11. *See also* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 271–72.

43. *See* Roberts, *Military Occupation*, *supra* note 31, at 261–94 (Adam Roberts provided a list of seventeen forms of military occupation, the vast majority of which do not directly conform to the traditional legal framework's conception of occupation).

44. *See* D.A. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY 37 (1949). *See also* Iain Scobbie, *International Law and the Prolonged Occupation of Palestine*, U.N. ROUNDTABLE ON LEGAL ASPECTS OF THE QUESTION OF PALESTINE 3 (2015), https://www.researchgate.net/publication/277290147_International_law_and_the_prolonged_occupation_of_Palestine.

45. *See* Roberts, *Prolonged Occupation*, *supra* note 11, at 47 (Roberts cites the Allied occupations of Japan and Germany, the South African occupation of Namibia, the Turkish occupation of Northern Cyprus, the Moroccan presence in Western Sahara, and the Vietnamese invasion of Kampuchea as modern examples).

46. *Id.* at 44.

ago, Roberts argued that this question had assumed prominence due to the exceptional duration of Israel's presence within the territory that came under its control in 1967.[47]

The point at which an occupation becomes prolonged will, as Adam Roberts observed, remain a contentious issue.[48] Commentators have proposed durational limits. An occupation is declared prolonged when it exceeds a predetermined timescale.[49] This determination, however, is not suited to a fixed chronological limit. It must be cognizant of the form of control that an occupation has assumed. An occupation becomes prolonged when it no longer adheres to the principle of temporality. Temporality is understood holistically. It is informed by an occupation's duration but also its condition.

This article suggests that an occupation becomes prolonged when it constitutes a form of control that threatens to become permanent. A prolonged occupation is a quasi-permanent administrative relationship that constitutes something other than a temporarily imposed humanitarian arrangement. This is more of a competence and observational-based trigger than one focused on the precise temporal scope of an occupation. This proposed understanding recognizes that the hallmark of a prolonged occupation is apparent when the factual accounting of the occupation threatens the regulatory ability of international law. This risks an occupation becoming indefinite and eventually irreversible.

Many of the challenges presented by prolonged occupation are widely understood. Roberts explained that the law of occupation is often interpreted to provide the occupying power with a large measure of authority. Although this may be justifiable in times of direct hostilities, Roberts believed this arrangement was not sustainable. It accentuated the likelihood, as the occupation's duration increased, that the legal framework's conservationist

47. *Id. See also* ZERTAL & ELDAR, *supra* note 4; GORENBERG, ACCIDENTIAL EMPIRE, *supra* note 17 (For general historical accounts of Israel's presence within the Palestinian territories.).

48. Roberts, *Prolonged Occupation*, *supra* note 11, at 47.

49. *Id.* at 47 (Adam Robert, for example, defined prolonged occupation as lasting for more than five years and as extending into a period when hostilities are sharply reduced). *See also* Richard Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank,* 2 J. REFUGEE STUD. 40, 45–47 (1989) (Alternatively, Richard Falk has suggested imposing specific obligations on an occupying power whose occupation has researched ten years in duration.).

orientation would hinder the socio-economic development of the occupied territory.[50] Roberts argued that if the existing framework was not adapted to recognize the characteristics and challenges posed by prolonged occupation, the framework itself could leave a society politically and economically underdeveloped.[51]

According to Roberts, responses to these challenges cannot be indefinitely neglected due to the conservationist nature of the occupation framework. Roberts, however, notes that providing an occupying power with additional latitude carries risk. The danger, said Roberts, "in making such a suggestion is that it may seem to imply the further suggestion that those parts of the law of war that deal with military occupations may not be fully applicable, and that departures from the law may be permissible."[52]

Resulting engagements with prolonged occupation are commonly structured by the prominent, interpretive approach. These legal engagements attempt to better utilize the legal framework. Efforts by states, courts, and scholars to address the challenges created by prolonged occupation are grounded within a factual notion of occupation. They avoid normative assessments. Instead, they accept that regardless of the occupation's duration, a traditionally-interpreted occupation framework continues to govern prolonged occupation. To address the myriad challenges posed by this form of occupation, competing interests must be effectively managed.

The critiques and premise offered by Roberts continue to provide a point of departure for subsequent responses. Although Roberts acknowledged the challenges posed by prolonged occupation—identifying the tension of addressing these challenges through a legal regime built upon the conservationist principle—subsequent responses have maintained fidelity to the prominent interpretation of the occupation framework. The ensuing debate fixates on the extent to which, and the means by which, an occupying power should or should not be accorded additional latitude to manage the intrinsic challenges presented by prolonged occupation.[53]

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50. Roberts, *Prolonged Occupation*, *supra* note 11, at 96.

51. *Id.* at 52.

52. *Id.* at 51.

53. Vaios Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?*, 94 INT'L REV. RED CROSS 165, 176 (2012).

Christine Chinkin explains that the "inherent dilemma" within this debate is that the prolonged nature of the occupation may be invoked both in favor of and in opposition to increasing the allowances that an occupying power receives.[54] Certainly, there are instances where broadening the occupying power's discretion will appear prudent. If the necessity of prolonged occupation inevitably breeds inherent challenges, if over time the failure to respond to demographic shifts and economic stagnation threatens the interests of the occupied population, the provision of expansive latitude will exhibit moral pull. Equally, however, one can envision numerous scenarios in which such latitude would convey a disproportionate focus on the rights of the occupying power.

Chinkin neatly captures the confines of the discourse that surrounds prolonged occupation. The identified dilemma, however, is premised on the prominent interpretative approach. This common legal framing responds exclusively to managerial challenges that result from the occupation's duration. Fixation on these governance challenges purport to ensure the occupied population's long-term needs. These will demand attention. Yet, an exclusive managerial approach neglects the causes and consequences of the altered form of control embodied by prolonged occupation. Upon this interpretative approach, the challenges presented by prolonged occupation may only be managed. Management is facilitated and improved by either increasing or limiting the occupying power's control of the seized territory. Upon this prominent interpretative approach, the elicited replies regularly elect management as the necessary, or only, response.

This singular view of prolonged occupation allows duration to become either a guise or a justification for quasi-permanent control. Israel's occupation of the West Bank provides numerous examples of an occupying power both appealing to and employing this approach to justify a novel form of regulation. Adhering to a non-normative reading of the occupation framework that links prolonged occupation to duration – not conditions – confines the forms of legal engagement that an actor may take when responding to the challenges posed by prolonged occupation. It allows an occupying power to justify initiatives that purport to remedy

54. *See* Christine Chinkin, *Laws of Occupation*, *in* MULTILATERALISM AND INTERNATIONAL LAW WITH WESTERN SAHARA AS A CASE STUDY 167, 178 (Neville Botha, Michèle Olivier & Delarey van Tonder eds. 2010).

these challenges. Such an approach—the reliance upon continual management to alleviate the effects of prolonged occupation—risks further entrenching or perpetuating occupation within the West Bank and beyond.

II. THE PROMINENT INTERPRETATIVE APPROACH: THE FACILITATION AND CONSEQUENCES OF THE PERPETUAL MANAGEMENT OF PROLONGED OCCUPATION

Immediately following the 1967 War, legal considerations were overshadowed by the dawn of a new regional reality. Soon, however, international law became a prominent feature of Israel's newfound control of the territory it assumed upon victory.[55] This began gradually and proceeded haphazardly. Days after the cessation of hostilities, Israel pledged to apply the occupation framework. It emphasized its commitment to the well-being of the local Palestinian populace.[56] Israel, however, shifted from its initial pronouncement and began questioning the West Bank's legal status. Weeks after the war had ended, Yaakov-Shimshon Shapira, then Minister of Justice, addressed the Knesset. Shapira argued that Israel should not assume the status of an occupying power within the recently "liberated territory."[57] Israel then passed an ordinance permitting its government to extend Israeli law, jurisdiction, and administration "to any area of Eretz Israel (Palestine)" that it deemed necessary.[58]

The ordinance was swiftly invoked.[59] It extended Israeli jurisdiction into East Jerusalem but was not applied within the West

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55. *See* AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD 250–264 (2001) (For an account of the events that immediately followed the 1967 War).

56. *See, e.g.*, U.N. Secretary-General, *Report Under General Assembly Resolution 2254 (ES-V) Relating to Jerusalem*, U.N. Doc. S/8146, annex II (Sept. 12, 1967) (For an account of the various claims and efforts made by Israeli officials). *See* Transcript No. 126 of the Constitution, Law and Justice Committee, 5727–1967, Sixth Knesset, Second Session (Akevot trans., 1967) (Isr.), *available at* http://akevot.org.il/wp-content/uploads/2016/09/MAG-Briefing-Eng.pdf. (For an account of recently released archival material that demonstrates Israel's intention to adhere to the occupation framework in the weeks following the war.).

57. ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 111 (1978).

58. *Id. See also* Law and Administrative Ordinance (Amendment No. 11), 5727–1967, 21 LSI 75 (1966–67) (Isr.).

59. Ian S. Lustick, *Has Israel Annexed East Jerusalem?*, 5 MIDDLE EAST POL. 35, 36-37 (1997).

Bank.[60] Official references to the Fourth Geneva Convention were removed.[61] The following year, Israel formally abandoned the term West Bank, reverting to the region's historical Hebrew names, Judea and Samaria. Despite these changes, Israel refrained from formally extending jurisdiction to or claiming sovereignty of the West Bank. It did, however, continue to question the territory's legal status.[62] As Israel moved away from its initial commitment to the occupation framework, the notion of settling the West Bank entered the public discourse.[63]

Despite Israel's evolving position, the international community remained steadfast. The Security Council called upon the involved governments to ensure respect for the Geneva Conventions.[64] Israel was condemned during successive emergency sessions of the General Assembly. These denunciations ranged in tenor and called upon Israel to remove its military from the territories it now held.[65] In response to the growing international consensus, Israel refuted the premise that its presence within the West Bank constituted an occupation. Israeli officials adopted an amended version of the "missing reversioner thesis" developed by Yehuda Blum.[66] This drew upon the notion of terra nullius. Though it avoided such framing by name, Blum's thesis

60. GERSON, *supra* note 57, at 111.

61. *Id.*

62. *See* Ministry of Foreign Affairs, Director Memo 765, Israel State Archives File A-7371/4 (Akevot trans., Mar. 20, 1968) (Isr.), *available at* http://akevot.org.il/wp-content/uploads/2016/09/Comay-Meron Cable-Eng.pdf. (Recently released diplomatic cables, from within Israel's Foreign Ministry, dispute the sincerity of these queries. The exchanges indicate that officials within the Ministry understood that the occupation framework was legally applicable and that certain actions – taken and intended – within the territories would violate the framework.).

63. ZERTAL & ELDAR, *supra* note 4, at 333–34. *See also* SHAFIR, *supra* note 2, at 96.

64. S.C. Res. 237, ¶ 2 (June 14, 1967).

65. *See, e.g.*, U.N. GAOR, 5th Sess., 1526th plen. mtg. at ¶ 82, U.N. Doc. A/PV.1526 (June 19, 1967) (The strongest accusations levied against Israel came from the Arab and Soviet delegations). *See, e.g.*, U.N. GAOR, 5th Sess., 1554th plen. mtg. at ¶ 91, U.N. Doc. A/PV.1554 (July 14, 1967) (For a more tempered approach.).

66. *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 33–34 (2002) [hereinafter KRETZMER, OCCUPATION OF JUSTICE] (A variety of state representatives presented direct and amended versions of the *missing reversioner* thesis before various UN bodies as debates within the legal sphere increasingly raised questions concerning the status of Israel's assumed governance of the West Bank.).

emphasized the perceived sovereign void that existed within the West Bank.[67] An altered, and partially moderated, version of the approach initially articulated by Blum gained further credence when presented as official policy by Meir Shamgar, then the Attorney General and later the President of the Israeli Supreme Court. Writing within his official capacity in the inaugural volume of the *Israel Yearbook on Human Rights* following a symposium at Tel Aviv University, Shamgar concluded that:

> the Israeli Government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability to the territories, and decided to act *de facto*, in accordance with the humanitarian provisions of the Convention.[68]

Israel's occupation of the West Bank moved swiftly from acknowledgement to indeterminacy. Shlomo Gazit, who upon conclusion of the war was appointed as Coordinator of Activities in the Territories, was tasked with overseeing Israel's administration of the West Bank.[69] Gazit explained that the occupation's architects ensured that "the establishment of military government in occupied territory be seen as a temporary phenomenon."[70] Privately, however, Israeli officials acknowledged that

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67. *See* Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samara*, 3 ISR. L. REV. 279, 283–84 (1968) (Yehuda Blum, a legal scholar and expert in international law at the Hebrew University who would later become Israel's Ambassador to the United Nations, published an influential article that provided the foundation for Israel's legal approach to the question of the West Bank's status. Blum's thesis, known as the missing reversioner theory, was premised on the assertion that Jordan's presence throughout the West Bank prior to 1967 was the result of illegal aggression. Following the termination of the British Mandate in 1948, the relevant territory lacked a legitimate sovereign. While the question of Jordanian sovereignty over the West Bank had been emphatically denounced by the international community, Blum contended, "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 a better title.").

68. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 266 (1971) [hereinafter Shamgar, *Observance of International Law*].

69. SHLOMO GAZIT, THE CARROT AND THE STICK: ISRAEL'S POLICY IN JUDEA AND SAMARIA, 1967–68 7 (1995).

70. *Id.*

their presence within the territories would likely endure. Moshe Dayan, Israel's Defense Minister, instructed Gazit to prepare for an "extended stay."[71]

A factual conception of occupation facilitated Israel's prolonged presence. Meir Shamgar, then a Justice of the Israeli Supreme Court, offered a traditional reading of the occupation framework. This forwarded a singular notion of temporality. It accentuated the absence of a durational limitation and remained silent on the form of control that an unconstrained occupation would assume. Shamgar wrote that "according to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue indefinitely."[72] This common interpretative approach became the foundation of Israel's subsequent legal engagements with the occupation framework.[73]

Writing in 1990, Adam Roberts correctly predicted Israel's continued occupation of the Palestinian territories.[74] The entrenchment of Israel's presence throughout the West Bank accentuated questions concerning the occupation framework's appropriateness. As Israel continued to govern the West Bank and establish its presence through the construction of settlements and their associated infrastructure, it would increasingly appeal to the occupation framework and management approach. As with the scholarly and juridical deliberations that acknowledged the occupation framework's inadequacies, Israel purported that many of its legal engagements were in response to the challenges presented by this particular form of occupation. Imposed policies were justified in response to the occupation's duration. Grounded within a non-normative conception of occupation, these responses managed the results, and neglected the causes, of prolonged occupation. Collectively, they contributed to the quasi-permanent form of control that the occupation would assume.

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71. *Id.* at x.

72. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government — The Initial Stage*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 14, 43 (Meir Shamgar ed., 1982) [hereinafter Shamgar, *Legal Concepts*].

73. GROSS, WRITING ON THE WALL, *supra* note 7, at 3.

74. Roberts, *Prolonged Occupation*, *supra* note 11, at 103.

A. The Challenge of Economic Development

On May 30, 1967, King Hussein of Jordan and Egyptian President Abdel Nasser signed a joint defense agreement.[75] Regional tensions escalated. Nasser declared that "our basic objective will be the destruction of Israel."[76] A little more than a week later, Israel would gain control of the West Bank and Gaza Strip. Combat forces gave way to military government units who expeditiously established an administrative structure.[77] Duties were divided between the Israel Defense Forces (IDF) and Israel's Government. Security and near-term economic needs came under the purview of military command. Political considerations and long-term economic matters would be addressed by ministerial committees.[78] The Military Government declared that its primary objective was to oversee the resumption of normality. Corresponding efforts were largely guided by economic objectives.[79]

Under the direction of Moshe Dayan, Israel implemented policies intended to foster economic integration with the assumed territories. The resulting governance structure claimed to provide for the "legitimate needs of local inhabitants and the security requirements of Israel itself."[80] Ostensibly, this was consistent with the obligations imposed by the occupation framework. Article 43 of the Hague Regulations requires an occupying power to restore and ensure public order and civil life throughout the occupied territory.[81] The precise meaning of the provision and the extent of the obligations that it imposes are, however,

75. Laura M. James, *Egypt: Dangerous Illusions*, *in* THE 1967 ARAB-ISRAELI WAR: ORIGINS AND CONSEQUENCES 56–70 (William Roger Lewis & Avi Shlaim eds., 2012).

76. MARTHA GELLHORN, THE FACE OF WAR 283 (1988).

77. Nimrod Raphaeli, *Military Government in the Occupied Territories: An Israeli View*, 23 MIDDLE E. J. 177, 178–79 (1969).

78. GERSON, *supra* note 57, at 110–111.

79. Raphaeli, *supra* note 77, at 179.

80. *Id.* at 180.

81. *See* Hague Convention (IV), *supra* note 5, art. 43 (The Article states, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.").

unclear.[82] Yet despite interpretative discord, it is widely assumed that Article 43 compels the occupying power to, inter alia, "restore order and normal economic life in the occupied territory."[83]

Israel's earliest interventions appear consistent with the provision. The Military Government worked to liberalize trade, manage produce surpluses, protect the agricultural sector, and provide development loans.[84] The passage of time would, however, witness the evolving needs of the occupied population. It would bring shifting priorities amongst the occupying power. The conventional application of the occupation framework appeared insufficient to pacify the involved interests. The uncertainty conveyed by the occupation framework, observations of its selective application, and its conservationist orientation prompted Adam Roberts to ask whether the framework unnecessarily confined economic development.[85] During prolonged occupation, the desire for economic stewardship—in response to market changes, anticipated societal needs, technological advancements, and demographic shifts—creates tension with the occupation framework's conservationist stance.[86] To resolve this discordancy, to begin responding to the challenge of economic development within prolonged occupation, Israel referenced the occupation's duration to justify "more effective" means of management.[87]

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82. *See* Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 663 (2005) [hereinafter Sassòli, *Legislation and Maintenance*].

83. *Id.* at 663. *See, e.g.*, S.C. Res. 1483 (May 22, 2003) (Following the US-led invasion of Iraq, the Security Council required the occupying power to, "promote the welfare of the Iraqi people through the effective administration of the territory."). *See also* Bothe, *supra* note 40, at 1467.

84. Raphaeli, *supra* note 77, at 179–80. *See also* NEVE GORDON, ISRAEL'S OCCUPATION 64-65 (2008).

85. Roberts, *Prolonged Occupation*, *supra* note 11, at 52.

86. *See* Trial of Alfreid Felix Alwyn Krupp von Bohlen Und Halbach and Eleven Others (The Krupp Trial) (U.S. Military Trib. at Nuremberg 1948), *in* U.N. War Crimes Comm'n, 10 Law Reports of Trials of War Criminals 135 (1949) (The Military Tribunal at Nuremberg expressing the conservationist principle. In the Krupp Trial, the Tribunal held, inter alia, that "the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort").

87. *See generally* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66.

Since 1967, the West Bank has been governed as an economic union with Israel.[88] The guiding policy of economic integration was presented as a benevolent necessity. Israel proclaimed that "[t]he Six Day War abolished to all intent and purposes the 'Green Line' that in the past demarcated the Israeli sector from the administered territories. Naturally and unavoidably, these areas are becoming dependent upon Israel for all their economic and service needs."[89] A fundamental economic transformation followed. Various sectors, including agriculture, trade, taxation, and natural resources, came under Israeli control. Initially, the imposed single market generated economic gains within the occupied territories.[90] Though the successful development of the West Bank was understood as a mutual benefit, integration aligned with Israel's (exclusive) economic interests.[91]

Many of Israel's economic interventions were challenged. Their legality was repeatedly questioned.[92] In reply, Israel referenced the need to respond to the particular quandaries evoked by the occupation's duration. Corresponding appeals to the management approach were grounded in a non-normative reading of the occupation framework. In 1972, a labor dispute occurred between hospital employees and a charitable association in Bethlehem. In response, the Military Government initiated settlement proceedings, amended preexisting legislation, and imposed mandatory arbitration. The petitioner claimed these actions were beyond the competence of an occupying power. It claimed

88. *See* Raja Khalidi & Sahar Taghdisi-Rad, *The Economic Dimensions of Prolonged Occupation: Continuity and Change in Israeli Policy Towards the Palestinian Economy*, U.N. Doc. UNCTAD/GDS/2009/2 (Aug. 2009).

89. *See* Ministry of Defence, Coordinator of Government Operations in the Administered Territories, *The Administered Territories 1967/1971 — Data on Civilian Activities in Judea and Samaria, the Gaza Strip and Northern Sinai* (Isr.), *cited in* BENVENISTI, *supra* note 8, at 224.

90. *Id.* at 241–42. *See also* Hisham Awartani, *Israel's Economic Policies in the Occupied Territories: A Case for International Supervision*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 399, 401–02 (Emma Playfair ed., 1992).

91. *Id. See also* GORDON, *supra* note 84, at 70.

92. *See generally* Osama A. Hamed & Radwan A. Shaban, *One-Sided Customs and Monetary Union: The Case of the West Bank and Gaza Strip under Israeli Occupation*, *in* THE ECONOMICS OF MIDDLE EAST PEACE 117 (Stanley Fischer, Dani Rodrik & Elias Tuma eds., 1993).

that the imposed measures contravened the occupation framework's conservationist ethos.[93]

In the *Christian Society case*, Israel's High Court of Justice considered the aforementioned claims. In response, it offered a broad interpretation of Article 43.[94] Following five years of occupation, the Court drew upon Israel's elongated presence within the territories. It identified and responded to the resulting challenges. The occupying power was deemed responsible for ensuring the, "whole social, commercial and economic life of the community."[95] The Court concluded that Israel must acknowledge changing conditions. It must attend to the resulting challenges. The Court obliged Israel to adopt measures needed to ensure "civil life."[96] This broad reading of Article 43 was justified by reference to the prolonged nature of the occupation. As an occupation's duration increases, the Court held, "[l]ife does not stand still, and no administration, whether an occupation administration or another, can fulfil its duties with respect to the population if it refrains from legislating and from adapting the legal situation to the exigencies of modern times."[97]

Soon after, a Palestinian utilities provider challenged a Military Government decision appointing an Israeli company to provide electricity to the Hebron area.[98] Prior to the order, a municipal generator supplied the city. Demand, however, increased following the development of Kiryat Arba, the early Israeli settlement located in the hills outside of Hebron. The former Palestinian provider argued that the military order was incompatible with a conservationist reading of Article 43.[99] The petition was

93. KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 58–59.

94. *See* HCJ 337/71 Christian Society for the Holy Places v. Minister of Defense 26(1) PD 574 (1971) (Isr.) (An English summary of the decision is available at, *Court Decisions, Christian Society for the Holy Places v. Minister of Defense,* 2 ISR. Y.B. HUM. RTS. 354 (1972)) [hereinafter Christian Society].

95. *Id.*

96. *Id. See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 58.

97. Christian Society, *supra* note 94, at 582. *See also*, BENVENISTI, *supra* note 8, at 246.

98. BENVENISTI, *supra* note 8, at 221–22. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 64–65.

99. *See* HCJ 256/72 Electric Company for the District of Jerusalem v. Minister of Defence 27(1) PD 124 (1972) (Isr.) [hereinafter Electric Company]. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65 (The Palestinian Electric Company for the Jerusalem District had been authorized by the Jordanian authorities to supply utilities throughout much of the West Bank prior to 1967).

dismissed. The High Court of Justice reaffirmed its expansive understanding of the occupation framework. It held that the military order was intended to ensure basic needs. The Court invoked the local population's economic welfare and ruled that the military commander did not violate the conservationist approach by ensuring the provision of electricity.[100]

Israel continued to cultivate an expansive interpretation of Article 43. This was based on a dual affirmation. The occupation framework would remain applicable regardless of the occupation's duration, but due to the occupation's duration, particular management was required. The Court affirmed that economic initiatives that altered the status quo ante were permissible when benevolent.[101] These early decisions legitimized foundational aspects of the occupation that purported to better manage the economic and social needs of the local population.[102]

The economic union that guided many of Israel's early policies vis-à-vis the West Bank was justified in accordance with Article 43.[103] Such economic management was deemed necessary to "ensure a return to orderly life and prevent the effective observance of the duty regarding the assurance of *la vie publique*."[104] These decisions entrenched an expansive understanding of Article 43.[105] They provided the occupying power with broad discretion

100. *Id. See also* Electric Company, *supra* note 99.

101. *See generally* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 57–74.

102. *See* HCJ 351/80 Electricity Company for the District of Jerusalem v. Minister of Energy 35(2) PD 673 (1980) (Isr.) (For the High Court of Justice's expansive view on what constituted the local population's welfare.). *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65–68.

103. *See generally* HCJ 69/81 Abu Aita et al. v. Commander of Judea and Samaria et al. 37(2) PD 197, 105 (1983) (Isr.), *translated in* HCJ 69/81 Abu Aita et al. v. Regional Commander of the Judea and Samaria Area et al. Judgement, HAMOKED, http://www.hamoked.org/Document.aspx?dID=290 (last visited Oct. 31, 2018) [hereinafter Abu Aita] (In *Abu Aita*, the High Court of Justice upheld the imposition of a value-added tax (VAT) within the West Bank. Israel asserted that the imposed VAT was necessary to, "protect the local residents from a situation in which VAT was imposed only in Israel." In such a case, they reasoned, "Israel would have had to resurrect the economic borders and impose restrictions on the free flow of goods and services." This, Israel argued, would be detrimental to the local population and inconsistent with the requirements of Article 43.). *See also* BENVENISTI, *supra* note 8, at 241.

104. *See* Abu Aita, *supra* note 103, at 104 (In which the Court referenced the original French text of Article 43.). *See also* BENVENISTI, *supra* note 8, at 224.

105. *See* HCJ 2164/09 Yesh Din v. Commander of IDF Forces in Judea and Samaria, ILDC 1820 (Isr.), *translated in* HCJ 2164/09 Yesh Din v. Commander

to impose economic policies. Ostensibly, these policies were intended to better manage prolonged occupation. They were premised upon an interpretation of the occupation framework that accepts occupation as fact and the framework's uninterrupted relevancy.

In *Yesh Din v. Commander of IDF Forces in Judea and Samaria et al.*, the High Court directly referenced the prolonged nature of the occupation. The case addressed Israel's operation of several quarries within the West Bank.[106] The Court considered and applied Article 55 of the Hague Regulations and, correspondingly, the rules of usufruct.[107] It promoted a "broad and dynamic" reading of the obligations bestowed upon an occupying power within a prolonged occupation.[108] Article 55 implies that an occupying power may derive benefit from the territory's natural resources. It is widely understood, however, that an occupying power is prohibited from imposing changes to production levels and that any changes must not be to the detriment of the local population.[109]

Although the Court held that Israel's operation of the quarries was consistent with the rules of usufruct, it nevertheless pivoted

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of the IDF Forces in the West Bank et al., Judgement, HAMOKED, http://www.hamoked.org/Document.aspx?dID=Documents2185 (last visited Oct. 31, 2018) [hereinafter Yesh Din]. *See also* David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 218 (2012) [hereinafter Kretzmer, *Law of Belligerent Occupation*].

106. *See generally* Valentina Azarova, *Exploiting a Dynamic Interpretation: The High Court of Justice and Israel's Quarries in the Occupied Palestinian Territory*, EJIL TALK! (Feb. 12 2012), http://www.ejiltalk.org/exploiting-a-dynamic-interpretation-the-israeli-high-court-of-justice-accepts-the-legality-of-israels-quarrying-activities-in-the-occupied-palestinian-territory [hereinafter Azarova, *Dynamic Interpretation*] (On Israel's operation of quarries throughout the West Bank from the 1970s onward.).

107. *See* Hague Convention (IV), *supra* note 5, art. 55 (Article 55 states that, "the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."). *See also* Aeyal Gross, *Israel is Exploiting the Resources of the Occupied West Bank*, HAARTEZ (Dec. 28, 2011), http://www.haaretz.com/israel-is-exploiting-the-resources-of-the-occupied-west-bank-1.403988 [hereinafter Gross, *Israel Exploiting Resources*].

108. Gross, *Israel Exploiting Resources*, *supra* note 107.

109. Azarova, *Dynamic Interpretation*, *supra* note 106. *See also* ARAI-TAKAHASHI, LAW OF OCCUPATION, *supra* note 22, at 196–97.

to Article 43.[110] It noted that Israel's operation of the quarries served the welfare of the local population.[111] The Court's decision was premised on the prominent interpretation of the framework. It endorsed the framework while coupling its application with the view that management initiatives were required to benefit the local population. The High Court acknowledged that this management approach became necessary due to the occupation's duration:

> the traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of economic relations between the two authorities—the occupier and the occupied. . . . This kind of conception supports the adoption of a wide and dynamic view of the duties of the military commander in the Area, which impose upon him, inter alia, the responsibility to ensure the development and growth of the Area in numerous and various fields, including the fields of economic infrastructure and its development.[112]

This hints at the notion of a benevolent occupier. The risks of Israel's economic management would, however, become apparent. Following an initial period of growth, the Palestinian economy began a sustained decline.[113] Israel derived benefit from its economic control of the West Bank. It gained access to a large, affordable, labor pool.[114] This increased economic prosperity within Israel.[115] At the same time, however, Shlomo Gazit explains that "the Israeli authorities and the military government did little to develop the local economic infrastructure."[116]

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110. Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 221–22.

111. *Id.* at 222 (Kretzmer describing that the High Court of Justice noted that the quarries produced stone that could be used by local Palestinians, paid royalties to the civil administration that could be reinvested in local projects, employed a segment of the local population, and contributed to the area's modernization.).

112. Yesh Din, *supra* note 105, ¶ 10. *See also* Azarova, *Dynamic Interpretation*, *supra* note 106.

113. Arie Arnon, *Israeli Policy Towards the Occupied Palestinian Territories: The Economic Dimension, 1967–2007*, 61 MIDDLE E. J. 573, 576–79 (2007).

114. Zeev Rosenhek, *The Political Dynamics of a Segmented Labour Market: Palestinian Citizens, Palestinians from the Occupied Territories and Migrant Workers in Israel*, 46 ACTA SOCIOLOGICA 231, 238–41 (2003).

115. *Id.*

116. Arnon, *supra* note 113, at 581–82. *See also* GAZIT, *supra* note 69, at 235.

Israel's economic approach to the West Bank continued to shift.[117] The policy of pacification through increased prosperity was replaced by initiatives that fortified Israel's control of the territory.[118] Customs arrangements heavily favored Israeli goods, which benefited from unfettered access to the West Bank and Gaza. Palestinian imports were restricted.[119] Imposed policies increasingly prioritized Israel's economic objectives. By the mid-2000s, the Palestinian economy teetered. Its GDP had plummeted. Following the Second Intifada, unemployment soared. The World Bank estimated that nearly 70 percent of the Palestinian population now lived in poverty.[120]

Israel's economic management was condemned.[121] In the late 1980s, the General Assembly urged the international community to provide economic assistance to the Palestinians.[122] Despite acknowledging that economic aid was not a substitute for a "genuine and just solution to the question of Palestine," the General Assembly recognized the continued relevance of the occupation framework.[123] It too opted in favor of better management. The international community pressed Israel to better ensure Palestine's economic needs.[124] The United Nations Conference on Trade and Development favored working within the international community to "encourage Israel to allow wide-ranging economic policy reform and liberalization in the Occupied Palestinian Territory, including the right to economic policy formulation and management by the Palestinian people."[125]

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117. *See generally* SHIR HEVER, THE POLITICAL ECONOMY OF ISRAEL'S OCCUPATION: REPRESSION BEYOND EXPLOITATION (2010).

118. *See* GORDON, *supra* note 84, at 9, 14–22, 62–66.

119. Leila Farsakh, *The Political Economy of Israeli Occupation: What is Colonial About It?*, 8 MIT ELECTRONIC J. MIDDLE E. STUD. 41, 47 (2008).

120. *Id.* at 41. *See also* World Bank, *Investing in Palestinian Economic Reform and Development: Report for the Pledging Conference* (Dec. 17, 2007), http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/294264-1166525851073/ParisconferencepaperDec17.pdf.

121. *See* G.A. Res. 43/178, ¶ 13 (Dec. 20, 1988) (Condemning Israel for its "brutal economic and social policies and practices against the Palestinian people in the occupied Palestinian territory.").

122. *Id. See also*, G.A. Res. 42/166, ¶ 5 (Dec. 11, 1987).

123. *See* G.A. Res. 43/178, *supra* note 121, at ¶ 15.

124. *See* Khalidi & Taghdisi-Rad, *supra* note 88, at 7.

125. *Id. See also* U.N. Conference on Trade & Development (UNCTAD), *Recent Economic Developments in the Occupied Palestinian Territory*, U.N. Doc. UNCTAD/TD/B/1221 (1989).

The economic challenges that resulted from the prolonged nature of the occupation have spurred continuous debate. While evoking diverse perspectives and encouraging an array of policy proposals, these debates rarely question the occupation framework's continued relevance. Instead, they assume a non-normative conception of occupation. They seek to provide a more effective means of managing the resulting situation. Despite Israel's increasingly entrenched presence throughout the West Bank, notwithstanding the precariousness of the Palestinians' economic conditions, variants of the management approach remain the favored means of addressing the exigencies of prolonged occupation. Within scholarly debates, proposals often contest what Christine Chinkin identified as the "inherent dilemma" of determining the extent to which an occupying power should receive additional latitude. The prominent debates recognize that the occupation framework's conservationist design impedes economic adaptability. All agree that this requires specific management.[126] Despite the benevolent intentions that accompany these deliberations, they largely neglect the possibility that perpetual management often contributes to perpetual occupation.

B. The Challenge of Legislative Competence and Long-term Planning

The consequences of Israel's territorial acquisition consumed its political and legal establishments in debate. Government officials contemplated their newly imposed duties and rights. Meir Shamgar, then the IDF's Military Advocate General, told a Knesset Committee:

> Our aim is to minimize legislation on pure security and administrative matters, based on Article 64 of the Geneva Conventions, help restore life to its previous course through our actions and enable a smooth operation of civil courts as soon as

126. *See, e.g.*, ERNST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 89 (1971). *See also* Roberts, *Prolonged Occupation*, *supra* note 11, at 53 (acknowledging a need to recognize the occupier's ability to affect prolonged occupation. This would facilitate (necessary) efforts to make "drastic and permanent changes in the economy or the system of government"). *See* Marco Sassòli, *Article 43 of The Hague Regulations and Peace Operations in the Twenty-First Century*, INT'L HUMANITARIAN L. RES. INITIATIVE 15 (2004) [hereinafter Sassòli, *Article 43*] (claiming that "sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve").

> possible. All of this while maintaining the principle of ensuring the interests of military control over the areas.[127]

Immediately following the 1967 War, Israel announced its first military orders. Existing law, in force prior to June 1967, would be retained unless it contravened a subsequent military directive.[128] This pronouncement accorded with Article 43 of the Hague Regulations. The order empowered the Military Commander to issue legislative decrees deemed necessary to administer the assumed territory. During the following months and then years, military officials issued a vast network of orders.[129] Though these orders formally maintained much of the preexisting legislative structure, they developed the occupation's legal foundation.[130]

The preferred use of administrative actions—the lessening of legislative initiatives—embraces a conservationist interpretation of the occupation framework. The occupying power's legislative competence to introduce, annul, or amend laws within the controlled territory is delineated in both the Hague Regulations and the Fourth Geneva Convention.[131] Traditionally, the occupying power's ability to legislate is read restrictively.[132] As with the economic development debate, however, this raises various questions. These query the efficacy of the occupation framework. When applied to prolonged occupation, they ask whether the framework frustrates the implementation of necessary legislative initiatives. They consider whether it impairs the imposition of policies intended to affect long-term change.[133]

Eyal Benvenisti explains that historically, "the occupant was not expected, during the anticipated short period of occupation,

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127. *See* Transcript No. 126 of the Constitution, Law and Justice Committee, *supra* note 56.

128. *See* Israel Defence Forces, Proclamation Concerning Law and Administration (Judaea and Samaria), 5727–1967, no. 2–7 (Isr.). *See also*, BENVENISTI, *supra* note 8, at 212.

129. RAJA SHEHADEH, THE LAW OF THE LAND: SETTLEMENTS AND LAND ISSUES UNDER ISRAELI MILITARY OCCUPATION 5 (1993).

130. *See* Raja Shehadeh, *The Legislative Stages of the Israeli Military Occupation*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 151, 152–166 (Emma Playfair ed., 1992).

131. *See* Fourth Geneva Convention, *supra* note 34, arts. 64–75.

132. Sassòli, *Legislation and Maintenance*, *supra* note 82, at 668.

133. *See, e.g.*, MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 225–26 (1959). *See also* Harris, *supra* note 3, at 103; Sassòli, *Legislation and Maintenance*, *supra* note 82, at 679.

to have pressing interests in changing the law to regulate the activities of the population except for what was necessary for the safety of its forces."[134] By the First World War, however, this restrictive reading of Article 43 was deemed untenable. Occupying powers became increasingly proactive. They desired flexibility.[135] Article 64 of the Fourth Geneva Convention provided broader exceptions to the framework's legislative limitations.[136] While this increased the occupier's ability to impose legislation or policy designed to create long-term change, the occupation framework maintained its conservationist purpose.[137]

The nature of occupation evolved throughout the latter-half of the twentieth century. Initiatives imposed by occupiers were increasingly framed as responses to the exigencies of prolonged (or transformative) occupations.[138] The occupation framework's traditional laissez-faire approach to governance was presented as implausible.[139] Morris Greenspan argued that human existence requires organic growth. It is impossible for a state to mark time indefinitely. Pragmatically, Greenspan noted the need for adaptive management, arguing that, "political decisions must be taken, policies have to be formulated and carried out."[140]

Increasingly, legislative initiatives were understood as a necessary means of responding to social, economic, and political

134. *See* BENVENISTI, *supra* note 8, at 91 (This, according to Benvenisti, was driven by the prevailing laissez-faire approach which influenced minimalist interpretations of the Regulation's provisions.).

135. *Id.*

136. *See* Yutaka Arai-Takahashi, *Law-Making and the Judicial Guarantees in Occupied Territories*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1421, 1422–23 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015) [hereinafter Arai-Takahashi, *Law-Making and Judicial Guarantees*]. *See also* Fourth Geneva Convention, *supra* note 34, art. 64 (Allowances for the "repeal or suspension" of existing legislation, deemed either a security threat or an imposition to the Convention's application, and the positive formulation of the Article's second paragraph (enabling the occupying power to fulfil its obligations under the Convention, maintain orderly government, and ensure security) were now read permissively). *See* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 110 (describing Article 64 as an "amplification and clarification" of Article 43 of the Hague Regulations). *See also* BENVENISTI, *supra* note 8, at 90, 96.

137. *Id.* at 120, 126. *See also* Bothe, *supra* note 40, at 1483.

138. *See* Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 706 (2005).

139. *See, e.g.*, Harris, *supra* note 3, at 103.

140. *See* GREENSPAN, *supra* note 133.

changes.[141] These changes are unavoidable, the inevitable by-products of the passage of time. They produce challenges and legal systems adapt accordingly. Initiatives and policies are introduced to meet evolving needs. Within a prolonged occupation, however, these unavoidable developments risk neglect. Proponents favored ensuring that the occupying power was not constrained by a conservationist reading of the framework. The longer an occupation lasts, Dinstein explains, "the more compelling the need to weigh the merits of a whole gamut of novel legislative measures designed to ensure the societal needs in the occupied territory do not remain too long in a legal limbo."[142]

The Likud Party's electoral ascendency in 1977 heralded the expansion of the settlement project.[143] Israel began imposing legislation and enacting policy designed to have permanent or long-term influence on the affected territory.[144] A large transportation network was developed to modernize roadways within the West Bank. This would link various settlements to Jerusalem.[145] The initiative was challenged in *Ja'amait Ascan v Commander of the IDF in Judea and Samaria*.[146] The petitioners, whose land would be expropriated to enable construction, argued that the planning initiative primarily served Israeli interests and that the project's permanence was inconsistent with a temporary notion of occupation.[147]

Israel refuted these claims. It asserted that the project benefited local residents and cited the existing infrastructure's inability to serve the growing population.[148] Israel referenced Article 43. It argued that due to the occupation's duration, it could

141. *See generally* ARAI-TAKAHASHI, LAW OF OCCUPATION, *supra* note 22, at 91–136.

142. DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 116–17.

143. *See generally* GORENBERG, ACCIDENTAL EMPIRE, *supra* note 17.

144. *See generally* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 76.

145. *Id.* at 94–95 (noting that planners and the relevant authorities explicitly acknowledged the strategic significance of the proposed transportation networks. The creation of highways linking the settlements to Israel was determined to facilitate varied political objectives).

146. *See generally* HCJ 393/82 Ja'amait Ascan v. Commander of the IDF in Judea and Samaria, 37(4) PD 785 (1983) (Isr.), *translated in* HCJ 393/82 Jam'iat Iscan Al-Ma'almoun v. IDF Commander in the Judea and Samaria Area — Judgment, HAMOKED, http://www.hamoked.org/Document.aspx?dID=160 (last visited Oct. 31, 2018) [hereinafter Ja'amait Ascan]. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 97–98.

147. *Id.*

148. *Id.* at 97.

not be required to preserve a distant status quo. A military government was obliged to further the local population's interests.[149] Long-term planning initiatives were framed as requirements. To ensure effective management, the occupier was to anticipate local needs and respond accordingly.[150]

In *Ja'amait Ascan*, the High Court of Justice endorsed Israel's appeal to the management approach. In response to the requirements of prolonged occupation, the Court favored an interventionist response. Citing Morris Greenspan's call for increased legislative competence, it held that:

> the power of the military government extends to taking all necessary measures to ensure growth, change and development. The conclusion that follows is that a military government may develop industry, trade, agriculture, education, health and welfare and other such matters which are related to good governance and are required in order to ensure the changing needs of the population in an area under belligerent occupation.[151]

The Court explored the policy's motives.[152] Ultimately, it accepted the Government's claim that the proposed changes were made necessary by the passage of time. It accepted that they would serve local interests and were thus compliant with Article 43 of the Hague Regulations.[153]

Israeli initiatives, ostensibly intended to respond to the challenges of prolonged occupation, were deemed legitimate if they benefited the local population. They were required to refrain from altering the basic institutions of the occupied territory.[154] Article 43 was reinterpreted by the Court to better respond to prolonged occupation. Despite the conservationist principle's historical origins, the Court held that contemporary manifesta-

149. *Id.*

150. *See* BENVENISTI, *supra* note 8, at 246.

151. Ja'amait Ascan, *supra* note 146, ¶ 26.

152. *Id. See* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 98 (noting that the Court understood, in accordance with the Hague Regulations, that the dominant motive must be to serve the interest of the local population. It asked whether the planning initiative had been taken to meet Israel's exclusive interests or if the good of the local population had been a guiding factor in the decision).

153. *Id.*

154. Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 220. *See also* BENVENISTI, *supra* note 8, at 246.

tions of occupation should now guide the framework's application. Article 43 must distinguish between short and long-term occupations. Its application would consider the passage of time. It would respond to altering conditions when establishing the requirements of civil life and public order. The High Court held that the military government, "may require long-term investments that will effect changes that will remain after the occupation ends."[155]

This need to impose change and address the inevitable results of prolonged occupation guided the Court's subsequent oversight. It justified the Military Government's desire to move beyond a conservationist conception of the occupation framework.[156] Unconfined and with extensive discretion, it directed Israeli efforts purporting to better manage prolonged occupation. This facilitated the imposition of legislation and policy that would impose long-term changes. Despite the benevolent façade of the Court's expansive interpretation of Article 43, David Kretzmer notes, "that there is no lack of evidence to show that [the resulting initiatives were] carried out as part of a general plan for the West Bank that was based on the planner's perception of Israeli interests."[157]

Settlement growth was accompanied by massive infrastructure investments. The transportation network, established in accordance with the *Ja'amait Ascan* decision, expanded. Approximately 1660 kilometers of roadways now link settlements to urban centers in Israel.[158] As of 2005, the formal boundaries of Israel's settlements constituted a mere 3 percent of the West Bank. The associated infrastructure, however, extended Israel's physical presence to over 40 percent of the territory.[159]

This creates significant impediments for the Palestinian population. Beyond linking the settlements to Israel, the road network that stretches throughout the West Bank impedes Pales-

155. KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 69. *See also* Ja'amait Ascan, *supra* note 146, ¶¶ 21–22.

156. Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205, 210 (Emma Playfair ed., 1992).

157. KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 82.

158. *See* Office for the Coordination of Humanitarian Affairs, The Humanitarian Impact on Palestinians of Israeli Settlements and other Infrastructure in the West Bank, 58 (June 2007).

159. *Id.* at 8, 19.

tinian movement. Due to a closure regime that employs checkpoints, road blocks, and access permits, Palestinian entry to the roads is limited. The physical presence of the roads often separate Palestinian communities into enclaves.[160] This strengthens Israel's control of the territory and impacts the quotidian experience of much of the West Bank's Palestinian population.[161]

Israel's engagements with Article 43 are grounded within a traditional interpretation of the occupation framework. They build upon the prevalent supposition that prolonged occupation justifies legislative management. The challenges posed by prolonged occupation require long-term solutions, attuned to the evolving needs of the local population. Israel contends that if the imposed initiatives provide for the local population, they are consistent with the legal framework.[162] This interpretative approach acknowledges, but does not question, the nature of the occupation. Formally, it professes to preserve sovereignty and ensure local needs.

The High Court of Justice, however, has interpreted "local population" to include Israeli citizens who live within the West Bank's many settlements.[163] This builds upon the Court's early judgment in the *Christian Society* case. Here, the Court understood Article 43 as compelling intervention into a range of sectors. Expansive legislative management was justified in response to the exigencies of prolonged occupation.[164] In *Electric Company for the District of Jerusalem v. Minister of Defense*, however, the Court included the residents of Kiryat Arba within its considerations. The occupying power was compelled to consider and ensure the needs of Kiryat Arba's residents alongside

160. *Id.* at 58, 65–66.

161. *Id.* at 58. *See also* World Bank, *Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy* (May 9, 2007).

162. Ja'amait Ascan, *supra* note 146, ¶ 13. *See also* HCJ 2056/04 Beit Sourik Village Council v. Government of Israel, et al. 48(5) PD ¶ 34 (2004) (Isr.), *translated in* HCJ 2056/04 — Beit Sourik Village Council et al. v. The Government of Israel, et al., Judgement, HAMOKED, http://www.hamoked.org/Document.aspx?dID=6520 (last visited Oct. 31, 2018) [hereinafter Beit Sourik]; Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 221–22.

163. Electric Company, *supra* note 99. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65.

164. Christian Society, *supra* note 94, at 582.

the requirements of the Palestinian population.[165] Eyal Benvenisti recalled how the Court's decision provided the occupying power with the necessary legislative competence to develop the settlement enterprise.[166] This facilitated the movement of the occupant's population from Israel to the territories. It permanently tilted the calculus that evaluated imposed measures to favor the West Bank's Israeli population.[167]

Proposals to alter the legislative competence of the occupying power vary. Commonly though, contestations adhere to a non-normative reading of the occupation framework. They accept, in some cases as axiomatic, that the challenges created by the occupation's duration must be managed.[168] The European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ) have reached similar conclusions.

In *Demopoulos v. Turkey*, the ECtHR addressed the admissibility of a property claim brought by a group of Greek-Cypriots. In response to a 1974 coup, led by the Cypriot National Guard and pro-unification supporters of Greece's military junta, Turkey assumed control of the northern-third of Cyprus. Upon establishment in 1983, the Turkish Republic of Northern Cyprus (TRNC) was widely recognized as an occupying power, a proxy for Turkish control of the territory it had assumed.[169] The TRNC

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165. Electric Company, *supra* note 99, at 138. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65.

166. *See* HCJ 5808/93 Economic Corporation for Jerusalem Ltd. v. IDF Commander in Judea and Samaria 49(1) PD 89 (1993) (Isr.) (Settlement development was further facilitated by the High Court of Justice's position that engagements with Article 43 must acknowledge and address "changing conditions" within occupied territory. The Court ruled that settlements constituted such change). *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 215.

167. BENVENISTI, *supra* note 8, at 221–22.

168. *See* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 120. *See also* Harris, *supra* note 3, at 103; Sassòli, *Legislation and Maintenance*, *supra* note 82, at 679.

169. Only Turkey has since recognized the TRNC. *See* Elihu Lauterpacht, *The Right of Self-Determination of the Turkish Cypriots*, REP. TURK., MINISTRY FOREIGN AFF. (Mar. 9, 1990), http://www.mfa.gov.tr/chapter1.en.mfa. *See also* Elihu Lauterpacht, *The Status of the Two Communities in Cyprus*, REPUBLIC TURK., MINISTRY FOREIGN AFF. (July 10, 1990), http://www.mfa.gov.tr /chapter2.en.mfa. *See also* G.A. Res. 3212 (XXIX), (Nov. 1, 1974). *See also* G.A. Res. 3395 (XXX), (Nov. 20, 1975); *See* S.C. Res. 541, (Nov. 18, 1983) (examples of the General Assembly and the Security Council denouncing the Turkish presence in Cyprus, rejecting resulting unilateral actions taken by Turkey, labeling

introduced a pilot-judgment procedure to address property claims by individuals displaced from Northern Cyprus.[170] This raised questions regarding the TRNC's legislative competence.[171] The ECtHR was asked to decide on the admissibility of the applicant's petition.[172]

The Court's judgment was grounded in international human rights law and the ECtHR's admissibility requirements. IHL scarcely featured within the decision.[173] Yet the ECtHR acknowledged the influence of the occupation's duration. When rendering its decision, the Court prioritized the need to ensure the uninterrupted provision of individual rights by effectively managing the status quo.[174] Acknowledging the complexities posed by duration, the Court held, "This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances."[175]

The ECtHR drew upon the ICJ's advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[176] South Africa assumed control of Namibia during the First World War. This continued under the Mandate system until the League of Nations was superseded by the

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its presence as an occupation, and branding the TRNC's declaration of independence as legally invalid). *See also* BENVENISTI, *supra* note 8, at 192.

170. Demopoulos v. Turkey, App. No. 46113/99, Eur. Ct. H.R. at ¶ 50 (2010) [hereinafter Demopoulos]. For further context, see Xenides-Arestis v. Turkey,App. No. 46347/99, Eur. Ct. H.R. at ¶ 37 (2006).

171. *See* Demopoulos*, supra* note 170, ¶¶ 55, 63.

172. *Id.* (This case required the Court to determine whether the TRNC's judgment procedure constituted a domestic remedy. The ECtHR held, for the purposes of admissibility, that the procedure created a local remedy and thus required exhaustion.).

173. Much of the discourse regarding both Northern Cyprus and Western Sahara is grounded within human rights law. *See* Bothe, *supra* note 40, at 1459.

174. *See* Demopoulos*, supra* note 170, ¶ 96.

175. *Id.* ¶ 85.

176. *See* Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R. 101–102 (2001) (separate opinion by Palm, J.). *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J Rep. 16, ¶ 125 (June 21) [hereinafter Namibia Opinion].

United Nations.[177] South Africa resisted the imposition of a trusteeship agreement and began a period of de facto administration.[178] The ICJ's *Namibia* Opinion facilitated the establishment of the international community's preferred management approach. Famously, it obliged the mandatory power to ensure the daily administration of the controlled territory through the creation or maintenance of basic services. The ICJ held:

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[179]

The Court's reasoning is inherently pragmatic. It seeks to preserve Namibian self-determination. Yet by instilling the notion that the illegitimacy of foreign administration must not compromise the provision of local services, it has contributed to the entrenchment of the management approach.[180]

Neither the ECtHR or the ICJ engaged deeply with the legal framework. Their decisions, however, provide credence to the notion that the occupation framework must only interpret occupation as a fact. Yet both Courts read this framework to address the challenges spurred by an occupation's duration. They provide weight to the belief that despite the acknowledged illegitimacy of the occupation regimes, the fact of occupation must be managed. In response, the conservationist principle is amended to meet the challenges of prolonged occupation.

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177. *See generally* JOHN DUGARD, THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS (1973).

178. *See* G.A. Res. 2145 (XXI), (Oct. 26, 1966) (The General Assembly terminating the South African mandate and rejecting South Africa's subsequent claims). *See also* S.C Res. 246, (Mar. 20, 1969). *See also* BENVENISTI, *supra* note 8, at 3; Yaël Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 213–14 (2008).

179. Namibia Opinion, *supra* note 176, ¶ 125.

180. KATHARINE FORTIN, THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW 260–61 (2017).

C. The Challenge of Security and Ensuring Public Order and Safety

Following two decades of occupation, a banal event triggered the First Intifada. An Israeli truck collided with a Palestinian passenger van near the Jabalia Camp at the northern point of the Gaza Strip. Four Palestinians were killed. Many Gazans believed the incident was in retaliation, a response to the stabbing of an Israeli citizen days earlier.[181] Mass demonstrations—in Jabalia, throughout Gaza, and then across the West Bank—harnessed decades of Palestinian discontent and frustrated nationalist ambition. Israel's engagements with the occupation framework shifted in response. Policies, professedly benevolent and ostensibly intended to manage the occupation, were no longer justified by appealing to local interests. Increasingly, Israel recalled the occupation framework's security provisions to validate its actions and policies within the West Bank.[182]

This justificatory transition reflects IHL's dual purposes.[183] The occupation framework's myriad humanitarian assurances are coupled with numerous security-based exceptions.[184] Several military manuals cite security as the most relevant justification

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181. JEAN-PIERRE FILIU, GAZA: A HISTORY 199 (2014). *See also* Michael Omer-Man, *The Accident that Sparked an Intifada*, JERUSALEM POST (Apr. 12, 2011), http://www.jpost.com/Features/In-Thespotlight/The-accident-that-sparked-an-Intifada.

182. *See* BENVENISTI, *supra* note 8, at 238 (noting that by the late 1980s and the start of the First Intifada, Israel was unable to credibly cite the improvement of local interests as a motivating factor for the occupation's policies).

183. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 16–17 (1st ed. 2014).

184. *See*, Fourth Geneva Convention, *supra* note 34, arts. 18, 35, 46, & 53 (For example, Article 53 of the Fourth Geneva Convention prohibits the destruction of public or private property, "except where such destruction is rendered absolutely necessary by military operations." Article 48 allows non-nationals of the occupied territory to depart from the territory unless, as per Article 35, their departure, "is contrary to the national interests of the state." In accordance with Article 18, parties to the conflict are required to indicate the presence of civilian hospitals, "in so far as military considerations permit." Under Article 46, individual or mass transfer is prohibited, however, the occupying power may "undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand"). *See* Hague Convention (IV), *supra* note 5, art. 52 (Article 52 of the Hague Regulations permits requisitions in kind and service when required by the needs of the army of occupation). *See also* Koutroulis, *supra* note 53, at 191.

for the annulment or introduction of legislation within an occupied territory.[185] An occupying power receives broad discretion.[186] Under Article 27(4) of the Fourth Geneva Convention, the occupier is entrusted with, "such measures of control and security in regard to protected persons as may be necessary as a result of the war."[187] Efforts to balance the demands of military necessity with the requirements of humanitarianism initially focused on conduct during general belligerency.[188] Yet prolonged occupation creates distance between the present and the triggering conflict.[189]

This distance poses questions regarding the function of the occupation framework. These query whether an occupation's duration influences how the framework balances both military and humanitarian considerations. They ask if duration tempers recourse to exceptions.[190] A prolonged occupation—as seen in the

185. *See, e.g.*, U.K. Military Manual, *supra* note 12, at 286–88; U.S. DEP'T OF ARMY, FIELD MANUAL 27–10: THE LAW OF LAND WARFARE 143 (1956) (revised 1976), http://nile.ed.umuc.edu/-nstanton/FM27-10.htm. *See also* Arai-Takahashi, *Law-Making and Judicial Guarantees*, *supra* note 136, at 1425.

186. *See* JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 1, 339 (1958) (stating that, "Article 64 authorizes the Occupying Power to subject the inhabitants of the occupied territory to whatever measures it considers necessary for its own security and to ensure that the present Convention is enforced and the territory properly administered") [hereinafter PICTET, COMMENTARY].

187. *See* Fourth Geneva Convention, *supra* note 34, art. 27(4) (the Article states, inter alia, that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war"). *See also* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 112.

188. *See generally* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L & POL. 831 (2010). *See also* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010).

189. Koutroulis, *supra* note 53, at 189.

190. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. Rep. 131 (July 9) [hereinafter Legal Consequences of the Construction of a Wall]; Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Written Statement of the Swiss Confederation, at 6, ¶ 26 (Jan. 30, 2004), https://www.icj-cij.org/files/case-related/131/1577.pdf [hereinafter Swiss Statement]. *See also* F. Llewellyn Jones, *Military Occupation of Alien Territory in Time of Peace*, 9

West Bank, Northern Cyprus, and Western Sahara—has moved from a military contest and become an administrative relationship. Although this shift does not discount the possibility of security threats or periodic incidents of violence, recourse to military necessity and the security needs of the occupier become less immediate.

Many articulations of the management approach begin from the premise that the occupation's duration presents challenges that the legal framework is ill-suited to address. Efforts to manage these challenges and meet the needs of the local population are heavily-weighted. Inversely, security or military necessity-based exceptions surrender much of their normative pull. Attempts to rebalance the military-humanitarian calculus represent yet another response to the challenges of prolonged occupation. Whether corresponding appeals propose strengthening humanitarian protection or (less commonly) assert broader security exceptions, they seek a better means of managing prolonged occupation.

During proceedings for the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Swiss Confederation considered the influence of duration on the relationship between military necessity and humanitarianism.[191] Switzerland submitted that:

> In the context of an occupation, international humanitarian law ensures consistency between humanitarian aims and the occupier's security needs and reduces the risk of a deterioration in relations between the occupying Power and the occupied. Any examination of necessity and proportionality in circumstances of prolonged occupation when hostilities have ceased must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons.[192]

Israel has not directly pursued justifications that rely upon the unconventional view that an occupation's duration expands the occupier's recourse to military necessity. Instead, the High Court of Justice noted that "military and security needs predominate in a short-term military occupation. Conversely, the needs

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TRANSACTIONS GROTIUS SOC'Y 149, 159–60; Roberts, *Prolonged Occupation*, *supra* note 11, at 96; Koutroulis, *supra* note 53, at 190–92.

191. *Id.* at 189.

192. Swiss Statement, *supra* note 190, at 6, ¶ 26. *See also* Koutroulis, *supra* note 53, at 193.

of the local population gain weight in a long-term military occupation."[193] Despite the Court's conventional approach, Israel's presence within the West Bank brought mounting security challenges. Israel reverted to Article 43 of the Hague Regulations. It embraced a factual conception of occupation and appealed to the exigencies of duration in response to these challenges.[194]

The promotion of safety, as per the English translation of Article 43, is commonly invoked to justify amendments to local legislation.[195] In *Ja'amait Ascan*, the High Court of Justice claimed that the establishment and scope of the military government's powers to manage "public order and safety" are influenced by the occupation's duration.[196] The Court recalled the early work of Doris Appel Graber. Reciting the consensus opinion that the occupation framework is ill-suited to regulate prolonged occupation, the Court claimed that, "this distinction between a short-term military government and a long-term military government has significant influence over the content which is to be infused into securing "public order and safety."[197]

The Court reached a similar determination in *Abu Aita et al. v. Commander of Judea and Samaria*. It confirmed that duration influences the implied balance between military requirements and humanitarian considerations. Interpreting Article 43, the Court held:

> It is true that this article contains no rules as to adjustment or reclassification bound up with, or conditional upon the time element, but the effect of the time dimension is implicit in the wording, according to which there is a duty to ensure, as far as possible, order and public life, which patently means order and life at all times, and not only on a single occasion. The element of time is also decisively involved in the question of whether it is absolutely impossible to continue acting in accordance with existing law, or whether it is essential to adapt that law to new realities. In the legal interpretation of Article 43, the relationship between the time element, and the form taken by the provisions of Article 43 is stressed more than once. It follows that the time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the

193. *See* Ja'amait Ascan, *supra* note 146, ¶ 22. *See also* Koutroulis, *supra* note 53, at 191–92.

194. *See* BENVENISTI, *supra* note 8, at 238.

195. Boon, *supra* note 12, at 124.

196. Ja'amait Ascan, *supra* note 146, ¶ 22.

197. *Id*.

> needs of the territory, or maintain equilibrium between them.[198]

These decisions adhere to the prominent interpretation of the occupation framework. They are premised upon and cite directly from scholars who forward the prevalent view that, within prolonged occupation, the legal framework is unable to regulate the needs of the occupier and the occupied. Without questioning the nature or normative structure of the occupation, they offer a means of better managing the challenges that result from prolonged occupation.

The implications of Israel's expansive conception of the "public order and safety" provision would, however, become apparent. Despite the Article's intended focus on the needs of the occupied population, Article 43 was again interpreted to include the influx of Israeli settlers that now resided in the West Bank.[199] Initiatives, justified in accordance with the Hague Regulations, were implemented to ensure the settler population's security needs. Often, this elevated the interests of the occupying power above efforts to ensure the welfare of protected persons.[200] As tensions rose and the occupation endured, Israel employed initiatives and policies that purported to manage the deteriorating security situation. A fence was erected around the Beit Hadassah building in Hebron. It was justified as a security measure, necessary for the protection of the Israeli families that had settled in the building's upper stories. Its construction, however, restricted access to the Palestinian-owned shops at ground-level. The Military Commander declared the fence an essential security requirement.[201] The High Court ruled that the Commander's authority to impose security-based policies extended to arrangements that safeguarded the settler population.[202]

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198. Abu Aita, *supra* note 103, at 133–34.

199. *See* Electric Company, *supra* note 99, at 138 (Ruling that the Israeli residents of Kiryat Arba were part of the local population for the purposes of Article 43's positive provisions). *See also* Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 223.

200. Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 223–24.

201. *Id.*

202. *See* HCJ 72/86 Zalum v. Military Commander of the Judea and Samaria Area 41(1) PD 528 (1987) (Isr.), *translated in* HCJ 72/86 — Zalum et al. v. Military Commander of the Judea and Samaria Area et al., Judgment, HAMOKED, http://www.hamoked.org/files/2013/1158750_eng.pdf (last visited Oct. 31, 2018). *See also* Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 224.

This reasoning has created an artificial distinction. It has diluted the restraining influence of Article 43. The legal regulation of Israeli settlements and the needs of their population were placed under the auspices of the occupation framework.[203] Israeli authorities consistently cited the challenges of prolonged occupation. They forwarded realist contentions regarding the nature and demands of the occupation and in justification of policies imposed throughout the West Bank.[204] These appeals were grounded within an interpretation of the legal framework that treats occupation, regardless of duration or cause, as a fact that required regulation. Many Israeli initiatives were condemned. The foundational interpretative approach assumed by both Israel and its detractors was, however, consistent. Divergences, while significant and often framed as legal violations, primarily concerned the most effective means of managing prolonged occupation.

III. THE NORMATIVE INTERPRETATIVE APPROACH: ASSESSING THE LEGALITY OF OCCUPATION

Despite its civilian presence, notwithstanding its increasing control of the territory, Israel has refrained from claiming sovereignty of the West Bank. It has instead appealed to IHL in justification of its settlement initiatives. Maiden development projects were linked to Israel's security apparatus.[205] Later, following judicial intervention, settlement policy increasingly focused on the allocation of "public" land.[206] Both approaches went beyond the mere denial of the occupation framework's relevancy. Instead, Israel justified its settlement policy—the source of

203. Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 226.

204. *Id.*

205. *See* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 75 (explaining that Under a Labour-led Government, Israel's early approach to the settlements was largely, if not officially, premised on the Allon Plan. This favored the retention of areas with low Palestinian populations in the West Bank that would eventually host strategically-located settlements along the Jordan Valley and around Jerusalem.). *See also* SHLAIM, *supra* note 55, at 256–68. *See also* KENNETH W. STEIN, HEROIC DIPLOMACY: SADAT, KISSINGER, CARTER, BEGIN AND THE QUEST FOR ARAB-ISRAELI PEACE 168–69 (1999).

206. *See* HCJ 390/71 Izzat Muhammad Mustafa Duweikat v. Government of Israel (Elon Moreh Case) 34(1) PD (1979) (Isr.). *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 75–100; RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 17–48 (Inst. for Palestine Stud. ed., 1985).

much international opprobrium—as consistent with various provisions of IHL.

Israel presented expansionist interpretations of the occupation framework's military necessity and property provisions. It read, restrictively, the framework's humanitarian clauses and its prohibition on the transfer of civilian populations.[207] These engagements are emblematic of what Aeyal Gross terms the "pick and choose" approach. Israel selectively applies the occupation framework, accepting the application of the Hague Regulations and denying the formal applicability of the Geneva Conventions.[208] This has allowed Israel to treat the West Bank as either occupied territory under military control or as its own territory where civilian laws are applicable to Israeli settlements.[209]

These selective appeals were often justified in tandem with references to the occupation's duration. They could not, however, mollify the principal purpose of the occupation framework—ensuring the inalienability of sovereignty. They failed to assuage criticisms that Israel's presence in the West Bank purposefully impeded Palestinian self-determination. Contemporary manifestations of occupation, traditionally perceived as compatible with self-determination, had altered. Since the era of decolonization, occupation was increasingly framed as a symptom of foreign domination.[210]

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207. *See Do Israeli Settlements Constitute an Obstacle to Peace?*, ISR. MINISTRY FOREIGN AFF. (Dec. 30, 2009), http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements3 (response to the widely-acknowledged interpretation that an occupying power is not permitted to settle its population within occupied territory, Israel reads Article 49(6) of the Fourth Geneva Convention restrictively). *See also Israeli Settlements and International Law*, ISR. MINISTRY FOREIGN AFF. (Nov. 30, 2015), http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx; ISRAEL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 55 (1981).

208. GROSS, WRITING ON THE WALL, *supra* note 7, at 45, 152. *See also* Aeyal Gross, The Dual Legal System, Address at the Palestine-Israel Journal Conference (May 17, 2016), *available at* http://www.pij.org/TheDualLegalsystem.pdf.

209. GROSS, WRITING ON THE WALL, *supra* note 7, at 162.

210. *See* Chinkin, *supra* note 54, at 168. *See also* BENVENISTI, *supra* note 8, at 17.

The High Court of Justice addressed the void between Israel's appeals to specific Hague provisions and the framework's guardianship of self-determination and sovereignty. *In Saliman Tawfiq Ayub et al., v. Minister of Defense et al. (the Beth El Case),* the Court pondered, "how can a permanent settlement be erected on land which was seized for temporary use only?"[211] It accepted the state's position that "civil settlement may continue to exist in that location only so long as the IDF holds the area by virtue of the confiscation order."[212]

The High Court of Justice has confirmed that an occupying power does not assume sovereign prerogative.[213] The Court recognized the corresponding requirement that an occupation must remain temporary. It, however, coupled these pronouncements with the declaration that "this temporariness may be long-term."[214] Israeli officials and the High Court referenced the legal framework's neutral conception of occupation and temporal neglect. They drew upon the prominent interpretative approach. The Court contended, correctly, that "international law does not set a time limit thereto and [the occupation framework] continues as long as the military government effectively controls the areas."[215]

Though this is an accurate reading of the occupation framework, it is ultimately incomplete.[216] The prominent interpretative approach privileges considerations of the jus in bello. By embracing an interpretation that accentuates the framework's durational neglect and uninterrupted relevancy, the requirement of temporality is diminished. Legal considerations, expressing jus ad bellum principles and conveyed by a holistic conception of

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211. *See* HCJ 606/78 Saliman Tawfiq Ayub v. Minister of Defense (Beth El Case) 33(2) PD at 14 (1978) (Isr.), *translated in* HCJ606/78, HCJ 610/78 — Ayub et al. v. Minister of Defednse et al., Judgment, HAMOKED, http://www.hamoked.org/Document.aspx?dID=3860 (last visited Oct. 31, 2018) [hereinafter Beth El Case].

212. *Id.* at 14–15, 17. *See also* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 246.

213. *See* Ja'amait Ascan, *supra* note 146, ¶¶ 8–12.

214. *Id.* ¶ 12. *See also* Koutroulis, *supra* note 53, at 166–67.

215. Ja'amait Ascan, *supra* note 146, ¶ 12. *See* Abu Aita, *supra* note 103, ¶ 10 (noting that the authority of the Military Governor is temporary and lasts for as long as military control is maintained in the relevant area. International law sets no restrictions on duration). *See also* Beit Sourik, *supra* note 162 (The Court reiterated the position that international law does not limit occupation.).

216. Giladi, *supra* note 21, at 284–85.

temporality, are relegated alongside the normative pronouncements that they contain.[217]

Israel increasingly claimed that controversial – and seemingly permanent – aspects of the occupation were, in fact, provisional. This coupled appeals to specific allowances, often under the Hague Regulations, with a limited conception of temporality. Senior IDF officials testified that the construction of the West Bank barrier was a "temporary fence erected for security needs."[218] Settlements were described as non-permanent. Following Israel's 2005 disengagement from the Gaza Strip, a group of settlers challenged a legislative act that required the dismantlement and evacuation of several settlements in Gaza. Again, the High Court stressed the temporary nature of the occupation and the rules imposed by international law. The Court held,

> most Israelis do not have ownership in the land on which they built their homes and businesses in the evacuated area. They acquired their rights from the military commander or from those acting on his behalf. These are not the owners of the property, and they cannot transfer more rights than they have.[219]

These contentions have created a judicially endorsed concept of temporality that privileges a literal notion of non-permanence above transitory characteristics.[220] It is premised upon the prominent interpretation of the occupation framework. This continues to view occupation, regardless of its assumed form, as a factual phenomenon. While practice and commentary largely adhere to this interpretive approach, some have attempted to move the resulting discourse beyond its traditional boundaries. They have forwarded normative interpretations of the occupation framework. These accentuate aspects of the framework that Israel's faciliatory legal engagements sought to indefinitely defer or failed to credibly address.

Aeyal Gross favors a normative conception of occupation. This, Gross contends, is necessary to hold an occupying power accountable.[221] As occupation is both a fact and a norm, it may not continue indefinitely. Recognition of occupation's normative

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217. *Id.* at 247–48, 263–65.

218. Beit Sourik, *supra* note 162, ¶ 29.

219. *See* HCJ 1661/05 Gaza Beach Regional Council v. Knesset of Israel 59(2) PD (2005) (Isr.). This aspect of the decision is recounted and discussed in, DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 245–46.

220. *See generally* Koutroulis, *supra* note 53, at 167.

221. GROSS, WRITING ON THE WALL, *supra* note 7, at 17.

character—based upon the requirement of temporariness and the principle of sovereign preservation—is necessary to maintain an occupation's legitimacy. It is essential to ensure that imposed foreign control may not become indefinite.[222] Gross correctly and convincingly recognizes how the occupation framework, traditionally interpreted, may prolong subjugation. The pivot towards normative content becomes crucial when engagements with the occupation framework preference a factual conception that perpetuates or neglects the occupation regime's sovereign encroachments.

Within the Palestinian territories, the resulting state of affairs prompted Hani Sayed to propose a more radical departure from the occupation framework. Sayed argues that the:

> post Oslo regime of Israeli control over the West Bank and the Gaza Strip is objectionable on normative grounds because it is perpetuating Palestinian subordination and forcing on the Palestinians a particular unviable final settlement of the conflict that is unrepresentative of the political dynamics inside the Palestinian polity in the [West Bank and Gaza Strip], inside the green line and in exile. The challenge is ultimately to imagine a legal framework for understanding the situation in the [West Bank and Gaza Strip] that does not link the Palestinian right to self-determination to the law of occupation.[223]

Although Sayed does not fully articulate what form this framework would assume, he acknowledges the necessity of a normative focus and a shift from the traditional legal approach to occupation. Such a shift has now occurred. Departures from a strict factual conception of occupation increasingly identify the framework's normative structure to assess the legality of particular forms of occupation.

A. The Illegality Approach

Recently, Michael Lynk, the UN's Special Rapporteur to the Palestinian territories, has urged the international community to amend its legal treatment of prolonged occupation. Lynk as-

222. *Id.* at 3–4.

223. Hani Sayed, *The Fictions of the "Illegal" Occupation in the West Bank and Gaza*, 16 OR. REV. INT'L L. 79, 126 (2014).

serted that Israel's occupation has, "become a legal and humanitarian oxymoron: an occupation without end."[224] Lynk cited the prevalence of a factual conception of occupation. His report noted that "the prevailing approach of the international community has been to treat Israel as the lawful occupant of the Palestinian territory. . . ."[225] This, the Rapporteur suggested, had long become an inaccurate legal characterization.[226] The report proposes a means of assessing when an occupation is rendered illegal.[227]

This draws upon a history of past practice. The international community has, on several occasions, reached determinations of illegality.[228] The General Assembly described the Palestinian territories as controlled through an illegal occupation.[229] Since the 1980s, however, these classifications of Palestine's occupation have decreased. Elsewhere though, South Africa's presence in Namibia, Portuguese control of Guinea-Bissau, the Vietnamese invasion of Kampuchea, Iraq's conquest of Kuwait, and the regular presence of Ugandan forces in Congolese territory have been pronounced illegal.[230]

Such pronouncements prompted Yaël Ronen to identify the existence of a juridical category of illegal occupation.[231] Ronen explains that an occupation becomes illegal upon violation of a preemptory norm of erga omnes character.[232] This acknowledgement, however, is not ubiquitous. Yoram Dinstein and Rosalyn Higgins both suggest that there is a strong doctrinal basis for the dismissal of the illegality claim.[233] Dinstein argues that a myth surrounds the legal regime of belligerent occupation. This

224. S. Michael Lynk (Special Rapporteur), *Second Rep. on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 15, U.N. Doc. A/72/43106 (Oct. 22, 2017).

225. *Id.* ¶ 18.

226. *Id.*

227. *Id.*

228. Ronen, *supra* note 178, at 202.

229. *See* G.A. Res. 32/20, *supra* note 3, preamble. *See also* G.A. Res. 33/29, preamble (Dec. 7, 1978); Ronen, *supra* note 178, at 216–21.

230. Ronen, *supra* note 178, at 213–16, 222–26 (for a detailed summary).

231. *Id.* at 203.

232. *Id.* at 206–08 (noting that this is often the prohibition on the use of force or the violation of the obligation to respect the right of peoples to self-determination).

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

implies that a particular occupation is, or in time becomes, illegal.[234] Alluding to the prominent interpretative approach, Dinstein asserts that "far from viewing belligerent occupation as innately unlawful, there is a whole body of international law regulating this state of affairs."[235]

The dismissal of the illegality approach is facilitated by a factual conception of occupation. This moderates the significance of the occupation framework's normative requirements. By preferencing international law's regulation of occupation, by privileging the view that the existence of an occupation is a neutral legal phenomenon, the accompanying discourse remains fixated on the means of management. This diminishes the significance of the occupation framework's fundamental purpose. Yet many of the international community's references to the illegality of a particular occupation fail to articulate their legal reasoning.

The recent report by the Special Rapporteur did, however, present a normative framework to assess the legality of occupation. The report prescribed that an occupant may not: (1) annex territory; (2) that an occupation shall remain temporary and not become permanent or indefinite; (3) that the best interests of the occupied population guides the occupying power's interventions; and (4) that the territory must be administered in good faith and in accordance with international law.[236] An occupying power whose administration breaches these identified principles verges into illegality.[237]

These criteria draw heavily upon the work of Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli.[238] The authors propose identifying "a norm that governs the [occupation] phenomenon, differentiating between a legal and illegal occupation."[239]

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234. DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 34.

235. *See, e.g.*, Yoram Dinstein, *Arab-Israeli Conflict in International Law*, 43 U. NEW BRUNSWICK L.J. 301, 313–14 (1994). *See also* ARAI-TAKAHASHI, LAW OF OCCUPATION, *supra* note 22, at 46.

236. *See* Lynk, *supra* note 224, ¶¶ 27–37, 42 (explaining that these principles are derived from the ICJ's *Namibia* opinion).

237. *Id.* ¶ 64.

238. *Id.* ¶ 27 (noting the additional influence of Aeyal Gross' recent work and Eyal Benvenisti's contention that an occupant who stalls efforts to terminate an occupation would be tainted with illegality. These are described as providing the "intellectual foundation" for the proposed criteria).

239. Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 553 (2005).

They identify three evaluative principles: (1) the notion that sovereignty or title does not vest in the occupying power; (2) the maintenance of public or civil life by the occupying power in accordance with the principle of self-determination; and (3) that occupation must be temporary and may not become either permanent or indefinite.[240] Should the occupying power violate any of these principles, the occupation becomes illegal.[241]

The desire to brand a particular occupation illegal, especially one which is prolonged, reflects a perceived failure of law and an accompanying sense of injustice. It is, however, worth recognizing a practical impediment. Applied to Israel's occupation of the Palestinian territories, a normative assessment of the occupation's legality would likely be resisted by influential states. Mainstream political and legal engagements with the conflict are inherently pragmatic. Security Council Resolution 242, for example, begins by emphasizing the "inadmissibility of the acquisition of territory by war."[242] Its enduring legacy, however, is seen through its entrenchment of the land for peace formula.[243] This provides a highly-incentivized calculation designed to both encourage and guide negotiations.

The international community's exchanges with the Israelis and Palestinians are steeped in the custom, diplomacy, and law that seek to manage this enduring conflict. A normative assessment of legality would likely struggle to influence this dominant approach. As the international community continues to prioritize engagement, declared illegality would presumably be viewed by, amongst others, the United States, the European Union, and the United Kingdom as facilitating isolation. Some may see benefit in such a result. This would, however, be resisted by dominant elements within the international community and, accordingly, raise questions regarding the approach's effectiveness.

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240. *Id.* at 553–55 (locating the "occupation within a normative framework that differentiates between legality and illegality and may both resolve the specific question of the legality of the Israeli occupation and redefine the contours of the legal discourse on occupation").

241. *Id.* at 555, 559, 586 (the authors determine that the "Israeli occupation . . . violates the three basic tenets of the normative regime of occupation and is, therefore, intrinsically illegal").

242. S.C. Res. 242, ¶ 1 (Nov. 22, 1967).

243. *See, e.g.*, WILLIAM B. QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 392 (Berkeley, CA: Univ. of Cal. Press, 2001).

Considerations of effectiveness raise subsidiary questions. It is unclear how a determination of illegality would alter subsequent legal engagements with the occupation regime. It is uncertain whether it would influence the application of the occupation framework. As Yaël Ronen notes, "for the category of illegal occupation to be meaningful, it must have consequences that advance the removal of the illegality."[244] The Special Rapporteur report suggests several such ramifications. These include encouraging member states and judicial bodies to prevent the cooperation of various entities that indirectly sustain the occupation.[245] The report contends that a declaration of illegality would "invite the international community to review its various forms of cooperation with the occupying power as long as it continues to administer the occupation unlawfully."[246]

Ben-Naftali, Gross, and Michaeli suggest that normative results follow a declaration of illegality.[247] Citing the Draft Articles on State Responsibility, they recall that conduct constituting an internationally wrongful act must cease.[248] They concede that law does not replace statesmanship and cannot compel an occupation's termination. The recognition of illegality may, however, affect subsequent legal considerations including the occupying power's recourse to security measures and efforts to frame the illegal occupation as an act of aggression.[249]

Declarations of illegality have been accompanied by the requirement to make reparations. This, too, is consistent with the Draft Articles on State Responsibility.[250] In the *Armed Activities on the Territory of the Congo* case, the ICJ found Uganda liable for its illegal presence in the Democratic Republic of the Congo and required the Ugandan Government to make reparations.[251]

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244. Ronen, *supra* note 178, at 227.

245. Lynk, *supra* note 224, at 65.

246. *Id.*

247. Ben-Naftali et al., *supra* note 239, at 612.

248. *Id. See also* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 88–91 (2001) [hereinafter Draft Articles on State Responsibility].

249. Ben-Naftali et al., *supra* note 239, at 612–13.

250. *See* Draft Articles on State Responsibility, *supra* note 248, art. 31. *See generally* Ronen, *supra* note 178, at 228–32.

251. Dem. Rep. Congo v. Uganda, *supra* note 21, at 257, ¶ 259, 279–83, ¶ 345. *See also* S.C. Res. 674, ¶ 8 (Oct. 29, 1990) (compelling Iraq to compensate Kuwait, "as a result of the invasion and illegal occupation. . ."). *See also* Ronen, *supra* note 178, at 228–29.

This rebuked an illegal occupation. Confirmed illegality, however, is not a harbinger of legal consequence or sanction.

In its Advisory Opinion *on the Legal Consequences of the Construction of a Wall*, the ICJ did not declare the Israeli occupation to be illegal.[252] Nevertheless, it acknowledged numerous violations of the occupation framework.[253] This compelled legal redress. Israel was obliged to comply with and cease violations of its international obligations.[254] It was required to provide reparations, ensure restoration, and offer compensation to those impacted by the Wall's construction.[255] Referencing *Barcelona Traction, Light, and Power Co. Ltd.*, the Court found Israel to have violated international obligations of an erga omnes character.[256] The occupation did not require a declaration of illegality in order for the Court to recognize violations that compel state concern and protection.[257] Where the Special Rapporteur report called upon the international community to review its forms of cooperation with the occupying power, so too did the ICJ's Advisory Opinion. The Court held that states were forbidden from recognizing the situation resulting from the construction of a wall. It stated that they may not render aid or assistance in maintaining the existing status quo. Members of the international community held a positive duty to end impediments, which stemmed from the wall's construction, to Palestinian self-determination.[258]

It is unclear whether the categorization of illegal occupation offers legal import not otherwise present within international law. Violations of the occupation framework inevitably taint prolonged occupation. Prolonged occupation is defined by subsidiary failures to adhere to various aspects of IHL. Common Article 1 of the Geneva Conventions requires High Contracting Parties to "respect and to ensure respect for the present Convention in all circumstances."[259] The general rules relating to compliance with

252. Ben-Naftali et al., *supra* note 239, at 552.

253. Legal Consequences of the Construction of a Wall, *supra* note 190, ¶¶ 114–37.

254. *Id.* ¶¶ 149–50.

255. *Id.* ¶¶ 152–53.

256. *Id.* ¶ 155.

257. *See* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5).

258. Legal Consequences of the Construction of a Wall, *supra* note 190, ¶ 159.

259. Fourth Geneva Convention, *supra* note 34, art. 1.

IHL fully apply to situations of occupation.[260] These are not contingent upon the occupation's legal status.

Significantly, the development of settlements is perhaps the most controversial feature of the occupation. They are almost universally viewed as a blatant violation of the Fourth Geneva Convention.[261] They constitute a grave breach of the Convention and are punishable under the Rome Statute.[262] Again, the severity of these sanctions is not influenced by the occupation's legal status. Recourse to such sanctions, however, is contingent on political and diplomatic will. Appeals to state responsibility, to the non-recognition of wrongful acts, or to reparations do not appear more attainable if grounded in the illegality approach.

Declarations of illegality do, however, carry rhetorical weight. Adam Roberts acutely observed that the categorization of an illegal occupation is "invariably used to refer to an occupation which is perceived as being the outcome of aggressive and unlawful military expansion."[263] Often, though with exception, evocations of "illegality" are devoid of legal specificity. Perception, however, is important. The legitimacy attributed to an occupation regime greatly influences the international community's reaction to the occupant. It affects its treatment of the occupation. A prolonged occupation will inevitably suffer a deficit of legitimacy. Yet the source of illegitimacy that shrouds Israel's occupation of the Palestinian territories is largely derived from the features of the occupation that themselves constitutes violations of the legal framework. The continued expansion of settlements, restrictions on the Palestinian right to self-determination, and the chronic violation of human rights are both sources of illegitimacy and violations of the occupation framework. It is doubtful that labeling the occupation illegal, in its totality, would alter or lessen the legitimacy calculus of a reality that is already widely denounced.

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260. Bothe, *supra* note 40, at 1483.

261. *See, e.g.*, G.A. Res. 66/225, ¶ 4 (Dec. 22, 2011) (167 in favor, 7 opposed, and 6 abstentions).

262. *See* Rome Statute of the International Criminal Court, art. 8(2)(a), July 17, 1998, 2187 U.N.T.S. 900, 37 I.L.M. 999. *See also* Gilles Giacca, *Economic, Social and Cultural Rights in Occupied Territories*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1485, 1513 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

263. Roberts, *Military Occupation*, *supra* note 31, at 293.

Determining when an occupation becomes illegal will remain contested. Whether the implications of such a determination introduce otherwise unavailable legal consequences appears uncertain. It is improbable that the label of illegality will further delegitimize an occupation already perceived as apocryphal. This should not discount the value of the determination. Ben-Naftali, Gross, and Michaeli note that reaching an assessment of illegality – through a normative account of an occupation regime – allows the observer to move beyond obfuscation and blurred boundaries.[264] Israel's myriad engagements with the occupation framework appeal to the indeterminacy that follows from a factual conception of occupation. Infusing normative content into considerations of an occupation regime is essential to gain legal clarity regarding the consequences of the occupying power's efforts to manage prolonged occupation.

Yet, as the ICJ claimed in its *Namibia* Opinion, "the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavor to bring the illegal situation to an end."[265] In accordance, efforts to meet the challenges of prolonged occupation should neither seek complete *disassociation* from the existing legal framework nor attempt to effectively manage the ongoing situation *within* the existing framework. Rather, they should embrace the occupation framework's normative content. These efforts must move to identify a legal basis to encourage the termination of prolonged occupation.

IV. FROM MANAGEMENT TO TERMINATION: AN ALTERNATIVE APPROACH TO PROLONGED OCCUPATION

In the ICJ's 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall*, Judge Elaraby offered a commonsense observation. Tasked with determining the legality of Israeli actions and policies, Judge Elaraby simply concluded, "the only viable prescription to end the grave violations of international humanitarian law is to end the occupation."[266] As the occupier becomes increasingly distant from the interests that led to the occupation's initiation, as the occupied population faces

264. Ben-Naftali et al., *supra* note 239, at 609.

265. Namibia Opinion, *supra* note 176, ¶ 111.

266. Legal Consequences of the Construction of a Wall, *supra* note 190, at 256 (separate opinion of Elaraby, J.).

growing subjugation and the continued suspension of their civil and political rights, the reality of prolonged occupation unavoidably fosters continued violations of international law.

The benevolent occupier may successfully provide basic social or economic rights. The occupation framework, however, is structurally precluded from addressing many of prolonged occupation's inescapable challenges. Consequentially, myriad responses to these challenges attempt to circumvent the framework. Political, diplomatic, and grassroots initiatives often favor ending the occupation. International law, however, remains fixated on an unattainable status quo. Guided by the prominent interpretative approach, these legal appeals endeavor to better regulate the present so as to preserve the past.

Attempts to manage prolonged occupation may be benevolent. They may come in response to undeniable challenges that demand redress. They also, however, promote an interpretation of the occupation framework that perpetuates occupation. This prominent interpretative approach allows an occupying power to strengthen its control of the territory and of the population. Commonly and regardless of intention or motive, responses to prolonged occupation contort the legal framework. They expand its provisions. In response to prolonged occupation, they claim latitude, while pledging fidelity to a factual, *alegal* conception of occupation that may continue indefinitely.

Instead, responses to prolonged occupation must embrace a normative reading of the legal framework. They must situate their engagements, their management efforts, in an interpretative approach that identifies and accentuates a holistic conception of temporariness. This is intended to move from responses that produce perpetual management. The interpretative approach proposed here remains cognizant of both the occupation's duration and the form that it assumes. The proposed interpretative approach harnesses a good faith obligation to terminate prolonged occupation. This must be preferred to interpretations whose silence on the question of duration facilitates the selective employment of international law, the perpetual management of identified challenges, and, by design or by default, the eventual entrenchment of foreign control.

This proposed shift, taken under the framework's auspices and cognizant of its confines, cannot unilaterally terminate occupation. Ben-Naftali, Gross, and Michaeli are correct. International

law does not replace diplomacy.[267] Yet it may facilitate or hinder its efforts. The interpretative approach offered here recognizes that engagements with the occupation framework are premised on a choice. This is between a factual, *alegal* conception of occupation and one that rests on normative acknowledgements regarding the nature and purpose of occupation. Further, it is amongst legal appeals that rely exclusively upon the jus in bello and those that additionally acknowledge the relevancy of the jus ad bellum. Engagements based on the latter interpretation are more likely to constrain the occupation regime. They are better equipped to safeguard the preservation of sovereignty, maintain competing relations, ensure the occupying power's military needs, and protect the occupied population. Legal appeals, grounded in this interpretative approach, are more consistent with the spirit of IHL and the principles espoused by the jus ad bellum.

The proposed good faith approach to enable termination provides an alternative path. This is based on a normative recognition. It places the principle of temporality at the center of the legal regulation of occupation. Adherence to this approach will facilitate three objectives. These collectively strengthen international law's relationship with prolonged occupation. First, it will recognize the significance of the interpretative choices that structure subsequent legal engagements with prolonged occupation. These reflect either an unconstrained or temporal conception of occupation. Such interpretative choices are further grounded within either exclusive appeals to the jus in bello or those engagements that draw upon a wider array of principles that exist in both IHL and the law governing the use of force. Next, it will appeal to the notion of good faith to accentuate the principle of temporariness and the objective of termination. This provides a more efficacious means of structuring and evaluating the legal regulation of prolonged occupation. Finally, it will contribute to a necessary shift in legal discourse. This shift follows the direction of diplomatic appeals by preferencing calls to terminate prolonged occupation above attempts to manage its unconstrained duration.

The interpretative approach proposed here links engagements with the legal framework to the framework's fundamental pur-

267. Ben-Naftali et al., *supra* note 239, at 612–13.

pose—ensuring temporality. Appeals to identified tenets of international law facilitate a reemphasized interpretation of the occupation framework's normative structure. This can moderate the framework's lax temporal dimensions by elevating the innate requirement to enable the occupation's termination. Such a reading of the occupation framework will provide a clear legal basis requiring an occupying power to delimit actions that perpetuate occupation. And it will preference interim initiatives, taken to address the challenges of prolonged occupation, that may stretch the framework's conservationist origins but do not frustrate the requirement to enable termination. This alternative reading of the occupation framework is firmly grounded in international law.

A. Recognition of an Interpretative Choice

Many of Israel's engagements with the occupation framework are conventional. Ostensibly, they draw upon a widely endorsed interpretative approach.[268] This prominent approach and the responses to prolonged occupation stemming from it are, however, the result of a deliberate choice. This exists between readings that emphasize the framework's lax temporal limitation and those that accentuate a holistic conception of temporality.[269] Adherence to the prominent interpretative approach is influenced by the traditional distinction between the jus ad bellum and the jus in bello. Devoid of context, these choices constitute accurate readings. The occupation framework privileges temporariness and fails to ensure precision.[270] In practice, however, these interpretative approaches become antinomies. They allow Meir Shamgar to claim that an occupation may continue indefinitely and they support Lassa Oppenheim's contention that "there is

268. *See* GREENSPAN, *supra* note 133, at 225–26. *See also* FEILCHENFELD, *supra* note 126, at 12 (both for early examples of such endorsements).

269. *See* ICRC Expert Meeting, *supra* note 39, at 74 (for an example of the former). *See also* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 3–4 (1863) (for an example of the latter) [hereinafter Army General Order 100].

270. *See* BENVENISTI, *supra* note 8, at 6. *See also* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 3.

not an atom of sovereignty in the authority of an occupying power."[271]

Shamgar's interpretative choice enabled the legal architecture of Israel's occupation.[272] Distinguishing between "political problems" and the "observance of the humanitarian provisions of the Fourth Geneva Convention," the then Attorney General delineated considerations of the jus ad bellum and the jus in bello.[273] This distinction is firmly grounded within international law.[274] The collective legal treatment of war separates the regulation of the use of force from the means by which force is used. Israel has elsewhere cited the importance of this distinction.[275]

Traditionally, the exclusive legal treatment of the jus ad bellum and the jus in bello ensures that the latter applies regardless of the former's assessment. This was conveyed, in relation to occupation, by an American Military Tribunal at Nuremburg. In the *Hostages Trial*, the Tribunal submitted that:

> international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.[276]

The separate and non-contingent application of the jus ad bellum and the jus in bello was read into Common Article 1 of the Geneva Conventions. This requires High Contracting Parties to

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271. *See* Shamgar, *Legal Concepts*, *supra* note 72, at 43. *See also* Lassa Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 LAW Q. REV. 363, 364 (1917).

272. GROSS, WRITING ON THE WALL, *supra* note 7, at 3.

273. Shamgar, *Observance of International Law*, *supra* note 68, at 266.

274. Giladi, *supra* note 21, at 250.

275. *See* THE STATE OF ISR., THE OPERATION IN GAZA 27 DECEMBER 2008 – 18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS, ¶ 35 (2009).

276. *See* Hostages Trial, *supra* note 21, at 637. *See also* Re Christiansen, 15 I.L.R. 412, 413 (Holland, Special Court of Arnhem, 1948) (The following year a Dutch Special Court ruled, "The rules of international law, in so far as they regulate the methods of warfare and the occupation of enemy territory, make no distinction between wars which have been started legally and those which have been started illegally."). *See also* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 3.

"respect and ensure respect for the present Convention *in all circumstances*."[277] The distinction received explicit recognition in the preamble to the First Additional Protocol. Accordingly, the provisions of the Geneva Conventions and of the Protocol "must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict. . . ."[278]

As Yoram Dinstein explains, "the law of belligerent occupation is a branch of the jus in bello." The rights and obligations attributed to the occupying power are not altered by "the chain of events in which the belligerent occupation was brought about."[279] This is reflective of strong policy considerations.[280] It is grounded within the realist contention that despite war's prohibition, armed conflict continues to occur. War's inevitability compels legal regulation and humanitarian moderation.[281] In practice, however, the distinction between the jus ad bellum and the jus in bello becomes absolute. It is interpreted to require "a total normative separation." The norms of one regime may not affect the "validity, application, compliance, or interpretation of the other."[282]

The duality of international law's relationship with armed conflict is deeply rooted in the legal orthodoxy that regulates occupation. Rotem Giladi has termed this the "total separation paradigm."[283] This distinction "prohibits answering IHL questions by recourse to jus ad bellum issues. It assumes that the jus in bello is neutral or autonomous."[284] Political or diplomatic consid-

277. *See* Fourth Geneva Convention, *supra* note 34, arts. 1–2 [emphasis added] (A similar distinction was derived from the wording of Common Article 2 which held that the "present Convention shall apply *to all cases of declared war* or any other armed conflict which may arise between two or more of the High Contracting Parties. . . ."). *See also* Giladi, *supra* note 21, at 251.

278. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) preamble, June 8, 1977, 1125 U.N.T.S. 3.

279. DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 3.

280. *See* Dem. Rep. Congo v. Uganda, *supra* note 21, at 321, ¶ 58. *See also* Giladi, *supra* note 21, at 257–61. *See also* MARCO SASSÒLI AND ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 103 (2d ed. 2006).

281. Giladi, *supra* note 21, at 258.

282. *Id.* at 262.

283. Giladi, *supra* note 21, at 263.

284. *Id.*

erations regarding the nature or status of the occupation are discounted by engagements grounded in IHL. The legal regulation of occupation is distinguished from politicized considerations that contest the cause, effect, and legitimacy of occupation.[285] The influence of this rigid distinction is evidenced by the general reluctance of humanitarian and legal organizations—those otherwise consumed with tempering and critiquing occupation—to refrain from assessing the occupation's legality. Accordingly, legal approaches deemphasize temporality's significance. The pursuit and fulfillment of termination becomes the concern of the political sphere.

Strict adherence to the total separation paradigm is, however, an interpretative choice. It facilitates the prominent approach to prolonged occupation. Grounded in the jus in bello, this preferred reading portrays occupation as fact. Subsequent considerations fixate on duration but neglect the fundamental principles that are compromised when the character of an occupation alters to become a form of quasi-permanent control. Accompanying legal engagements neglect the occupation's origins. They do not engage with causes of occupation or those influences that contribute to its continuation. These factors—queries concerning the occupation's duration—remain within the political sphere. They are beyond the reach and relevancy of IHL. As the ICRC expert panel noted, since IHL did not impose formal limits on the occupation's duration, it is incapable of preventing prolonged occupation.[286] An unconstrained notion of occupation supersedes temporariness. It becomes the function of international law to manage, not resolve, occupation.

The implications of this interpretative choice neglect the primacy of temporality. They negate its prominence within the occupation framework and they abandon its relevance to foundational considerations of the jus ad bellum. These are unnecessary concessions. While aspects of prolonged occupation will demand management, it need not come at the expense of broader considerations. Though the occupation framework is correctly assumed to form part of the jus in bello, this does not discount the continued significance of the jus ad bellum.

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285. *Id.* at 264.

286. ICRC Expert Meeting, *supra* note 39, at 74.

Commentators have long-acknowledged the simultaneous relevancy of the jus ad bellum and the jus in bello.[287] Christopher Greenwood notes, "while the former will always operate before the latter comes into play, once hostilities have commenced it is necessary to consider both. The relationship between them thus becomes of considerable importance."[288]

Rotem Giladi extends this reasoning to the case of occupation.[289] While the applicability of the occupation framework continues without distinction, "jus ad bellum considerations . . . play an important role in bringing about and shaping specific cases of occupation."[290] Giladi convincingly illustrates how the phenomenon of occupation requires reference to the jus ad bellum. The occupation framework is bound in duality. It is concerned, "like other IHL norms, with the humane treatment of individuals. It also uniquely addresses questions of governance and sovereignty."[291] Accordingly, the norms of occupation are reliant upon the norms of the jus ad bellum.[292] This reliance is reflected in the occupation framework's prohibition of annexation.[293] As Giladi explains, "the prohibition on annexation is still implicit in the transient, *alegal* nature of the occupation, but at the same time also serve to ensure the preservation of world order by removing one legal incentive for war."[294]

An interpretative choice that preferences a factual conception of occupation neglects the centrality of jus ad bellum norms. Responses to prolonged occupation that favor management while remaining silent on temporality surrender a principal function of the occupation framework. This implied deference is unnecessarily dismissive of the position that temporariness holds within the occupation framework and of the centrality that jus ad bellum norms claim both within general international law and for the legal regulation of occupation. Instead, a revised interpretative approach to the legal treatment of prolonged occupation

287. *See generally* Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221, 222 (1983) [hereinafter Greenwood, *Jus ad Bellum Jus in Bello*]. *See also*, Giladi, *supra* note 21, at 266–67.

288. Greenwood, *Jus Ad Bellum Jus In Bello*, *supra* note 287, at 222.

289. Giladi, *supra* note 21, at 266–85.

290. *Id.* at 268.

291. *Id.* at 298.

292. *Id. at 268.*

293. Bothe, *supra* note 40, at 1461.

294. Giladi, *supra* note 21, at 274.

should opt to accentuate the principle of temporariness and the subsequent requirement to enable occupation's termination.

B. Accentuating Temporariness and a Good-Faith Standard to Terminate Prolonged Occupation

On the eve of the occupation's fifth decade, a Military Appeals Court in the West Bank ruled that it possessed the authority to review the compatibility of military orders with the law of occupation. The Court pronounced that the occupation framework was "the grundnorm of the occupation regime, and judicial review was the only check against [the] unrestrained exercise of power by the military commander."[295] Elsewhere, Martti Koskenniemi described the High Court of Justice's reliance upon the principle of proportionality as constituting "the Grundnorm against which the activities of the occupation authority must be measured."[296]

Identifying a basic norm reflects the interpreter's conception of what the occupation framework should achieve. It constitutes how the framework should be understood. To be effective—to accurately capture the spirit of IHL and the purposes of the jus ad bellum—this determination must not be influenced by a factual, indefinite conception of occupation. Instead, the proposed good faith approach to enable termination offers an alternative foundation. It is structured around two interconnected elements: the understanding that occupation constitutes a provisional state and the principle of good faith. These two factors collectively support the proposed interpretative shift. They identify and accentuate the principle of temporariness and invoke fundamental norms of international relations.

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295. *See* Mil. Appeal 5/06 Military Court of Appeals (Judea & Samaria), Eran Schwartz v. Commander of IDF Forces in the Religion (Sept. 17, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.), *translated in* Eran Schwartz v. the Commander of IDF Forces in the Region, at 11–12, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=61C330FB85F051E1C12575BC00429F83&action=openDocument&xp_countrySelected=IL&xp_topicSelected=GVAL-992BUG&from=state (last visited Oct. 31, 2018). *See also* BENVENISTI, *supra* note 8, at 326 (referring to the Appeals Board decision).

296. Martti Koskenniemi, *Occupied Zone — A Zone of Reasonableness?*, 41 ISR. L. REV. 13, 18 (2008).

Temporality's identification is not innovative. The notion that occupation constitutes a provisional state remains undisputed.[297] Article 55 of the Hague Regulations holds that an occupying power assumes the status of a temporary administrator.[298] With reference to the objectives of the conservationist principle and the purposes of Article 43, the ICRC Commentaries define an occupying power as "merely being a de facto administrator."[299] The 2015 Clapham Commentaries simply note that "occupation is a temporary situation, not equivalent to annexation."[300] Eyal Benvenisti surmises that "because occupation does not amount to sovereignty, the occupation is also limited in time and the occupant has only temporary managerial powers, for the period of time until a peaceful solution is reached."[301]

The prominent normative approaches proposed elsewhere recognize temporariness's centrality. This is reflective of temporality's ubiquity. Ben-Naftali, Gross, and Michaeli acknowledge that "the temporary, as distinct from the indefinite, nature of occupation is thus the most necessary element of the normative regime of occupation."[302] The consequences of the approach proposed here, however, diverge from the foundational normative and non-normative approaches identified elsewhere.

The abovementioned approaches associate the failure to ensure temporality with declared illegality. The proposed approach, however, imposes a positive obligation—the enablement of termination. It articulates a means of shifting the international legal discourse from the prominent, management-focused approach to an understanding that better responds to the altered form of control that prolonged occupation represents. Referencing the Draft Articles on State Responsibility, the illegality

297. *See* Orna Ben-Naftali, *PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 129, 159 (Orna Ben-Naftali ed., 2011). *See also* Malcolm Shaw, *Territorial Administration by Non-Territorial Sovereigns*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 369, 381 (Tomer Broude & Yuval Shany eds., 2008).

298. *See* Hague Convention (IV), *supra* note 5, art. 55 (The Article governs the use of private property.).

299. *See* PICTET, COMMENTARY, *supra* note 186, at 273.

300. *See* Bothe, *supra* note 40, at 1460.

301. *See* BENVENISTI, *supra* note 8, at 6.

302. *See* Ben-Naftali et al., *supra* note 239, at 599.

approach notes the obligation to cease wrongful acts.[303] While this is a compelling legal argument, to extend its relevancy beyond a particular, recurring violation of the occupation framework, requires a holistic understanding of temporality.

The proposed good faith obligation to enable termination provides this. It acknowledges that temporality is defined both by duration and the character of the occupation. The illegality approach offers a more limited notion of temporality that is linked to the occupation's duration. Ben-Naftali, Gross, and Michaeli call upon the international community to establish a clear durational limitation. An occupation exceeding one year, they suggest, be transferred to an international authority.[304] Further, the qualification of an occupation as "illegal" does not affect the continued application of the occupation framework.[305] This maintains the risk of perpetual management. The proposed approach provides a means of coupling the employment of the occupation framework with a holistic conception of temporality that is conscience of and responsive to the form that the occupation has assumed.

Temporality's prominence reflects both political and humanitarian purposes. These are crucial features of international law's relationship with occupation. They are expressive of the norms governing relations amongst states and between nations and individuals. Accordingly, employment of the occupation framework must embrace this holistic conception of temporariness. It must harness these grander meanings and preference a reading that facilitates the objective of termination. Engagements with the occupation framework, in response to prolonged occupation, must accentuate both this principle and reflect its origins and purposes.

303. *See* Draft Articles on State Responsibility, *supra* note 248, art. 30. *See also* Ben-Naftali et al., *supra* note 239, at 599.

304. *Id.* at 613.

305. *Id.* at 612.

1. The Political and Humanitarian Purposes of the Occupation Framework Are Premised on a Holistic Notion of Temporality

The legal construct of occupation developed as a rejection of conquest.[306] International society discounted the validity of sovereign title that historically followed debellatio. Occupatio bellica became an intermediate status. It recognized a military authority's territorial control and began establishing a temporary regulatory framework. This framework provided that an occupying force would administer the territory "on a provisional basis, but has no legal entitlement to exercise the rights of the absent sovereign."[307]

The emergent principle—that "belligerent occupation is in essence a temporary condition in which the powers of the belligerent occupant are not without limit"—was initially codified in Francis Lieber's *General Order No. 100*.[308] Further articulation and codification followed. A host of military manuals acknowledged a temporary conception of occupation. This temporal conception informed, and was formalized by, the international lawmaking initiatives of the mid-nineteenth and twentieth centuries.[309] These efforts continued to premise occupation's regulation upon the notion of a durational limitation. They infused both political and humanitarian objectives into international law's relationship with the occupation of foreign territory.[310] Temporality undergirds initiatives to both preserve sovereignty and to protect a vulnerable population subject to foreign control.

Sovereignty's divergence from the historical right to conquest necessitated the construction of a provisional phase. This existed during the period between when a foreign state established control of a hostile's territory and when the belligerents completed a peace treaty determining the territory's status. This tempo-

306. *See* Arai-Takahashi, *Preoccupied With Occupation*, *supra* note 5, at 54–56. *See also* SHARON KORMAN, THE RIGHT TO CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE (1988).

307. Bhuta, *supra* note 9, at 725–26.

308. *See* Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 87 (2003). *See also* Army General Order 100, *supra* note 269, at 4.

309. Imseis, *supra* note 308, at 87–92.

310. As such, these alternative purposes may be conveyed, as in tension. *See* Cohen, *supra* note 28, at 502–20 (contrasting a humanitarian conception of the law of belligerent occupation with a realist or Schmittian reading of the law).

rary state was to ensure that "de facto power did not immediately translate into de jure sovereignty, conquest, and subjugation."[311] Though the occupation framework's origins reflected the desire to preserve European order, the notion that occupation constituted a provisional, de facto phenomenon privileged sovereign preservation.

The prioritization of European order waned. Global initiatives structured the community of nations around the principles of sovereign equality and the prohibition of the acquisition of territory by force.[312] Temporality assumed a constitutive function. It facilitated many of the foundational principles of international order. These principles received expression within the occupation framework. Prominently, temporality is reflected in the framework's prohibition of annexation.[313] This remains part of customary international law and receives articulation within Article 2(4) of the UN Charter and in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Amongst States.[314]

Temporality is reflected in the rules regulating an occupier's authority. These rules establish the occupier as an administrator whose power is derived from its factual presence—not its sovereign entitlement.[315] The requirement to preserve existing legislation—articulated within Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention—both constitutes and is reliant upon the principle of temporality.[316]

Engagements with prolonged occupation that accentuate temporality better represent the political objectives conveyed within the occupation framework. They are reflective of fundamental international norms. Temporality's relationship with and sup-

311. *Id.* at 503.

312. *See* U.N. Charter art. 2, ¶¶ 1, 4. *See also* G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

313. Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L. L. 580, 582–85 (2006) [hereinafter Roberts, *Transformative Military Occupation*].

314. *See* U.N. Charter, art. 2, ¶4. *See also* Declaration on Friendly Relations, *supra* note 312.

315. *See* Roberts, *Transformative Military Occupation*, *supra* note 313, at 585–86.

316. *Id.* at 586–89.

port of these norms go beyond political considerations and structural components of the jus ad bellum. It is expressive of the occupation framework's humanitarian purposes. Temporality constitutes a requisite condition of the framework's jus in bello function.

The occupation framework's humanitarian purpose has become paramount. Article 4 of the Fourth Geneva Convention establishes the status of protected persons.[317] The International Criminal Tribunal for the Former Yugoslavia described the Convention's "object and purpose" as safeguarding those individuals "who do not enjoy the diplomatic protection, and . . . are not subject to the allegiances and control, of the State in whose hands they may find themselves."[318] Humanitarian requirements are imbued throughout the Convention.[319] Benvenisti remarked that "the very decision to dedicate the Fourth Geneva Convention to persons and not governments signified a growing awareness in international law of the idea that peoples are not merely the resources of states, but rather that they are worthy of being subjects of international norms."[320]

These developments, however, proceeded sequentially. The Hague Regulations made minimal reference to explicit humanitarian requirements.[321] Nevertheless, the early willingness to deny an occupying power sovereignty forbade foreign control from becoming a means to subjugate a local population. The limitation of the right to conquest, through the temporal conception of occupation, accompanied the increasing humanization of conflict. Gregory Fox describes this lineage. The law governing occupation, "emerged in the late eighteenth century as a humanizing trend in the law of war, modifying a state's previously unencumbered right to subjugate conquered foreign territories."[322] Though the use of force maintained legitimacy, these modifications tempered a foreign power's rule. By establishing occupation as a temporary phenomenon, contingent upon a negotiated

317. Fourth Geneva Convention, *supra* note 34, art. 4.

318. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment, ¶ 168 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). *See also* Cohen, *supra* note 28, at 509–10.

319. Fourth Geneva Convention, *supra* note 34, arts. 27–33.

320. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 106 (1st ed. 1993) [hereinafter BENVENISTI 1st ed.]. *See also* Cohen, *supra* note 28, at 508.

321. *Id. See also* Meron, *supra* note 29, at 245–46.

322. *See* Fox, *supra* note 10, at 228.

agreement, regulatory attempts endeavored to modify the "harsh but common consequences of foreign control over territory."[323]

The humanitarian purpose of the occupation framework evolved in tandem with the legal regulation of war. Now, an occupying power assumes responsibility for an array of humanitarian considerations. These directly influence the lived experiences of the occupied population. Corresponding humanitarian considerations are privileged by contemporary readings of the occupation framework.[324] The management approach, ostensibly, endeavors to ensure humanitarian requirements. It seeks to fill a void. This exists when the needs created by an occupation's duration exceeds the allowances that an occupying power may take to fulfill its humanitarian obligations. The ability of the occupied population to fully address their humanitarian needs—to fulfill their political, economic, and cultural wants through the realization of self-determination—becomes contingent upon the principle of temporality.[325]

The occupation framework embodies international norms. It sets particular objectives. These are widely acknowledged. They contend that occupation is not equivalent to annexation. The legal framework imposes duties of good governance and humanitarian concern upon the occupying power. And it provides the occupying power with specified allowances to ensure its military's wellbeing and to provide effective administration of occupied territory.[326] Again, each of these principles are contingent upon temporality.

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323. *Id.*

324. *See generally* Meron, *supra* note 29.

325. *See* S.C. Res. 1483, *supra* note 83, preamble (This emphasized "the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly. . . ."). *See also* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 319 (1995); Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L.R. 19, 36 (2003).

326. *See, e.g.*, Bothe, *supra* note 40, at 1460. *See also* BENVENISTI, *supra* note 8, at 6–7; EYAL BENVENISTI, MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (s.v. "occupation, belligerent," 2009); Ben-Naftali et al., *supra* note 239, at 554–55.

The purpose here is not to reiterate these principles. Their existence is not in doubt. The purpose here, instead, is to preference an interpretation of the occupation framework that accentuates a holistic, not merely durational, notion of temporality. It is to disentangle prolonged occupation's treatment from the prominent interpretative approach. Attempts to manage prolonged occupation continue to cite, or are premised upon, an interpretation that emphasizes the absence of a firm durational limitation. Engagements that appeal to the management approach do not question whether initiatives taken under the framework's auspices are conducive with enabling the occupation's termination. They deemphasize a central and constitutive purpose of the occupation framework—ensuring an occupation's temporality. For if an occupation is to constitute a temporary state, if sovereignty will revert, if the occupying power is to serve as a trustee and not a sovereign, then the occupation must end. While the framework may be silent on the chronology of such termination—and an exclusive focus on the question of duration may support the position assumed by Yoram Dinstein, the ICRC expert meeting, and others—to permit that such silence equates to or facilitates the implied permanence of prolonged occupation would render the entire framework an absurdity.

2. Termination Is the Necessary Corollary of Temporality

When the Namibian Mandate terminated, South Africa was deprived of the international recognition that legitimized its control as a Mandatory Power. The Mandate's termination, however, did not compel South Africa to vacate the foreign territory.[327] The proposal presented within these pages does not purport to exact occupation's termination. It is mindful of international law's limitations.[328] The proposal recognizes that the occupation framework cannot coerce an occupying power to end its prolonged control of foreign territory when a predetermined threshold is reached.

As noted, such determination is not suited to a fixed chronological scale.[329] Yet, when the situation on the ground becomes

327. Ronen, *supra* note 178, at 215–16.

328. Boon, *supra* note 12, at 110–12.

329. There should, of course, be no doubt as to whether Israel's presence within the West Bank satisfies this classification.

one where neither The Hague Regulations nor the Fourth Geneva Convention can competently protect sovereignty or effectively balance the relationship between the occupier and the occupied, resulting legal engagements must recognize that the occupation has or risks becoming indefinite. The proposed approach wishes to reject the creeping prevalence of an indeterminate conception of occupation. By moving from a factual, unconstrained notion of occupation, this favored interpretation links the principle of temporality to its inevitable corollary, termination.

The requirement to cease unlawful activity is firmly grounded in international law. The Draft Articles on State Responsibility compel an offending party to end unlawful activity and provide assurances of non-repetition.[330] This suggests that a state, occupying foreign territory without legal justification, is required to immediately terminate the occupation.[331] Calls for cessation are often contingent upon the perception that an occupation is itself illegal.[332] Yaël Ronen illustrates, however, that such declarations are themselves predicated upon acknowledgement of violations that affect the constitutive nature of the occupation regime. Accordingly, "the cessation of a violation necessarily means termination of the occupation."[333]

In its *Namibia* opinion, the ICJ required South Africa to withdraw from and end its occupation of the administered territory. Again, this decision was reliant upon the Court's determination of illegality.[334] Similarly, the international community often predicates calls to terminate occupation on the assumption of illegality.[335] A declaration that an occupying power is obliged to end its territorial control follows, as Benvenisti suggested, the

330. *See* Draft Articles on State Responsibility, *supra* note 248, art. 30.

331. Olivier Corten, *The Obligation of Cessation*, *in* OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY 545, 545 (James Crawford et al. eds., 2010).

332. Ariel Zemach, *Can Occupation Resulting from a War of Self-Defense Become Illegal?*, 24 MINN. J. INT'L L. 313, 316–17 (2015).

333. Ronen, *supra* note 178, at 228.

334. Namibia Opinion, *supra* note 176, ¶ 133. *See also* S.C. Res. 301, ¶ 6 (Oct. 20, 1971); Ronen, *supra* note 178, at 228.

335. Ronen, *supra* note 178, at 228. *See also* G.A. Res. 3061 (XXVIII), ¶ 3 (Nov. 2, 1973); S.C. Res. 661, at 19, 20 (Aug. 6, 1990).

burden to resolve the underlying political stalemate.[336] This determination is influenced by the perceived legitimacy of the occupation.

Such perception, however, does not reactively prompt a declaration of illegality. The international community has not reverted to the determinative language that the General Assembly employed in the late 1970s when describing the Israeli occupation.[337] This has prompted the Special Rapporteur's recent initiative to establish a framework assessing occupation's legality. As noted, the Rapporteur's report accurately observed that "the prevailing approach of the international community has been to treat Israel as the lawful occupant of the Palestinian territory."[338]

The interpretative approach presented here separates the objective of termination from assessments of legality. This distinction is motivated by the abovementioned apprehensions concerning the illegality approach.[339] The proposed approach does not deny that an occupation may be, or may become, illegal. It instead recognizes that a determination of illegality, within a context as fraught as Israeli-Palestinian relations, is inseparable from politics. To move beyond the political resistance that would accompany such a declaration, to bypass the pragmatic challenges of selecting which individuals or what mechanisms possess the authority to render such a determination, the proposed approach embraces the more modest standard of *enabling* the occupation's termination. This requirement is associated not with the occupation's legal status, but with its duration and form.

Despite the prevalence of the management approach, the requirement to enable an occupation's termination is indicative of international will. Notwithstanding the common association between termination and illegality, calls to conclude occupation are not dependent on the occupation's legal status. Following the U.S. and British occupation of Iraq, the Security Council held that the Iraqi right to self-determination was contingent upon

336. BENVENISTI, *supra* note 8, at 244.

337. *See* G.A. Res. 32/20, *supra* note 3, preamble. *See also* G.A. Res. 33/29, *supra* note 229, preamble.

338. Lynk, *supra* note 224, ¶ 18.

339. *See supra* Part III.A.

the occupation's expeditious termination.[340] Termination thus becomes the necessary fulfillment of the occupation framework's fundamental purposes. It is the prerequisite of the principle pacta sunt servanda.[341]

Linking the enablement of termination to temporality provides an objective. If an occupant is determined to violate international law, it provides a subsequent step—a means of redress—that is not immediately conveyed by the illegality approach. Devoid of a legal determination, it acknowledges that termination is not merely a means to rectify a legal wrong. It is a positive requirement compelled by the occupation framework's normative purpose. This durational limitation is effectively absent from the prominent interpretative approach, which maintains that nothing under IHL prevents an occupant from embarking on a long-term occupation.[342]

Temporality's dependency on termination reiterates an inescapable truth. This holds that the principles conveyed by the occupation framework—preserving sovereignty, safeguarding local needs, ensuring self-determination—prevent an occupation from becoming prolonged. These principles are contingent on the basic norm of temporality and the fulfillment of this primary requirement compels termination. To avoid perpetual management, to better capture the spirit of IHL, an amended interpretative approach that accentuates temporality and preferences termination may derive faciliatory support from the principle of good faith.

3. The Relevance and Potential of the Principle of Good Faith

In 1973, largely in response to Israel's continuing occupation of the Palestinian territories, the General Assembly passed Resolution 3171. The resolution supported the rights of peoples living under foreign occupation to "regain control of their natural resources."[343] Eyal Benvenisti remarked that Resolution 3171 conveyed that an occupying power may not purposefully delay a

340. *See* S.C. Res. 1483, *supra* note 83, preamble. *See also* Lynk, *supra* note 224, ¶ 32.

341. Corten, *supra* note 331, at 545–46.

342. ICRC Expert Meeting, *supra* note 39, at 74.

343. G.A. Res. 3171, (Dec. 17, 1973).

conflict's peaceful settlement. It may not perpetuate occupation.[344] The occupant, Benvenisti noted, "has a duty under international law to conduct negotiations in good faith for a peaceful solution."[345]

The second element of the proposed interpretation appeals to the principle of good faith. This reinforces an amended normative approach that views temporality as a basic norm and termination as an objective imbued throughout the occupation framework. Within the Israeli-Palestinian context, the notion of good faith often appears as a rhetorical device. It assumes the form of a loaded allegation that both parties enthusiastically accuse the other of lacking.[346]

Alongside this popular usage, the principle of good faith has become an evaluative criterion. It provides a standard of compliance against which an occupation's legality is assessed. Proponents of the illegality approach link determinations of malfeasance to particular violations of the occupation framework.[347] Commonly, these violations amount to de facto annexation. They manifest through the refusal to "engage in good faith negotiations toward ending the occupation."[348] Benvenisti has long contended that an occupant, acting in bad faith to stall an occupation's termination, becomes an aggressor and is tainted with illegality.[349]

The present invocation of good faith, however, assumes a more fundamental purpose. It protects against the misuse of international law. It ensures that legal interpretations and engagements with the occupation framework maintain consistency with the framework's ostensible purposes.[350] Good faith is firmly

344. BENVENISTI, *supra* note 8, at 245.

345. *Id.*

346. *See, e.g.*, JAMES L. GELVIN, THE ISRAEL-PALESTINE CONFLICT: ONE HUNDRED YEARS OF WAR 240–41 (2007) (for a broader use of the notion of good faith in the formal peace talks between Israel and the Palestinians).

347. *See* Ben-Naftali et al., *supra* note 239, at 553–55. *See also* Ronen, *supra* note 178, at 206–08; Lynk, *supra* note 224, ¶¶ 27–37.

348. Zemach, *supra* note 332, at 316.

349. *See* BENVENISTI 1st ed., *supra* note 320, at 215. *See also* BENVENISTI, *supra* note 8, at 245–46.

350. This foundational legal requirement is expressed through the rule, pacta sunt servanda, and is codified in Article 26 of the Vienna Convention on the Law of Treaties. This is described as a cornerstone of international relations. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. *See also* MARK E.

rooted in international law and underpins many preeminent legal rules.[351] It is expressive of the international community's desire to preserve order and avoid arbitrariness and chaos.[352] In its *Nuclear Tests Case*, the ICJ explained that, "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."[353]

The good faith principle governs the conduct of international negotiations. It requires, "negotiating in a way that is likely to yield an agreement."[354] The ICJ further elucidates. The Court has explained that good faith negotiations must demonstrate willingness to contemplate alternative proposals, avoid preconditions, and accept assistance from third-parties.[355] This is supportive of the view, expressed by Benvenisti and others, that bad faith conduct compels illegality. However, the good faith obligation to enable termination does not purport to oblige negotiations. It does not assess the legality of an occupation regime. Instead, this proposal recognizes that responses to the challenges posed by prolonged occupation are the result of interpretative discordance between a temporal understanding of occupation

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VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 363 (2009).

351. The duty to act in good faith is found in Article 2(2) of the U.N. Charter, Articles 26 and 31 of the Vienna Convention, and in the preamble to the Declaration on Friendly Relations. *See* U.N. Charter, art. 2, ¶ 2; Vienna Convention, *supra* note 350, arts. 26 & 31; Declaration on Friendly Relations, *supra* note 312, preamble. *See* Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. Rep. 9, 48 (Jul. 6) (separate opinion of Lauterpacht, J.) (Judge Lauterpacht held that, "Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."). *See* Lynk, *supra* note 224, ¶ 35 (The Special Rapporteur report noted that the principle of good faith is a cornerstone principle of the international legal system and of all legal relationships in modern international law).

352. *See* Steven Reinhold, *Good Faith in International Law*, 2 BONN RES. PAPER PUB. INT'L L. 1, 2 (2013).

353. Nuclear Tests (N.Z. v. Fr.), Judgement, 1974 I.C.J. Rep. 253, ¶ 49 (Dec. 20).

354. Barry O'Neill, *What Does it Mean for Nations to "Negotiate in Good Faith"?*, CTR. INT'L SECURITY & COOPERATION, STAN. U. 2 (2001), *available at* http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf.

355. *Id. See also* The Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 142 (Sept. 25).

and one that accentuates the framework's failure to assert a firm durational limit. It is between a factual and a normative conception of occupation. And it contests an *alegal* and an illegal vision of the occupation regime.

Each interpretative account is premised upon a particularized reading of the occupation framework. Despite temporality's incontestability, despite its embodiment and expression of the occupation framework's constitutive norms, it continues to be relegated through an interpretative approach that views occupation as an unconstrained fact. A reading of the occupation framework that appeals to the requirements of good faith is better situated to emphasize temporality's preeminence. It better facilitates an interpretative approach that, recalling Article 31 of the Vienna Convention, accentuates the "object and purpose" of the occupation framework.[356] The proposed approach creates a link between a treaty's interpretation and its performance.[357] It clearly articulates the claim, established within the occupation framework, that temporality is contingent upon termination. Such an interpretation offers a more purposeful reading of the occupation framework and a more efficacious means of engaging with the myriad challenges posed by prolonged occupation.

4. Ensuring an Effective Safeguard Against Misuse

The desire to move from a factual, unconstrained notion of occupation and the corresponding management approach does not discount the challenges posed by prolonged occupation. These challenges are real and often urgent. As noted, occupations traditionally conclude when the fortunes of war are altered or upon a negotiated agreement.[358] The good faith obligation to enable termination seeks to facilitate the latter. In the West Bank, the first traditional means—the changing fortunes of war—is improbable due to Israel's disproportionate military strength. Equally, it is undesirable in a region plagued by instability and violence. Yet it is these regional realities that heighten the risk of an already prolonged occupation continuing indefinitely. An occupying power, disinclined to withdraw from territory and harboring security-based apprehensions, is unlikely to make

356. Vienna Convention, *supra* note 350, art. 31.

357. VILLIGER, *supra* note 350, at 425.

358. Roberts, *Prolonged Occupation*, *supra* note 11, at 47. *See also* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 271–72.

concessions that stray from its immediate interests. An occupied population, politically divided and hamstrung by ineffective leadership, will struggle to represent its constituent's objectives.

The approach proposed here presupposes that temporality compels termination. The posited interpretation is immediately concerned with ensuring that the legal framework is not interpreted to facilitate occupation or resigned to its perpetual management. It recognizes that an adjustment to the occupation framework will not usurp geopolitical and regional dynamics and simply compel an occupation's termination. Thus, certain management is inescapable. It is a required means of ensuring the interests of a population bereft of political and economic autonomy. It is obliged by the occupation framework.[359] In accordance, the enablement of termination becomes an accompaniment to and an objective of management initiatives. The proposed interpretative shift intends to alter understandings of the legal framework so that termination moves from the background to the forefront of relevant legal engagements. Thus, the objective of termination becomes a bulwark against initiatives—masquerading as management efforts and compelled by the occupation's duration—that frustrate, rather than facilitate, the principle of temporality.

The proposed imposition of a check is not novel. Often, however, the prescribed restraint accompanies engagements with prolonged occupation that adhere to the prominent interpretative approach. This permeates much of the academic literature. The aforementioned "inherent dilemma"—concerning the latitude required to effectively treat prolonged occupation—often fails to link purported management initiatives with the principle of temporality or the obligation to terminate occupation.

In as early as 1942, E.H. Feilchenfeld argued that an occupying power may disregard the conservationist principle by providing "appropriate justification.[360] This would provide the occupying power with what Feilchenfeld believed was the necessary latitude to address the economic challenges of prolonged occupation. Yoram Dinstein proposed a litmus test. It is axiomatic, Din-

359. *See* BENVENISTI, *supra* note 8, at 6. *See also* Roberts, *Military Occupation*, *supra* note 31, at 295 (Both Benvenisti and Roberts capture this purpose of the occupation framework by defining the occupying power as serving as a trustee for the limited duration of the occupation.).

360. *See* FEILCHENFELD, *supra* note 126, at 89.

stein held, that an occupying power requires increased legislative latitude to effectively manage prolonged occupation.[361] Misuse, however, could not be discounted. If the occupying power truly requires further legislation to meet the needs of the occupied population, if it endeavors to successfully manage the prolonged occupation, it must, Dinstein concluded, exhibit a similar (legislatively enacted) concern for its own population.[362] In *Abu Aita*, the High Court of Justice adopted Dinstein's litmus test.[363] The Court held that imposed initiatives, ostensibly intended to benefit the local population, were valid if "the military government is filled with the same concern in regard to its own people and applies the same measures taken in the area of military government in its own area."[364]

Subsequent efforts to both increase and regulate the legislative latitude received by an occupant maintained fidelity to the prominent interpretative approach. These initiatives rarely linked the proposed means of preventing abuse with the principle of temporality. Adam Roberts, for example, acknowledged the need to amend the occupation framework. Such alterations would, however, be susceptible to misuse. To safeguard against potential abuse, Roberts favored limiting particular allowances while extending only those deemed necessary to effectively manage prolonged occupation.[365]

Similar proposals followed. The scholarly treatment of prolonged occupation offered an array of regulatory methods. These intended to both better manage occupation and safeguard against legislative overreach by the occupying power. Marco

361. *See* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 120.

362. *Id.* at 121. *See also* Yoram Dinstein, *The Legislative Power in Administered Territories*, 2 TEL AVIV L. REV. 505, 511 (in Hebrew) (1972); BENVENISTI, *supra* note 8, at 92 (In accordance, the existence of a law in the occupant's own territory will provide evidence of the lawfulness of a similar law's introduction within the occupied territory. Both Dinstein and Benvenisti note, however, this may only serve as a prima facie test that requires specific examination within a particular case.).

363. *See* Abu Aita, *supra* note 103, at 5, 135–36.

364. *Id.* (Justice Shamgar, delivering the judgment, concluded, as had Dinstein, that this criterion was not exhaustive. This reflected the belief that circumstances may arise where "conditions in a territory and special circumstances demand legislative steps not required at the time, or at all, in the home country.).

365. Roberts, *Prolonged Occupation*, *supra* note 11, at 51, 53.

Sassòli proposed appealing to the Security Council.[366] Eyal Benvenisti suggested a consultative process that solicits local participation and input.[367] While Benvenisti's response lends a degree of democratic legitimacy to the management process, others seek a broader international mandate. Richard Falk has proposed the development of an international convention. If an occupation continues for ten years, the convention would direct the management of the prolonged occupation and safeguard local interests.[368] Similarly, Brian Walsh and Ilan Peleg call for the creation of an "occupation document." To effectively manage prolonged occupation, the proposed mechanism would identify imposed foreign control as a "special legal condition which requires specific legal doctrine designed to meet the needs of an occupation."[369] Effective management is derived from human rights law. This, according to Walsh and Peleg, balances protections that safeguard the local population and the occupier's right to pursue genuine security interests.[370]

Other proposals indirectly allude to temporality's importance. Most often, though, these fail to reference the requisite criterion of termination. Proponents of a self-determination-based standard, such as Alain Pellet, acknowledge the discordance between the legal framework and the challenges posed by prolonged occupation. This discordance compels initiatives to better facilitate effective management. Pellet asserts that "humanitarian" responses, necessary to address these challenges, are lawful to the

366. To prevent abuse, the UN body would evaluate and authorize necessary departures from the occupation framework to ensure the required management initiatives. *See* Sassòli, *Article 43*, *supra* note 126, at 15–16. *See also* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 843 (2003) (offers a similar appeal in relation to the U.S. and British-led occupation of Iraq and "transformative" occupations more broadly).

367. BENVENISTI, *supra* note 8, at 146–247. *See* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 241, 264 (Emma Playfair ed., 1992) (offering a similar suggestion in relation to local governance).

368. *See* Falk, *supra* note 49, at 45–47 (suggesting the creation of an internationally supervised plebiscite or a mechanism to evaluate whether the law governing belligerent occupation remains relevant).

369. Brian Walsh & Ilan Peleg, *Human Rights Under Military Occupation: The Need for Expansion*, 2 INT'L J. OF HUM. RTS. 62, 62–63 (1998).

370. *Id.* Noam Lubell, *Human Rights Obligations in Military Occupation*, 885 INT'L REV. RED CROSS 317, 329 (2012) (for an example of similar proposal to Walsh and Peleg).

extent that they do not threaten the occupied population's right to self-determination.[371]

Considerations of an occupying power's legislative discretion consistently fail to build upon an interpretation of the legal framework that accentuates temporality. This process begins before an occupation becomes prolonged. Scholarly deliberations concerning how and when an occupant may introduce legislation remain within the direct wording of Articles 43 and 64.[372] Legislation may be introduced to maintain order, to ensure the safety of the occupant's military forces, or to realize the legitimate purposes of the occupation.[373] Subsequent efforts to reconcile the framework's conservationism with prolonged occupation followed this approach. They permit expansive authority to better manage the exigencies of prolonged occupation but fail to couple these allowances with the principle of temporality or the requirement to enable termination of prolonged occupation.

The proposed good faith approach offers an alternative. It insists that initiatives, undertaken for the ostensible benefit of the local population, must remain consistent with the occupation framework's purposes. These must not compromise a notion of temporality that is cognizant of the foundational norms that this principle encapsulates. Instead, they must enable its termination. This is justified by a simple assumption. This holds that responses to the challenges posed by prolonged occupation are most effective when premised upon temporality. That the interests of the occupied population, the requirements of the occupying power, and the demands of international order are best satisfied when occupation terminates. Too often, the international law governing the phenomenon of occupation preferences a factual, unconstrained notion of occupation. Where diplomatic appeals and the principle of self-determination have constantly called for the occupation to end, international law is largely silent. The good faith approach to enable termination seeks to

371. Alain Pellet, *The Destruction of Troy Will Not Take Place*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 169, 192, 201–02 (Emma Playfair ed., 1992).

372. Hague Convention (IV), *supra* note 5, art. 42. *See also* Fourth Geneva Convention, *supra* note 34, art. 64.

373. *See generally* LORD ARNOLD D. MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR (4th ed. 1966). *See also* BENVENISTI, *supra* note 8, at 91–92; GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON LAW AND PRACTICE OF BELLIGERENT OCCUPATION 97 (1957); Sassòli, *Legislation and Maintenance*, *supra* note 82.

more accurately represent the spirit of IHL. It wishes to realign legal appeals with the principle of self-determination and diplomatic calls for the conclusion of prolonged occupation.

C. Aligning the Occupation Framework with Diplomatic Appeals to Terminate Prolonged Occupation and the Principle of Self-Determination

Shortly following the 1967 War, the Security Council gathered in New York. On November 22, it adopted Resolution 242. The Security Council cited the illegality and inadmissibility of the acquisition of territory by force.[374] It directly referenced the recent war. Continuing, the resolution famously affirmed that the establishment of a "just and lasting peace" required Israeli withdrawal from the recently occupied territories.[375] The termination of belligerency was premised upon respect for the sovereignty, territorial integrity, and political independence of all states in the region.[376] The resulting "land for peace" formula compelled the nascent occupation's termination and the normalization of relations.[377] This formula became the foundation of the diplomatic approach to the enduring conflict between Israel and the Palestinians.

A decade later, Egyptian President Anwar Sadat journeyed to Jerusalem and addressed the Knesset. A new era of optimism was heralded. Sadat declared that "peace cannot be worth its name unless it is based on justice, and not on the occupation of the land of others."[378] The Egyptian leader evoked the international consensus that had developed around Resolution 242. Sadat pronounced that the call for a "permanent and just peace, based on respect for the United Nations resolutions, has now become the call of the whole world. It has become a clear expression of the will of the international community. . . ."[379] The following

374. S.C. Res. 242, ¶ 1 (Nov. 22, 1967).

375. *Id.*

376. *Id.*

377. *See* Bruce D. Jones, *The Security Council and the Arab-Israeli Wars: Responsibility Without Power*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 298, 308 (Vaughn Lowe et al. eds., 2008).

378. Anwar Sadat, Egypt President, Address at the Israeli Knesset (Nov. 20, 1977), *reprinted in* THE ISRAELI-PALESTINIAN CONFLICT: A DOCUMENTARY RECORD 1967–1990 136, 139, 142 (Yehuda Lukacs ed., 1992).

379. *Id.*

year, Egypt and Israel signed the Camp David Accords. A framework for Middle East peacemaking was reestablished. Palestinian autonomy would be implemented over five years. Transitional arrangements would be negotiated. Upon Palestinian self-governance, Israel was required to withdraw from the West Bank and Gaza Strip.[380]

Similar optimism accompanied Yitzhak Rabin and Yasir Arafat on the White House lawn in 1993. The symbolism of an Israeli Prime Minister embracing the hand of a Palestinian Chairman was momentous. The era of Oslo and the Declaration of Principles again premised a negotiated peace upon Israeli withdrawal and Palestinian self-governance.[381] Yet optimism would flounder following an intifada, a series of deadly wars in Gaza, and the continued entrenchment of Israel's civilian presence throughout the West Bank. Still, however, the international community remains steadfast. It continues to insist that Israel end its occupation of the Palestinian territories.

Since at least 1980, the international community has referenced the prolonged character of the occupation. It has directly appealed to Israel to end its control of the West Bank and Gaza. Security Council Resolution 476 cites the "overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967."[382] Similar calls have become ubiquitous.[383] From widely endorsed UN resolutions to the activist's placard, appeals to terminate the occupation are ever-present. Yet international legal engagements, premised on the prominent interpretive approach, assume that the occupation's duration is neither limited nor affected by the occupation framework. Alternative interpretations that draw upon occupation's normative character find that an occupation regime violates fundamental principles of the legal framework. Often, the occupation is declared illegal. It is unclear, however, whether this declaration

380. A Framework for Peace in the Middle East, Isr.-Egypt, Sept. 17, 1978, 1136 U.N.T.S. 196, *in* THE ISRAELI-PALESTINIAN CONFLICT: A DOCUMENTARY RECORD 1967–1990 155, preamble, sec. 1 (Yehuda Lukacs ed., 1992).

381. Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., art. 1, 7(2), Sept. 13, 1993, 32 I.L.M. 1525.

382. S.C. Res. 476, ¶ 1 (June 30, 1980).

383. *See*, *e.g.*, G.A. Res. 71/23, (Nov. 30, 2016). *See also* Lynk, *supra* note 224, ¶ 15.

triggers legal consequences not otherwise elicited by the underlying violation(s). It is not immediately apparent what subsequent steps follow declared illegality.

Both interpretative approaches diverge from the international community's affirmed diplomatic course. The proposed good faith approach to enable termination offers an alternative. It better represents the spirit of IHL. It aligns the occupation framework with the prominent diplomatic treatment of the occupation. International law is understood to inform diplomatic engagement. Though it may not always be a decisive factor, "the rules of international law frequently [provide] the framework in which diplomatic negotiations, arguments, and positions [are] formulated."[384] International law shapes the content of and the positions offered in "multilateral forums and in bilateral diplomatic representations."[385] As observed throughout the Israeli-Palestinian conflict "the long-term framework for [normalizing] relations between hostile actors" has been articulated in a legal vernacular and imposed through numerous diplomatic initiatives.[386]

To influence and support diplomatic initiatives, international law must be effective. The international law of occupation, as prominently interpreted, threatens to frustrate the principles espoused by the international community. These principles directly align with the occupation framework's normative character. Yet, they are continuously neglected by an interpretative approach that is either resigned to benevolent attempts to humanize a purportedly unalterable situation or vulnerable to manipulation. International law, the former Secretary General Javier Pérez de Cuéllar declared, must become more effective in governing international relations. It must not "stagnate but keep pace with change in the conditions of international life. . . . It must evoke a shared understanding and it must be seen to derive from the morality of international behavior."[387]

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384. ANDREW JACOVIDES, INTERNATIONAL LAW AND DIPLOMACY: SELECTED WRITINGS BY AMBASSADOR ANDREW JACOVIDES 234 (2011).

385. Francois O. Wilcox et al., *International Law in Diplomacy*, 77 PROCEEDINGS OF THE ANN. MEETING OF THE AM. SOC'Y OF INT'L L. 99, 100 (1983).

386. Tom Farer, *Diplomacy and International Law*, *in* THE OXFORD HANDBOOK OF MODERN DIPLOMACY 493, 493 (Andrew F. Cooper, Jorge Heine & Ramesh Thakur eds., 2013).

387. *See* Javier Pérez de Cuéllar, U.N. Secretary-General, Address at the University of Bordeaux (Apr. 24, 1991), *in* Press Release, Secretary-General's Statement at University of Bordeaux, U.N. Press Release SG/SM/4560 (1991).

General Assembly Resolution 44/23 announced the "decade of international law."[388] The General Assembly spoke of the need to strengthen the "rule of law in international relations."[389] It reaffirmed the role of international law in promoting the "means and methods for the peaceful settlement of disputes between states."[390] The proposed good faith approach facilitates the alignment of legal and diplomatic discourses. In accordance with the demands of the international community and the constitutive principles upon which they draw, engagements with the occupation framework that accentuate temporality are better suited to present termination as the required means of preserving sovereignty, protecting local interests, and ensuring self-determination. An occupying power may not legitimize initiatives that appeal to the occupation's duration but do not enable its termination. An interpretative approach that acknowledges occupation as fact and merely seeks to manage its effects compromises international law's efficacy and thus its relevancy.

Diplomatic appeals to terminate occupation are often grounded in the principle of self-determination. Building upon Palestinian nationalism and the spirit of Camp David, formal appeals to self-determination accompanied American and Egyptian calls to terminate the occupation.[391] The principle of self-determination vests in Article 1 of the UN Charter.[392] It is confirmed in both the international human rights covenants.[393] Its normative development, however, corresponds with the era of decolonization. Self-determination would associate with state-building initiatives.[394] These advancements, however, proved difficult to reconcile with the occupation framework's conservationist design. The law of occupation is described as antithetical

388. G.A. Res. 44/23, preamble, ¶ 2(b), (Nov. 17, 1989).

389. *Id*.

390. *Id*.

391. *See* NATHAN THRALL, THE ONLY LANGUAGE THEY UNDERSTAND: FORCING COMPROMISE IN ISRAEL AND PALESTINE 22 (2017).

392. *See* U.N. Charter, art. 1, ¶ 2 (states that the purpose(s) of the United Nations are to, "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . .").

393. *See* International Covenant on Civil and Political Rights art. 1., Dec. 16, 1966, 999 U.N.T.S. 171. *See also*, International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 3.

394. Manuela Melandri, *Self-Determination and State-Building in International Law: The Need for a New Research Approach*, 20 J. CONFLICT. & SEC. L. 74, 83 (2015).

to state-building initiatives.[395] Several have questioned its compatibility with the principle of self-determination.[396]

This poses an important distinction. Consideration of self-determination's compatibility with the occupation framework followed the U.S.-led invasion of Iraq. This debate largely focuses on the phenomenon of transformative occupation.[397] The notion of state-building evoked by this context differs from that discussed within this article. The proposed normative reading of the occupation framework is applicable to transformative occupations. This, however, raises various issues that are beyond the current scope but will be considered elsewhere. The form of control exhibited by prolonged occupation differs from that of transformative occupation. It is employed for alternative purposes and serves distinguishable ends.

Since Sadat's journey to Jerusalem, calls for Palestinian statehood increasingly appeal to self-determination.[398] This provides a legal basis that favors the termination of occupation. Marco Sassòli notes that the fact of occupation may be construed as incompatible with the right to self-determination.[399] Palestinian statehood, the two-state solution, and the realization of self-determination compels, and is contingent upon, termination. The occupation framework, traditionally conceived, does not facilitate this process. Sassòli explains that the right to self-determination cannot be implemented by an occupying power. To ensure self-determination, Sassòli continues, an occupying power need not legislate. Instead, it must withdraw.[400]

The consequences of the right to self-determination and the objective of the proposed interpretative approach are identical. Each identify termination as a constitutive requirement. Yet, adherence to the non-normative interpretative approach poses a conflict. Though Sassòli acknowledges that the fulfilment of self-determination compels cessation, this is described as an issue of

395. Nigel D. White, *Settling Disputes: A Matter of Politics and Law*, *in* THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 61, 70 (Wouter Werner, Marieke De Hoon & Alexis Galán eds., 2017). *See also* Melandri, *supra* note 394, at 82–85.

396. Melandri, *supra* note 394, at 83. *See also* Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change*, 17 EUR. J. INT'L L. 531 (2006).

397. *See generally* Fox, *supra* note 10. *See also* Cohen, *supra* note 28.

398. THRALL, *supra* note 391, at 22.

399. Sassòli, *Legislation and Maintenance*, *supra* note 82, at 677.

400. *Id.*

the jus ad bellum. The self-determination argument "cannot be used to deny an occupying power the right to legislate under the jus in bello."[401] The proposed approach does not suggest the revocation of an occupant's legislative competence. It, however, aligns the purposes of the occupation framework with the right to self-determination. By acknowledging the relevancy of jus ad bellum norms by insisting that termination is the corollary of temporality, the proposed approach wishes to insulate the occupation framework. It intends to ensure that the law of occupation does not become an anachronism; that it is not dismissed in favor of more efficacious legal approaches that better align with prevailing normative standards or diplomatic objectives. This does not require radical restructuring. But it compels a recommitment to the object and purpose of the occupation framework.

The proposed interpretative approach operates within the confines of international law. Accordingly, it remains susceptible to many of its weaknesses.[402] Little here will move the hardened skeptic to reconsider the viability of international law and its place within the Israeli-Palestinian conflict. Yet it is important to recognize—even upon such dismissive terms—that simply rejecting the role assumed by international law as inept underestimates how the prominently interpreted occupation framework perpetuates occupation.

Still, one is entitled to wonder whether the proposed interpretative approach fares better than the specific provisions contained within the occupation framework. This, however, misunderstands the purpose of the approach. The proposed interpretive approach is not intended to replace treaty-based provisions. Instead, it wishes to complement them. Employment of the good faith obligation does not compel a choice between specific provisions and fundamental norms. The conformity of settlement development, for example, may be evaluated in accordance with both Article 49(6) of the Fourth Geneva Convention but also with broader legal considerations. As presently interpreted, the occupation framework engages with the symptoms of prolonged occupation. A non-normative interpretation of the legal framework, confined to management, does not acknowledge or address the altered form of control that a prolonged occupation imposes.

401. *Id.*

402. *See* Boon, *supra* note 12, at 110–12.

The proposed approach facilitates engagement with the causes of this control.

Settlement construction perpetuates, and thus prolongs, occupation. Beyond Article 49(6), settlement construction may be construed as an act of aggression.[403] The perpetuation of occupation, the altered form of quasi-permanent control that prolonged occupation has become may be understood to contravene Article 2(4) of the UN Charter. The occupation framework will contribute to a discourse grounded in uncontested principles—regarding the use of force, the annexation of territory, and the realization of self-determination—that resonate with and within international society.[404]

When the Cypriot government remonstrated with the international community, it called for the termination of Turkey's occupation of the northern-third of its territory. It did not, however, emphasize the occupation framework.[405] It spoke clearly of occupation and invoked international law. The Cypriot government coupled calls to terminate the occupation with the principles of the jus ad bellum.[406] It appealed to the prohibition of the use of force in international relations. It employed human rights law.[407] Such foundational principles of international order vest within the occupation framework. They are inherent to the principle of temporality and their assurance logically compels termination. Should an occupying power choose to pursue permanent control, the proposed normative approach will strip away the façade provided by a factual conception of occupation. It will pivot the accompanying discourse from perpetual management to termination. And it will facilitate appeals to fundamental norms, neglected by the prominent interpretative approach, but which constitute cornerstones of the international order.

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403. *See, e.g.*, G.A. Res. 3314 (XXIX), art 3(a), annex (Dec. 14, 1974).

404. JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 271–349 (2010).

405. *See, e.g.*, *Latest Developments*, CYPRUS MINISTRY FOREIGN AFF., http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa09_en/mfa09_en?OpenDocument (last visited Oct. 31, 2018).

406. *See, e.g.*, Permanent Rep. of Cyprus to the U.N., Letter Dated May 29, 2001 from the Permanent Rep. of Cyprus to the United Nations Addressed to the Secretary-General, U.N. Doc. A/55/970-S/2001/541 (May 31, 2001).

407. JACOVIDES, *supra* note 384, at 234.

CONCLUSION

Israel's occupation of the West Bank has now reached fifty years in duration. It demonstrates little prospect of subsiding. Within this occupied landscape, strong legacies have been forged. These extend from clearly identifiable spaces that constitute settlements and their associated infrastructure to the increasingly fraught relations between the Israelis and Palestinians who live amongst these spaces—settler and indigenous; occupying power and protected person; other and other. IHL and the occupation framework are intended to manage these relations and confront their potential legacies so as they do not become eternal features of the conflict. With the passage of time, however, and the construction of a status quo, the traditional occupation framework has proven incapable of regulating the inevitabilities and challenges of prolonged occupation.

The proposals within this article, of a good faith obligation to enable termination, of a holistic notion of temporality, offer an amended normative approach. This approach is grounded in general principles of international law. It exclusively focuses, however, on the obligations of the occupying power. This is not intended to discount or undervalue the role the Palestinians and their leadership in Ramallah must assume to facilitate the occupation's termination and the normalization of relations with Israel. Instead, this singular focus acknowledges the position of strength that an occupying power assumes. Over the course of prolonged occupation, Israel's presence has become entrenched. As such, it faces a significant burden and responsibility in realizing the occupation's termination. The good faith obligation attempts to ensure that the occupying power is unable to apply the existing framework so as to indefinitely defer the consequences of this burden.

Naturally, this only represents a point of departure within the confines of international law. Many questions remain and untold obstacles will present. The good faith obligation to enable termination does not represent the extent to which the occupation framework requires reevaluation. Nor has this article considered all of the shortcomings or challenges of international law's relationship with prolonged occupation. Instead, the approach proposed here recognizes how a factual or *alegal* conception of occupation threatens the fundamental principles conveyed by the framework itself. In response, the good faith obligation is intended to challenge the legally manufactured status quo that

has facilitated the occupation's duration. It must, however, remain conscious of its own limitations and recognize that international law—an amended legal framework or normative structure—does not provide all of the answers to the challenges or unintended consequences presented by prolonged occupation and entrenched conflict. Yet it may better contribute to their redress.

In relation to the West Bank, this is particularly pertinent. Many in Israel have long recognized that the occupation presents a self-imposed existential dilemma. This stems from the demographic realities of the West Bank's Palestinian population, which with the Palestinian citizens of Israel, will eventually become a majority. The consequences of this were succinctly conveyed by former Israeli Prime Minister Ehud Barak: "As long as in this territory west of the Jordan River there is only one political entity called Israel it is going to be either non-Jewish, or non-democratic."[408]

The traditional occupation framework allows this dilemma to remain unaddressed. It facilitates a status quo that is viewed as indeterminate and legally neutral but in which specific violations, like settlement construction, create a far more powerful reality that frustrates the entire enterprise and purpose of the framework. The imposition of the good faith obligation may not directly result in the freeze of settlement development or the termination of the occupation. It can, however, move an occupying power to confront and no longer benefit from a manufactured status quo that has developed under the guise of the occupation framework. It can limit appeals to a facilitatory interpretation that discounts normative content.

Israeli society has long been split—left and right—in its response to the demographic dilemma posed by the occupation. This is often viewed as a point of ideological departure. It has defined elections and distinguishes political parties. The left favors recognition of the occupation, acceptance of its governing framework, and its eventual termination in accordance with a two-state solution and Palestinian self-determination. The right continues to deny its status, preferencing security justifications, and an accompanying notion of a Greater Israel. Yet when

408. Rory McCarthy, *Barak: Make Peace with Palestinians or Face Apartheid*, GUARDIAN (Feb. 2, 2010), http://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace.

viewed in collaboration with the means by which international law has been engaged by proponents of settlement development, and those wishing to perpetuate the occupation, this fundamental political distinction presents an unexpected paradox.

While the occupation framework is most likely to be received by those who favor the occupation's termination and to be rejected by those who oppose territorial compromise, Joseph Weiler describes how the traditional framework favors rejectionists:

> It is exactly here that the construct of belligerent occupation can be manipulated. For it presents those who would wish to retain the Territory with the preferred position: You exercise control over the territory (as a belligerent occupant) but you are able to deny the local citizens any political rights since they do not become citizens of the occupying state – and all of this with the penumbra of legality accorded to this status in international law. Legally you get the land without the people.[409]

The good faith obligation reemphasizes the normative structure of the traditional framework. It recognizes that with prolonged occupation, the traditional framework can serve as an unwilling accomplice, but an accomplice nonetheless, to the occupation's protraction and thus the conflict's perpetuation. Adopting a good faith obligation to enable termination, triggered by prolonged occupation, will begin to strip the occupying power of an indeterminate, legally-confirmed status that permits it to indefinitely maintain an advantageous status quo. Instilling a requirement to act in accordance with prolonged occupation's termination, the occupying power will be reduced in its ability to use the occupation framework as a legal guise to avoid the consequences of its prolonged occupation. Facing such consequences may prove a more powerful motivator to move towards the occupation's termination than any codified legal provision has or could.

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409. Joseph H.H. Weiler, *Israel, the Territories and International Law: When Doves are Hawks*, *in* ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL'S 50TH ANNIVERSARY 381, 390 (Alfred E. Kellermann, Kurt Siehr & Talia Einhorn eds., 1998).