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The (Il)Legality of Occupation: An Integrated *Jus Ad Bellum* Approach

Sophie Schubert (Freie Universität Berlin)

1. Introduction

In my talk, I would like to take a step back from the law of occupation and ask a broader question: can occupations themselves be illegal under general international law?

To answer this, I will explore the relationship between occupation, general international law, and *jus cogens* norms. At the heart of this debate lies a central tension: should occupation be seen merely as a factual situation governed exclusively by international humanitarian law, or can it also be or become illegal under general international law? What would that mean for the distinction between the *jus ad bellum* and the *jus in bello*? Last year, these questions came into sharp focus in the ICJ advisory opinion on Palestine.

Today, I will walk you through five key aspects of this debate:

- 1) First, the applicability of general international law to occupation.
- 2) Second, the leap that the court makes from adjudging particular policies and practices of the occupying power to considering the legality of occupation as a whole.
- 3) Third, the court’s language which refers to ‘unlawful presence’ and not to ‘illegal occupation’.
- 4) Fourth, the enduring importance of distinguishing between *jus ad bellum* and *jus in bello*, even in situations of illegal occupation.
- 5) And finally, I will address the relevant norms that can render an occupation illegal.

2. The applicability of general international law to occupation

At first sight, the issue seems straightforward: if one state occupies the territory of another, surely we can ask whether this is legal or illegal. But the matter is more complicated.

Occupation is governed by the law of occupation, which is part of *jus in bello*. The *jus in bello* traditionally applies neutrally. It regulates how an occupying power treats the civilian population, without judging whether the occupation itself was the result of aggression or self-defence. That neutrality reflects a humanitarian logic: protection of civilians should not depend on political or legal debates about the causes of the conflict.

But this leads us to the core question: is occupation just a factual condition triggering the law of occupation and governed exclusively by IHL and human rights law, or can it also be assessed as legal or illegal under general international law more broadly? In other words: is the situation of occupation exempted from a test of legality under general international law?

A more restrictive view sees occupation simply as a factual condition. It cannot be tested against the *jus ad bellum* or other rules of general international law. At the most, general international law is relevant only at the start of an occupation. An occupation is legal or illegal *ab initio*, depending on whether it resulted from lawful or unlawful force. But once established, it is then governed solely by IHL.

Yet, the majority of scholarship—and indeed the ICJ's 2024 *Palestine* advisory opinion—rejects this. The prevailing view today is that general international law does apply to occupation, both at the moment it is established *and* throughout its maintenance. The legality of occupation is not frozen at the moment of its creation. An occupation cannot only be considered illegal from the beginning on, but an initially lawfully established occupation may become illegal over time, particularly if it involves breaches of peremptory norms, such as annexation or the denial of the right to self-determination.

Even the dissenting judges in the *Palestine* opinion—Judges Aurescu, Abraham and Tomka—accepted that general international law applies throughout occupation. Their disagreement was not about applicability of general international law, but about the consequences in the specific case of the OPT.

This consensus is significant. It tells us that occupation cannot be treated as a legal vacuum solely governed by IHL. Instead, it remains embedded in the broader framework of general international law.

3. The 'leap' from particular violations to the illegality of occupation

This brings us, second, to the more contentious issue: namely, can violations committed during occupation affect the legal status of the occupation as a whole?

For the Israeli occupation of the OPT the three dissenting judges said no. Israel had violated many rules, but this did not impact the overall legal status of the occupation of the OPT.

The majority, however, took a different path: it moved beyond isolated violations and declared the continued presence of Israel in the OPT unlawful. First, the Court analysed violations of specific norms committed through various Israeli policies and practices: breaches of the law of occupation and human rights law, of the prohibition of annexation, and of the right to self-determination. Then, it made the critical leap from identifying these violations to concluding that the occupation as a whole—or rather, Israel's continued presence—was unlawful. In the court's words:

Israel's policies and practices and the creation of facts on the ground have significant effects on the legal status of the occupation and thereby on the legality of the continued presence of Israel in the OPT.¹

This reasoning is crucial. The Court did not simply say: 'Israel has violated rules of international law.' Instead, it elevated the effect of those violations to a different level: they altered the character of the occupation as a whole. The occupation itself had become an internationally wrongful act in its entirety.

So, we can distinguish two separate, yet connected, wrongful acts: the maintenance of illegal policies and practices, and on top of that the illegal occupation itself. These wrongful acts are connected because the illegality of the occupation is brought about *through* the Israeli policies and practices.

Hypothetically, in a different occupation—say, one of short duration, without annexation or denial of self-determination—violations might not *necessarily* affect the legality of the occupation as a whole. But in the OPT, the violations and the occupation were so intertwined as to be indistinguishable from each other — rendering the occupation illegal as a whole.

¹ ICJ, *Palestine Advisory Opinion*, para 245, emphasis added.

4. Terminology: ‘Illegal Occupation’ vs. ‘Unlawful Presence’

Third, let me turn to the terminology that the court used. The Court’s language is worth examining. Instead of speaking of an ‘illegal occupation’, the court referred to ‘the unlawful continued presence of Israel as Occupying Power in the OPT’. Why this phrasing? These choices suggest a careful judicial effort by the court to navigate sensitive terrain. Two reasons stand out:

The first reason for this choice may be institutional consistency. The court is in line with its long-standing jurisprudence when referring to “continued presence” and not to illegal occupation. In the 1971 *Namibia* opinion the Court referred to South Africa’s ‘continued presence’ as illegal. And in the 2019 *Chagos* opinion, it spoke of the UK’s ‘continued administration’ as unlawful. The *Palestine* opinion fits this established language of the court.

A second reason, for its choice in wording may be that the Court wanted to preserve the distinction between *jus ad bellum* and *jus in bello*. Reserving the term ‘occupation’ for the *jus in bello*, while using ‘continued presence’ for the legality of military force under *jus ad bellum*. It avoided the impression of collapsing the two bodies of law into one.

Still, many commentators and also some of the judges see this distinction in wording as largely formal. Occupation by definition is the non-consensual presence of a state in foreign territory. If that presence is unlawful, then so is the occupation. And I think this point has merit.

What these terminological differences ultimately do not change is the underlying reality they are referring to: the force used to occupy foreign territory — whether to establish or to maintain effective control. This situation can be described either as an ‘occupation’ or as a ‘continued presence’. Still, whether we speak of illegal occupation or unlawful presence, the implications are profound. Both concepts highlight that international law not only regulates the conduct of an occupying power, but can also impact the legality of the situation itself. And this has far-reaching consequences: for the duties of the occupying power and for the duties of third states.

5. The Continuing Distinction and Parallel Application of *Jus ad Bellum* and *Jus in Bello* during Illegal Occupation

The fourth issue I wish to highlight is the continuing importance of keeping *jus ad bellum* and *jus in bello* distinct – even when an occupation is illegal.

The ICJ stressed this point in the *Palestine* opinion: On the one hand, the *jus ad bellum* determines the legality of the use of force to establish or maintain effective control over territory. It is here that questions of illegal occupation arise. On the other hand, the *jus in bello*—the law of occupation—regulates the conduct of the occupying power, even if the occupation is illegal. Even an unlawful occupier remains bound by the law of occupation until its presence ends. And until then, the law of occupation governs the daily realities of effective control.

This distinction has practical consequences. It means that illegality under *jus ad bellum*—for example, maintaining presence in defiance of the *jus ad bellum* or self-determination—can coexist with ongoing obligations under *jus in bello*. It also means that international responsibility is multi-layered: the occupant may be responsible both for the wrongful use of force maintaining an occupation, and at the same time for violations of humanitarian law. The separation thus protects civilians while holding states responsible at multiple levels.

6. Norms relevant for determining the legality of an occupation

Fifth, another key point of the opinion addressed the reasons for why an occupation is or becomes illegal.

Some scholars couch the reasons for an occupation's illegality predominantly in IHL. But this stretches the law *lex lata* as it stands too far: The law of occupation generally assumes the temporariness of occupation but does not set time limits for occupation. It does not regulate when an occupation must end. For that, we must turn to general international law.

The central paragraph of the *Palestine* opinion declaring Israel's presence unlawful is paragraph 261:

The Court considers that the violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the [OPT]. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the [OPT] and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the [OPT] unlawful.

The Court identified three elements making Israel's presence in the OPT unlawful:

1. The prohibition of annexation
2. the right of self-determination
3. and third, the 'sustained abuse' of the occupying power's position, linking the first two elements together.

This last point is interesting: As Professor Marko Milanovic noted in a recent article, 'abuse' introduces a subjective element, focusing on the occupier's intention to turn a temporary situation into permanent control.

What may follow from the notion of 'sustained abuse' is that at least when a state abuses the right of self-defense to pursue other than defensive purposes with maintaining an occupation - and this might not only be the aim to annex territory, but may, for example, include the aim to racially discriminate or to destroy a group in whole or in part - no legitimate defensive purpose will be present or at least the abusive purpose outweighs any legitimate purpose.

This finding of the Court reflects the diverging views among the judges on how exactly an occupation becomes illegal. A close reading of the individual opinions shows that some judges considered *jus ad bellum*, including the prohibition of annexation, to be the decisive criterion. Others assigned greater weight to the right to self-determination — recognized by the Court in its opinion, notably for the first time, as a peremptory norm. And others again, seemed to base the illegality more on the concept of abuse of rights.

The diverging views of the judges on this point mirrors ongoing scholarly debates: some scholars ground the illegality of occupation in the violation of peremptory norms; others argue that *jus ad bellum* is the key body of law; while still others emphasize the right to self-determination. The Court combines these different approaches. It remains—and probably deliberately so—open-ended reflecting a compromise approach.

In my view the most convincing approach, which is also widely shared in scholarship, is to ground the illegality of an occupation in the *jus ad bellum*. Occupation amounts to a continued use of force to establish or maintain effective control over foreign territory. As any use of force, also force to occupy foreign territory must adhere to the principles of necessity and proportionality under the *jus ad bellum*.

Thus, even an initially lawfully established occupation can become illegal during its maintenance—for example, if it ceases to meet the conditions of self-defence under Article 51 of the UN Charter. The occupation would then amount to an unlawful use of force. Focal point for determining the illegality of occupation is hence the *jus ad bellum* not only when *establishing* an occupation, but also during its *maintenance*.

The standards of the *jus ad bellum* allow us to include considerations relating to the right to self-determination, a right of utmost importance in a situation of occupation, but also of other international norms into the analysis. To do justice to these other rules of international law, one could systematically interpret the standards of necessity and proportionality relating to the right of self-defense *in light of those* other norms. A basis for this could be found in Article 31 VCLT.

The *jus ad bellum* provides us with a useful framework for establishing whether an occupation is illegal or not, which can include other relevant norms such as self-determination and other peremptory rules into the equation.

7. Conclusion

To conclude — five points stand out:

First, occupation is not exempt from legality assessments under general international law. Both, its establishment and its maintenance, can be lawful or unlawful, depending on compliance with general international law. Occupations may therefore become illegal over time, especially when they involve aggression, annexation, or the denial of self-determination.

Second, violations committed during an occupation can impact the legal status of an occupation leading to two separate yet connected internationally wrongful acts.

Third, while the terminology of ‘unlawful continued presence’ vs. ‘illegal occupation’ was chosen for certain reasons by the court, the substantive message remains the same: international law denies legality to occupations especially when they involve aggression, annexation, or the denial of self-determination. The ICJ’s *Palestine* opinion confirms this trajectory, framing such occupations as ‘unlawful continued presence’.

Fourth, even unlawful occupiers remain bound by humanitarian law. The separation of *jus ad bellum* and *jus in bello* ensures that civilians remain protected, while states are held accountable for unlawful uses of force.

Fifth, while the ICJ in its opinion combines different reasons for why the occupation of the OPT is unlawful: the prohibition of annexation, the right to self-determination and the notion of sustained abuse, I suggest that the *jus ad bellum* provides us with a useful framework which allows us to integrate other relevant norms of international law into the analysis.

And lastly, it follows from all of this that other third states have an obligation not only to cooperate to bring various serious breaches of peremptory international law to an end, but in the case of an illegal occupation they must cooperate to bring the occupation itself to an end. As the ICJ reminded us, declaring a situation unlawful is not the end of the matter—it is the beginning of the effort to bring the situation to an end.

Thank you very much for your attention.