Acquisition of Territory, Annexation and the Jordan Valley

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Introduction

1. As underscored by the previous presentations today, Israeli actions in the Jordan Valley over the past four decades, and certainly since 2000, have given rise to serious concerns as to whether the valley itself has been annexed, or can be considered to have been annexed, by the State of Israel as a result. In determining the validity of these concerns one must necessarily give consideration to the following two related sub-sets of international law.

The Law Governing Acquisition of Territory

2. The first of these is the law governing acquisition of territory, by which is meant those rules of international law that govern the acquisition of *sovereignty* over territory.

3. Traditionally, international law has prescribed several distinct modes by which sovereignty can be acquired over territory. Simply put, these include: **Cession** (transfer of territory by treaty or agreement);[1] **Occupation** (not to be confused with "occupation" in IHL terms, but only in relation to possession with intent to control to the exclusion of others *terra nullius*);[2] **Prescription** (possession with intent to control to the exclusion of others the territory of another state; possession doesn't result from international armed conflict);[3] **Operation of Nature** (i.e. volcanic islands emerge in a state's territorial waters); and **Conquest** (right to acquire territory by force of arms; outdated, unlawful

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[1] "Cession is the transfer of territory, usually by treaty, from one state to another. If there were defects in the ceding state's title, the title of the state to which the territory is ceded will be vitiated by the same defects; this is expressed in the Latin maxim, *nemo dat quod non habet*. […] Except for territorial changes following the conclusion of peace treaties, cession of territory has now become rare". *See* generally, P. Malanczuk. *Akehurst's Modern Introduction to International Law*, 7th Ed. (London: Routledge, 2002), at 148 [hereinafter *Malanczuk*].

[2] "Occupation is the acquisition of terra nullius – that is, territory which immediately before acquisition belonged to no state. The territory may never have belonged to any state, or it may have been abandoned by the previous sovereign. Abandonment of territory requires not only failure to exercise authority over the territory, but also an intention to abandon the territory. […] Nowadays there are hardly any parts of the world that could be considered as *terra nullius*. […] Territory is occupied when it is placed under effective control by the purported sovereign". Not to be confused with concept of foreign military occupation. *See id*. at 148-149.

[3] "Like occupation, prescription is based on effective control over territory". The difference between the two is that "prescription is the acquisition of territory which belonged to another state, whereas occupation is acquisition of *terra nullius*". The application of the effective control test here is resultantly stricter than as applied with occupation. *See id*. at 150.

now). Of these five traditional modes of acquisition of territory, conquest is the most relevant to the question of the Jordan valley for reasons outlined below.

The Law Governing Belligerent Occupation

4. The second sub-set is the law governing belligerent occupation. This body of law is an outgrowth of the traditional (no longer applicable) international law and practice concerning the right to acquire territory by force, or the right of conquest. The right of conquest is understood simply "as the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants."[4] Throughout most of recorded history the right of conquest was treated as a self-evident proposition of force and statecraft, a corollary of the right of the sovereign to resort to unlimited war and to exercise absolute dominion over everything coming under its control as a result.

5. In the modern age, where international law prohibits the use of force with certain limited exceptions, the modern law of belligerent occupation is based upon the following two propositions, both of which render the archaic right of conquest completely moot:

6. The first of these is the proposition that belligerent occupation represents a temporary condition during which the role of the belligerent occupant is limited merely to that of the *de facto* administrative authority. Accordingly, the belligerent occupant is prohibited from altering the status of the occupied territory, and is allowed to amend the laws and regulations in force in the territory only to the extent needed to enable it to meet its obligations under relevant international humanitarian law, primarily as codified in the 1949 Fourth Geneva Convention and the 1907 Hague Regulations. Of course, these obligations include ensuring both the well-being of the protected population and the security of the occupying power's armed forces.[5]

7. The second of these propositions was summarized best by Oppenheim when he noted that belligerent occupation does not yield so much as "an atom of sovereignty in the authority of the occupant."[6] This is an affirmation of the *jus*

[4] S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Oxford University Press, 1996) 8.

[5] As the case of the OPT illustrates, the phenomenon of prolonged occupation "has produced particular problems" for this principle of law, given the fact that "the longer an occupation continues, the more difficult it is to ensure effective compliance with the Fourth Geneva Convention." *See* Statement of David Delparaz, Head of ICRC Delegation in Cairo, to the United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, 48 Cairo (June 14-15, 1999) [hereinafter *United Nations International Meeting*]. In this respect, Benvenisti has noted that because "the Fourth Geneva Convention stop[s] short of requiring the occupant to develop (not just maintain) the economic, social, and educational infrastructures[,] . . . a protracted occupation . . . might lead to stagnation, and consequently to the impoverishment and backwardness of the occupied community". *See* E. Benvenisti. *The International Law of Occupation*, at 105.

[6] L. Oppenheim. *The Legal Relations Between an Occupying Power and the Inhabitants* 33 L.Q. Rev. (1917) 364 ,363 *quoted in* Y. Dinstein *The International Law of Belligerent Occupation and Human*

cogens rule of international law prohibiting the acquisition of territory through the threat or use of force, a pillar upon which the law of belligerent occupation rests.

Annexation

8. So how does Annexation fit in to all of this? Strictly speaking, "annexation" is not one of the traditional modes of acquisition of territory. Rather, it merely describes a "symbolic" act or declaration made by a state, intended to provide unequivocal evidence of the acquisition of sovereignty over a parcel of territory. In this sense, the notion of annexation must be seen as part of the general question of how territory is acquired through the more accepted modes previously mentioned.[7]

9. Be that as it may, in view of the two cardinal principles of the law of belligerent occupation – again, first that foreign military occupation is a temporary state of affairs during which the occupying power is prohibited from altering the status of the territory, and second that no sovereignty over occupied territory can vest in the occupying power as a result of the occupation itself – it necessarily follows that annexation of occupied territory is absolutely prohibited.

United Nations and the Question of Annexation of Territories Occupied by Israel

10. As is widely known, this legal principle has been affirmed and reaffirmed by the United Nations in the context of Israel's behaviour in the OPT for decades, most specifically in respect of Israeli actions in East Jerusalem. Indeed, when assessing whether recent Israeli actions in the Jordan Valley can be said to have rendered that territory "annexed", *per se*, one might usefully look at the case of East Jerusalem, and more importantly how the international community has reacted to it, for guidance. It is well to keep in mind, as professor Brownlie has noted, that "there is no magic in the formal declaration of sovereignty by a government" over territories it intends to annex, by which it might be reasonably concluded that the test of whether or not territory may be considered annexed is a factual one which does not necessarily require formal declarations of annexation to be satisfied.[8]

11. On 28 June 1967, a few weeks after the general close of military hostilities in the West Bank, the Israeli government passed the Law and Administration Ordinance (Amendment No. 11) Law, which provided for the extension of its law, jurisdiction, and administration to newly captured Arab East Jerusalem. The next day the Israeli government enacted the Municipalities Ordinance (Amendment No. 6) Law, which authorized the Interior Minster to unilaterally enlarge the municipal boundaries of East Jerusalem "at his discretion and without an inquiry" into any impact it may have on the indigenous Palestinian populace. Armed with this broad power, the minister proceeded to enlarge

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Rights 8 Isr. Y.B. on H.R.(1978) 106 ,104 .

[7] I. Brownlie. *Principles of Public International Law*, 6th ed. (Clarendon: Oxford University Press, 2003) at 140.

[8] *Id*.

East Jerusalem's 6.5 square kilometer land area to encompass 71 square kilometers of expropriated Palestinian land. Subsequently, the Israeli government amalgamated the newly expanded East Jerusalem with West Jerusalem, and, on June 29, 1967, the Assistant Israeli Commander of Jerusalem, Yaacov Salman, issued an order dissolving the twelve member elected Arab Municipal Council of East Jerusalem, including its duly elected mayor, Mr. Rawhi al-Khatib. It is interesting to note that in the forty years since Israel sized control over East Jerusalem, its has never officially stated that it has annexed it.[9]

12. In the years that followed, both the General Assembly and Security Council issued numerous resolutions declaring Israel's annexation of East Jerusalem to be contrary to international law, specifically the Fourth Geneva Convention. For instance, in Resolution 2253 (ES–V) of July 4, 1967, the General Assembly declared all "measures taken by Israel to change the status of the City" to be "invalid," and in Resolution 252 of May 21, 1968, the Security Council proclaimed that "all legislative and administrative measures and actions taken by Israel . . . which tend to change the legal status of Jerusalem are invalid and cannot change that status." Notwithstanding these clear expressions of international opposition, however, Israeli authorities continued to implement policies designed to integrate East Jerusalem with West Jerusalem, remaining unequivocally of the opinion that this process "was irreversible and not negotiable." The high-water mark of Israeli legislative attempts to consolidate this "unification" policy came with the passing of the so-called "Basic Law" on Jerusalem on 30 July 1980. According to this law, "united" Jerusalem was declared to be the eternal capital of the State of Israel. Much like its reaction following the passing of the Law and Administration Ordinance (Amendment No. 11) Law and the Municipalities Ordinance (Amendment No. 6) Law in 1967, the international community reacted quickly to condemn Israel through Resolution 478. In this Resolution, the UN Security Council affirmed the principle of the inadmissibility of the acquisition of territory through the threat or use of force and the continued applicability of the Fourth Geneva Convention to "Palestinian and other Arab territories occupied since June 1967, *including Jerusalem*" [emphasis added]. It further declared that "the enactment of the 'basic law' by Israel" constituted "a violation of international law" and was "null and void and must be rescinded forthwith." To these authoritative restatements of the law governing acquisition of territory through the threat or use of force, have been added similar reaffirmations by the International Court of Justice, other organs of the UN, and the ICRC.

<u>The Jordan Valley: Annexed Territory?</u>

13. In light of what has been said thus far, might it be possible to conclude that the Jordan Valley has been effectively annexed by the Israeli government? To answer the question, one must necessarily look at the facts.

[9] *But see*, S. Erlanger. "Israel is Faulted on East Jerusalem", International Herald Tribune (15 May 2007).

14. In his January 2007 report to the Human Rights Council, Professor John Dugard noted that despite earlier plans to build the wall along the spine of the Jordan valley, Israel has asserted its control over this region in much the same way it has asserted control over the seam zone in the western portion of the West Bank. This has manifested itself in blanket restrictions imposed on the freedom of movement of Palestinians in and access to the Jordan valley, and by the increase in the number of Israeli settlements in the Jordan valley.

15. For instance, Palestinians living in the Jordan valley must possess identity cards with a Jordan valley address, and only those persons may travel within the Jordan valley without an Israeli issued permit. Other Palestinians, including non-resident landowners and workers, must obtain permits to enter the Jordan valley and in practice such permits are not valid for overnight stays. Travel restrictions make it difficult for farmers in the Jordan valley to access markets in the West Bank as their produce is frequently held up at checkpoints where it perishes in the process. Land closures seem to have increased and the total area of closed military zones now amounts to 46% of the Jordan valley (David). As the vast majority of the Jordan Valley falls within Area C under the Oslo Accords, Palestinian housing is a serious problem because construction and expansion of Palestinian living space is dependent on Israeli permits which are rarely given. Home demolitions in the Jordan valley are resultantly on the rise.

16. So, and in conclusion, does any of this mean that the Jordan valley has been annexed by Israel? I would be remiss were I not to confess some difficulty in answering this question. On the one hand, one might reasonably assert that Israeli actions in the valley have been qualitatively no different from those pursued by it elsewhere in the West Bank, particularly in the Seam Zone between the green line and the wall, thereby rendering the case of the Jordan valley no different. To be sure, unlike the case of East Jerusalem, the civilian Israeli legislature has not gone so far as to officially declare that the municipal law of Israel applies to the Jordan Valley (even though in practice it does to Israeli settlers – again, no different from elsewhere in the WB). On the other hand, knowing as we do that the determination of annexation is necessarily a factual one and that formal declarations of annexation are not necessary to find the existence of an intent to annex, one might equally reasonably assert that Israel's actions in the Jordan valley collectively amount to an attempt to annex that portion of the OPT. But then, using the same logic, would one not be able to assert that Israeli actions over the course of the whole of its forty-year occupation of the OPT collectively amount to an attempt to annex the whole of it? Perhaps.

17. In conclusion, I would like to submit that questions of annexation of occupied territory, as a matter of law, have very limited practical value. This is primarily because of the two cardinal principles of the law of belligerent occupation previously mentioned – again, first that occupation is a temporary state during which the occupying power is prohibited from altering the status of the territory, and second, that sovereignty can never vest in the occupying power. These principles are considered axiomatic to situations of belligerent occupation and, particularly in respect of the impossibility of sovereignty ever

legally vesting in the occupying power, it would seem to matter very little (legally speaking) as to what the occupying power said or did to change this so long as the whole of the international community remained resolute in its affirmation of these fundamental principles of international law. Thankfully, that is the case in respect of the international community's treatment of the OPT, including the Jordan valley, as indicated by countless resolutions of the General Assembly and other international fora.