



## **The UN and Israel's Occupation of the Palestinian Territories - Ardi Imseis**

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**TB:** Hi, I'm your host, Talia Baroncelli, and you're watching *theAnalysis.news*. I'll shortly be joined by international legal scholar Dr. Ardi Imseis to speak about the illegality of Israel's indiscriminate bombing of Palestinians in the Gaza Strip.

On a personal note, I'd like to thank all of our listeners and viewers for watching and supporting the show. We really can't make the show without your support. If you're able to make a small contribution, you can do so by going to our website, *theAnalysis.news*, and hitting the donate button at the top right corner of the screen. You can also share the show and like and subscribe to the show wherever you watch it, be it on podcast streaming services such as Spotify, Apple, or YouTube. Thanks for watching, and see you in a bit with Dr. Ardi Imseis.

I'm very happy to be joined by Dr. Ardi Imseis. He is an Assistant Professor of International Law at Queens University in Canada. He spent 12 years working for the UN in Gaza as well as in East Jerusalem, working for UNRWA, which is the United Nations Relief and Works Agency, as well as for the UNHCR, the UN's High Commissioner for Refugees. He was also on a commission that was mandated to investigate the human rights violations and violations of humanitarian law taking place in Yemen. He has recently published an amazing book called *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity*. Thank you so much for joining me today, Dr. Imseis.

**AI:** Thanks for having me, Talia. Thank you.

**TB:** We've been watching the news and seeing how Israel is perpetrating all sorts of atrocities in the occupied Palestinian territories. There was a recent *CNN* report that showed that over 50% of the bombs being dropped are what's called "dumb bombs," so they're not precision-guided. The UN has just said that 90% of Palestinians have been forcibly displaced, and the death toll is at least 20,000. It's probably even more than that, of whom 9,000 are

children. What is your assessment right now of the extent of the war crimes that are being committed by Israel?

**AI:** Well, take what I say with a grain of salt because it comes at some distance. I'm sitting in Ottawa. Based on the information available in the public realm coming through on an hourly basis on the *Al Jazeera* news network, who are the only ones who have a physical presence on the ground, the only major international journalist organizations on the ground in the Gaza Strip, and any other coverage that is being picked up. It is unbelievable and unprecedented the amount of damage and destruction being brought on the people of Gaza.

The events of October 7 were clearly very difficult for the Israeli side, to the extent that civilians were killed, and they certainly were, and by the hundreds. It clearly gives rise for concern that these were violations of the laws of war, and they may very well include war crimes. The taking of hostages, for instance, is a war crime. The targeting of civilians is clearly a war crime. What is certainly true, in my respectful view, is that based on the response by the occupying power in Gaza, the killing of 20,000 individuals, two-thirds of whom are women and children, the vast majority of whom, upwards of 90-95% are civilian, thousands of others in the rubble and unaccounted for, presumably dead, over 50,000 casualties on the Palestinian side. Again, the vast majority of whom are civilians, the imposition of starvation by the occupying power as a tool of warfare, that is the absolute cutting off of water, food, fuel, electricity, and so on, deliberately. The forcible transfer of the Palestinian population now, about 85% of the population of the Gaza Strip has been forcibly transferred from their homes, crushed southbound towards the Egyptian border. The real substantial threat of a forcible transfer into Egypt, accompanied, of course, all of this by express statements by the Israeli High Command, that is precisely what they're doing, or that's precisely what they want to do; that is to drive them out of the Gaza Strip. The scorched-earth tactics, where I think now upwards of about 60% of all infrastructure, including habitable buildings, is either destroyed completely or partially destroyed, such that there's nothing for these refugees to return to. All of this is unprecedented in the history of the Palestine problem and goes even far beyond that which took place in 1948, empirically speaking, in terms of hard numbers. We're now at a time that, in my lifetime, I've never seen, and I've been a scholar and a practitioner of Christian Palestine my whole life. These are dark times indeed.

**TB:** The international response has not been adequate. I think that's even an understatement. It's been pretty embarrassing, actually. Unfortunately, the General Assembly resolutions are not binding. So even though 153 countries voted for a ceasefire, it's not a binding resolution. It's not going to stop Israel from continuing its indiscriminate bombardment of civilians. How else could the UN help in this particular situation? Is there anything else that you see that they should be doing?

**AI:** You were right to speak of the ceasefire push. The very, very first thing that the UN should have been doing, literally from the off, two or three days into the events, given the scope and the breadth of the attacks that the occupying power was imposing on the people of

Gaza from very early on, would be to call for a ceasefire. That's the normal course for the United Nations. Of course, the Secretary-General did not do that. As the Chief Executive Officer of the organization, it falls to him to speak on behalf of the organization, and he failed to do that. It wasn't until, I think, about 11 days into the onslaught on Gaza that the Secretary-General began calling for humanitarian ceasefires or humanitarian pauses. It was a language that wasn't unequivocal. By calling it a humanitarian ceasefire or a humanitarian pause, it implies that it is legitimate and accepted that there would be a continuation at some stage after the pause of an armed force on the civilian population once the pause ends. That was very disappointing. Almost in his defense, the Secretary-General was probably taking his cues from reading the temperature or the mood in the Security Council, the very clear difference of opinion between the United States on the one hand and the other for permanent members.

It's come to the point where, as you'd mentioned now, we finally got a General Assembly resolution: 153 member states of 193 member states, with, I think, 10 against and maybe 20 or 22 abstaining. Those are the ones who voted and called for a ceasefire, a humanitarian ceasefire, not too long ago. Just today, right now, as we speak, as you and I speak, the Security Council is now debating the passage of a draft resolution that itself doesn't call for a ceasefire but only refers to the previous Security Council resolution of the 15 of the month, a calling for a humanitarian pause.

In terms of the United Nations institutional response, it hasn't been as good politically as it should be. On a humanitarian side, they're going flat out. UNRWA is the largest presence. I used to work in the Gaza Strip for UNRWA, so I'm well familiar with their operations.

They've got thousands of local staff, local Palestinian staff, who are doing their utmost in impossible conditions. Those staff themselves and their families are being attacked from the sky and from pretty much everywhere else by the occupying power and being driven from their homes. They are doing an impossible job with very little supplies, very little food, if any, fuel, and so on to dispense. They've tried.

According to the UN humanitarian coordinator, Martin Griffiths, the resident humanitarian coordinator, and his representative, Lynn Hastings, it's not a proper UN humanitarian response on the ground in Gaza. As a result, it is something that cannot be called a humanitarian response by virtue of the fact that there is no space for them to do their work. There's no respect for their independence, impartiality, neutrality, and their need primarily for access to the resources, food, and fuel to dispense to the needy population, all by action of the occupying power. So it is not a good situation.

What can the UN do? I can tell you what they should do. They should be immediately calling for a ceasefire that's unconditional and de-politicize any calls for a ceasefire. You're seeing from the United States a heavy politicization of any call for a ceasefire. They want to blame Hamas and so on. In response, of course, other states in the United Nations are saying, "All right, if you're going to politicize it, then we'll do just the same and call the Israelis out for their completely disproportionate response, their illegal occupation, and the ravaging of the

civilian population.” It doesn’t look good at the UN, frankly. On the 19th of December, when you and I are talking, things may change within days, but it doesn’t look good.

**TB:** Yeah, and I highly doubt that the Security Council will vote for a ceasefire. I’m sure the United States will veto it, but let’s see what happens after this interview.

**AI:** Let’s see.

**TB:** UN Secretary-General António Guterres did say that the events of October 7 did not take place within a vacuum and that there’s a history of occupation that led up to it, which, of course, doesn’t justify the massacre of civilians. And neither does Hamas’s atrocities justify what Israel is currently unleashing on the Palestinians in Gaza.

I do want to take a historical view, given that your book is looking at the history of the UN and the Partition of 1947, which it put forth in Resolution 181. Maybe we could first examine two concepts before we look at the history, that being the rule of law versus the rule by law. The way I understand it is that the rule of law is the body of international norms, customary law, and the system that came after World War II essentially. Rule by law is the way that the UN doesn’t actually enforce the rule of law. There’s a discrepancy between the two. How would you explain it?

**AI:** Yeah, thanks for the question. It goes straight to the book that I published: *The United Nations and the Question of Palestine*. In that book, I juxtapose the idea of the international rule of law, which, as you rightly pointed out, is the notion in the liberal order that law is meant to govern relations between actors in a system. In this case, the international system, those actors are primarily states. Still, they also include non-state actors, people who have a right to self-determination, and others, even individuals, to the extent that individuals have human rights. The idea of the rule of law is that international law exists to hold all to account as applicable under this rubric of law. The idea here is that there should be a universal application of the law, regardless of the position or the station of the actor in question.

What I find when I look at the question of Palestine and its management by the United Nations over decades - since 1947 to the very present - is that while the UN holds itself out as being the standard bearer of the international rule of law, what we find is that through the actions of the United Nations on the question of Palestine - and repeatedly from 1947 to the present - there seems to be something more akin to what I call the rule by law. Where law is created by the United Nations or affirmed by the United Nations, but at bottom, abused, selectively applied in order, quite frankly, to impose an order that is at bottom inequitable when looked at from the vantage point of, in this case, the Palestinian people. And more broadly, the global subaltern or the global underclass, if you like.

What’s interesting about the question of Palestine is that it seems to me to embody this condition that I call international legal subalternity. Again, the essence of that condition, which is something I’ve come up with as a condition under international law that I can see

before me in my work, is that international law is repeatedly held out to the global underclass, the global subaltern, the global subs, women, children, minorities, non-self-governing groups, people on the outside of power looking in effectively. International law is held out to these people as holding a promise for justice. Each time that those groups, and in this case, the Palestinian people, go for that promise and try and use international law or international institutions, the United Nations primarily, to realize that promise, the goalposts always seem to shift, and paradoxically, by the actions of the very same international community that holds this promise out being the UN.

We see that from 1947, with the purported partition of Palestine by the General Assembly of the UN, we see it thereafter by the UN's creation, not very long after the partition resolution failed, creation of a normative and institutional regime that was unique for Palestinian refugees through UNRWA and another UN organization. We see it as well through the failure of the United Nations to manage the question of the occupied Palestinian territory from 1967 to the present day for what it is, which is an illegal occupation, and if it is illegal, that gives rise to certain consequences that the UN's position doesn't accord with today. Then finally, you can very clearly see it in how the Security Council of the United Nations has denied the State of Palestine membership in the United Nations organization for spurious reasons that are shaped as legal ones, but in fact, are very political and politicized when looked at through the prism of the law governing membership of the organization.

My book looks at each of these moments. Despite these moments taking place over different paradigmatic times, the late empire in the late '40s, the decolonization period in the '60s, '70s, and '80s, all the way to the present, the unipolar and now the multipolar world that we are now going through. Despite the politics of these different paradigmatic moments, the condition of legal subalternity remains and is embodied by the Palestinian people and the state of Palestine in their engagement with the UN.

**TB:** Would you direct your critique towards the member states that are part of the UN or more towards the structure of the UN? The Security Council is composed of five permanent members who have veto power. There's a power imbalance there that's embedded within the UN system itself.

**AI:** Yeah.

**TB:** Where would you say you direct your critique at the most?

**AI:** That's right. It's a very perceptive question that you've asked, and it's a very useful question. What is the UN effectively? What do you mean? What do we mean when we speak of the United Nations? Is it an independent organization, or is it merely the sum of its parts being different member states, some of whom have more power than others, both materially and indeed legally, when you look at the P5, the permanent five representatives on the Security Council who have a veto?

My book, and in my practice, and this comes through my experience with the United Nations, accepts that it is neither one nor the other; it is both—one at the same time. I had mentioned earlier that the Secretary-General is an independent civil servant. Under Article, I believe it is 100 of the UN Charter, he's not to seek instruction from any member state. No member state is to impose any obligations on him or any of his staff because they are independent. The UN, of course, we know from the jurisprudence of the International Court of Justice, the reparations case from 1948, we know that the UN has its own individual legal personality.

At the same time, when you look at the Security Council, just by way of example, you can see that even though the UN holds itself out in the UN Charter, all states and all members are sovereign equals; some, in fact, are more equal than others. As I just mentioned, that is the P5 who have, in law, under the UN Charter, a treaty, have more power than others by virtue of their veto power. The UN is all of these things at once.

It's important that when we assess - when I assess the UN's engagement with the question of Palestine from 1947 to the present, I take into account what is happening and who the actors are. My book does that, and I do that in my analysis.

If we look at 1947 and the partition of Palestine, to go back to your initial substantive question, there you have the General Assembly, which had the problem of Palestine handed over to it by the British mandate power. The British had asked the General Assembly, then numbering 51 states, most of them Western; again, the vast majority of the world was still under colonialism at this time, for a study to be done by the General Assembly for the "future government of Palestine." Through my examination of the UN record concerning its management of the question of Palestine, "the future government of Palestine," it didn't take long to figure out what was going on. Western states were trying to shape a resolution for Palestine that effectively created a Jewish state in a place full of non-Jews. That is to say, the majority of the population were Palestinians, Arabs, Muslims, and Christians who had, for the preceding 30 years, faced a slow trickle of European Zionist Jewish settlement facilitated by the British mandatory power. That Zionist settlement was aimed at one thing, creating what was then called a Jewish National Home under the League of Nations system and even within the UN documents, but that everyone knew was going to be a Jewish state, even though these European Zionist settlers who happened to be Jewish and who wanted to establish this state were a very small number.

By the time the General Assembly is handed over this problem, I'd say the population of Palestine was two-thirds Palestinian, Arab, and Indigenous people to one-third European Jewish settlers. The General Assembly chose to partition the country through Resolution 181 in a manner that was completely violative of principles of self-determination. What does that look like? What did that look like? Well, under Resolution 181, two-thirds of the population, the Indigenous population, were given 43% of the country. One-third of the population, the Jewish settler population from Europe was given 56% of the country. That's not all. On the eve of the Partition Resolution, and this is all according to UN documents, by the way, on the eve of the Partition Resolution, the Jewish community in Palestine only owned 5.6% of the country. Yet under the Court, under the terms of the Partition Resolution, they were being

given 56% of the country. Of course, if it was going to be a Jewish state, one would presume that they would have a preponderance of Jews living in that state and that the Jewish portion of this state would be a majority Jewish population. Well, according to the UN record, that was the case. Even under the UN Partition Plan, the population ratio of the purported Jewish state to be established under that plan was one-to-one. In fact, I looked at the records very carefully; there were about 2,000 or 3,000 more Palestinian Arabs in the Jewish state than Jewish residents of Palestine in the proposed Jewish state.

From the off, according to the UN Partition Plan, the Jewish state wouldn't even have a majority Jewish population. What does all of that mean? Well, it sets up the groundwork for a civil war. Now, according to UN records, which I looked at very carefully, the United Nations Special Committee for Palestine, which was mandated to look at this problem and come up with solutions - which they then sent to the General Assembly and which the General Assembly used to form the basis of Resolution 181 -, had information given to it directly in hearings by the Jewish agency, the Jewish Zionist leadership at the time headed by David Ben-Gurion. He ended up becoming the first Prime Minister of Israel, to the effect that they were armed - that is, that the Zionist militias existed. Ben-Gurion was asked, "If you get a General Assembly Resolution Partition in Palestine, what will you do if the Arabs reject it?" He said, "We will go to the Arabs," and I'm paraphrasing, "We will go to the Arabs. If they reject, we will tell them we have a decision in our favor." That is the General Assembly resolution. "If you fail to accept the decision, then we will use force to impose it on you." All of this is to say that the UN knew that the Zionists had the capabilities to deploy force to impose themselves militarily on the people of Palestine. They also knew that the British would quit Palestine physically, would remove their police power, and would remove their military from Palestine prior to the partition resolution being given effect. That meant that the Palestinian population would be left undefended because their leadership and their military had been destroyed in the 1930s by the British occupying, or rather, mandate power. All is to say that the Nakba of 1948 was set in stone, was set up on a plate, was teed up, as we say in golf, by the decision of the General Assembly to illegally partition Palestine, and again, without the consent of the Palestinian natives running completely contrary to principles of self-determination.

I'll give you, by way of example, just to close this thought, a little point from the UN record. When asked about self-determination, UNSCOP, while it's considering the partition of Palestine, the UNSCOP record is very clear. They say expressly, bear with me, "According to the well-known international principle of self-determination, which is now universally recognized and forms a keystone of the charter of the United Nations, the affairs of a country must be conducted in accordance with the wishes of the majority of its inhabitants." In 1947, it was too late to look at the matter from any other angle. They just carry on. They just carry on and basically say, "Look, sorry. Despite the fact that we know that the partition plan is going to violate principles of self-determination, we are going to go forward with it nonetheless." The reason why they did that, of course, was because it was a General Assembly dominated by Europe, and they wanted to fix what they called the "Jewish question" in the wake of the Holocaust at the expense of the Palestinians.

**TB:** You're arguing that this particular Resolution 181, which was written by the General Assembly, was, in a way, foreclosing the possibility for the Palestinians to avail themselves of their right to self-determination.

**AI:** Absolutely. If you were to apply principles of self-determination on the territory at the time, which was required, of course, under international law, and as was done in respect of other Class A mandates, because Palestine was a Class A mandate under the League of Nations Covenant, and other Class A mandates existed, say, in Syria, Lebanon, Iraq, and so on. They did have those rules applied to them. If you were to apply self-determination to the Class A mandate, you would have to give respect and defer to the will of the majority, wouldn't you? Well, in this case, they knew right from the off. In their record, they're very clear that if the majority was given its will, if the Palestinian, Arab, and Indigenous majority had its will respected, there would be no Jewish state. Of course, UNSCOP, the United Nations at the time, said, "We can't count on this. There must be a Jewish state, and we're going to establish one regardless of what the indigenous majority of the population feels." This is from the violation of the right of the Palestinian people to self-determination, and yet presented by the UN as an opportunity for them to express their self-determination in the other half of Palestine, the 43% of the partitioned territory.

Of course, all of this was for not because immediately following the partition resolution's passage, a civil war broke out. The first six months of which involved the ethnic cleansing by the Zionist militia of 300,000 Palestinian Indigenous Arabs from what was then earmarked for the Jewish state. Then, when Israel declared its independence, so to speak, declared its statehood on the 14 of May 1948, and other states entered Palestine to save Palestine, we are given in Western parlays to believe that they invaded Israel. In fact, they didn't. There was a collective responsibility to defend Palestine, the Arab League. They entered. It was only after they entered in 1948, May 15, that that began an interstate phase of the war. For the next 12 months or so, the 1948 war continued into 1949 and resulted in another 450,000 Palestinian civilians expelled, with a total of about 750,000 to 800,000 expelled as a result of the 1948 Nekba. Fast forward to today, and you see that happening on the ground right now in Gaza.

**TB:** I do have a question about the right to self-determination because the right to self-determination is something that came out in the early part of the 1900s. It's not a product of the post-World War II institutional framework. It's something that came much earlier. I believe the Soviet Union also contributed to the development of the right to self-determination. Would you say that the post-World War II order was, in a way, at odds with that particular right, that they didn't even, within the context of decolonization, didn't want to respect the right to self-determination?

**AI:** Well, self-determination is an interesting concept in international law. It goes through different phases during its progressive evolution. When it first emerged through Woodrow Wilson's positions following World War I, it was a political postulate. He urged that there should be no continuation of the empire, that people's rights in the colonies needed to be



respected, and that they should be able to self-determine. It wasn't until 1945, with the advent of the UN Charter, that the idea of self-determination as such was codified into a treaty, making it international law. However, there are scholars who argue that in 1945, despite being included in the UN Charter, self-determination was as yet an international legal principle. Some scholars argue that in 1945, despite being included in the UN Charter, it was merely a political postulate. This does not ring true because it otherwise wouldn't have been put into an international treaty being the UN Charter.

Be that as it may, it's clear when it comes to Palestine that in terms of state practice, which is part of the customs of states and how international law forms, in terms of state practice, in the year 1947, the right of self-determination for peoples subjected to Class A mandates of the League of Nations. And here I'm required to go back to that for your viewers. Class A mandates under the League of Nations had their independence provisionally recognized under Article 22 of the League of Nations Covenant. Because of that, it was very clear, based on those positions established in the UN Charter and the League of Nations Covenant and the state practice for Class A mandates, Lebanon, Syria, Jordan, and others, that the people of Palestine enjoyed a right to self-determination. Then, moving forward into the 1960s, when self-determination picked up through decolonization, that is, the emergence of the so-called new states from Asia, Africa, Latin America, and so on, who are coming out of the yoke of European colonialism, that's where the real practice of self-determination of the colonies emerges, such that now is very clear that people who are subjected to colonialism in forms of foreign domination, alien domination, racial regimes, including foreign occupation, have a right to self-determination. That's also another basis for the Palestinian people's right to self-determination, although now in the truncated territory of the occupied Palestinian territory being the West Bank, including East Jerusalem and the Gaza Strip.

**TB:** I wanted to ask you about the role of the International Court of Justice, the ICJ, which is the UN Court. It basically adjudicates disputes brought to it by sovereign states as well as issues legal advisory opinions. But most states would argue that it doesn't really occupy a role above sovereign states. There isn't really an entity that can enforce the application of UN principles or international law. This is also even more complicated by the fact that the International Criminal Court, which is a completely different court altogether, the ICC, doesn't have jurisdiction over countries such as Israel or the United States, which are continuously in violation of principles enshrined in the Rome Statute, which is the document which governs the jurisdiction of the International Criminal Court. So, there's no real entity that can enforce or ensure that there are repercussions for the violations of these international norms that are perpetrated by the U.S. and Israel.

How would you assess the role of the ICJ, as well as its 2004 legal advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territories?

**AI:** Yeah, absolutely. It's a good question. In fact, I deal with this in Chapter 5 of my book. Look, the ICJ, the International Court of Justice, is the principal judicial organ of the United

Nations. The UN has six principal organs. The ICJ is the principal judicial organ. As such, all member states of the United Nations have access to the Court if they so consent.

But what's interesting is that the Court also operates a jurisdiction or has a jurisdiction to provide legal opinions on legal questions that are put before it. We call these advisory opinions. The General Assembly has put questions to the Court and sought advisory opinions on any number of things over the course of the life of the United Nations. In 2004, it put a question to the Court asking the Court what the legal consequences were of the construction by Israel of a wall in the occupied Palestinian territory. That wall still exists. It is still, to a certain extent, being constructed, but the vast majority of it is complete. All of it, or the vast majority of it, in the occupied Palestinian territory, severing Palestinians from one another, closing off space, and making it impossible for Palestinian farmers to farm their lands on the other side of the wall or for people to get to their family and friends, or indeed, key services like hospitals and other such jobs on the other side of the wall and so on.

The Court in 2004 declared that the wall was unlawful for a number of reasons. First and foremost, because it violates the Palestinian people's right to self-determination. The Court affirmed that the Palestinian people are people under international law juridically, that, as a result, they have a right to self-determination, that the occupied Palestinian territory, being the West Bank, including East Jerusalem and the Gaza Strip, are occupied territory and effectively, the territorial unit within which the Palestinian people have a right to exercise self-determination. Because they occupied these territories, Israel, as occupying power, cannot, as a matter of law, be sovereign in them. Occupation is meant to be temporary, for example. These were very useful pronouncements made by the Court. One thing that the Court didn't do, nor was it asked to do, was determine the legality of Israel's occupation as such. This is the issue that I take up in Chapter 5 of my book, and which, incidentally, is now before the International Court of Justice, which I'm happy to talk about in a moment.

The essence of it is this: in international law, there's a difference between the law that governs the right to use force. Initially, this is what we call the *jus ad bellum*, and this is governed by Article 2, subsection 4 of the UN Charter and other exceptions to the general prohibition that exists in Article 2, subsection 4 of the Charter. There is a general prohibition on the use of force in international relations; there are two exceptions to this, possibly three. The law governs how force is used. So, the right to use force, the *jus ad bellum*, and the law governing how force is used, the *jus in bello* or international humanitarian law. So the law governs the distinction between civilians and combatants or proportionality of the use of force when force is used, the necessity principles, and so on, that you can't target a civilian or a civilian object, and so on. And when you do, the use of force you use must be proportionate. Now, it's important to keep these two bodies of law in mind because the UN has documented chapter and verse, and you see this come through in the 2004 Advisory Opinion on the Wall, Violations by the Occupying Power, Israel, of the *jus in bello*, the IHL, the International Humanitarian law. Settlements are a war crime. You can't deport the

population, the civilian population. You can't use torture or violate their human rights, and so on.

There's documentation of how force is to be used. Still, there's no assessment done by the Court of the right of Israel to A, use force to maintain its presence in the occupied territory, and B, ultimately, the legality of its presence in the occupied territory. That is exactly the question that is now being put before the Court in a case that is pending before the Court by Resolution 77/247 of 30 December 2022, the General Assembly, following through on a suggestion that I made and a number of others have made, but that I make in my book in Chapter 5, has asked the Court, what are the legal consequences effectively of Israel's continued annexation, settlement, and the position of racial discrimination and violation of the right of the Palestinian people to self-determination in the occupied Palestinian territory? In view of all of those things, what are the legal consequences of all of those things for the legal status of Israel's presence in the territory? It's basically inviting the Court to determine that Israel's presence in the territory is unlawful.

One of the things that your listeners should be aware of is that occupations are meant to be temporary. An occupation does not provide the occupying power with sovereignty. It can never do that. Russia is in occupation of Ukraine. It purports to have annexed portions of Ukraine. The international community has rightfully expressed dismay with that and rejected that. Russia, as an occupying power, cannot annex occupied territory, nor can it claim sovereignty in occupied Ukraine. The exact principles apply to occupied Palestine. Yet, this occupation has lasted. Israel's occupation of the OPT, Occupied Palestinian Territory, has lasted 56 years. And under the color of some purported right by the occupying power, every single government since 1967 has claimed sovereignty in that territory. The Israeli occupying power has legislated this, including in its quasi-constitutional laws, its basic laws, that only Jews have self-determination rights in occupied Palestinian territory. It's followed through with actions to colonize that territory. Today, there are 750,000 Israeli settlers living illegally in the occupied Palestine territory. Even in the Gaza Strip, in the wake of all of this indiscriminate bombardment and ethnic cleansing that is taking place. There are large segments of the Israeli government, including members of the cabinet, that are arguing that once the war is over, so to speak, the Israeli settlers or the government of Israel should be allowed to resettle in the Gaza Strip. If that's what occupation is, temporary and occupying power is not sovereign, and yet Israel claims sovereignty in this territory, the Court is now being asked to determine the legality of the occupation.

Finally, if it does determine that the occupation is illegal, then the consequences of that in international law are very clear. Under the law of state responsibility, a state engaged in internationally wrongful conduct has three basic obligations. First, to end the conduct forthwith, so you must end the occupation forthwith and unconditionally. Second, make appropriate assurances of a non-repetition. Third, pay appropriate reparations for any damage thereby. Third states also have obligations because this violation, the occupation, triggers violations of what we call peremptory norms, the right to self-determination, the inviolability of territorial integrity of the state, and so on. Certain states are under an obligation not to aid

or assist in the maintenance of these illegal acts being the occupation or to recognize them as lawful. These consequences would be great because they would then trigger a change in the UN discourse on how to end the occupation. Now, these Palestinians are told they must negotiate the end of the occupation with their jailer, with the occupying power who operates in bad faith, and according to the UN documentation, which we've produced over many decades? Well, however, do you negotiate the end of your bondage with your jailer? It's impossible. Clearly, that is not required by the law of state responsibility if the occupation is declared to be unlawful. Fingers crossed, that will take place next year before the International Court of Justice.

**TB:** Parallel to this inquiry that was presented by the General Assembly to the ICJ for them to determine whether the occupation is unlawful or not, we could also have an inquiry before the International Criminal Court. That would also have, I would assume, different legal consequences. But Israel has not signed up the jurisdiction of the ICC.

**AI:** That's right. It's a different court. This Court, the ICC, is a court that concerns itself with individual criminal responsibility, which is different from what the ICJ would concern itself with, which is state responsibility.

Yes, there are parallel proceedings that have been ongoing at the International Criminal Court. Palestine acceded to the Rome Statute of the International Criminal Court in 2014. There has been an open investigation since 2021 on the situation in Palestine, as it is called. Under the Rome Statute of the International Criminal Court, the Court has jurisdiction over what we call the core crimes in international criminal law: genocide, aggression, crimes against humanity, and war crimes. It is open and within the realm of the possibility that at least three of those core crimes: genocide, crimes against humanity, and war crimes; can be looked at by the Office of the Prosecutor as he engages in his investigation in respect of the situation in Palestine, and notwithstanding the fact that Israel is not a party to the Rome Statute. The reason for that is that Palestine is a party. Because Palestine is a party to the Rome Statute, the territory on which the International Criminal Court has jurisdiction in the situation Palestine is the territory of the occupied Palestinian territory, that is, the West Bank, including East Jerusalem and the Gaza Strip. This was confirmed by the pre-trial chamber about a year and a half ago of the ICC.

Aggression would not be able to be pursued because the fine print of the Rome Statute makes it impossible for aggression to be pursued if the alleged aggressor state is itself not a signatory of the Rome Statute. In this case, the alleged aggressor state is Israel, and it is not a signatory. That's one of the downsides.

A couple of weeks ago, the issue of genocide was placed before the Office of the Prosecutor by a group of states from the Global South, led by South Africa. Crimes against humanity and war crimes are already in front of the Office of the Prosecutor. It's only a matter of time before the Office of the Prosecutor issues arrest warrants and indictments. There are some concerns, however, based on his public statements in recent days, that there might be a

politicization on his part of who is pursued before the Court. He's been very vociferous, for instance, in speaking about Hamas war crimes on October 7. Indeed, those actions, to the extent that they're investigated by his office and demonstrate reasonable grounds to pursue them criminally, should be pursued criminally. But he hasn't been as vociferous in respect of, say, Israel's settlement regime. He's spoken of, say, settler violence, but he's not spoken openly of the very clear legal responsibility that attaches to the leadership of the State of Israel, individually, criminally, for the establishment of settlements and over many decades. That's the elephant in the room because the Israelis have no defense for that. They're actually openly, and they historically have very openly and publicly said that they have every intention of settling the territory. They don't believe it's illegal, and they're going to persist. Well, that's the case made, as it were. There's no reason why the Office of the Prosecutor should not have—and years ago—issued indictments against the Israeli leadership for violating that portion of the Rome Statute, which prohibits settlement by an occupying power. And yet he hasn't. So there's some concern there.

**TB:** I do have a final question because we have seen many countries in the Global South express their disappointment or frustration with the UN system and with the so-called rules-based international order, particularly with regard to Russia's invasion of Ukraine. Western countries were vociferously condemning Russia's invasion, but now, with Israel's occupation of Palestinian territories and its bombardment of Gaza, those same countries haven't been speaking out. If anything, countries like the U.S. have been enabling this bombardment. Even though Joe Biden did say that Israel is indiscriminately bombing the Palestinian territories, it does sound like he hasn't set any red lines. He's actually giving the green light for it. The U.S. is funding Israel to enact these atrocities.

My question would be, if you look at this body of international norms and you look at the history of it, a lot of third-world international scholars would say that this specific legal system emerged out of a very specific colonial context, one which was propped up by Western capitalism and the desire to exploit other countries and to take their resources in order to support the development of European-ness in a way or European countries. If you're an optimist and you really believe in these specific values that are enshrined in the UN Charter and in other international norms and in customary law, how do you reconcile that with the fact that this international system actually came out of a system of oppression, discrimination, and exploitation of colonized people?

**AI:** Yeah, that's a really good question. It's something that any critical international lawyer deals with and must necessarily deal with; that is the historical evolution of the international legal order out of Europe and out of the clash of the European Empire with the non-European world that that empire aimed to colonize and exploit because that's the pedigree of international law. Modern international laws are about that clash and the rules that needed to be produced by Europe to legitimate what it was doing to the non-European world. This is a critique of international law that is a reasonable one, one that I engage with in my book and in my other scholarship and that others do in what we call the Third World Approaches to

International Law School of Thought (TWAAIL). There's also a stream of thought within this school of thought that recognizes the potential universal character and quality and importance of the normative framework that modern international law offers. The idea here is that you recognize it, but now you have to actually put it to work. It's important for us to call out the need to abide by the rule of law truly, the universal application of these norms without fear or favor. Otherwise, you end up with more of the same colonial imperial abuse of the law, what I call rule by law.

One good example is you see this happen now when you juxtapose, say, the Western response to Russia's occupation and purported annexation of Ukraine with the Western response to Israel's occupation of Palestine, or indeed, Morocco's occupation of Western Sahara, or Israel's occupation of occupied Syria, of the Syria and Golan Heights. You have the same principles of law: occupation, its temporariness, the inadmissibility of the acquisition of territory through threat or use of force, the inadmissibility that an occupied territory can be annexed by the occupying power, the inadmissibility of the imposition by an occupying power of its own civilian settlers in the territory it occupies, and the inadmissibility effectively of colonizing an occupied territory. These same principles apply in Ukraine as they do in occupied Palestine, Western Sahara, and the Golan Heights, occupied Syria, and Golan Heights. Yet, the positions of the great powers are diametrically opposite in these conflicts. The West wants everybody, and rightfully so, led by the United States, to support sanctions against Russia for its illegal annexation and occupation of Ukraine. It scratches its head and wonders why the Global South doesn't follow suit and doesn't support them in that call. The reason why the Global South does not do that is precisely now being displayed for all of us in real-time on the camera in respect of what the occupying power in Israel is doing, rather the Israeli occupying power is doing in occupied Palestine in Gaza, where the West is, led by the United States, not willing to call for a ceasefire. Not willing to call out Israel's illegal occupation or the fact that it doesn't enjoy a right of self-defense to impose an illegal regime on another country through, among other things, the imposition of racial discrimination or apartheid.

It's the unequal application of these principles that requires even the most skeptical of TWAAIL international lawyers or those who practice in the world like I do, who dabble in TWAAIL from time to time, that calls upon us to call these double standards out. We mustn't, in my respectful view, throw our hands up and say, "Oh, well, law does not matter," because that's a nihilistic thing to do. What would we be left with? Law does matter. We just need to apply it, I think, universally and without favor with an idea of the humanism that was meant, or at least should be meant, to be read into it in 2023, some 75 years since the partition of Palestine and some 77 years since the creation of the United Nations.

**TB:** Well, Dr. Imseis, thank you so much for joining us and for making the case for the universal applicability of these international norms and laws. It was really great to get your insights on what's going on right now in Gaza and Israel's indiscriminate illegal bombardment of Palestinians.

**AI:** My pleasure to be with you, Talia. I wish you well with the podcast, and I wish all your viewers well.

**TB:** Thank you for watching *theAnalysis.news*. If you'd like to support the show, you can do so by going to our website, *theAnalysis.news*, and making a small contribution if you're able to do so. Thank you, and see you next time.

**END**

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