

## Briefing Note: Annexation under International Law and in the oPt Context

### Overview

Annexation—the acquisition of territory through the threat or use of force—whether realised in practice and in fact (*de facto*) or through the formal extension of authority by law (*de jure*), is strictly prohibited under international law, and is a violation of the United Nations (UN) Charter. The prohibition of annexation constitutes a peremptory norm of general international law, meaning it represents a central pillar of the international legal order. Changes to territory or title resulting from annexation have no legal effect. The annexation of territory by a State carries legal consequences for the responsible State, and creates binding, positive obligations for all third States.

In the context of the occupied Palestinian territory (oPt), Israel has formally (*de jure*) annexed East Jerusalem and, it has been argued, annexed in fact (*de facto*) through various measures other areas of the West Bank, including in the Jordan Valley. Finally, formal (*de jure*) Israeli annexation of the Jordan Valley or other parts of the oPt—and subsequent responses from the international community—will likely have far-reaching legal and political implications, and will be closely observed by States with extraterritorial aspirations.

### De Jure and De Facto Annexation

Though the precise boundary between situations of *de jure* and *de facto* annexation is subject to dispute, both are identically prohibited under international law. In essence, *de jure* annexation consists of a formalised declaration of sovereignty by a State over a given territory, or parts thereof, which is not recognised by the international community as forming part of that State’s sovereign territory. By contrast, *de facto* annexation is the treating of territory as if it were part of the offending State’s sovereign territory, though without any formal declaration by the offending State of such a status. This could be manifested in, for instance, extension of the offending State’s domestic legislation into (parts of) the territory in question, or exploitation of the territory’s land or natural resources without permission of the recognised sovereign power or in a manner exceeding what is allowed under international law.

### Prohibition of Annexation under International Law

Article 2(4) of the UN Charter requires that all member states “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This principle found subsequent support in the Friendly Relations Declaration (1970), adopted unanimously by the UN General Assembly, which declared that “the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” The prohibition of annexation—a corollary of the prohibition of acts of aggression—be it *de jure* or *de facto* must therefore be understood as a fundamental principle of international law.

### Prohibition of Annexation as a Peremptory Norm of International Law

A peremptory norm of general international law (also known as a *jus cogens* norm) is defined as one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>1</sup> In short, peremptory norms occupy the uppermost tier in the hierarchy of international law. There exists no recognised, exhaustive list of rules which have achieved *jus cogens* status. However, given the centrality of State sovereignty and territorial integrity in the international legal order, it may be comfortably concluded that the prohibition of annexation is *jus cogens*. Such a conclusion is supported by inclusion of the prohibition against aggression and the illegal use of force including the acquisition of territory by force in a non-exhaustive list of well-established peremptory norms provided by the International Law Commission.<sup>2</sup> Additionally, the inadmissibility of the acquisition of territory by war has been confirmed in a number of UN Security Council Resolutions, including in relation to the conduct of Israel.<sup>3</sup>

Furthermore, annexation may also constitute a serious breach of a people’s right to self-determination, which is itself recognised as a peremptory norm of general international law.

### Annexation under International Humanitarian Law

Under international humanitarian law (IHL), belligerent military occupations are temporary situations which cannot confer any transfer of title or sovereignty over the occupied territory to the Occupying Power. Flowing from this general principle is the specific provision that unilateral annexation of all or part of an occupied territory cannot in any way deprive members of the occupied population of the multitude of protections afforded by the Fourth Geneva Convention.<sup>4</sup> As such, any changes made—as a result of

<sup>1</sup> Article 53, Vienna Convention on the Law of Treaties, 1969.

<sup>2</sup> Commentary to Article 40, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, (hereafter ‘ARSIWA, 2001’).

<sup>3</sup> In relation to the conduct of Israel, see: UNSC Res 242 [1967], S/RES/242; UNSC Res 497 [1981], S/RES/497.

<sup>4</sup> Article 47, Fourth Geneva Convention, 1949.

annexation—to the status of the occupied population have no legal effect. Nor does unilateral annexation affect the occupied status of the territory in question.

### Annexation in the Context of the West Bank

East Jerusalem was—with the rest of the West Bank—occupied by Israel in 1967. In 1980, East Jerusalem was *de jure* annexed by Israel through the passing of *The Basic Law: Jerusalem, the Capital of Israel*. This measure was swiftly and unequivocally condemned by the UN Security Council,<sup>5</sup> which affirmed that the *Basic Law* violated international law and was without legal effect. In addition, concerns have been raised that Israeli practices across the West Bank generally constitute a form of *de facto* annexation. For instance, in the view of the current Special Rapporteur on the human rights situation in the territories occupied by Israel since 1967:

“Israel has continuously entrenched its *de facto* annexation of the West Bank by imposing intentionally-irreversible changes to occupied territory proscribed by international humanitarian law: the establishment of 230 settlements, populated by more than 400,000 Israeli settlers [...] the extension of Israeli laws to the West Bank and the creation of a discriminatory legal regime; the unequal access to natural resources, social services, property and lands for Palestinians in the occupied West Bank”.<sup>6</sup>

As such, proposed moves to annex the Jordan Valley may be said to constitute an extension and/or formalisation of an existing unlawful policy, rather than an entirely new phenomenon. Further, Israel’s classification of the West Bank as non-occupied, or ‘disputed’ territory has no bearing on the legality of any annexation of West Bank territory.

### Obligations of Third States in Response to Situations of Annexation

The annexation of territory triggers binding legal obligations for third States. In response to a serious breach<sup>7</sup> of a peremptory norm, third States must cooperate to bring to an end, through lawful means, the unlawful situation (in this case, the invalid legal claim to territory).<sup>8</sup> The range of measures available to third States to meet this obligation is broad, and operates on a spectrum of severity. States may, for example, employ private demarches, public condemnation or review of existing trade agreements. Examples of measures previously adopted by third parties in response to situations of annexation are considered below.

Third States must also refrain from any act which may serve to recognise the unlawful situation resulting from annexation.<sup>9</sup> This may be manifested, for example, in refusal to extend the benefits of trade agreements with the annexing State to incorporate entities in the annexed territory, or refraining from undertaking diplomatic relations with the annexing State in the annexed territory. Similarly, third States are also required to refrain from rendering aid or assistance which would serve to maintain the unlawful situation.<sup>10</sup>

In addition, all States party to the Geneva Conventions are bound to ensure respect for the Conventions in all circumstances.<sup>11</sup> This means that all States, whether or not a party to the armed conflict in question (including military occupation), are legally bound to ensure other States’ conduct complies with the Conventions. Where the conduct of a party to an armed conflict contravenes the Geneva Conventions—such as an occupied population being deprived of certain IHL protections as a result of annexation—third States are required to adopt positive, lawful measures with a view to bringing the offending State’s conduct back in compliance with IHL.

### Examples of Third Party Practice in Response to Situations of Annexation

The threat posed to the international legal order by acquisition of territory resulting from threats or use of force is reflected in the practice of third States and international organisations. The realistic prospect of effective, proportionate responses by third parties can serve as an essential deterrent against future instances of annexation.

In 1990, following its invasion of Kuwaiti territory, Iraq declared a “comprehensive and eternal merger” of the two States. In response the UN Security Council declared this annexation as legally invalid, and called upon all States, international organisations and specialised agencies not to recognise the unlawful situation created as a result.<sup>12</sup> The Security Council also imposed sanctions on Iraq, including the freezing of Iraqi and Kuwaiti overseas assets, and the imposition of a trade ban.

In 2014, following the assumption of control over Ukrainian Crimea by Russia-affiliated forces, the international community moved swiftly to condemn this act, and to impose a range of sanctions on Russia, and/or individuals and entities whose actions were deemed to have undermined Ukraine’s territorial integrity, sovereignty and independence. For instance, the EU and its member States imposed a range of ‘restrictive measures’, including the cancelling of EU-Russia and bilateral summits and suspension of negotiations over Russia’s joining of the Organisation for Economic Co-operation and Development and the International Energy Agency. In addition, in excess of 200 individuals and entities were subject to asset freezes and travel bans.

<sup>5</sup> UNSC Res 478 [1980], S/RES/4781.

<sup>6</sup> Report on the Situation of human rights in the Palestinian territories occupied since 1967, October 2018, A/73/45717, para.25.

<sup>7</sup> ‘Serious breach’ of such a norm is defined as one which involves a gross or systematic failure by the responsible State to fulfil the obligation. See Article 40(2), ARSIWA, 2001.

<sup>8</sup> Article 41(1), ARSIWA, 2001.

<sup>9</sup> Article 41(2), ARSIWA, 2001.

<sup>10</sup> Ibid.

<sup>11</sup> Article 1 common to the four Geneva Conventions of 1949.

<sup>12</sup> UNSC Res 662 [1990], S/RES/662.