

## Prolonged Occupation and International Law

# International Humanitarian Law Series

*Editors-in-Chief*

Professor Timothy L.H. McCormack

*Editorial Advisory Board*

Professor Georges Abi-Saab – H.E. Judge George H. Aldrich  
Madame Justice Louise Arbour – Professor Ove Bring  
Professor John Dugard – Professor Dr. Horst Fischer  
Dr. Hans-Peter Gasser – Professor Christopher Greenwood  
Professor Ruth Lapidoth – Professor Gabrielle Krik McDonald  
H.E. Judge Theodor Meron – Captain J. Ashley Roach  
Professor Michael Schmitt

VOLUME 66

The International Humanitarian Law Series is a series of monographs and edited volumes which aims to promote scholarly analysis and discussion of both the theory and practice of the international legal regulation of armed conflict.

- The series explores substantive issues of International Humanitarian Law, including:
- Protection for victims of armed conflict and regulation of the means and method of warfare
  - Questions of application of the various legal regimes for the conduct of armed conflict
  - Issues relating to the implementation of International Humanitarian Law obligations
  - National and international approaches to the enforcement of the law and
  - The interactions between International Humanitarian Law and other related areas of international law such as Human Rights, Refugee Law, Arms Control and Disarmament Law, and International Criminal Law.

The titles published in this series are listed at [brill.com/ihul](http://brill.com/ihul)

# Prolonged Occupation and International Law

*Israel and Palestine*

*Edited by*

Nada Kiswanson and Susan Power



BRILL | NIJHOFF

LEIDEN | BOSTON

Cover illustration: Israeli soldiers take cover behind shields, during the demonstration against Israeli settlements in the village of Kafr Qaddoum near the West Bank city of Nablus. Palestinian-Israeli conflict in Nablus, Palestine – 19 Aug 2022. Photo by Nasser Ishtayeh/SOPA Images/Shutterstock (13134395j).

#### Library of Congress Cataloging-in-Publication Data

Names: Kiswanson, Nada, editor. | Power, Susan editor.  
Title: Prolonged occupation and international law : Israel and Palestine /  
edited by Nada Kiswanson and Susan Power.  
Description: Leiden ; Boston : Brill Nijhoff, [2023] | Series:  
International humanitarian law series, 1389-6776 ; volume 66 | Includes  
bibliographical references and index.  
Identifiers: LCCN 2022054281 (print) | LCCN 2022054282 (ebook) |  
ISBN 9789004503922 (hardback) | ISBN 9789004503939 (ebook)  
Subjects: LCSH: Palestine–International status–Congresses. | Arab-Israeli  
conflict–Law and legislation–Congresses. | Military  
occupation–Congresses.  
Classification: LCC KZ4282 .T47 2018 (print) | LCC KZ4282 (ebook) | DDC  
341.4/2095694–dc23/eng/20230206  
LC record available at <https://lccn.loc.gov/2022054281>  
LC ebook record available at <https://lccn.loc.gov/2022054282>

Typeface for the Latin, Greek, and Cyrillic scripts: “Brill”. See and download: [brill.com/brill-typeface](http://brill.com/brill-typeface).

ISSN 1389-6776

ISBN 978-90-04-50392-2 (hardback)

ISBN 978-90-04-50393-9 (e-book)

Copyright 2023 by Nada Kiswanson and Susan Power. Published by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Brill Nijhoff, Brill Hotei, Brill Schöningh, Brill Fink, Brill mentis, Vandenhoeck & Ruprecht, Böhlau, V&R unipress and Wageningen Academic.

Koninklijke Brill NV reserves the right to protect this publication against unauthorized use. Requests for re-use and/or translations must be addressed to Koninklijke Brill NV via [brill.com](http://brill.com) or [copyright.com](http://copyright.com).

This book is printed on acid-free paper and produced in a sustainable manner.

*This book is dedicated to  
sita Fatme and sito Aziza, and all other grandparents  
that fled Palestine, key in hands, never to return*

*It is also dedicated to Joe Power who energetically  
supported the liberation of Palestine*

*And to Suha Jarrar, a powerful advocate for Palestinian  
rights, whose legacy continues to inspire*





# Contents

Foreword	IX
<i>Emma Playfair</i>	
Acknowledgements	XII
Abbreviations	XIV
Notes on Contributors	XVIII

Introduction	1
<i>Nada Kiswanson</i>	

## PART I

### *Legal Frameworks and Characterisations*

1	Israel's Unlawful 1967 Invasion of Palestine	13
<i>John Quigley</i>		
2	Out of Time: On the (Il)legality of Israel's Prolonged Occupation of the West Bank	31
<i>Vito Todeschini</i>		
3	The Occupation of Palestine from a TWAIL Lens	52
<i>Ray Murphy, Anita Ferrara and Susan Power</i>		
4	Reducing the Friction: A Functional Analysis of the Transformed Occupation of the Gaza Strip	69
<i>Aeyal Gross</i>		
5	Apartheid and International Law in Palestine	104
<i>John Reynolds</i>		
6	The Occupation–Colonialism Continuum: Impact on Transitional Justice in Palestine/Israel	133
<i>Rimona Afana</i>		
7	Israel's Military Justice System as an Annexationist Tool	159
<i>Sahar Francis</i>		
8	Adaptation under Occupation: Climate Change Vulnerability	176
<i>Suha Jarrar †</i>		

## PART 2

*Legal Responsibilities and Accountability*

- 9 Israel's Impunity from Peremptory Norms 199  
*John Dugard*
- 10 Third State Responsibility versus Sanctions in Regulating Trade with  
Illegal Settlements at the EU 223  
*Manuel Devers and Tom Moerenhout*
- 11 Palestine, Israel, and the International Criminal Court 253  
*Nada Kiswanson*
- 12 Private Sector Responsibility for the Treatment of Palestinian Prisoners  
and Detainees in Light of the Law and Policy of the International  
Criminal Court 289  
*Shane Darcy*
- 13 Prosecuting Systematic Economic Exploitation of Occupied Territory as  
Pillage 310  
*Susan Power*
- 14 Criminal Jurisdiction under Occupation: The Oslo Accords and the  
ICC 330  
*Halla Shoaibi and Asem Khalil*
- 15 Domination, Transformation, and Annexation via Utilities 348  
*Marya Farah and Maha Abdallah*
- 16 Palestinian Refugees and International Law 371  
*Thomas Hammarberg*
- Bibliography 393
- Index 398



## Foreword

I am honoured to write the foreword for this book which aims to focus international attention on the extraordinary length of the belligerent occupation of the Palestinian territory by Israel. Inherently only a temporary status, this occupation has now lasted more than half a century.

Over thirty years ago, in December 1987, Al-Haq organised its first international conference on “International Law and the Administration of Occupied Territories”. Our aim was to seek international expertise on the question of how an occupier should administer occupied territory under a prolonged occupation, a question which had been largely unexplored since after World War II. Working with Al-Haq at the time, I helped to organise that conference and subsequently edited the collection of papers.<sup>1</sup>

Humanitarian law was a backwater at that time, so we were asking experts to draw on precedents from decades earlier to consider how Israel should be administering the Palestinian territory it occupied. At that time the prolonged nature of the occupation, already in place for twenty years, preoccupied many of our contributors, but who then could have imagined that it would still be continuing for over 55 years, until today?

Yet soon after publication of that book, humanitarian law became all too topical in a number of ways: the Gulf War, the occupation of Kuwait by Iraq, the establishment and developing jurisprudence of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court, and the International Court of Justice’s advisory opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Al-Haq’s book, published under my name in 1992, provided persuasive evidence of the violations of international law in Israel’s administration of the territories it occupied. We had hoped that by making the international community aware of the maladministration and exploitation by Israel of the territories it occupied and of its violation of international humanitarian and human rights law, we could contribute to the pressure on Israel to change. Regrettably this did not happen and the opportunities for such change now seem ever more remote. Rather the occupation deepened and as explored in the current volume, came closer in many ways to *de facto* annexation, with

---

<sup>1</sup> Emma Playfair (ed), *International law and the Administration of Occupied Territories* (OUP 1992).

expansion of settlements, the building of the Wall, restrictions on movement, and seizure of Palestinian land and resources, as well as the continued systematic repression of the Palestinian civilian population.

I was therefore glad to know that Al-Haq had again taken the initiative, in partnership with the Palestinian Centre for Human Rights, Birzeit University's Institute of Law, and the International Federation for Human Rights to bring together international legal and practitioner expertise in an international conference in 2018 on "The Threshold from Occupation to Annexation". That conference and the passing of half a century of occupation gave momentum to the present volume, edited by Nada Kiswanson and Dr Susan Power focusing on the critical issue of prolonged occupation and international law.

I was privileged to work with Al-Haq in its early formative years and to have known the Palestinian Centre for Human Rights since its establishment in Gaza. I observed both organisations over the years as they faced seemingly insurmountable challenges and admired their steadfastness in overcoming these and in sustaining the extraordinary quality of their work in documenting, defending, and promoting human rights in Palestine. At the time of writing, there is a concerted effort to stifle Palestinian human rights organisations and silence Palestinian civil society at large, including by criminalising, arresting, and threatening human rights defenders.<sup>2</sup> The vibrant international law discourse and human rights movement is, however, resilient. Since the conference held by Al-Haq in 1987, not only has international humanitarian law developed rapidly, but documents have come into the public domain which have enabled researchers to review key aspects of the events surrounding the establishment of the State of Palestine and the occupation of Palestine. While many of these remain "classified", enough has been made accessible for Palestinian, Israeli and international historians to add considerably to earlier understandings of what really happened in 1948 and 1967 to the Palestinian people. Some of these findings are drawn on by the distinguished contributors to the present volume, including some who also contributed to our conference in 1987.

Chapters in this book cover an array of topics and aspects of the prolonged occupation and Israel's control, ranging from colonialism and apartheid to the

---

2 See for example 'UN Special Rapporteurs Condemn Israel's Designation of Palestinian Human Rights Defenders as Terrorist Organisations – Press Release', *UN News*, 25 October 2021; 'Israel Must Safeguard Human Rights Defenders in Occupied Palestinian Territory and Within Its Borders – UN Expert', *UN News*, 11 August 2021; UNHRC, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Michael Lynk, A/HRC/34/70, 13 April 2017, pages 8–17.

illegality of occupation. Nada Kiswanson, in her excellent introduction, summarises and groups the chapters. Importantly, many of the chapters in this book propose specific actions which can and should be taken by States, collectively and individually. Such actions include asking the United Nations to organise the necessary steps towards a fair solution for Palestinian refugees, including financial resources to cover compensation. They also include calls for the direct involvement of the international community in bringing an end to settlement activities in the West Bank and the lifting of the blockade of the Gaza Strip. In agreeing that Israel's exercise of control over Palestinians is unacceptable, chapters examine Third States' responsibilities under international law and underline their duties not to recognise as lawful a situation created by serious breaches arising under a peremptory norm of general international law, nor to render aid or assistance in maintaining that situation. Notably, the European Commission should be pressed to propose a law to stop trade with illegal settlements, but if the Commission fails to do so, then Member States should act unilaterally in compliance with its legal obligations. Considering the potential role of the International Criminal Court, contributors stress the importance of realistic expectations of what can be achieved through the ICC while anticipating that it can expose some crimes committed by Israeli officials and in turn bring much needed justice to some victims.

I applaud Al-Haq and their co-convenors of the conference and Nada Kiswanson and Dr Susan Power for their efforts in bringing new analyses and, importantly, recommendations for urgent action to the international community. I sincerely hope that drawing on the recommendations put forward by the contributors to this book, action will be taken to bring justice to Palestinians and Israelis so badly affected by the long years of conflict.

*Emma Playfair*

## Acknowledgements

This book began a fledgling idea, caught in a moment in The Hague in 2017, as the editors working together and grappling with the extent and implications of Israel's *de facto* annexation of the occupied Palestinian territory, discussed the need to create space for advanced academic discourse and reflection on the broader subject of prolonged occupation. At the time, twenty-five years had followed since the publication of Emma Playfair's seminal edited book *International Law and the Administration of Occupied Territories*. As the military administration hurtled past the half century mark, it was time to look deeper, past the administration of the territory and at the very nature of the occupation itself, its prolonged and permanent character, and resulting implications.

The editors would like to extend their gratitude to all the contributors to this book for their thought-provoking, stimulating chapters, written during an exceptional time-period.

The editors are also grateful to Al-Haq, Birzeit University – Institute of Law, the Palestinian Centre for Human Rights, and the International Federation for Human Rights for organising the international conference on “The Threshold from Occupation to Annexation”, which took place on 3–4 October 2018 in Palestine, that encouraged us to pursue our longer-term aspiration to develop this book.

In particular, the editors wish to thank Rania Muhareb for her drive and commitment in spearheading the organisation of the joint academic conference hosted in Birzeit and Professors Jamil Salem and Mustafa Mari for convening and leading the initial selection committee and setting the seeds for the book which followed. Also, many thanks to the team at Al-Haq, who worked tirelessly behind the scenes including Lillian Zanairi, Laura Thomas, Samer Khalifah, and Tahseen Ellayyan.

The editors are also grateful to Emma Playfair, Shawan Jabarin, John Dugard, and John Quigley for their invaluable and kind support. Emma's book served as a model of excellence throughout the process.

The editors are especially indebted to the wonderful team at BRILL, who have provided their guidance and expertise, in particular Lindy Melman and Thalien Colenbrander, and the Editors of the International Humanitarian Law Series.

Susan wishes to thank the inspirational and dynamic Legal Research and Advocacy Team at Al-Haq, Seamus Cox, Teresa Power, and family for their continuous encouragement.

Last, but certainly not least, Nada wishes to thank her mother, husband, and children, without whom this book would not have been possible.

*Nada Kiswanson*

*Dr Susan Power*

# Abbreviations

ACRI	Association for Civil Rights in Israel
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977)
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977)
BDS	Boycott, Divestment, and Sanctions
CAT	Convention against Torture
CCP	Common Commercial Policy
CERD	United Nations Committee on the Elimination of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CFSP	Common Security Foreign Policy
CIA	Central Intelligence Agency
CRC	Convention on the Rights of the Child
CUP	Cambridge University Press
EC	European Commission
ECI	European Citizens' Initiative
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
Elements of Crimes	International Criminal Court, Elements of Crimes (2011)
ESCWA	United Nations Economic and Social Commission for Western Asia
EU	European Union
FIDH	International Federation for Human Rights
Fourth Geneva Convention	Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949)
FRUS	Foreign Relations of the United States
GDP	Gross domestic product
Geneva Conventions	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and

	Shipwrecked Members of Armed Forces at Sea (12 August 1949); Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).
Guiding Principles	United Nations Guiding Principles on Business and Human Rights
Hague Regulations	The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning Laws and Customs of War on Land (1907)
HCJ	Israeli High Court of Justice
HL Deb	United Kingdom, House of Lords, Debates
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention for the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	UN International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defence Forces
IEC	Israel Electric Corporation
IHL	International Humanitarian Law
ILC	International Law Commission
JEC	Jerusalem Electric Company
JSC	Judicial Selection Committee
JWC	Joint Water Committee
LAW	LAW - The Palestinian Society for the Protection of Human Rights and the Environment
MAG	Military Advocate General
New York Declaration	New York Declaration for Refugees and Migrant (16 November 2016)
NGO	Non-governmental Organisation
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OECD	Organisation for Economic Co-operation and Development

OHCHR	United Nations Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territory (1967)
OUP	Oxford University Press
PA	Palestinian Authority
PCATI	Public Committee Against Torture in Israel
PLC	Palestinian Legislative Council
PLO	Palestine Liberation Organization
Rome Statute	Rome Statute of the International Criminal Court (17 July 1998)
SOAS	School of Oriental and African Studies
SCSL	Special Court for Sierra Leone
SUP	Stanford University Press
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)
TWAIL	Third World Approaches to International Law
UAR	United Arab Republic (Syria and Egypt political alliance)
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UN Charter	Charter of the United Nations (24 October 1945)
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UN Independent Commission of Inquiry on the 2014 Gaza Conflict	United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict
UN Independent International Fact-Finding Mission on the Implications of Israeli Settlements	United Nations Independent International Fact-Finding Mission to Investigate the Implication of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem



UNSC	United Nations Security Council
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTS	United Nations Treaty Series
US	United States of America

## Notes on Contributors

### *Maha Abdallah*

is a legal researcher and human rights advocate. She holds an LL.M. in international human rights law from the Irish Centre for Human Rights.

### *Rimona Afana*

is Assistant Professor of Peace Studies at Kennesaw State University and Visiting Scholar at the Emory University School of Law, Vulnerability Initiative.

### *Shane Darcy*

is Professor and Deputy Director, Irish Centre for Human Rights, School of Law, National University of Ireland Galway.

### *Manuel Devers*

is a lawyer specialised in international law and EU law. He holds a Master of Laws in EU law and international law from the Riga Graduate School of Law and a Master of Laws in international law from University Paris 1 Panthéon-Sorbonne.

### *John Dugard*

is Professor of Law and *ad hoc* Judge at the International Court of Justice. He served as the Special Rapporteur on the Human Rights Situation in the Occupied Palestinian Territory between 2001 and 2008.

### *Marya Farah*

is a lawyer focusing on international human rights law and advocacy. She holds a Juris Doctor, Master of Public Policy, and Bachelor of Arts in Political Science and Organisational Studies.

### *Anita Ferrara*

is a postdoctoral lecturer at the Irish Centre for Human Rights, National University of Ireland, Galway.

### *Sahar Francis*

is General Director of Ramallah-based Addameer Prisoner Support and Human Rights Association, a Palestinian NGO providing legal and advocacy support to

Palestinian political prisoners in Israeli and Palestinian prisons. An attorney by training, she joined the Association in 1998, first as a human rights lawyer, then as Head of the Legal Unit.

*Aeyal Gross*

is Professor of International and Constitutional Law at the Tel-Aviv University. He is also a Visiting Professor of Law at SOAS, University of London.

*Thomas Hammarberg*

is a Swedish diplomat and human rights expert. He has been a member of the Swedish Parliament. He represented Sweden in the Refugee Working Group established through the Madrid Peace Process in 1991. He was also Sweden's Ambassador on Humanitarian Issues and Secretary-General of the Olof Palme International Center. He previously served as Secretary-General of Amnesty International and Secretary-General of Save the Children (Sweden). He was Council of Europe Commissioner for Human Rights from 2006 to 2012.

*Suha Jarrar*

was a Senior Legal Researcher with Al-Haq. She specialised in environmental law under occupation.

*Asem Khalil*

is Dean of the Faculty of Graduate Studies and Professor at the Birzeit University. He obtained a PhD from the University of Fribourg.

*Nada Kiswanson*

is Legal Counsel practicing international criminal and human rights law. She has an LL.B and LL.M from Uppsala University and an LL.M from Leiden University. She has appeared before the International Criminal Court on behalf of hundreds of individual Palestinian victims. She has also worked with and represented Palestinian human rights organisations, primarily Al-Haq, before inter-governmental organisations and judicial institutions.

*Tom Moerenhout*

is a legal scholar specialised in international economic and humanitarian law. He has attained two Master degrees and a PhD in international relations and international law at the Graduate Institute of International and Development Studies in Geneva.

*Ray Murphy*

is Professor at the Irish Centre for Human Rights, National University of Ireland Galway.

*Emma Playfair*

is a British lawyer, former Al-Haq volunteer and Representative of the Ford Foundation's Middle East and North Africa Office.

*Susan Power*

is Head of Legal Research and Advocacy at Al-Haq, a Palestinian NGO, based in Ramallah, Palestine. She has a PhD from Trinity College, Dublin and she lectured for seven years at Griffith College Cork and Dublin.

*John Quigley*

is Professor Emeritus at the Moritz College of Law at the Ohio State University.

*John Reynolds*

is Associate Professor at the School of Law and Criminology, Maynooth University, National University of Ireland.

*Halla Shoaibi*

is Assistant Professor at Birzeit University and Master Program Director of the Birzeit Master Program in Israeli Studies. She obtained a PhD from the American University.

*Vito Todeschini*

is a legal expert in the areas of human rights, international humanitarian law and accountability, with a particular focus on Palestine/Israel and the wider MENA region. He has a PhD from Aarhus University.