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Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories

Advisory opinion of the International Court of Justice on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem

Note by the Secretary-General

Addendum

1. At the 56th (resumed) plenary meeting of its seventy-seventh session, on 30 December 2022, the General Assembly, by its resolution 77/247, in accordance with Article 96 of the Charter of the United Nations, decided to request the International Court of Justice, pursuant to Article 65 of its Statute, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:

(a) "What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?"

(b) "How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?".

2. On 19 July 2024, the International Court of Justice delivered its advisory opinion on the above question.

3. On 24 July 2024, I received the duly signed and sealed copy of this advisory opinion of the Court.

4. On 24 July 2024, I transmitted to the General Assembly the advisory opinion given by the International Court of Justice on 19 July 2024 in the case entitled *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (A/78/968).

5. I hereby transmit to the General Assembly the individual opinions, separate opinions and declarations appended to that advisory opinion.

[Original: English]

DECLARATION OF PRESIDENT SALAM

[Original English text]

Agreement with the Court's reasoning and conclusions in the present Advisory Opinion — Israel aware since 1967 of the unlawful nature of its settlement policy — Israeli discriminatory policies and practices tantamount to apartheid — Question of the ab initio *unlawfulness of the occupation — Effects of resolution 181 (II) and its legal consequences for Israel — Modalities of reparation arising from Israel's violations — Need for concrete action by the United Nations — Role of the Court and the achievement of peace through law.*

1. I fully agree with both the reasoning and conclusions of the Court in this Advisory Opinion, which is why I voted in favour of all the points in the operative part. In this declaration I would like to set out a few additional reasons that are not stated in the Advisory Opinion but which, in my view, help to justify the conclusions reached by the Court, in particular the finding that Israel's continued presence in the Occupied Palestinian Territory is unlawful and that Israel is under an obligation to bring to an end as rapidly as possible its unlawful presence and cease immediately all new settlement activities and withdraw all settlers.

2. I shall therefore present my additional views on the following points: Israel's policies and practices in the Occupied Palestinian Territory, the unlawfulness of the occupation, the effects of United Nations General Assembly resolution 181 (II) and the modalities for the reparations owed by Israel for its violations of international law in the Occupied Palestinian Territory.

1. Additional observations on certain Israeli policies and practices

3. The Court devotes a large part of its Opinion to the analysis of Israel's policies and practices in the Occupied Palestinian Territory (paragraphs 103 to 243). It is a thorough analysis based on highly credible sources, the conclusions of which are difficult to contest. I fully agree with these conclusions. However, I would like to focus specifically on two of these policies which, in my view, demonstrate the systematic and deliberate nature of Israel's conduct in breach of international law in the Occupied Palestinian Territory, namely settlement and apartheid.

4. Regarding the first point, the Court recalls that Israel has implemented a policy of settlement and annexation throughout its occupation of Palestinian territory. The Advisory Opinion highlights the following components of this policy: the transfer of Israeli civilians into the Occupied Palestinian Territory, the forced displacement of the Palestinian population, the confiscation of land, the exploitation of natural resources and the extension of Israeli law to this territory. Each of these already constitutes in itself a serious violation of the relevant norms of international humanitarian law and international human rights law, with which Israel, as an occupying Power, is bound to comply.

5. What is important to note first is that Israel has been repeatedly reminded of the unlawful nature of these policies and of its obligation to bring them to an immediate end. The Advisory Opinion refers to numerous resolutions by various United Nations bodies and institutions, including the Security Council, the General Assembly, and the Human Rights Council, and to reports of the Office of the High Commissioner for Human Rights and the Secretary-General, all of which have repeatedly deplored both the policy of establishing settlements in the Occupied Palestinian Territory and the accompanying measures. These have contributed to depriving the Palestinians of the occupied territories of the enjoyment of fundamental rights inherent to human dignity, undermined the integrity of the Palestinian territory and, above all, prevented the Palestinian people from exercising its right to self-determination.

6. Unfortunately, Israel has repeatedly refused to heed these calls to respect international law and comply with its international obligations, thus ignoring the Court's 2004 Opinion, which states that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 184, para. 120).

7. Similarly, Israel must have been aware of the conclusions of the "guardian" of the Geneva Conventions, the International Committee of the Red Cross (ICRC), whose president declared the following:

> "The ICRC's publicly stated position is that this policy amounts to a violation of IHL, in particular the provision of the Fourth Geneva Convention prohibiting the transfer of part of the population of the Occupying Power — in this case Israeli citizens — to the occupied territory . . . The Israeli government's decisive and systematic support over the years to the establishment of settlements, including by taking away land, has effectively achieved just that: a profound alteration of the economic and social landscape of the West Bank, which hinders its development as a viable nation and undermines future prospects for reconciliation." (Peter Maurer, "Challenges to international humanitarian law: Israel's occupation policy", *ICRC*, Vol. 94, No. 888, 2012, p. 1507.)

8. However, what is most important to note is that the Israeli authorities were warned from the very first months of the occupation that the establishment of settlements in the Occupied Palestinian Territory constituted a violation of international law. Indeed, the then legal adviser to Israel's Ministry of Foreign Affairs, Theodor Meron, had made it clear in a memorandum to the Israeli Prime Minister's office, as early as September 1967, that "the establishment of civilian settlements in the occupied West Bank and other conquered territories violates the Fourth Geneva Convention related to the protection of victims of war and, specifically, its prohibition on settlements (Article 49 (6))".

9. Meron explained that:

> "This prohibition, I wrote, is categorical and 'not conditioned on the motives or purposes of the transfer, and is aimed at preventing colonialization on conquered territory by citizens of the conquering state.' Any steps to place citizens in occupied land could only be done 'by military bodies and not civilian ones [on military] bases' clearly temporary in nature. With reference to the position of the government of Israel that the West Bank was disputed territory, and therefore not 'occupied territory,' I opined that this position had not been accepted by the international community, which regards the territory concerned as normal occupied territory. Israeli settlements in the area of 'Etzion Bloc' would be viewed as evidence of an intent to annex that area, I warned." (T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", *American Journal of International Law*, Vol. 111, 2017, No. 2, p. 358.)

10. Meron had also warned the Israeli authorities of the illegality of deportations and the demolition of Palestinian homes in the occupied territories (Memorandum from Theodor Meron, Legal Adviser to Israel's Ministry of Foreign Affairs, to the Director General of the Prime Minister's Office on "Geneva Convention: Blasting Homes and Deportation", 12 March 1968, cited in T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", *American Journal of International Law*, Vol. 111, 2017, No. 2, pp. 358-359).

11. It is therefore in full knowledge of the illegality of its actions that, instead of putting an end to its settlement of the occupied territories, Israel has been intensifying its efforts since 1967. For example, it is to be noted that

> "over the past ten years, the population of settlements in the occupied West Bank, including East Jerusalem, has grown from 520,000 in 2012 to just under 700,000. The population lives in 279 Israeli settlements throughout the West Bank, including 14 settlements in East Jerusalem, for a total population of over 229,000." (Report of the United Nations High Commissioner for Human Rights, 15 March 2023, A/HRC/52/76, para. 5.)

12. The Opinion rightly points out in paragraph 115 that the establishment of these settlements is a clear violation of Article 49 (6) of the Fourth Geneva Convention, which prohibits the deportation of the population of the occupied territory and the transfer by the occupying Power of its population to the occupied territory. These are therefore serious violations that the States parties to the Geneva Conventions are obliged to punish; they are also under an obligation to track down those responsible for committing or ordering the commission of such offences. The ICRC has pointed out that this obligation is also a customary one, extending to all States, which must not only investigate such grave breaches allegedly committed by their nationals or their armed forces, or on their territory, they also have the right to confer on their national courts universal jurisdiction for the punishment of such grave breaches for which no statute of limitations may apply (ICRC Study on Customary International Law, rules 156 to 158, 160 and 161).

13. In this respect, it is also undoubtedly worth recalling that the "deportation of population" is an act constituting a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court (hereinafter the "Rome Statute"). Similarly, the direct or indirect transfer by an occupying Power of part of its civilian population into the territory that it occupies constitutes a war crime under Article 8 of the Rome Statute. It should also be noted that, according to Article 8 *bis* (2) of the Rome Statute, "any annexation by the use of force of the territory of another State or part thereof" constitutes a crime of aggression "regardless of a declaration of war". In accordance with their obligations under the Rome Statute, the States parties should draw all the legal conclusions from the Court's findings in this Advisory Opinion to prevent and punish the perpetrators of these acts.

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14. The second policy which I would like to address concerns Israel's discriminatory legislation and measures in the Occupied Palestinian Territory (paragraphs 180 to 229 of the Advisory Opinion). On this point, the Court concludes that "Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities", and therefore "constitute a breach of Article 3 of CERD [Convention on the Elimination of All Forms of Racial Discrimination]" (paragraph 229 of the Opinion).

15. Article 3 of CERD reads as follows: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction". The Court's conclusion on this point is especially important given the reluctance of some internationalists to refer to the particularly heinous crime of apartheid outside the context of South Africa.

16. While it must be recognized that the definition of apartheid in Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter the "Apartheid Convention") is marked by the experience in South Africa, which is expressly mentioned, this cannot mean that for any policy to be characterized as constituting apartheid it must fully reproduce the policies and measures implemented in South Africa at that time. Such an approach would effectively deprive the Apartheid Convention of any effect today, since it is doubtful that any State in today's world would openly claim to pursue a policy of racial segregation as practised in South Africa at the time the convention was adopted. In order to prevent and punish what constitutes a crime under international law, whose prohibition is an undisputed *jus cogens* norm, a non-restrictive reading of this definition is therefore necessary.

17. As noted above, Article 3 of CERD, to which Israel is a party, establishes an obligation to prevent, prohibit and eradicate any act of apartheid. Furthermore, although Israel is not a party to either the Apartheid Convention or the Rome Statute, there can be no doubt that the prohibition of apartheid is a customary norm, that is recognized as a peremptory norm from which no derogation is possible and whose violation constitutes a crime against humanity. It is to be noted that, following in the steps of the United Nations General Assembly (see resolution 2202 (XXI) of 16 December 1966), the Security Council described apartheid as "a crime against the conscience and dignity of mankind [which] is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security" (resolution 473 of 13 June 1980, para. 3).

18. In its Advisory Opinion on *Namibia*, the Court identified the effects of measures adopted by South Africa in Namibia as characteristic of a policy of apartheid. According to this jurisprudence, measures could constitute apartheid if they

> "establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 57, para. 130).

19. Moreover, the Court unequivocally stated in that Opinion that a State may be guilty of apartheid outside its national territory and against persons who are not its nationals (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 57, para. 130).

20. It was clearly not appropriate for the Court to seek to determine the constitutive elements of apartheid in customary international law in this Advisory Opinion. However, by drawing on the elements highlighted by the Court in its 1971 Advisory Opinion and the provisions of Article II of the Apartheid Convention and Article 7 (2) *(h)* of the Rome Statute, it is possible to identify the elements that constitute the essence of this crime and therefore to assess whether Israel has implemented such a policy in the Occupied Palestinian Territory. Accordingly, apartheid would be established based on the following elements: the existence of two or more distinct racial groups; the commission of inhumane acts against one or more groups; an institutionalized régime of systematic oppression and domination by one racial group over one or more other racial groups and an intention to maintain this régime.

21. Regarding the first element, it should be noted that in the context of international human rights law, the term "race" or "racial group" must be understood in its broadest sense. Thus, by stating that the term "racial discrimination" refers to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin", Article 1 of CERD clearly indicates that "race" is not the only criterion of racial discrimination. Furthermore, in its General Recommendation VIII on the interpretation and application of Article 1, paragraphs 1 and 4, of CERD, the Committee on the Elimination of Racial Discrimination considers that the identification of individuals belonging to a particular racial or ethnic group or groups "shall, if no justification exists to the contrary, be based on the self-identification by the individual concerned" (CERD General Recommendation VIII Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention, Identification with a Particular Racial or Ethnic Group, Thirty-eighth Session of the Committee on the Elimination of Racial Discrimination, A/45/18, 28 September 1990, p. 89). As international criminal tribunals have pointed out, when considering the definition of "racial group" in the context of other crimes under international law, in the absence of a scientific definition or an objective method to determine whether a person belongs to a supposed "race", it is necessary to refer to the perception of the groups concerned of their distinct identity. Thus, in the *Rutaganda* case, Trial Chamber I of the International Criminal Tribunal for Rwanda "notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence,

a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group" (ICTR, *The Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda, ICTR-96-3-T, 6 December 1999*, para. 56). In the same vein, the International Criminal Tribunal for the former Yugoslavia stated that "a national, ethnical, racial or religious group is identified 'by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics'" (ICTY, *Trial Chamber I, Section A, The Prosecutor* v. *Vidoje Blagojević, Dragan Jokić, IT-02-60-T, 17 January 2005*, para. 667).

22. Palestinians and Israeli Jews identify themselves as two distinct groups based on "subjective" elements relating to "descent, or national or ethnic origin", including those relating to religion and culture, and should therefore be considered as two "racial groups" within the meaning of the first constitutive element of apartheid. In this respect, it should also be pointed out that Israel's 2018 Basic Law states that "[t]he Land of Israel is the historical homeland of the Jewish People" and that the State will "strive to secure the welfare of members of the Jewish people", thus drawing a clear distinction between Jewish and non-Jewish people. (Basic Law: Israel, the Nation State of the Jewish People, 5778-2018, Article 1 *(a)*, and Article 6 *(a)*, see the full text at https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf). Similarly, it should be noted that the Court recently stated that "[t]he Palestinians appear to constitute a distinct 'national, ethnical, racial or religious group'" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 45).

23. With regard to the second element, the commission of inhumane acts, the Advisory Opinion sets out numerous violations that undoubtedly come under this heading, some of which are expressly listed in the Apartheid Convention and the Rome Statute. They include the transfer of members of the Israeli population into the occupied territory, together with the deportation of part of the Palestinian population (paragraph 118); the punitive demolition of Palestinian property (paragraphs 208-212); forced evictions, numerous house demolitions for lack of building permits, and restrictions on residence which leave members of the Palestinian population with no choice but to leave their place of residence (paragraph 147); the confiscation of land (paragraphs 118-123), thus depriving the Palestinians in the occupied territory of their means of subsistence; the exploitation of natural resources in the occupied territory, "including water, minerals and other natural resources, for the benefit of [Israel's] own population, to the disadvantage or even exclusion of the local Palestinian population" (paragraph 126); numerous acts of violence against the Palestinian population, both by settlers in the Occupied Palestinian Territory and by the Israeli security forces (paragraphs 148-154); unjustified and abusive restrictions on the freedom of movement of the Palestinian population in the occupied territory (paragraphs 200-206).

24. It is evident from the magnitude and consistency of these violations that they are not isolated acts but are part of an institutionalized régime of systematic oppression by Israelis, over Palestinians in the occupied territory. As the Opinion demonstrates, settlers and Palestinians live in the occupied territory under a régime established by Israel which grants different rights and benefits to each of the two groups. Numerous reports from United Nations bodies have already established and decried this situation. For example, the Independent International Fact-Finding Mission set up by the General Assembly concluded that

> "[t]he settlements are established for the exclusive benefit of Israeli Jews and are being maintained and developed through a system of total segregation between the settlers and the rest of the population of the Occupied Palestinian Territory. This system of segregation is supported and facilitated by a strict military and law enforcement control to the detriment of the rights of the Palestinian population" (Independent International Fact-Finding Mission to Investigate the Effects of Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of Palestinians in the Occupied Territory, including East Jerusalem, 7 February 2013, A/HRC/22/63, para. 103).

25. The systematic nature of the occupying Power's oppression of the Palestinians is also evidenced by the discriminatory measures relating to housing, and land and property rights. As noted by the United Nations High Commissioner for Human Rights,

> "[i]t is clear that Israeli planning and zoning regimes in Area C and East Jerusalem are discriminatory, rendering it almost impossible for Palestinians to obtain building permits. Data from the Israeli Civil Administration made public in December 2021 revealed that fewer than 1% of Palestinian building permits (24 out of 2,550) in Area C had been approved between 2016 and 2020. In contrast, 8,356 permits for Israeli settlement housing units were issued" (Report of the United Nations High Commissioner for Human Rights, 15 March 2023, A/HRC/52/76, para. 30).

26. In addition, there are restrictions on the freedom of movement which, according to the International Fact-Finding Mission, quoted by the Court, "come in many forms, including settler-only roads, a regime of checkpoints and crossings (closure obstacles), impediments created by the wall and its gate and permit regime, as well as administrative restrictions" (paragraph 200 of the Opinion).

27. The Advisory Opinion also notes that Israel put in place two different legal systems in the Occupied Palestinian Territory, which are applied separately to each of the two groups. Thus, while the Israeli military authorities apply "Israeli military authorities apply to settlers the law applicable to civilians in Israel, as well as to non-Israeli Jews present in the West Bank" and that "[a]s a result, settlers in the West Bank enjoy the rights and privileges of Israeli citizenship, as well as the protections of Israeli domestic laws and social benefits", Palestinians in the West Bank are subject to Israel's military law and military courts (paragraph 136).

28. Finally, Israel's pursuit of its policy of settlement expansion and annexation, as well as repeated declarations by senior Israeli officials of their intention to remain in the Occupied Palestinian Territory, demonstrates that Israel fully intends to continue the established régime of domination of the Palestinians on which this policy is based. In December 2022, Israeli Prime Minister Netanyahu wrote on X (formerly Twitter) that

> "[t]he Jewish people have an exclusive and indisputable right to all areas of the Land of Israel. The government will promote and expand settlement in all areas of the Land of Israel — in the Galilee, the Negev, the Golan Heights, Judea and Samaria" (Benjamin Netanyahu, Twitter, 28 December 2022:https://x.com/netanyahu/status/1608039943817007105).

More recently, in September 2023, Mr Netanyahu showed the United Nations General Assembly a map representing the "new Middle East" which incorporates all the Occupied Palestinian Territory into the State of Israel (https://www.gov.il/en/pages/epmungaspeech, https://www.youtube.com/watch?v=V0M7eoAjBdE, at minute 9:18).

29. Israel's commission of inhumane acts against the Palestinians as part of an institutionalized régime of systematic oppression and domination, and its intention to maintain that régime, are undeniably the expression of a policy that is tantamount to apartheid.

30. This is also the conclusion reached by United Nations Special Rapporteurs on the Occupied Palestinian Territory since 2007 (see, for example, A/HRC/53/59 of 28 August 2023, A/HRC/49/87 of 21 March 2022, A/HRC/40/73 of 30 May 2019, A/HRC/25/67 of 13 January 2014, A/HRC/16/72 of 10 January 2011, A/HRC/4/17 of 29 January 2007), mainstream organizations such as Amnesty International (see *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity*, 2022) and Human Rights Watch (see *A threshold crossed. Israel Authorities and the Crimes of Apartheid and Persecution*, 2021), and renowned Israeli human rights organizations (see in particular B'Tselem, "A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid", p. 3,

(https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_fr.pdf)) and Yesh Din (Volunteers for Human Rights, "The Israeli Occupation of the West Bank and the Crime of Apartheid, Legal Opinion", June 2020, p. 57).

31. Numerous Israeli public figures who were privileged witnesses to events in the Occupied Palestinian Territory have also concluded that these acts are tantamount to a situation of apartheid. For example, Michael Ben-Yair, former Attorney General of Israel, said in 2022 that Israel had become "an apartheid regime . . . a one state reality, with two different peoples living with unequal rights". Ami Ayalon, former director of the Shin Bet (the Israeli intelligence service), wrote in his memoirs: "We've already created an apartheid situation in Judea and Samaria, where we control the Palestinians by force, denying them self-determination". Finally, it is significant that two former Israeli ambassadors to South Africa, Ilan Baruch and Alon Liel, declared in 2021 that the systematic discrimination of Israel, "on the basis of nationality and ethnicity", constituted apartheid (Michael Ben-Yair, "Former AG of Israel: with great sadness I conclude that my country is now an apartheid regime", thejournal.ie, 10 February 2022; Ami Ayalon, *Friendly Fire* (Steerforth Press, 2021), p. 260; Ilan Baruch and Alon Liel, "It's apartheid, say Israeli ambassadors to South Africa", GroundUp, 8 June 2021).

32. Even more tellingly, many of those who lived under apartheid in South Africa state that, based on their experience, the discriminatory and segregationist policy implemented by Israel in the Occupied Palestinian Territory is similar to that of South Africa under apartheid. According to South African Archbishop Desmond Tutu, who won the Nobel Peace Prize in 1984 for his fight against apartheid,

> "[m]any black South Africans have travelled to the occupied West Bank and have been appalled by Israeli roads built for Jewish settlers that West Bank Palestinians are denied access to, and by Jewish-only colonies built on Palestinian land in violation of international law. Black South Africans and others around the world have seen the 2010 Human Rights Watch report which 'describes the two-tier system of laws, rules, and services that Israel operates for the two populations in areas in the West Bank under its exclusive control, which provide preferential services, development and benefits for Jewish settlers while imposing harsh conditions on Palestinians.' This, in my book, is apartheid. It is untenable." (Desmond Tutu, "Justice requires action to stop subjugation of Palestinians", Tampa Bay Times (30 April 2021), https://www.tampabay.com/opinion/columns/justice-requires-action-to-stop-subjugation-of-palestinians/1227722/. See also John Dugard, Confronting Apartheid, Jacana, Sunnyside, 2018, pp.171-268.)

2. Illegality of the Israeli occupation and its legal consequences

33. The Court recalls in its reasoning that

> "the rules and principles of general international law and of the Charter of the United Nations on the use of force in foreign territory (*jus ad bellum*) have to be distinguished from the rules and principles that apply to the conduct of the occupying

Power under international humanitarian law (*jus in bello*) and international human rights law".

It explains that "[t]he former rules determine the legality of the continued presence of the occupying Power in the occupied territory; while the latter continue to apply to the occupying Power, regardless of the legality or illegality of its presence. It is [therefore] the former category of rules and principles regarding the use of force, together with the right of peoples to self-determination, that the Court considers to be applicable" in its response to the question regarding the legality of the occupation (paragraph 251 of the Advisory Opinion).

34. I share both the Court's reasoning and its conclusion that

> "the violations *by Israel* of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination *have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the Occupied Palestinian Territory*. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful." (Paragraph 261 of the Advisory Opinion; emphasis added.)

35. The question posed by the General Assembly related to Israel's "continued presence" and not to the circumstances in which its occupation of Palestinian territory occurred. Therefore, it was not for the Court to pronounce on the latter aspect, that is on the legality *ab initio* of the occupation. It is worth recalling, however, that the General Assembly has several times had occasion to affirm the illegality *ab initio* of Israel's occupation. In 1977, it declared that it was "[d]eeply concerned that the Arab territories occupied since 1967 have continued, for more than ten years, to be under *illegal Israeli occupation* and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights" and "reaffirm[ed] that the acquisition of territory by force is inadmissible and that all territories thus occupied must be returned"; it concluded by "[c]ondemn[ing] Israel's continued occupation of Arab territories, in violation of the Charter of the United Nations" (resolution 32/20, The Situation in the Middle East, 25 November 1977; (emphasis added). See also resolution 33/29, The Situation in the Middle East, 7 December 1978, and resolution 34/70, The Situation in the Middle East, 6 December 1979).

36. Recalling the General Assembly's finding on the illegality *ab initio* of Israel's 1967 occupation of Palestinian territory, and its condemnation of the continuation of this occupation in violation of the United Nations Charter, can only reinforce the Court's findings in this Opinion on the illegality of Israel's continued presence in the Occupied Palestinian Territory.

37. The Court considers, in paragraph 267 of the Opinion, that Israel's wrongful presence in the Occupied Palestinian Territory constitutes an act engaging the international responsibility of that State, and adds that it is a wrongful act of a continuing character "which has been brought about by Israel's violations, through its policies and practices, of the prohibition on the acquisition of territory by force and the right to self-determination of the Palestinian people". While I fully subscribe to the Court's finding that Israel has an obligation to "bring an end to its presence in the Occupied Palestinian Territory as rapidly as possible", in my view the reasoning of the Court requires a precision and an addition. It should be clarified that, while Israel's policies and practices in the

Palestinian territory occupied since 1967 clearly constitute a violation of the Palestinian people's right to self-determination, the failure to respect this right dates back to 1948 and not 1967, as recalled by General Assembly resolution 32/20, adopted in 1977 and quoted above, in which the Assembly stated that it was "[d]eeply concerned . . . that the Palestinian people, *after three decades*, [were] still deprived of the exercise of their inalienable national rights" (emphasis added). In this respect, I feel that the Court's reasoning should be supplemented by a reference to Israel's obligations under resolution 181 (II).

38. As recalled in the Advisory Opinion (see paragraph 52), on 29 November 1947 the United Nations General Assembly adopted an important resolution, resolution 181 (II), which, in my view, remains the cornerstone for any lasting solution to the Israeli-Palestinian conflict based on the vision of two States. In this resolution, the General Assembly adopted a "Plan of Partition" providing for the creation of two independent states on the territory of Palestine, one Arab and the other Jewish, which "shall come into existence . . . two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948", and the creation of a special international régime (*corpus separatum*) for the city of Jerusalem to be administered by the United Nations.

39. It was on the basis of resolution 181 (II) that both Israel and Palestine proclaimed their existence (see paragraphs 53 and 64 of the Opinion) and sought admission to the United Nations, each in their own time, as a Member State and as an observer State (see paragraphs 55 and 70 of the Opinion). This resolution forms a whole, whose terms must be read together and inseparably. In other words, neither Israel nor Palestine can claim to derive rights from the resolution while rejecting or ignoring the rights of the other party enshrined in the same text. It follows that the proclamation of an independent Jewish State on 14 May 1948 based on resolution 181 (II) necessarily entails a commitment to the establishment of an independent Arab State. In this regard, it should be recalled that the State of Israel's proclamation of independence provides that the former is "ready to cooperate with the agencies and representatives of the United Nations in implementing the [said] resolution". Israel has therefore indisputably committed itself not only to respecting resolution 181 (II), but also to implementing it.

40. It was, in any event, on this express condition that Israel was admitted to the United Nations. Thus, in resolution 273 (III) by which it admitted Israel as a Member of the United Nations, the General Assembly stated that it did so while "[r]ecalling its resolutions of 29 November 1947 [181 II] and 11 December 1948 [194 III] and taking note of the declarations and explanations made by the representative of the Government of Israel before the *ad hoc* Political Committee in respect of the implementation of the said resolutions".

41. However, in this Opinion the Court has not determined all the legal consequences arising from this situation, in particular the obligations incumbent on Israel. Israel's admission to the United Nations gives rise to rights but also to legal obligations. Thus, having undertaken to implement resolution 181 (II), Israel is under a legal obligation not to hinder the exercise of the Palestinian people's right to self-determination, or to oppose the proclamation of a Palestinian State by the representatives of the Palestinian people, and indeed it cannot do so without undermining its own rights, the existence of the two States being inextricably linked in the same legal instrument.

42. Having committed to implementing resolution 181 (II), Israel also has an ongoing obligation to co-operate with the United Nations to ensure that the State of Palestine, proclaimed in Algiers in 1988 and admitted to the United Nations as an observer State on the basis of resolution 181 (II), can exercise its full sovereignty over its territory and achieve total independence, which requires the complete withdrawal of Israel from the Occupied Palestinian territory.

43. In this respect, it should be noted that in the exchange of letters of 9 September 1993 between Yasser Arafat, President of the Palestine Liberation Organization (hereinafter "PLO") and Yitzhak Rabin, Prime Minister of Israel, the PLO President recognized "the right of the State of Israel to exist in peace and security" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 183, para. 118).

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44. Furthermore, as the Court points out, the obligations that Israel has violated include *erga omnes* obligations (paragraph 274 of the Opinion), which entail "special legal obligations" for other States in accordance with customary international law, as reflected in Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts. Consequently, with respect to Israeli policies and practices that infringe the Palestinian people's right to self-determination, all States are bound by the customary obligations laid down in that Article. This requires not only taking no action that might hinder the exercise of that right, but also providing the necessary lawful support for the realization of that right and co-operating actively with the United Nations to that end. The Court has set out in general terms the content of these obligations for all States in paragraphs 275 to 279 of the Opinion.

45. These obligations are both negative and positive. The negative obligations require States to refrain from encouraging, aiding or assisting Israel in violation of the rules of international humanitarian law applicable in the Occupied Palestinian Territory. As the ICRC clarified in its 2016 commentary on the First Geneva Convention,

> "financial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though it may not amount to aiding or assisting the commission of a wrongful act by the receiving States for the purposes of State responsibility". (See ICRC Commentary, Geneva Conventions, Common Article 1, https://ihl-databases.icrc.org/fr/ihl-treaties/gci-1949?activeTab=1949GCs-APs-and-commentaries, para. 160.)

Thus, any unconditional financial, economic, military or technological assistance to Israel would constitute a breach of this obligation.

46. With respect to positive obligations, States must take proactive measures to bring violations to an end and ensure respect for the relevant conventions in the Occupied Palestinian Territory, including by using their influence over Israel (see ICRC Commentary, Geneva Conventions, Common Article 1, https://ihl-databases.icrc.org, para. 164).

47. As our esteemed late colleague, James Crawford, wrote, it is important to note that the obligation to ensure respect is not satisfied by mere diplomatic protests (James Crawford, "Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories", https://www.militarycourtwatch.org/page.php?id=QA2pesuJIWa28530AcRDr3iFZmt, para. 86), or solely by co-operating with the United Nations. Indeed, as the Court has emphasized with regard to the crime of genocide, a State's referral of a violation of obligations *erga omnes* to the organs of the United Nations does not relieve other States of their obligations "to take such action as they can" to ensure respect for those obligations and prevent or punish violations thereof, "while respecting the United Nations Charter and any decisions that may have been taken by its competent organs" (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 220, para. 427).

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48. The nature of the obligations violated by Israel also has numerous implications for the United Nations and its various organs and institutions. The "duty" of the Organization and its institutions to "ensure respect for international law" in the Occupied Palestinian Territory, recalled in paragraph 277 of the Advisory Opinion, requires them to take concrete steps to put an end to the violations by Israel identified in the Opinion, and to enable the full realization by the Palestinian people of its right to self-determination.

49. Of course, as the Court has previously stated, it is not for the Court to "determine what steps the General Assembly may wish to take after receiving the Court's [O]pinion or what effect that [O]pinion may have in relation to those steps" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 421, para. 44) and it is for the General Assembly, as well as for the Security Council to "consider what further action is required to put an end to the illegal presence of Israel, taking into account the present Advisory Opinion" (paragraph 281 of the Opinion).

50. The fact remains, however, that the United Nations, its principal organs and its institutions must ensure that the measures they adopt are efficient and effective given that those addressed to Israel in almost all the resolutions of the General Assembly and the Security Council have remained without effect. These include, in particular, Security Council resolutions 237 (1967), 242 (1967), 252 (1968), 267 (1969), 298 (1971), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 484 (1980), 592 (1986), 605 (1987), 607 (1988), 672 (1990), 681 (1990), 904 (1994), 1073 (1996), 1322 (2000), 1397 (2002), 1515 (2003), 1544 (2004), 1850 (2008), 1860 (2009), 2334 (2016) and 2720 (2023), in violation of Article 25 of the Charter of the United Nations, which states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

51. It is therefore essential that the Security Council and the General Assembly take further appropriate and concrete measures to bring to an end, without delay and within a well-defined timeframe, the violations of international law resulting from Israel's policies and practices in the Occupied Palestinian Territory.

52. In particular, the Security Council may wish to update the Quartet Roadmap endorsed by its resolution 1515 (2003) in order to "achieve the vision of two States living side by side in peace and security", and reach "a final and comprehensive agreement" negotiated between the parties, based on the relevant Security Council resolutions, which provide for a resolution of "final status issues" (Security Council resolution 2334 (2016), adopted by the Security Council at its 7853rd meeting on 23 December 2016, S/RES/2334 (2016), para. 8).

53. To this end, the United Nations should strengthen international co-operation among its Member States and use all the means provided for in the Charter, in particular those in Chapter VI and, if necessary, Chapter VII.

54. In sum, as already stated in Security Council resolution 2334 (2016), quoted in paragraph 71 of the Opinion, the United Nations should work towards

> "the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving without delay a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap and an end to the Israeli occupation that began in 1967" (resolution 2334 (2016) adopted by the Security Council at its 7853rd meeting, on 23 December 2016, S/RES/2334 (2016), para. 9).

3. Modalities of reparation

55. The final point I would like to address is that of the reparations owed to Palestinians and to Palestine as a result of Israel's policies and practices in the Occupied Palestinian Territory in breach of international law.

56. The main consequence of the violations must be the obligation to bring them to an end. This primarily and necessarily entails the obligation for Israel to put an end to its unlawful presence in the Occupied Palestinian Territory (see paragraph 267 of the Opinion). Only the imperative withdrawal of Israel from the Occupied Palestinian Territory will enable the Palestinian people to fully exercise its right to self-determination, including its right to a fully independent, sovereign and viable State. This is therefore the main objective that the United Nations and all States must pursue.

57. Accordingly, this withdrawal cannot be conditional on the success of negotiations whose outcome will depend on Israel's approval. In particular, Israel cannot invoke the need for a prior agreement on its security claims for such a condition may lead to perpetuating its unlawful occupation. Indeed, in accordance with the principle expressed by the maxim *ex injuria jus non oritur* — no one may benefit from their own illegal act. Otherwise, the cessation of violations of international law, including violations of peremptory norms (*jus cogens*), would be subject to the veto of the perpetrator of those violations.

58. Negotiations between the parties — which remain necessary — would then focus mainly on the modalities of implementation, rather than on the question of Israel's withdrawal, which must take place, according to the terms of the Opinion, "as rapidly as possible". They would also focus on other matters necessary to achieve a just, comprehensive and lasting peace, such as the question of refugees, mutual security arrangements between the two States and changes that could be made by mutual agreement to the 1967 boundary lines.

59. Such negotiations would be more likely to succeed if they take place under the auspices of the United Nations and on the basis of international law, whose respective impartiality and legitimacy would go some way to offsetting the great power imbalance between the occupier and the occupied.

60. The other important point that ought to be mentioned is that of the reparations owed by Israel for its violations of international law to the victims in the Occupied Palestinian Territory and to the Palestinian people. This has to be "full reparation", including restitution and compensation, which must, according to the well-known formula of the Permanent Court of International Justice in the *Chorzów Factory* case, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (see paragraph 269 of the Opinion).

61. Thus, as the Court previously stated in 2004, Israel is under an obligation to, *inter alia*, "return the land, orchards, olive groves and other immovable property [that has been] seized from any natural or legal person" in an abusive, discriminatory manner and in violation of international law in the Occupied Palestinian Territory. "In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, para. 153).

62. As regards compensation, it is not for the Court, in the context of the present Opinion, to establish the specific elements or quantum thereof. It has affirmed the principle and it is now up to all parties concerned to determine the modalities of such compensation, which must be made in accordance with the rules of international law. As the United Nations International Law Commission notes, the injury to be repaired "includes all damage, whether material or moral, resulting from the internationally wrongful act of the State". Compensation covers "any financially assessable damage including loss of profits so far as this is established in the given case" (ILC, paragraph 2 of the commentary on Article 31 and paragraph 1 of the commentary on Article 36, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10)). There are many precedents that could guide such an approach.

63. In this regard, it should be recalled that in its 2005 Judgment in the case concerning *Armed Activities on the Territory of the Congo*, the Court found that Uganda was required to make reparation for the injury resulting from the "illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder, and exploitation of the DRC's natural resources" (*(Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 259). On this basis, it then fixed the amount of compensation to be paid to the Democratic Republic of the Congo in a further proceeding (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, pp. 137-138, para. 409). It should also be noted that, because of the illegal occupation of Kuwait and "for the purpose of reparation or financial compensation by Iraq", the Security Council affirmed that Iraq was, under

international law, "responsible for any loss, damage and injury suffered, in respect of Kuwait and third States and their nationals and companies, as a result of the invasion and illegal occupation of Kuwait by Iraq" (resolution 674 (1990) adopted by the Security Council on 29 October 1990 at its 2951st meeting, S/RES/674 (1990), item 8).

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64. I would like to conclude by making a general remark on an argument concerning the impact of the Court's Opinion on the negotiations, which was put forward by some participants in these proceedings to invite the Court to decline to give the Advisory Opinion requested by the General Assembly. It was argued that the Court's Opinion would be likely to jeopardize the peace negotiations. In accordance with its jurisprudence, the Court has responded that this would not be the case.

65. Over and above this response, one must question the opposition that some appear to draw between peace and law. Quite apart from the fact that in the present case peace negotiations have been practically non-existent for more than ten years, in my view it is incorrect to suggest that, by stating the law, the Court would undermine any peace process. Quite the contrary, the very philosophy that led to the establishment of the various judicial mechanisms for the settlement of disputes — from the first arbitrations to the creation of the Permanent Court of Arbitration and the Permanent Court of International Justice to this Court — is that international law and justice unquestionably provide a means for the pacification of international relations. By stating the law, the Court provides the various actors with a reliable basis for a just, comprehensive and lasting peace.

66. I am convinced that a negotiation process that is shorn of legal and equity considerations would carry within itself the seeds of future conflict. Negotiations on all issues, including the legitimate security concerns of both States, Israeli and Palestinian, can only be successful if they have international law and justice as their cornerstone.

67. In stating the law in these proceedings, the Court, in keeping with its role, has contributed to laying the foundations for a just and enduring solution to a conflict that has lasted far too long, has caused immense human suffering in this part of the world and whose repercussions are felt far beyond. It is with this deep conviction that I participated in the present proceedings, as no doubt my colleagues did too.

(Signed) Nawaf SALAM.

[Original: English]

DISSENTING OPINION OF VICE-PRESIDENT SEBUTINDE

The Court has jurisdiction to entertain the request for an advisory opinion — However, in exercising its discretion judiciously and maintaining the integrity of its judicial role, the Court should have refrained from rendering the advisory opinion requested — The Advisory Opinion omits the historical backdrop crucial to understanding the multifaceted Israeli-Palestinian dispute and is tantamount to a one-sided "forensic audit" of Israel's compliance with international law — The Advisory Opinion does not reflect a balanced and impartial examination of the pertinent legal and factual questions — It is imperative to grasp the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine, as well as the previous and ongoing efforts to resolve the conflict through the negotiation framework identified by the Security Council — The Court lacks adequate, accurate, balanced and reliable information before it to enable it to judiciously arrive at a fair assessment and conclusions on the disputed questions of fact — The Advisory Opinion not only circumvents Israel's consent to the Court's resolution of the issues involved, but also circumvents and potentially jeopardizes the existing internationally sanctioned and legally binding negotiation framework for the resolution of the Israeli-Palestinian conflict — The Advisory Opinion also contains several shortcomings, in particular with respect to its answer to Question 2 — The timeline proposed by the Court for Israel's withdrawal from the occupied territories is impracticable and disregards the matters agreed upon in the existing negotiating framework, the security threats posed to Israel and the need to balance competing sovereignty claims — The Court's application of the principle of full reparation is not appropriate in the circumstances of the Israeli-Palestinian conflict — The Court has misapplied the law of belligerent occupation and has adopted presumptions implicit in the question of the General Assembly without a prior critical analysis of relevant issues, including the application of the principle of uti possidetis juris *to the territory of the former British Mandate, the question of Israel's borders and its competing sovereignty claims, the nature of the Palestinian right of self-determination and its relationship to Israel's own rights and security concerns — The only avenue for a permanent solution to the Israeli-Palestinian conflict remains the negotiation framework set out in the United Nations and bilateral agreements.*

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I. Introduction

1. I agree that the Court has jurisdiction pursuant to Article 65, paragraph (1), of the Court's Statute, to entertain the request for an advisory opinion by the General Assembly, and have voted in favour of paragraph 285, subparagraph (1), of the operative clause. Regrettably, I find myself unable to concur with the majority in issuing the Advisory Opinion, for the reasons detailed in this dissenting opinion. In my view, the Court, in exercising its discretion judiciously and maintaining the integrity of its judicial role, should have refrained from rendering the Advisory Opinion requested. The framing of the questions in resolution 77/247 assumes certain legal and factual conclusions, thereby precluding a thorough and balanced examination of the Israeli-Palestinian conflict's distinctive historical background. Furthermore, most statements in the Court dossier present a unilateral perspective of the conflict, which reinforces the imbalanced approach in the Court's Advisory Opinion. For example, whilst the questions presume that there is an "ongoing violation by Israel of the right of the Palestinian people to self-determination"; and that "since 1967, Israel has unlawfully 'occupied' territory" that previously comprised British Mandatory territory, the Court has not received arguments or evidence on the territorial scope (i.e. borders) of the State of Israel as on the eve of independence; nor of Israel's competing territorial claims in relation to the disputed territory. These are issues that must first be addressed before the legal consequences of the alleged occupation of territory by Israel, or the territorial scope of Palestinian self-determination, can be determined.

2. Furthermore, the Advisory Opinion, while addressing key legal matters and factual determinations central to the conflict — including Israel's alleged occupation, annexation of the disputed territories, and the Palestinian right to self-determination — omits the historical backdrop that is crucial to understanding this multifaceted dispute. As a result, the Advisory Opinion is tantamount to a one-sided, "forensic audit" of Israel's compliance or non-compliance with international law, that does not reflect a comprehensive, balanced, impartial, and in-depth examination of the pertinent legal and factual questions involved. It also overlooks the intricate realities and history of the territories and populations within modern-day Palestine, specifically the areas referred to as the "Occupied Palestinian Territories" (OPTs). To be able to render an opinion that is both substantive and equitable, and that genuinely aids the General Assembly and Security Council in resolving the Israeli-Palestinian conflict peacefully and permanently in line with the UN Charter, it is essential to thoroughly examine these issues, informed by the relevant principles of international law, including those I highlight in this dissenting opinion. In this regard, the observation by Judge Rosalyn Higgins in her separate opinion in the *Wall* Advisory

Opinion, is particularly poignant to the questions addressed in the present Advisory Opinion, as the Court has clearly adopted a similar approach in the present case[1].

3. I must express my regret that, due to the constrained timeframe that the Court has allotted to the preparation of individual opinions, my dissenting opinion cannot provide a comprehensive analysis of every aspect of the Advisory Opinion that I find objectionable. Therefore, I have opted to focus on the elements that I deem to be of utmost significance.

II. Historical context of the Israeli-Palestinian conflict

A. The origin of the Israeli-Palestinian conflict

4. Before addressing the questions raised by the General Assembly, it is imperative to grasp the historical nuances of the Israeli-Palestinian conflict and to acknowledge the sustained efforts of United Nations bodies tasked with upholding international peace and security in their pursuit of a durable resolution to this conflict. The Israeli-Palestinian conflict can be traced back to the conflicting sovereignty claims over the territory comprising British Mandatory Palestine in 1947. The Jewish people view this area as their historical homeland[2], while Palestinian Arabs and their allies regard it as the homeland of the Palestinian Arabs[3]. The pan-Arab viewpoint sees the heart of the conflict in the displacement of Palestinian Arabs from that territory and Israel's subsequent territorial gains over the same. Israel is, in their view, often cast as inherently aggressive and expansionist and a key source of regional turmoil. Their opposition to Israel is rooted in the pan-Arab belief that Palestinians are an essential part of the Arab world's unity[4], and that Palestine, as their homeland, should remain undivided. This stance is bolstered by the conviction that Palestinian Arabs are a homogeneous indigenous people that have a profound connection to the disputed territory and an inalienable right to return thereto and to exercise self-determination therein[5].

5. The Jewish people, on the other hand, have an ancient history over the same disputed territory known during the British Mandate, as "Palestine" and after independence, as Israel. Their claim to indigeneity is based on the continuous historical and cultural ties that existed long before the Balfour Declaration of 1917 or the British Mandate of 1922, or the establishment of Israel as an independent State in 1948. Their claim to this territory dates back to the ancient Kingdom of Israel 3,000 years ago. Their bond to the land has persisted despite the adversities, persecution, and diaspora the Jewish people have faced over millennia. Israel contends that the essence of the conflict is not about competing territorial claims, as such, but rather the pan-Arab denial of Israel's existence and legitimacy as an independent, non-Arab State a region perceived as belonging exclusively to the Arabs. According to Israel, its adversaries aim to eradicate its existence as a nation, and therefore, Israel's actions are purely defensive, aimed at safeguarding its sovereignty against those existential threats[6].

6. Notwithstanding the differing perspectives on its origins and nature, the Israeli-Palestinian conflict involves complex historical, cultural, ideological, and territorial challenges involving multiple States and non-

[1] "The law, history, and politics of the Israel-Palestine dispute is immensely complex . . . Context is usually important in legal determinations . . . I find the 'history' as recounted by the Court . . . neither balanced, nor satisfactory." Paragraph 14 of the separate opinion of Judge Rosalyn Higgins, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 210, para. 14 and p. 211, para. 16.

[2] See Israeli Declaration of Independence, 1948; Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, Art. V; Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, Art. XXXI (6).

[3] The Palestinian National Charter, Art. 1, provides that "Palestinian is the homeland of the Arab Palestinian people: it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation".

[4] *Ibid*. This article establishes the Palestinian identity in the context of the broader Arab nations and asserts the indivisibility of Palestine as the homeland of the Palestinian people.

[5] *Ibid.* Article 6 provides, "The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were expelled from it or have stayed there. Anyone born after that date, of a Palestinian father — whether in Palestine or outside it — is also a Palestinian."

[6] Written Statement of Israel.

state actors. In my view, before answering the questions posed by the General Assembly, it is imperative to grasp the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine, as well as the previous and ongoing efforts to resolve the conflict through the negotiation framework identified by the Security Council. While acknowledging Arab claims to the land, it is crucial to recognize that Jews in Israel are not settler colonists either. Both Jewish and Arab connections to the region are deeply intertwined. Achieving a permanent solution to the conflict requires carefully negotiated agreements between the parties involved, rather than unilateral declarations and stances. Judicial recommendations based upon one-sided narratives and made in a contextual vacuum, are least likely to assist the United Nations General Assembly or the Security Council to achieve this noble goal.

B. Competing territorial claims over the territory of former Mandatory Palestine

7. To answer the questions posed by the General Assembly, it is necessary to appreciate the competing historical and territorial claims of the inhabitants of the territory previously known as British Mandatory Palestine. The history of Palestine and Israel did not start from the Balfour Declaration of 1917 or the British Mandate of 1922, or the Declaration of Independence of Israel in 1948. Rather, the history of the people residing in the territory formerly known as British Mandatory Palestine, spans millennia, as briefly described below.

The Jewish nation

8. Contrary to popular opinion, available evidence shows that as early as 1200 BCE, the Jewish people existed in the territory known as present-day Israel (also known during the British Mandate of 1922-1947 as "British Mandatory Palestine") as a cohesive national group with a well-established and formed culture, religion, and national identity as well as a physical presence which has been maintained through the centuries despite the devastating impacts of conquests and their dispersion into exile. Ancient Israel existed between 1000-586 BCE with current archaeological evidence[7]. Ancient Israel was divided into two provinces or kingdoms: the northern kingdom called Israel with its capital being Samaria; and the southern province of Judea or Judah (*Y'hudah in Hebrew)* with its capital as Jerusalem. Over time, the ancient land of Israel was subjected to various conquests and occupations by stronger kingdoms, including the Babylonian empire (586-539 BCE), the Persian Empire (539-332 BCE), the Hellenistic era (332-167 BCE), the Hasmonean Dynasty (167-63 BCE), the Roman empire (63 BCE-324 CE), the Byzantine Era (324-638 CE), the Arab Caliphate (638-1099 CE), the Crusaders (1099-1291 CE), the Mamluk era (1291-1517 CE), the Ottoman Empire (1517-1917 CE), and British Mandate (1917-1948). Although these conquests led to many Jews being exiled or dispersed to different parts of the world for more than 1,500 years, there was a remnant that continued to live in the land of current Israel until a sizeable number of Jews started to return in 1882 and subsequent years. At that time, no more than 250,000 Arabs lived in the land. In 1948, following the Holocaust, the State of Israel attained its independence or self-determination. The above history is reinforced by recent archaeological evidence obtained through systematic investigation of

[7] There is substantial evidence that Jewish people lived in the region of ancient Israel between 1000-586 BCE. This period corresponds to the era of the United Monarchy under Kings Saul, David, and Solomon, and the subsequent divided kingdoms of Israel and Judah. The evidence includes archaeological findings in the City of David. Excavations in Jerusalem's "City of David" have uncovered structures, fortifications, and artifacts dating to the time traditionally associated with the reign of King David. An inscription found at Tel Dan mentions the "House of David", providing extra-biblical evidence for the Davidic dynasty. Mesha Stele (also known as the Moabite Stone) is an artifact from the ninth century BCE that references the Kingdom of Israel and its interactions with neighbouring Moab. Ostraca (pottery shards with inscriptions) found at Lachish dating to the late seventh century BCE provide insights into the administration and military affairs of the Kingdom of Judah. Numerous artifacts, including pottery, seals, and inscriptions, have been found throughout Israel and Judah. These artifacts provide evidence of a settled, literate society engaged in trade, agriculture, and governance. The Hebrew Bible (Old Testament) offers detailed accounts of the history, culture, and governance of the Israelites during this period. While these texts are religious in nature, many scholars consider them valuable historical documents. Assyrian inscriptions and annals mention the Kingdoms of Israel and Judah, including interactions, conflicts, and tributes. For example, the Black Obelisk of Shalmaneser III depicts Jehu, king of Israel, paying tribute to the Assyrian king. These combined archaeological, textual and historical pieces of evidence support the existence and continuous habitation of Jewish people in ancient Israel during the period from 1000 to 586 BCE.

all the remains of the country's past — from prehistory to the end of Ottoman rule which clearly reveals the historical link between the Jewish people and the Land of Israel, uncovering the remains of their cultural heritage in their homeland. These visible remains, buried in the soil, constitute the physical link between the past, the present and the future of the Jewish people in this part of the world. It can be argued that this history is what informed the civilized community of nations through the United Nations to re-establish the "national homeland of the Jewish people" in 1948[8].

"*Syria Palaestina*"

9. Territorially, the name "Palestine" applied vaguely to a region that for the 400 years before World War I was part of the Ottoman Empire. In 135 CE, after stamping out the second Jewish insurrection of the province of Judea or Judah, the Romans renamed that province "*Syria Palaestina*" (or "Palestinian Syria"). The Romans did this as a punishment, to spite the *"Y'hudim"* (Jewish population) and to obliterate the link between them and their province (known in Hebrew as *Y'hudah*). The name "*Palaestina*" was used in relation to the people known as the Philistines and found along the Mediterranean coast[9]. The term "Palestine" was used for centuries without a precise geographic or territorial definition. Prior to the establishment of "British Mandatory Palestine", Palestinian Arabs viewed themselves as having a unified identity with the Arabs in the subregion until the twentieth century. When the distinguished Arab American historian, Professor Philip Hitti, testified against the Partition of Mandatory Palestine before the Anglo-American Committee in 1946, he remarked: "There is no such thing as 'Palestine' in history; absolutely not." The first Palestine-Arab Congress which convened in Jerusalem from 27 January to 10 February 1919 to choose Palestinian representatives for the Paris Peace Conference, adopted a resolution in which it, *inter alia*, considered Palestine as an integral part of Arab Syria[10]. In 1937, Auni Bey Abdul-Hadi, a local Arab leader, told the Peel Commission which ultimately suggested the Partition of Palestine: "There is no such country [as Palestine]! 'Palestine' is a term the Zionists invented! . . . Our country was for centuries part of Syria."

C. The emergence of "British Mandatory Palestine" in the 1920s

10. Following the defeat of the Ottoman Empire in World War I and subsequent division of Ottoman territories by the League of Nations, British Mandatory Palestine was formed in 1922[11]. The Palestine Mandate was a "Class A" Mandate awarded to Britain, primarily with the charge of reconstituting a national home for the

[8] Encyclopaedia Brittanica and Jacob Liver, ed., *The Military History of the Land of Israel in Biblical Times* (1968).

[9] The Philistines are an ancient tribe who migrated from the Aegean region and settled in the region of Canaan, roughly corresponding to modern-day Gaza Strip, southern Israel, and parts of south-western Lebanon, and who were known for their conflicts with Israel.

[10] The First Palestine Arab Congress, held in January and February 1919 in Jerusalem, was a significant event in the history of Palestinian nationalism. This congress brought together representatives from various Palestinian regions to discuss their concerns and aspirations in response to the political changes following World War I and the collapse of the Ottoman Empire. The main resolutions and declarations of the Congress included a rejection of the Balfour Declaration of 1917 which supported the establishment of a "national home for the Jewish people" in Palestine. The delegates viewed this as a threat to the rights and existence of the Arab inhabitants of Palestine. The congress demanded the independence of Palestine as part of a larger Arab State. They sought to be free from British control and opposed any form of foreign mandate or colonization. The congress emphasized the unity of Palestine with the greater Arab world, advocating for close ties with neighbouring Arab countries and the creation of a united Arab front to protect their interests. The delegates called for the establishment of a democratic government in Palestine, representative of its Arab majority, and the right to self-determination without external interference. The congress resolved to send a delegation to the Paris Peace Conference to present their demands and grievances, seeking international recognition and support for their cause. The resolutions of the First Palestine Arab Congress laid the foundation for the Palestinian national movement and reflected the aspirations and concerns of the Arab population in Palestine at the time.

[11] The pre-1948 British Mandate for Palestine comprised the territory that is today known as Israel, the West Bank, the Gaza Strip and Jordan. The area west of the Jordan River constitutes the modern-day State of Israel, the West Bank, and the Gaza Strip; whilst the area east of the Jordan River constitutes present-day Hashemite Kingdom of Jordan. In 1922, the British administratively divided the territory, establishing the Emirate of Transjordan in the area east of the Jordan River which later became the State of Jordan in 1946. Thus, by the time the British mandate ended in 1948, Mandatory Palestine referred to the area west of the Jordan River.

Jewish people, especially those escaping persecution and the Holocaust[12]. Britain issued the Balfour Declaration in 1917 and incorporated it into the Mandate's final approved text in 1922. The Balfour Declaration stated that the British Government "favoured the establishment in Palestine of a national home for the Jewish people" and agreed to use Britain's "best endeavours" to facilitate this, without prejudicing the "civil and religious rights of existing non-Jewish communities in Palestine".

11. The formal establishment of British Mandatory Palestine occurred on 24 July 1922 when the League of Nations granted Britain the mandate[13], which officially came into effect on 29 September 1923. The territorial scope of British Mandatory Palestine originally comprised two regions referred to as Transjordan (in the east) and Palestine (in the west)[14]. The borders of the original Mandatory Palestine were determined by negotiation and agreement as follows. The line in the north emerged from Anglo-French negotiations in 1923. The one in the south was fixed by treaties in the mid-1920s between Britain and the new nation of Saudi Arabia. The border between the Mandate of Palestine and the Mandate of Mesopotamia (Iraq) was of little immediate importance, given that the line was in the middle of an uninhabited desert and Britain controlled both sides. That line was finally fixed through an exchange of letters in 1932. The eastern part of Mandatory Palestine (which constitutes 80 per cent of the territory and was known as "Transjordan") remained under the British administration until 25 May 1946, when it became the independent kingdom of Transjordan and was later renamed Jordan. The western part of Mandatory Palestine (which constitutes 20 per cent of the territory and was referred to as "Palestine") remained under the British Mandate until May 1948 when Britain ended the mandate. It is this latter territory comprising 20 per cent of the original Mandate of Palestine (known today simply as "Palestine") that remains under contention in the Israeli-Palestinian conflict.

D. The partition of Mandatory Palestine and proposal for a "two-State solution"

12. The proposal for the creation of a two-State solution in the territory of British Mandatory Palestine (one for the Jewish population and the other for the Arab population) has been a recurrent item on the United Nation's agenda but has repeatedly been rejected by the Arab population living in the territory, as well as by Israel's Arab neighbours. Following the breakup of the Ottoman Empire after World War I, the League of Nations created several mandates over the territories formerly governed by the Ottoman Empire, including the one described immediately above[15]. Seventeen years later, in 1936, the Arabs rebelled against Britain as mandate holder for Palestine and Mesopotamia (present-day Iraq). The Peel Commission[16], a task force established by Britain to ascertain the cause of the Arab rebellion, found that the primary reason for the hostilities was the conflicting national aspirations of Jews and Arabs living in the territory: For, while the Jewish community sought to establish a national home in Palestine, as promised by the Balfour Declaration of 1917 and facilitated by the British Mandate, the Arab community, for their part, sought to establish their own national State and opposed the increasing immigration of Jews to Palestine and their acquisition of land, fearing displacement and loss of political and economic control. The Arabs feared that the growing Jewish population would eventually dominate the region, leading to the displacement and loss of Arab livelihoods. The Commission also found that economic disparities and competition for resources between Arabs and Jews, further fuelled tensions between the two communities. The Jewish community often had better financial support from abroad and more advanced

[12] See British Mandate for Palestine, 17 *Am. J. Int'l L*. 164, 164, 170 (Supp. 1923) (hereinafter "Palestine Mandate").

[13] Article 22 (4) of the Covenant of the League of Nations.

[14] See map in Figure 1.

[15] In April 1920, the Mandates for Palestine and Mesopotamia (present-day Iraq) were assigned to Great Britain by the League of Nations, pursuant to Article 22 (4) of the Covenant of the League of Nations. This Article provided that "certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone". France was assigned the mandate to govern Syria, including Lebanon.

[16] The Peel Commission, officially known as the Palestine Royal Commission, was established by the British Government to investigate the causes of the Arab revolt in Mandatory Palestine and to propose solutions. The Commission issued its report and recommendations to the British Government on 7 July 1937.

agricultural techniques, which sometimes led to disparities in economic development and job opportunities. The Commission also noted that British policies and the terms of the Mandate, which aimed to facilitate the establishment of a Jewish national home while also safeguarding the rights of the Arab population, were inherently contradictory and difficult to implement effectively.

13. The Peel Commission concluded that these conflicting aspirations were irreconcilable under the existing mandate and proposed a "partition plan" as a potential solution, suggesting the creation of separate Jewish and Arab States with a continued British mandate over key areas[17]. However, this proposal was ultimately rejected by the Arab population, leading to continued conflict. Since then, the United Nations, has espoused the idea of a two-State solution based on consensual negotiations and agreement between the Palestinian Jews and Arabs, as the only viable option for lasting peace and security in that part of the world. While Israeli leadership has been open to the concept, Palestinian Arabs and neighbouring Arab States have consistently rejected the idea of a Jewish State coexisting with an Arab State on at least seven occasions, as shown below.

Figure 1

14**. First rejection in 1937:** Pursuant to the recommendations of the Peel Commission in 1937, the British Government offered the Palestinian Arabs 80 per cent of Mandatory Palestine (Transjordan), and the Jews the remaining 20 per cent (Palestine) in a suggested split that was heavily in favour of the former. Despite the tiny size of their proposed State, the Jews voted to accept this offer, but the Arabs rejected it and resumed their violent rebellion against the British mandate. In 1946, however, the territory known as Transjordan gained independence from Britain on 25 May 1946. This event marked the end of the British mandate over that part of the territory and the establishment of the Hashemite Kingdom of Transjordan, with the Emir Abdullah becoming its first king. The country was later renamed the Kingdom of Jordan.

[17] In 1937, the Peel Commission recommended the partition of Palestine into separate Jewish and Arab States, with a continued British mandate over a corridor including Jerusalem and Bethlehem. Key points of the Peel Commission's partition plan included, the creation of a Jewish State would comprise roughly one third of Palestine, including the fertile coastal plain and the Galilee region; an Arab State that would consist of the remaining two thirds, including the central hills and the Negev Desert; and a small area, including Jerusalem, Bethlehem, and a corridor to the port of Jaffa, that would remain under British control due to its religious significance and mixed population. The plan also included recommendations for population transfer, suggesting the voluntary or compulsory movement of Arabs from the proposed Jewish State and Jews from the proposed Arab State to reduce friction between the two communities. Although the British Government did not implement the Peel Commission's recommendations, the idea of partition influenced future proposals for resolving the conflict in Palestine.

15. **Second rejection in 1947:** Ten years later, in 1947, after Transjordan (comprising 80 per cent of the original mandatory territory) had broken away and gained independence, the United Nations General Assembly through resolution 181 (1947) again called for the establishment of two States (one Jewish and one Arab), this time, in the remaining 20 per cent of the territory of the British Mandate, with Jerusalem remaining under international administration ("*corpus separatum*")[18]. The proposal which was initially accepted by the Jewish leadership[19] as a compromise for establishing an independent Jewish State, was rejected by the Arab community who were essentially opposed to the creation of a Jewish State at all in the region. Unable to resolve the territorial issue, Britain withdrew its mandate from Palestine on 14 May 1948, leaving the thorny issue to be resolved by the United Nations and the conflicting parties within the region. Contemporaneously with the British withdrawal, the Jewish leadership in Palestine declared the creation of an independent State of Israel as a national homeland for Jews and a haven for Jews fleeing the Holocaust[20]. The declaration referenced the Balfour Declaration of 1917 and the United Nations General Assembly resolution 181, which recommended the partition of Mandatory Palestine into Jewish and Arab States. The Declaration mentioned the creation of the State of Israel, asserting the Jewish people's right to establish their own State in their ancestral homeland with immediate effect. The Declaration also outlined the principles upon which the new State would be founded, including the guarantee of civil rights for all inhabitants regardless of religion, race, or gender. Notably, the Declaration calls for peace and co-operation with neighbouring Arab States and extends an invitation to the Arab inhabitants of Israel to participate in the building of the State based on full and equal citizenship. The document concludes with an appeal to the Jewish people worldwide to support the new State and to the international community to recognize and assist in its development.

16. **Third rejection in 1967:** Twenty years later, in what is known as the "Six-Day War", Israel launched a series of pre-emptive air strikes against Egypt on 5 June 1967 in response to the escalating tension and military threats from its Arab neighbours (namely, Egypt, Syria and Jordan) who once again, sought to eliminate the Jewish State from the region[21]. Israel achieved a swift and decisive victory in this war, recapturing East Jerusalem and the West Bank from Jordan; the Golan Heights from Syria; Gaza and the Sinai Peninsula from Egypt. This recaptured territory has since been referred to as the "Occupied Palestinian Territories" or "OPTs" (although it should perhaps be better referred to as "Disputed Palestinian Territories"). From this point onwards, these Arab States had a direct territorial dispute with Israel quite apart from their commitment to the Palestinian cause. The Israeli Government was split over what to do with this new territory. Half of the Government wanted to return the West Bank to Jordan and Gaza to Egypt in exchange for peace. The other half wanted to give that territory to the region's Arabs, who had begun referring to themselves as the Palestinians, in the hope that they would ultimately build their own State there. Neither initiative got very far. A few months later, the Arab League met in Sudan and issued its "Three-Nos": no peace with Israel, no recognition of Israel, no negotiations with Israel. Again, the two-State solution was flatly rejected by these Arab States.

17. **Fourth rejection in 1969-70:** Upon ending a ceasefire with Israel, Egypt with the military support of the Soviet Union, initiated renewed attacks against Israel between March 1969 and August 1970 in what became known as the "War of Attrition"[22]. Egypt's objectives during this war included the recapture of the Sinai Peninsula from Israeli forces which had seized control of the peninsula during the Six-Day War; the weakening of Israeli morale and economy through continuous military assaults thereby pressuring it to make territorial and political concessions; and the bolstering of Arab morale and unity against Israel's existence and military

[18] General Assembly resolution 181 of 29 November 1947.

[19] Represented by the Jewish Agency.

[20] The Israeli Declaration of Independence was proclaimed on 14 May 1948.

[21] Escalating tensions and hostilities leading to the Six-Day War are attributed, *inter alia*, to a steady increase in border skirmishes and hostilities between Israel and its Arab neighbours; frequent clashes in the demilitarized zones and along the borders; Egypt's blockade of the Straits of Tiran, considered by Israel as an act of war; a build-up of Arab military forces in the Sinai Peninsula; increased political pressure and rhetoric from various Arab leaders calling for the destruction of the State of Israel.

[22] While the Egyptian-Israeli front was the main battleground, there were smaller eastern fronts involving Jordanian, Syrian, Iraqi, and Palestinian forces against Israeli forces.

dominance in the region. This war ended with Israel's eventual acceptance of a complex ceasefire proposal in August 1970. However, the "cold peace" between the two countries was short-lived as three years later, Egypt, assisted by Israel's other Arab neighbours, launched a surprise attack on Israel.

18. **Fifth rejection in 1973:** From 6 to 25 October 1973, a coalition of Arab States led by Egypt and Syria launched a surprise military attack on the State of Israel, in what is known as the "Yom Kippur War"[23]. The surprise attack which began on Yom Kippur (the Jewish day of repentance) and which coincided with the Islamic month of Ramadan, was intended to challenge Israel's victory in the Six-Day War of 1967 whereby Israel had acquired territory four times its previous size[24]. The war which involved the USA and Soviet Union on opposite sides, had far-reaching implications and ultimately led to negotiations on terms more favourable to the Arab States. The Israelis recognized that, despite impressive operational and tactical achievements on the battlefield, there was no guarantee that they would always dominate the Arab States militarily, as they had done consistently throughout the First, Second and Third Arab-Israeli Wars; these changes paved the way for the Israeli-Palestinian peace process. At the 1978 Camp David Accords that followed the war, Israel returned the entire Sinai Peninsula to Egypt, which led to the subsequent 1979 Egyptian-Israeli peace treaty, marking the first instance that an Arab country recognized Israel as a legitimate State.

19. **Sixth rejection in 2000:** Israeli Prime Minister Ehud Barak met at Camp David, with Palestinian Liberation Organization (PLO) Chairman Yasser Arafat in 2000, to conclude a new two-State plan. Barak offered Arafat a Palestinian State in all of Gaza, and 94 per cent of the West Bank, with East Jerusalem as its capital. The Palestinian leader flatly rejected the offer. In the words of President Bill Clinton of the United States, "Arafat was here 14 days and said no to everything." Instead, the Palestinians launched a bloody wave of suicide bombings that killed over 1,000 Israelis and maimed thousands more, on buses, in wedding halls, and in pizza parlours.

20. **Seventh rejection:** In 2008, Israel tried yet again to table the idea of a two-State solution before the new leadership of the PLO. Prime Minister Ehud Olmert went even further than Ehud Barak had, expanding the peace offer to include additional land to sweeten the deal. Like his predecessor, the new Palestinian leader, Mahmoud Abbas, turned the deal down.

21. To date, Israel still occupies the West Bank and the whole of Jerusalem, whilst Arab Palestinians now claim East Jerusalem as the capital of their potential or future Palestinian State. Most Palestinian refugees and their descendants live in Gaza and the West Bank, as well as in neighbouring Jordan, Syria, and Lebanon. Israel is reluctant to allow them to return to their homes claiming that this would overwhelm the country and threaten Israel's existence as a Jewish State. Meanwhile, in the past 50 years the number of Jews returning to Israel has increased and Israel has built settlements in the disputed territories where more than 700,000 Jews now live. These settlements have been declared "legally invalid" by the Security Council[25], although Israel disagrees. In 2005 Israel withdrew its troops and settlers from the Gaza Strip, while retaining control over the airspace, shared border, and shoreline, because of "security concerns". However, the UN still considers the Gaza Strip territory occupied by Israel precisely because Israel retains significant control over Gaza's borders, airspace, and maritime access, as well as the movement of goods and people into and out of the territory. Politically, Gaza has since 2006 been administered by Hamas[26], an Islamist extremist group committed to the destruction of the State of

[23] This war is also known as the Ramadan War, the October War, or the Fourth Arab Israeli War.

[24] Egypt had lost 23,500 square miles in the Sinai Peninsula and the Gaza Strip, although Israel had withdrawn from the Peninsula three years prior. Jordan had lost the West Bank and Eastern Jerusalem, and Syria had lost the strategic Golan Heights.

[25] The United Nations Security Council resolution 2334 (2016) states that Israel's establishment of settlements in Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity. These settlements constitute a flagrant violation of international law and a major obstacle to achieving a comprehensive, just, and lasting peace in the Middle East. The resolution calls for an immediate and complete cessation of all settlement activities in the occupied Palestinian territory, emphasizing that any changes to the 4 June 1967 lines (including Jerusalem) must be agreed upon through negotiations between the two sides. Additionally, it condemns acts of violence, terrorism, and incitement, urging both parties to observe calm and rebuild trust.

[26] In 2006 Hamas won the Palestinian elections and seized control of Gaza the following year after ousting the rival Fatah

Israel and designated by several States as a terrorist organization. Since then, Hamas militants and their allies have fought several wars with Israel, which along with Egypt has maintained a partial blockade on the Gaza Strip to isolate Hamas and to try to stop their attacks and indiscriminate firing of rockets towards Israeli cities. The Hamas attack on Israel of 7 October 2023 in which several Israeli citizens were murdered and others taken hostage, ushered in the latest war between Israel and Hamas and its allies (including Hezbollah in Lebanon). The USA, European Union and other Western countries have all condemned the Hamas attack on Israel and some have given military support to Israel, whilst extending humanitarian assistance to the Palestinian civilians who continue to suffer huge casualties.

E. Permanent-status issues that remain unresolved

22. Key issues that have historically remained in contention amongst the populations living in the former British Mandatory Palestine, include, (i) the issue of a possible "two-state solution", including when and how an independent Palestinian State could be created in the disputed territories alongside the State of Israel (including determination of the possible borders between the two States and how water, arable land and other natural resources will be shared); (ii) the safety and security of civilian populations in Israel and in Palestine; (iii) whether, when and how Israel should withdraw its military forces and settlements from the disputed territories; (iv) the status of the Holy City of Jerusalem (including whether it should be a shared capital for the two States and how it should be administered); and (v) Palestinian freedom of movement, including the right of Palestinian refugees to return to their homes in the disputed territories. The above issues remain unresolved and are a central part of the context in which the General Assembly's request for an advisory opinion should be understood. A solution to the Israeli-Palestine conflict would inevitably require that these key issues are addressed and resolved in such a manner as to ensure lasting peace and security for all peoples in the region. Historically, the UN Security Council has identified a negotiation framework as the most viable avenue for achieving a mutually acceptable solution.

III. The negotiation framework for the resolution of the conflict and the supporting role of the United Nations

23. Throughout its history, the United Nations has been vested in trying to find a lasting solution to the Israeli-Palestinian conflict. As stated above, this started in 1947, only two years after the founding of the United Nations, and on the eve of Britain ending its Mandate over Palestine. The General Assembly through resolution 181 (II) (1947) approved a Plan for the Partition of British Mandatory Palestine into three entities that would result in the creation of a Jewish State and an Arab State, with the Holy City of Jerusalem and its immediate suburbs being administered by the UN as an international zone or "*corpus separatum*"[27]. As stated above, the said Plan of Partition fell through[28], culminating in the 1948 War of Independence between the Jewish and Arab populations and leading to the eventual abandonment of the Plan. The UN Security Council through resolution 62 (1948) called for "an armistice [to] be established in all sectors of Palestine", and called upon the parties directly involved in the conflict to reach such an agreement[29]. Since then, however, relations between the Jews and Arabs in the former British Mandatory Territories have continued to deteriorate. Nevertheless, the United Nations, in particular the Security Council, has over the years remained seized of the "Palestinian Question", desiring to resolve the conflict peacefully and in accordance with its mandate under the Charter of the United Nations.

24. Over the last 45 years, an international legal framework involving UN and bilateral negotiations for the resolution of the Israeli-Palestinian conflict has developed, which is based on the concept of "land for peace", and which does not view the resolution of the conflict as being imposed upon the concerned parties from outside. Peace treaties between Egypt and Israel and Jordan and Israel were signed and implemented in 1979 and 1994

movement of the West Bank-based President Mahmoud Abbas.

[27] General Assembly resolution 181 (II) of 29 November 1947.

[28] See paragraphs 15-16 above.

[29] Security Council resolution 62 of 16 November 1948.

respectively. In 2020, in the context of the Abraham Accords, normalization agreements (equivalent to peace treaties) have been reached between Israel and a diverse list of Arab countries including the UAE, Bahrain, Morocco, and Sudan. The Israeli presence in the West Bank pending the conclusion of a peace agreement between Israel and the Palestinians is consistent with the international and bilateral frameworks for the resolution of the conflict.

A. Security Council resolutions 242 (1967) and 338 (1973)

25. International law recognizes negotiation and agreement as the primary mechanisms for resolving international disputes. UN Security Council resolutions 242 (1967) and 338 (1973) establish a framework for peace which has been mutually endorsed and agreed by both parties, and they remain the international framework for resolution of the Israeli-Palestinian conflict. Resolutions 242 and 338 leave open the possibility — indeed probability — of Israeli sovereignty in parts of the West Bank in a final peace agreement. Resolution 242 provides that peace "should" (not "must") include withdrawal of Israeli forces "from territories occupied in the recent (1967) conflict", not from "all the territories occupied" in that conflict. The Security Council's deliberations suggest that this wording was no accident, and the drafting history suggests that many of the drafters intended that withdrawal "is required from some but not all of the territories". Resolution 338 calls upon the parties to implement resolution 242.

26. Resolution 242's "land-for-peace" concept remains the cornerstone of all proposed peace plans to resolve the conflict. It served as a basis for the regional peace initiative in Camp David in 1978; the Israel-Egypt Treaty of Peace of 1979; and the Israel-Jordan Treaty of Peace of 1994. Furthermore, all Israeli-Palestinian agreements, including the Interim Agreement, invoke both resolution 242 and resolution 338. These resolutions have also been invoked in numerous decisions of international organizations relating to the ultimate resolution of the regional conflict. The Security Council and General Assembly have reiterated on numerous occasions their support for the existing bilateral agreements as the applicable legal framework for settling the Israeli-Palestinian conflict and determining the sovereign status of the territory in dispute. This is evidence which underscores the position both that the relevant framework for a territorial settlement begins with resolution 242, and that any Palestinian right or title to exercise authority over disputed territory (and its inhabitants) is not necessarily exclusive.

B. The Interim Agreements between Israel and the Palestinian Authorities (Oslo Accords)

27. The Oslo Accords[30] are binding bilateral agreements which were entered into by Israel and the Palestine Liberation Organization (PLO), the then official representatives of the Palestinian people, pending a final settlement between the parties, to serve as an irreversible mechanism for reaching a compromise solution acceptable to both parties, within the framework of the internationally recognized formula for resolving the regional dispute. According to those agreements, issues to be addressed in permanent status negotiations include "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours and other issues of common interest". Specifically with respect to recognition of the Palestinian people's right to self-determination, Israel for the first time recognized in the Oslo Accords the PLO as the representative of the Palestinian people, and the Accords reflect the agreed bilateral framework through which Palestinian self-determination can be realized. The Oslo Accords being agreements between subjects of international law (namely Israel and the PLO), bind any successor to the PLO. The Security Council, the General Assembly, the Quartet, the Secretary-General's special envoy, and the subsequent agreements between the parties have all referred to the Oslo Accords and their consistency with applicable UN resolutions. The international and bilateral framework for the resolution of the conflict, establishes a legal basis for Israel's

[30] Oslo I Accord, officially known as the "Declaration of Principles on Interim Self-Government, Arrangement", was signed on 13 September 1993. Oslo II Accord, officially known as the "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip", was signed on 28 September 1995.

continuing exercise of certain powers and responsibilities in the West Bank which the majority has characterized as "illegal".

28. The Advisory Opinion ignores the *lex lata* international legal framework and has the effect of undermining the international "land for peace" formula set out in UN Security Council resolutions 242 and 338, and of invalidating the bilateral Oslo Accords. I am thus unable to join the majority in that Opinion. The historic peace processes between Israel and its neighbours show that, in this context, one-time enemies can set aside their differences and resolve their disputes without resorting to force and compulsion. As I have stated before in a previous opinion, "a permanent solution to the Israeli-Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement"[31].

29. After the Six-Day War of 1967, the Security Council in its resolution 242 (commonly referred to as the "land for peace" framework), affirmed that "the establishment of a just and lasting peace in the Middle East" required the fulfilment of two interdependent conditions, namely the "withdrawal of Israel armed forces from territories occupied in the recent conflict" on the one hand, and the "termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force"[32]. In resolution 338, which called for a ceasefire in the 1973 Arab-Israeli war, the Security Council again decided that "immediately and concurrently with the ceasefire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East". This emphasis on the importance of the Israeli-Palestinian and broader Arab-Israeli peace process was subsequently affirmed by the General Assembly, which has emphasized the need to achieve a "just and comprehensive settlement of the Arab-Israeli conflict" (General Assembly resolution 47/64 (D) of 11 December 1992).

30. The international community's focus on encouraging negotiation between the parties resulted in several agreements, including the 1979 peace treaty between Israel and Egypt; the 1994 peace agreement between Israel and Jordan; and the 1993 and 1995 Oslo Accords[33] between Israel and the Palestine Liberation Organization ("PLO"). Most notably, the 1993 Oslo Accords resulted in the recognition by the Palestinian Liberation Organization of the State of Israel and the recognition by Israel of the PLO as the representative of the Palestinian people. The Declaration of Principles on Interim Self-Government Arrangements, signed by representatives of both parties, endorsed the framework set out in Security Council resolutions 242 and 338 and expressed the parties' agreement on the need to

> "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process" (Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993).

31. Although the Oslo Accords have not yet been fully implemented, they continue to bind the parties concerned and to provide a framework for allocating responsibilities between Israeli and Palestinian authorities and informing future negotiations regarding permanent status issues. Since then, the United Nations has repeatedly affirmed the need for negotiations aimed at achieving a two-State solution and resolving the dispute between Israel and Palestine. In 2003, the Security Council, in resolution 1515, "*[e]ndorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". The Quartet

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Order of 26 January 2024*, dissenting opinion of Judge Sebutinde, para. 11.

[32] Security Council resolution 242 of 22 November 1967.

[33] The Oslo I Accord, signed in Washington DC in 1993, and the Oslo II Accord, signed in Taba, Egypt in 1995.

was composed of representatives of the United States, European Union, Russian Federation and United Nations[34]. In that resolution, the Security Council "*[c]all[ed]* on the parties to fulfil their obligations under the Roadmap in co-operation with the Quartet and to achieve the vision of two States living side by side in peace and security"[35]. Another major set of peace negotiations between Israel and the PLO took place from 2007-2008. These negotiations appear to have been extremely close to a peace deal[36]; however, they once again failed[37], and were followed by domestic political change in Israel to a government less open to such a deal.

32. Although attempts at negotiation have periodically continued, including efforts supported by the United Nations and other members of the international community[38], there has as of yet been no final negotiated settlement of the Israeli-Palestinian conflict. Nevertheless, the Security Council in 2008 declared its support for continued negotiations between the parties and "support[ed] the parties' agreed principles for the bilateral negotiation process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues"[39]. In 2016, the Security Council in resolution 2334 recalled both parties' obligations, "[c]alling upon all parties to continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on final status issues" and "urg[ed] . . . the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving, without delay a comprehensive, just and lasting peace in the Middle East"[40].

33. The General Assembly has likewise regularly recalled the Oslo Accords and the Quartet Roadmap in its resolutions regarding the Israeli-Palestinian Conflict. For example, the General Assembly has:

> "[r]eiterate[d] its call for the achievement, without delay, of a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, including Security Council resolution 2334 (2016), the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map, and an end to the Israeli occupation that began in 1967, including of East Jerusalem, and reaffirms in this regard its unwavering support, in accordance with international law, for the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders"[41].

34. Finally, the Court has itself previously recognized the importance of continued negotiations between the concerned parties, as the only viable means to achieving lasting peace and security in the Middle East. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explained:

> "Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, *in the Court's view,*

[34] Security Council resolution 1515 of 19 November 2003.
[35] *Ibid.*
[36] See e.g. Gordon Brown: "In 2008, we were inches from peace in the Middle East. I believe it's still within our grasp", *The Guardian*, 9 January 2024, https://www.theguardian.com/commentisfree/2024/jan/09/israel-palestine-gaza-peace-plan.
[37] Reports suggest that the Israeli Prime Minister, Ehud Olmert, offered a peace deal to PA President Abbas, which was rejected. See e.g. *Jerusalem Post*, "Revealed: Olmert's 2008 peace offer to Palestinians", https://www.jpost.com/diplomacy-and-politics/details-of-olmerts-peace-offer-to-palestinians-exposed-314261.
[38] See *Vox*, "The many, many times Israelis and Palestinians tried to make peace — and failed", 22 November 2023, https://www.vox.com/world-politics/2023/11/22/23971375/israel-palestine-peace-talks-deal-timeline.
[39] Security Council resolution 1850 of 16 December 2008.
[40] Security Council resolution 2334 of 23 December 2016.
[41] See General Assembly resolution 77/25 of 6 December 2022; General Assembly resolution 76/10 of 1 December 2021; General Assembly resolution 75/22 of 2 December 2020.

> *this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973).* The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, *a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region*."[42] [Emphasis added.]

35. As can be seen from the above history, the relevant organs of the United Nations have consistently envisaged a permanent resolution of the Israeli-Palestine conflict based on good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement. This context must be kept in mind in assessing the current General Assembly's request for an Advisory Opinion.

C. The General Assembly's request for an advisory opinion

36. On 30 December 2022, the United Nations General Assembly adopted resolution 77/247 requesting the Court pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions:

> "*(a)* What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> *(b)* How do the policies and practices of Israel referred to . . . above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"

37. On 31 May 2023 and 22 June 2023, the Secretary-General of the United Nations, under cover of a letter from the Legal Counsel, transmitted to the Registry a dossier of documents likely to throw light upon the questions asked, pursuant to Article 65, paragraph 2, of the Court's Statute[43]. Fifty-seven States and international organizations filed their written statements pursuant to Article 66, paragraph 4, of the Court's Statute[44]. In addition, 15 participants submitted their written comments on the submitted written statements[45]. Resolution 77/247 has been criticized as having been supported by only 87 Member States of the General Assembly, with the remaining 106 members having abstained or voted against the resolution or simply were absent during the vote. Further criticism has been levelled against the request which is perceived by some as an attempt by a frustrated General Assembly taking over the role of the Security Council, the body that is primarily charged with the responsibility for international peace and security. However, it is not for the principal judicial organ of the United Nations to concern itself with the internal relations between the other organs of the

[42] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 200-201, para. 162.

[43] Dossier of documents submitted pursuant to Article 65, paragraph 2, of the Statute.

[44] Turkey, Namibia, Luxembourg, Canada, Bangladesh, Jordan, Chile, Liechtenstein, Lebanon, Norway, Israel, Algeria, the League of Arab States, Syrian Arab Republic, Palestine, the Organization of Islamic Cooperation, Egypt, Guyana, Japan, Saudi Arabia, Qatar, Switzerland, Spain, Russian Federation, Italy, Yemen, Maldives, United Arab Emirates, Oman, the African Union, Pakistan, South Africa, United Kingdom of Great Britain and Northern Ireland, Hungary, Brazil, France, Kuwait, United States of America, China, The Gambia, Ireland, Belize, Bolivia, Cuba, Mauritius, Morocco, Czechia, Malaysia, Colombia, Indonesia, Guatemala, Nauru, Djibouti, Togo, Fiji, Senegal and Zambia.

[45] Jordan, the Organization of Islamic Cooperation, Qatar, Belize, Bangladesh, Palestine, United States of America, Indonesia, Chile, the League of Arab States, Egypt, Algeria, Guatemala, Namibia, and Pakistan.

United Nations. The Court need only satisfy itself that the present request was made in accordance with the provisions of the Charter of the United Nations, in particular, Article 96 thereof, as well as Article 65 of the Statute of the Court.

IV. Jurisdiction and discretion of the Court

A. Jurisdiction

38. Article 65, paragraph 1, of the Court's Statute empowers the Court's to render advisory opinions "on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". Article 96 of the Charter of the United Nations provides that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question". The Court has also previously stated that the questions requested should arise "within the scope of the activities of the requesting organ"[46] and that "[i]t is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it"[47].

39. Although the Charter of the United Nations has vested the Security Council with the primary responsibility for the maintenance of international peace and security[48], the present request for an Advisory Opinion was authorized by the General Assembly under its agenda item entitled "Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories" [49]. The Court has previously recognized that the General Assembly has been involved with the Israeli-Palestine question since 1947, when it recommended the Plan of Partition for Palestine[50]. As the United Nations has "permanent responsibility towards the question of Palestine until the question is resolved"[51], it follows that the questions asked in the General Assembly's request for this Advisory Opinion do arise within the scope of its activities in maintaining international peace and security. Therefore, I agree that the Court has jurisdiction to render an advisory opinion in the present case and have accordingly voted in favour of paragraph 285, subparagraph (1), of the operative clause.

B. Judicial discretion and the impropriety of rendering an advisory opinion

40. Where advisory jurisdiction has been established, the Court retains the discretion to decline to give an opinion where there are "compelling reason[s]" for it to do so[52]. The Court must "satisfy itself . . . as to the propriety of the exercise of its judicial function"[53] with reference to these compelling reasons. Thus, while "[a] reply to a request for an Opinion should not, in principle, be refused"[54], nevertheless, the retention of the discretion of whether to render an advisory opinion "exists so as to protect the integrity of the Court's judicial

[46] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.

[47] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, para. 15.

[48] Art. 24, Charter of the United Nations.

[49] General Assembly, 77th Session, Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories, 30 December 2022.

[50] General Assembly, resolution adopted on the report of the *ad hoc* committee on the Palestinian question, 29 November 1947; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 188-189, para. 129.

[51] General Assembly, 77th Session, Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories, 30 December 2022.

[52] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 20, para. 19.

[53] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 157, para. 45.

[54] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19.

function as the principal judicial organ of the United Nations"[55]. As observed by Judge Buergenthal in the *Wall* Opinion, quoting what the Court said in *Western Sahara*, the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request is "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character"[56].

41. I have voted against subparagraph 2 of the operative paragraph 285 because I am of the view that there are compelling reasons in the present case why the Court should have declined to render the requested advisory opinion. These are as follows:

1. Lack of adequate information before the Court

42. In my view, the Court does not have before it accurate, balanced, and reliable information to enable it to judiciously arrive at a fair conclusion upon disputed questions of fact, in a manner compatible with its judicial character[57]. Due to the one-sided formulation of the questions posed in resolution 77/247, coupled with the one-sided narrative in the statements of many participants in these proceedings, some of whom do not even recognize the existence or legitimacy of the State of Israel, the Court does not have before it the accurate and reliable information that it needs to render a balanced opinion on those questions. Most of the participants in these advisory proceedings have, regrettably, presented the Court with a one-sided narrative that fails to take account of the complexity of the conflict and that misrepresents its legal, cultural, historical, and political context. By asking the Court to look only at the "policies and practices of Israel", the General Assembly shields from the purview of the Court, the policies and practices of the Palestinian Arabs and their representatives (including non-state actors), as well as those of other Arab States in the Middle East whose interests are intertwined with those of the Palestinian Arabs. As pointed out in Part II of this dissenting opinion (Historical Context to the Israeli-Palestinian Conflict), these other States have historically played a significant role in the success or failure of efforts at finding a lasting solution to peace in the Middle East, including by either fostering peace agreements between Israel and representatives of the Arab Palestinians (such as the Palestinian Liberation Organization (PLO)); or by sponsoring or engaging in several wars against Israel, including by simply calling for its annihilation. Without information regarding the policies and practices of Israel's adversaries, the Court is limited in its opinion regarding the various complex issues behind the Israeli-Palestinian conflict and has, as feared, resorted to imposing obligations on Israel, whilst disregarding her legitimate security concerns and the obligations of Israel's Arab neighbours. In my respectful view, this approach is likely to exacerbate rather than de-escalate tensions in the Middle East. In Part VI of this dissenting opinion, I further highlight some of the important international law principles and propositions that the Court could and should have considered and carefully examined before drawing the conclusions contained in its Advisory Opinion.

2. The Advisory Opinion circumvents the existing international negotiation framework

43. The Advisory Opinion clearly circumvents and is likely to jeopardize the existing internationally sanctioned and legally binding negotiation framework for the resolution of the Israeli-Palestine conflict referred to in Part III of this dissenting opinion. The Court, by addressing in the Advisory Opinion the legal obligations of only one party to the dispute and ignoring the rights and obligations of both parties as envisaged in the Oslo

[55] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 64.

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, declaration of Judge Buergenthal, p. 240, para. 1, citing *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46.

[57] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 161, para. 56; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 103, para. 7.

Accords and Road Map, both of which exclude recourse to the Court, clearly circumvents the existing negotiation framework. It is no wonder, the Security Council, the organ of the United Nations charged with the primary responsibility for international peace and security, is not the one that requested the Court for an advisory opinion on the Israeli-Palestine conflict. That body understands that the complex issues encompassed are best resolved through the existing negotiation framework rather than through the imposition of a solution outside that framework. As recently as 19 March 2023, both Israel and Palestine met with other interested parties in Sharm-el-Sheikh, Egypt, and reaffirmed their "unwavering commitment to all previous agreements between them" and to "address all outstanding issues through direct dialogue"[58]. Again, there was no mention of judicial involvement in any shape or form, notwithstanding that resolution 77/247 had already been adopted.

44. As narrated in Part III of this dissenting opinion, Israel and Palestine painstakingly concluded a series of agreements known collectively as the Oslo Accords in 1993 and 1995, signifying their intention to "put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights"[59]. The thrust of the Oslo Accords and Roadmap is mutual performance and good faith negotiations, leading to a consensual outcome. To that end the parties thereto agreed upon a wide range of interim measures, pending the achievement of a final agreement through good faith negotiations. Some of the interim measures agreed included: (i) Israel's recognition of the PLO as the legitimate Palestinian authority; (ii) powers and responsibilities were transferred from the Israeli military Government and its Civil Administration to the Palestinian Authority, while Israel continued to exercise powers and responsibilities not so transferred; (iii) Palestinian citizens were to hold free and direct general elections of their political leaders; (iv) the West Bank was divided into three areas — A, B and C. The Palestinians would obtain exclusive control over Area A; Israel would retain exclusive control over Area C, and Area B would be under joint Israeli-Palestinian control; (v) lastly, the parties agreed to enter into negotiations to resolve remaining issues including "Israeli settlements in the OPTs"; "borders of the two States"; "the Status and administration of Jerusalem"; and "security, stability and peace"[60]. The Oslo Accords also contained a specific dispute resolution mechanism and do not permit either party to unilaterally resort to external, third-party, or judicial settlements[61]. Since 1993 an elaborate set of arrangements have been put into place to operationalize the Oslo Accords.

45. According to the 2003 Road Map for peace,

> "a two-State solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian State to be established, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement"[62].

3. The Advisory Opinion circumvents the principle of State consent

46. Another reason for declining to give the Advisory Opinion is to avoid adjudicating what is essentially a bilateral dispute between Israel and the Palestinian people in the absence of comprehensive arguments from one of the parties. In *Western Sahara*, the Court ruled that where an advisory opinion "would have the effect of

[58] On 19 March 2023, at the invitation of Egypt, Israeli, Palestinian, Jordanian and US political and security senior officials met to pave a way forward towards the peaceful settlement between the Israeli and Palestinian peoples. The parties reaffirmed their commitment to advancing security, stability and peace for Israelis and Palestinians alike, and recognized the necessity of de-escalation on the ground, the prevention of further violence, as well as of pursuing confidence-building measures, enhancing mutual trust, creating political horizon and addressing outstanding issues through direct dialogue. (http://il.usembassy.gov/joint-communique-from-the-march-19-meeting-in-sharm-el-sheikh/).

[59] Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, 28 September 1995, Preamble.

[60] Declaration of Principles on Interim Self-Government Arrangements, 1993, Arts. I and V.

[61] *Ibid.*, Art. XXI.

[62] A Performance-based Road Map to a permanent two-State solution to the Israeli-Palestinian Conflict (https://peacemaker.un.org/israel-palestine-roadmap2003).

circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent", the Court would decline to give that opinion[63]. Similarly, in *Eastern Carelia,* the League of Nations sought an opinion from the Permanent Court of International Justice (PCIJ) on Russia's treaty obligations to Finland concerning the autonomy of Eastern Carelia. Russia had previously declined a request to submit this dispute to the League[64]. The PCIJ ruled that "[a]nswering the question would be substantially equivalent to deciding the dispute between the parties"[65] and thus, declined to give an opinion. The deciding factor in that case, was that Russia was not a party of the League of Nations and therefore had not given the PCIJ its consent to its exercise of advisory jurisdiction[66]. The PCIJ also recognized the "particular circumstances" of the case[67], limiting its application.

47. In the present case, many participants have referred to the *erga omnes* (and possible *jus cogens*) nature of some of the rights claimed by the Arab Palestinians and the fact that these are "of interest to the international community" at large, and therefore transform the nature of the dispute between Israel and Palestine from a bilateral one. I respectfully disagree. As I have stated above, the Israeli-Palestine conflict and all its attendant complex issues, is historically and essentially a bilateral dispute, in respect of which both parties have subscribed to another mode of dispute resolution, namely international negotiation, and not judicial or third-party settlement. The questions before the Court do not ask it to opine upon the law relating to occupation or to self-determination, in the abstract: the Court's Advisory Opinion is clearly required to consider the historical context of the conflict between Israel and Palestine spanning decades, including the framework developed by the organs of the United Nations towards settlement of that conflict. Israel has clearly not given its consent to the Court pronouncing itself on the complex issues involved. In this regard, Israel's participation in the contentious case relating to the application and interpretation of the Genocide Convention[68] must not be confused with, or mistaken for its consent to judicial settlement of the various complex issues outlined in this opinion. Similarly, many of the participants who have weighed in on how the Court should or should not answer the questions before it, are not parties to the conflict, whilst others have other vested interests in seeing the matter resolved one way or another. Of particular concern is the question of the ongoing Gaza war between Israel and Hamas, a matter about which many participants aired their views in their written statements or observations, and which is clearly *sub judice* in two contentious cases before the Court. The Court would need to carefully navigate its Advisory Opinion away from the issues that are *sub judice* in those other cases if it is to maintain its judicial integrity.

48. For all the above reasons, I am strongly of the view that the Court should have declined to give its Advisory Opinion in the present case. Instead, Israel and Palestine, the two parties to the conflict, should be encouraged to return to the negotiating table and to find a lasting solution jointly and consensually. The United Nations and international community at large, should do all in their power to support such negotiations. Regrettably, the advisory opinion has downplayed the importance of the negotiation framework, including the role of the United Nations and international community in that regard.

V. Shortcomings of the Advisory Opinion

49. The Court, taking a cue from the questions of the General Assembly, and various statements and observations filed before the Court, identifies Israel's policies and practices relating to the occupation which they deemed to be illegal, and which should consequently entail legal consequences for Israel, other States, and the United Nations. Besides voting against the advisory opinion, I would like to share some thoughts on the questions raised in the request and the Court's responses thereto, highlighting their limitations.

[63] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.
[64] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 24.
[65] *Ibid.*, pp. 28-29.
[66] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 28, para. 46.
[67] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28.
[68] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*.

A. Answering Question 1

50. Given the broad international support for these legal propositions, the majority of the Court has quite predictably accepted the legal premises or presumptions of the first Question referred to it by the General Assembly, namely: *(a)* that Israel's occupation including settlements and annexation of Palestinian territories occupied since 1967 is illegal per se; *(b)* that Israel is responsible for an "ongoing violation . . . of the right of the Palestinian people to self-determination"; *(c)* that Israel's policies and practices are deliberately and necessarily "aimed at altering the demographic composition, character and status of . . . Jerusalem"; and *(d)* that Israel's practices and policies are inherently discriminatory and violate important rules of international humanitarian law (IHL) and international human rights law (IHRL).

51. Thus unsurprisingly, the Advisory Opinion finds Israel's occupation of the OPTs illegal per se, and certain features thereof as incompatible with international law, including, the long duration thereof, which the advisory opinion deems incompatible with the right of the Arab Palestinians to self-determination. The Advisory Opinion further finds that Israel's settlement policy and associated measures have contributed to a prohibited demographic change in the OPTs and therefore unlawful under international law. The Opinion also adjudges Israel's conduct as *de facto* or *de jure* annexation that is incompatible with the prohibition against acquisition of territory by force. The answers to question one, even if based on a one-sided narrative, may not pose any surprises for the General Assembly, especially since much of the applicable law was already pronounced by the Court in previous advisory opinions, including the *Wall* Opinion, *Namibia* Opinion and *Chagos* Opinion. That is a straightforward mathematical exercise. The real challenge for the Court arises when trying to answer the second question with the limited information that the one-sided narrative affords — "How do the policies and practices of Israel referred to . . . above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"

B. Answering Question 2

52. Predictably, the Court after qualifying Israel's presence in the disputed territories as an illegal occupation, in keeping with the views of most participants, has concluded that under international law Israel is obligated to bring to an end its illegal policies and practices, with a view to realizing Palestine's right to self-determination. Again, this is unsurprising and not new because the Court made similar statements in the *Wall* Opinion. Furthermore, as far as I can tell from the limited information before the Court, even Israel does not dispute the fact that the Palestinian people have a right to self-determination. The greater challenge from a legal and practical standpoint, is in the Court determining the more complex and nuanced issues, such as territorial scope of the independent Palestinian State, the timeline and process by which Israel should bring the "unlawful occupation" to an end, including withdrawing from the disputed territories without jeopardizing its own security needs.

C. Issues that require careful consideration

53. In this part of my opinion, I share some misgivings that I have with some of the issues that in my view, the Court has not given adequate consideration in the Advisory Opinion.

1. Timeline for ending Israel's occupation is uncertain and impracticable

54. The timeline proposed by most participants and what the Court has called "bring[ing] to an end *as rapidly as possible* the unlawful presence of Israel in the Occupied Palestinian Territory" is uncertain and impracticable[69]. While Palestine, as well as most of the participants, have called for "an immediate, total and unconditional" end of Israel's illegal occupation, the wording in the Advisory Opinion, coupled with a total absence of any comments addressing Israel's security concerns, has the same effect as what most States asked

[69] See operative paragraph 285 (4).

for. Moreover, this is clearly contrary to what Israel and Palestine previously agreed including under the Oslo Accords, or indeed what the Security Council sanctioned under resolutions 242 and 338. An immediate, total, and unconditional withdrawal of Israeli armed forces and civilian settlements is simply impracticable in the present circumstances. Unlike in the *Namibia* Opinion where such decisive language might have been appropriate, the complexities of the Israeli-Palestine conflict do not easily lend themselves to such a sweeping formulation. This is because Israel's continued presence in the West Bank and Jerusalem (and recently in Gaza) is premised in part, on real security concerns; the disagreement between the parties over the borders of the two States, and the *de facto* reality on the ground. Those matters will render the immediate and unilateral withdrawal of Israel practically impossible.

55. More importantly, the Court should have envisaged and recommended to the General Assembly, Security Council and third States, a process that incorporates the aforementioned international negotiation framework into "Israel's withdrawal". This could have been done, for example, by recommending that the timeline and the *modus operandi* of Israel's withdrawal should be determined by bilateral or multilateral negotiations under the supervision of the United Nations. This was the approach the Court adopted in the *Gabčíkovo-Nagymaros* case where the Court stated that the immediate parties "must negotiate in good faith in the light of the prevailing situation"; or as in the *Wall* Opinion where the Court stated that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation".

2. The Advisory Opinion ignores Israel's legitimate security concerns and need for effective security guarantees

56. Another significant factor which the Court has overlooked, and which distinguishes the Israel-Palestine conflict from other international situations involving calls for an "immediate, total and unconditional end" of colonization or occupation or expired legal mandate, is the existential and security threats posed to the Jewish people and State of Israel, from the disputed territories and from its adversaries in the neighbourhood and beyond. It is undeniable that there are States and non-State actors who have openly expressed a desire to see the State of Israel, not just withdraw from the OPTs but also wiped off the face of the earth, including from its own territory. Time and time again Israel's adversaries have launched surprise attacks on Israel within her borders and not just in retaliation for her occupation of Palestinian territory. Indeed, many of the wars between Israel and her Arab neighbours have been fought by Israel pre-emptively to remove an immediate and existential military threat originating from either the OPTs or from enemies further afield. Examples include the 1967 war, the Six-Day War, and more recently, the ongoing Gaza war. As pointed out earlier in this opinion, the Security Council has hitherto taken cognizance of Israel's legitimate security concerns and called for a withdrawal that occurs concurrently with effective security guarantees, as reflected in its resolutions 242 (1967) and 338 (1973) and others.

57. The practical requirement that withdrawal from Palestinian territory should be accompanied by effective security guarantees was also central to the Oslo Accords and the interim agreements[70] between Israel and the PLO, which led to the establishment of the Palestinian Authority to which Israel transferred powers of governance over parts of the OPTs. Indeed, the collapse of the Oslo process was brought about by Israel's unwillingness to continue its withdrawal from the occupied territories in the absence of effective security guarantees from the Palestinian side. At that time, instead of security guarantees, Israel was experiencing suicide bombings emanating from the OPTs during the periods 1994-1997 and 2000-2006, which led to a slowing down and eventual halt of the withdrawal exercise. Conversely, the only time Israel has unilaterally withdrawn from the Gaza Strip in 2005 and not insisted on concurrent security guarantees for itself, the results have been disastrous for Israel.

[70] 1995 Interim Agreement, Art. X.

58. In particular, the Advisory Opinion does not consider the tense security situation in the West Bank, which renders it practically impossible for Israeli forces to unilaterally withdraw from occupied territories without putting in place security guarantees for the hundreds of Israeli citizens or settlers (including those that hold valid titles to private land predating 1948) who would remain under Palestinian control. The situation could become dangerously volatile for any Israeli citizen left behind, if a unilateral withdrawal by Israel from the disputed territories would lead to a power vacuum that would be filled, as in the case of the Gaza Strip, by Hamas or other extremist groups dedicated to Israel's destruction. In view of the above circumstances, it is regrettable that the Court, in rendering its Advisory Opinion in the present case, has chosen to overlook and has underestimated the legitimacy of Israel's security concerns.

3. Need to balance competing sovereignty claims

59. Another complex issue which is relevant to analysing the legal consequences of the illegality of Israel's policies and practices is the fact that Israel has its own sovereignty claims regarding parts of the territory which the international community views as the OPT[71], an issue not given any attention by most participants. Although there appears to be a broad international consensus around the proposal that the two-State solution should be implemented based on Israel's 1967 borders, such political consensus cannot, in and of itself, bestow title to territory where none exists under international law, or remove title over territory where such title legally exists. Determination of sovereignty may entail, for example, taking cognizance of and treating differently, areas where there was a predominantly Jewish presence pre-1948 (e.g. the Jewish Quarter of Old Jerusalem or Gush Etzion) vis-à-vis other areas from which Israel unilaterally withdrew (e.g. the Gaza Strip). Requiring Israel's "immediate, total and unconditional" withdrawal would be tantamount to denying Israel's legal claims pertaining to parts of those territories.

60. To determine the competing sovereignty claims, the Court would need to shift its focus from a review of "Israel's policies and practices in the OPTs" to a review of Israel and Palestine's competing sovereignty claims over different parts of the OPTs, notwithstanding that such matters were not sufficiently argued during these proceedings. Clearly these are complex issues that rightly call for a negotiated, rather than judicial settlement. This is yet another reason why resolution 242 calls for an agreement leading to "termination of all claims" and the acknowledgment of "secure and recognized boundaries". This is also why the Oslo Accords envisioned final status negotiations over borders. In this respect, Israel's occupation is different from cases of decolonization (covered by resolution 1514) or termination of League of Nations Mandates (as described in the 1971 *Namibia* Opinion) where in both cases the occupying Power had no plausible sovereignty claim to any part of the territory in question. It is also different from the *Chagos* Opinion where the legal dispute underlying the competing sovereignty claims was relatively straightforward and was properly argued before the Court.

4. The question of remedies or reparations

61. Finally, I have serious doubts as to whether it is appropriate to apply the 1928 *Chorzów Factory* principle of "reparations" (as a remedy that "must, as far as possible, wipe out all the consequences of the [alleged] illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed") to all of Israel's violations of international law identified in the Advisory Opinion. This is clearly a situation where there is enough blame to go round, not just of Israel but also of Arab Palestinians (for the failure of prior peace negotiations and for resorting to war) and, to some extent, the international community, for taking so long to find a lasting solution to the Israeli-Palestine conflict. The solution of two States coexisting peacefully side by side, has never lain in the hands of one or the other party. Israel's unilateral withdrawal from the OPTs (short of vanishing from the face of the earth) is not going to bring about the much-needed peace in the Middle East. This begs the question: what exactly is Israel's share of the blame for which it should pay reparations?

[71] General Assembly resolution 77/126.

62. Besides, in most if not all cases of decolonization or termination of League of Nations or UN Mandates where the occupying or colonial power has benefitted from decades of plundering the natural and mineral resources in the occupied territory or colony, the people of those territories have upon attainment of self-determination, not received any reparations for their loss, much less that restoring them to the *status quo ante*! The situation in this part of the Middle East is different because as has been shown in the historical context, Israel is not a colonizer. It was Britain that originally held the mandate for Palestine, and the State of Israel was the only State to emerge as an independent State, inheriting the whole of the disputed territory under *uti possidetis juris*. Without first ascertaining and balancing the competing sovereignty and territorial claims of the concerned parties, it is, in my view, unrealistic and simplistic to recommend the kind of reparations referred to in the Advisory Opinion. The European Court of Human Rights, in comparable circumstances, opined in the 2010 *Demopoulos* case involving Northern Cyprus, with which opinion I would agree in the present case, that:

> "The Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to the concrete factual circumstances."[72]

VI. The Advisory Opinion disregards important legal principles and propositions in international law

63. In my respectful view, the approach taken by the majority in rendering the Advisory Opinion is fundamentally flawed as it fails to consider important legal principles and propositions in international law, governing the Israeli-Palestinian question. The Court's analysis of the status of the territories recaptured by Israel in 1967 and any legal pronouncements on the status of those territories, should have been guided by the following principles of international law.

A. Sovereign equality of States

64. Article 2, paragraph (1), of the Charter of the United Nations enshrines the idea that all Member States of the UN, regardless of their size, population, economic power or military strength, are considered equal under international law[73]. The principle of sovereign equality necessitates that international law be applied consistently across all States and situations. Yet, the application of international law to the Israeli-Palestinian conflict seems to diverge from this standard. For instance, the characterization of Israeli settlements in the post-1967 territories, including East Jerusalem, as illegal and a serious violation of international law, or the assertion that the borders as of 4 June 1967 serve as Israel's *de facto* boundaries, or the prescription of a mandatory two-State solution — these are interpretations not uniformly applied to other regions deemed "occupied", such as Crimea by Russia, Western Sahara by Morocco, or Northern Cyprus by Turkey. Israel, like any other State, is entitled to equal treatment under international law. Therefore, it is imperative that the rules and principles of international law are crafted and applied with objectivity, ensuring equal and non-discriminatory treatment for all States. As stated above, the General Assembly's questions, and the whole approach in the Advisory Opinion are one-sided and imbalanced and ignore or downplay Israel's existing territorial and sovereignty rights.

[72] *Demopolous* et al. versus *Turkey*, Decision 1.3.2010 GC.

[73] The principle has been described by the ICJ as "one of the fundamental principles of the international legal order" which should be "viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory". *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening) Judgment, I.C.J. Reports 2012 (I)*, pp. 123-124, para. 57.

B. The rule of law must clearly distinguish between law and policy

65. Not all international expressions of norms take on the character of binding law. And yet the Advisory Opinion treats all UN resolutions quoted therein, as creating binding legal obligations which is not necessarily true. For instance, the UN General Assembly's or Security Council's legal views do not automatically become international law. They only serve as proof of customary international law if they represent widespread State practices and the collective belief that such practices are legally required (*opinion juris*). Meanwhile, the international legal framework also acknowledges policy statements that carry no legal weight and do not impose any legal obligations. Many of the UN General Assembly and Security Council resolutions referring to the Israeli-Palestinian conflict are examples of non-binding statements of policy. Resolution 242 is an example of a non-binding recommendation by the Security Council issued in response to the Israeli-Arab Six-Day War in June 1967. This resolution emphasized the necessity of negotiations and suggested guidelines for the parties during their negotiations. Another example is General Assembly resolution 194 (1948) which is relied upon for the assertion that Palestinian refugees have "a right of return". Rather than creating a binding obligation on Israel, this resolution was no more than an expression of policy in relation to refugees resulting from the 1947-1949 Israeli-Palestinian conflict. Similarly, the statement or inference that the two-State solution is mandatory or necessary to achieve a just, lasting and comprehensive peace, is another non-binding policy statement.

C. State consent is required before resolution of inter-State disputes

66. As a fundamental principle of international law, UN institutions (including the principal judicial organ) require the explicit consent of the involved State to mediate disputes between States or between States and non-State entities. The United Nations primarily operates on the principle of State sovereignty and typically cannot impose resolutions without the agreement of the State. Yet as observed above, the Advisory Opinion circumvents State consent by giving judicial opinions over matters that are clearly reserved for the UN and bilateral negotiation framework.

D. Borders, sovereignty, and precise scope of territorial claims cannot be presumed

67. The questions of Israel's alleged occupation of certain Palestinian territories since 1967, or of its annexation of foreign territory, or of the alleged infringement of the Palestinian people's right to self-determination, are all questions that cannot be answered without first determining the territorial scope (i.e. borders) of the State of Israel, a critical matter regarding which the Court has not received arguments or evidence. The borders, the territorial sovereignty of both Israel and Palestine, are another sensitive area the Court cannot simply presume to appreciate based on the one-sided narrative contained in the statements of the pro-Palestinian group of States.

68. The General Assembly's questions contained in resolution 77/247 rest on certain assumptions, namely that: (1) all the territories held during the Jordanian and Egyptian occupation within the 1949 Armistice Lines are automatically the sovereign territories of Palestine, and thus not of Israel; (2) that Israel's presence in the West Bank, the Gaza Strip and Jerusalem is without any legal justification; (3) Israel's presence in these areas violates Palestinian rights; (4) this territory is "Palestinian"; and (5) that Israel's policies and practices are annexational and necessarily "aimed at altering the demographic composition, character and status of . . . Jerusalem". While the language of resolution 77/247 portrays these assumptions as having been established already, I am not sure that these issues are as straightforward as they appear. Consequently, it falls to the Court to carry out its obligation to unpack, test and verify these assumptions, both for the purpose of determining whether it should exercise its jurisdiction and ultimately, in delivering the requested opinion. At the very least, the Court would need to examine and evaluate evidence concerning whether the 1949 Armistice Lines are "secure boundaries" within the meaning of Security Council resolutions 242 and 338. This, in turn, would require examination of the threats facing Israel emanating from the OPTs and the broader region. In the context of the questions put to the Court, determination of territorial sovereignty is critical because without clarifying the

respective claims of both parties to the conflict, it would be impossible to answer the question of territorial scope of the Palestinian self-determination claim or of Israel's withdrawal from territory considered occupied. Furthermore, the Court would need to determine the territory over which Palestinians claim sovereignty and whether Palestine has historically made different assertions before different fora. Regrettably, the Court, which evidently adopted the above presumptions without question, does not address any of the above issues and frankly does not have before it sufficient information to even make an educated guess.

69. General Assembly resolution 77/247 refers to the West Bank, the eastern part of Jerusalem, and the Gaza Strip as "Palestinian territory". The resolution appears to assume that sovereign rights to this area rest exclusively with the Palestinian people. It disregards any potential claims the State of Israel and the Jewish people may have with respect to some of these areas. In law and in fact, for over a century, sovereign legal title over the West Bank (and indeed the Gaza Strip) has been, and continues to be, indeterminate, or in abeyance. This has been the legal position under international law since the end of World War I, when Turkey (as the successor to the Ottoman Empire) ceded sovereignty of the areas outside of its current borders. No agreement, instrument, judgment, opinion, or event with legal effect has changed this status since, as reflected — and explicitly stated — in agreements between the interested parties, and particularly agreements between the Israeli and Palestinian authorities. Under these agreements, the question of the final disposition of these areas shall be determined only by negotiation. Until then, both sides have agreed to provisional arrangements, which continue to apply and govern the legal relationship between them today. I offer a few thoughts below regarding these complex issues.

E. *Uti possidetis juris* and the borders of Israel on the eve of independence

70. Under international law there are several principles upon which legally enforceable borders are established, including effective control, historical title, and treaties. *Uti possidetis juris*[74] is one of the main principles of customary international law intended to ensure stability, certainty and continuity in the demarcation of territorial boundaries of States emerging from decolonization or mandates such as the British Mandatory Palestine. In effect, the principle of *uti possidetis juris* transforms the colonial and administrative lines existing at the moment of birth of the new State into national borders. The principle applies to the State, as it is "at the moment of independence", i.e. to the "photograph" of the territorial situation existing then. As the Court explained in the *Burkina Faso*/*Republic of Mali* case, the doctrine ensures that:

"By becoming independent, [the] new State acquires sovereignty with the territorial base and boundaries left to it by the [administrative boundaries of the] colonial power . . . [The principle of *uti possidetis juris*] applies to the State as it is [at that moment of independence], i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* [*juris*] freezes the territorial title; it stops the clock"[75].

71. The Court further observed in the case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* that *uti possidetis juris* is a "retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes"[76]. In applying the

[74] The principle of *uti possidetis juris*, which stipulates that newly formed sovereign States should maintain the internal borders that their preceding dependent area had before gaining independence, aims to preserve the territorial integrity of new States by maintaining the status quo of borders, thereby preventing conflicts that could arise from border disputes. The principle is also associated with preventing foreign intervention by eliminating any contested terra nullius (no man's land) that foreign powers could claim. It has been notably applied by the Badinter Arbitration Committee during the disintegration of Yugoslavia, specifically regarding the nature of the boundaries between Croatia, Serbia, and Bosnia and Herzegovina. In essence, *uti possidetis juris* serves as a stabilizing factor during the transition of territories from colonial rule to independence, ensuring that the new States' borders are recognized based on historical administrative lines rather than being redrawn, which could lead to further disputes and instability.

[75] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30.

[76] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 388, para. 43.

doctrine, one does not ask whether the law at the time of the "photograph" viewed the administrative lines as international boundaries. Indeed, it is quite plain that the borderlines are not expected to have been international boundaries at the time of the "photograph". Thus, for instance, in the *Burkina Faso* case, the Court did not have to inquire whether *uti possidetis juris* was a binding rule of international law at the time of decolonization. It was enough for the Court that *uti possidetis juris* was a binding rule of international law at the time the Court resolved the border dispute.

72. As stated above, when Britain terminated its stewardship over what was left of the Mandate for Palestine in 1947[77], according to the principle of *uti possidetis juris*, the administrative boundaries of the Mandate for Palestine on 14 May 1948 became the borders of the independent State of Israel (the only State to emerge from Mandatory Palestine at the time of Britain's withdrawal)[78]. Those borders were as follows: (1) To the west the Mediterranean Sea was the border. (2) The eastern boundary of the Mandate was the Jordan River, and a line extending south from the Dead Sea (into which the Jordan River empties), to the Red Sea near Aqaba, separating Palestine it from Transjordan. (3) To the north, the boundary with the French Mandate for Syria and Lebanon, which was agreed upon in the Paulet-Newcombe Agreement of 23 December 19201. (4) To the south, the border with Egypt, running along the Negev Desert. These borders remained until the termination of the British Mandate on 15 May 1948, and the subsequent Declaration of Independence by the State of Israel (see map in Figure 2).

Figure 2

73. Israel's independence would thus appear to fall squarely within the bounds of circumstances that trigger the principle of *uti possidetis juris.* Applying the rule would appear to dictate that Israel's borders are those of the Palestine Mandate that preceded it, except where otherwise agreed upon by Israel and its relevant neighbours. Indeed, Israel's peace treaties with neighbouring States to date — with Egypt and Jordan — appear to reinforce it. These treaties ratify borders between Israel and its neighbours explicitly based on the boundaries of the British Mandate of Palestine. Likewise, in demarcating the so-called "Blue Line" between Israel and Lebanon in 2000, the United Nations Secretary General relied upon the boundaries of the British Mandate of Palestine[79]. Given

[77] The Mandate for Palestine originally included the territory of Transjordan, but that territory was with the approval of the League of Nations, administratively separated from the Mandate in 1922 and granted its independence by Britain in 1946.

[78] See Part II, "The emergence of British Mandatory Palestine".

[79] See UN Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978)*, ¶ 6 n.1, UN doc. S/2000/590 (16 June 2000) ("As noted in my report of 22 May, the international boundary between Israel and Lebanon was established pursuant to the 1923 Agreement between France and Great Britain entitled 'Boundary Line between Syria and Palestine from the Mediterranean to El Hamme', which was reaffirmed in the 'Israeli-

the location of the borders of the Mandate of Palestine, applying the doctrine of *uti possidetis juris* to Israel would mean that Israel has territorial sovereignty over all the disputed areas of Jerusalem, the West Bank, and Gaza, except to the degree that Israel has voluntarily yielded sovereignty since its independence. This conclusion stands in opposition to the widely espoused position that international law gives Israel little or no sovereign claim to these areas[80].

F. The UN Partition plan, 1948 War of Independence and Israel's Armistice lines

74. On the eve of the British withdrawal, on 14 May, Jewish authorities declared the independence of the Jewish State in Palestine, called Israel[81]. Local Arab authorities, on the other hand, while rejecting the Jewish State, did not declare or otherwise move to create an Arab State in Palestine. Israel's Declaration of Independence was immediately followed by the outbreak of the 1948 Arab-Israeli War[82] as five Arab States (including Jordan, which had received independence from Britain in 1946, Egypt, Iraq, Lebanon and Syria) that were opposed to the establishment of a Jewish State in the region, invaded the newly independent State. The war ended by late 1948, with Israel controlling roughly three quarters of the territory of the Palestine Mandate. The remaining territory was conquered by Syria, Egypt, and Jordan. Egypt ruled the conquered parts of Palestine (the Gaza Strip) by military administration. Jordan occupied part of that territory which became known as the West Bank, while Egypt occupied Gaza. Jerusalem was divided between Israeli forces in the West and Jordanian forces in the East, while Transjordan and Syria treated the conquered areas as part of their municipal territories. No other Arab State claimed sovereignty within the area. Syria[83], Egypt[84], and Jordan[85] all signed armistice agreements with Israel, marking the lines between the territory controlled by Israel and the lands conquered by the Arab States. However, the armistice agreements were clear in stating that the armistice lines were not boundaries and that the parties retained their claims to territorial sovereignty[86]. Shortly thereafter, the Arab States that had conquered parts of Palestine imposed a military administration on the areas they had seized[87]. In September, fearing a Transjordanian annexation of parts of Mandatory Palestine, Egypt initiated the creation of an Arab Government of "all Palestine", which, on 1 October, declared an independent Arab State in all of Palestine. While six Arab States recognized the new "Government" of Palestine, it never exercised any authority anywhere, and it quietly retired to anonymous offices in Cairo and then dissolution[88].

75. A fourth armistice agreement was signed with Israel's last neighbouring State — Lebanon[89]. Because Lebanon had not succeeded in conquering and holding any of the territory of the Palestine Mandate, the armistice line with Lebanon coincided with the prior boundary of the Mandate. Nonetheless, the armistice line had an

Lebanese General Armistice Agreement' signed on 23 March 1949.").

[80] See e.g. Barack Obama, President, US, Remarks by the President on the Middle East and North Africa (11 May 2011), https://www.whitehouse.gov/the-pressoffice/2011/05/19/remarks-president-middle-east-and-north-africa; David Cameron, Prime Minister, UK, Mahmoud Abbas, President, Palestine, David Cameron and Mahmoud Abbas Press Conference (13 March 2014), https://www.gov.uk/government/speeches/pressconference-in-jerusalem.

[81] Declaration Of Establishment Of State Of Israel (14 May 1948).

[82] This war is known in Israel as the War of Independence.

[83] See Armistice Agreement between Israel and Syria, Isr.-Syria, July 20, 1949, UN doc. S/1353.

[84] General Armistice Agreement between Egypt and Israel, Egypt-Isr., 13 December 1949, UN doc. S/1264/Rev. 1.

[85] See Armistice Agreement between the Hashemite Kingdom of Jordan and Israel, Isr.-Jordan, 3 April 1949, UN doc. S/1302.

[86] Specifically, Article II.2 of the Armistice Agreement between Israel and Transjordan states that "[n]o provision in this Agreement shall in any way prejudice the rights, claims and positions of either party hereto in the ultimate peaceful settlement of the Palestine question". Article VI.9 provides that "the Armistice Demarcation lines defined in Articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlement or boundary lines or to claims of either Party relating thereto".

[87] *Ibid.*

[88] Avi Shlaim, "The Rise and Fall of the All-Palestine Government in Gaza", 20 *J. Palestine Stud*. 37, 37–53 (1990).

[89] See Lebanese-Israeli General Armistice Agreement, Isr.-Leb., 23 March 1949, UN doc. S/1296/Rev. 1.

interesting feature. Like the armistice lines with Israel's other neighbours, the armistice line with Lebanon was established as a military line, without prejudice to the parties' claims to territorial sovereignty[90].

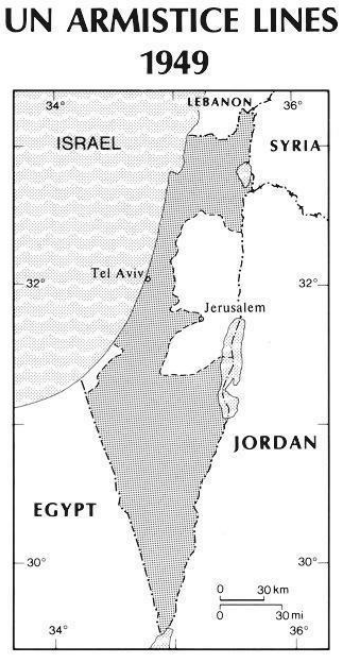

Figure 3

76. The armistice lines, as established in 1949 and modified by minor adjustments in military lines between 1949 and 1967, are often referred to as the "1967 boundaries"[91]. Indeed, the Advisory Opinion has recommended that Israel withdraws from the disputed territory based on the "1967 boundaries". However, the implication that the 1949 armistice lines became Israel's legal international borders is difficult to square with the doctrine of *uti possidetis juris*. To give these lines the status of international borders would amount to approving the use of aggressive force by foreign States in 1967 against the Jewish people and the territorial integrity of the sovereign State of Israel, in violation of the prohibition under international law, of the use of force to acquire territory. As earlier stated, in the course of the first Arab-Israeli war, Egypt took control of the Gaza Strip, while Jordan and Iraqi forces occupied Judea, Samaria and East Jerusalem (redesignated as the West Bank). Jordan subsequently annexed Judea and Samaria illegally. This purported annexation was only officially recognized by three other States[92], but was rejected by the Arab League. Jordan's occupation and subsequent annexation of the "West Bank" was clearly in breach of international law, its control of the area having been obtained by force following an act of aggression and therefore having no effect on Israel's entitlement to sovereignty over the disputed territories upon independence. That is why the said Armistice lines are not synonymous with legitimate territorial borders.

77. Thus, while considerable efforts had been invested in creating and advancing proposals for altering the borders of the Jewish State of Israel and a contemplated companion Arab State (two-State solution), no such efforts have so far, succeeded in being implemented. Thus, it would appear that *uti possidetis juris* dictates

[90] *Ibid.* at Arts. II-III, V.

[91] See e.g. Ethan Bronner, "Netanyahu Responds Icily to Obama Remarks", *New York Times*, 19 May 2011, at A9; Tim Lister, "Maps, Land and History: Why 1967 Still Matters", *CNN*, 24 May 2011, at IV.

[92] The United Kingdom, Iraq and Pakistan.

recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948, rather than the "1967 borders" unless and until the parties to the conflict agree otherwise.

G. Israel's rights to settle in the territory comprising former Mandatory Palestine

78. The borders, territorial sovereignty of both Israel and Palestine is another sensitive area the Court cannot simply presume to appreciate based on the one-sided narrative contained in the statements of the pro-Palestinian group of States. The General Assembly's questions ask the Court to make a number of prejudicial assumptions or presumptions, including, *(a)* the illegality of Israel's occupation including settlements and annexation of Palestinian territories occupied since 1967; *(b)* "ongoing violation by Israel of the right of the Palestinian people to self-determination"; *(c)* the fact that Israel's policies and practices are necessarily "aimed at altering the demographic composition, character and status of . . . Jerusalem"; and *(d)* the "discriminatory character of Israel's legislation and policies" in the OPT. The questions ask the Court to presuppose that all the territories held during the Jordanian and Egyptian occupation within the 1949 Armistice Lines are automatically the sovereign territories of Palestine, and thus not of Israel. I am not sure that this issue is as simple as it appears. At the very least, the Court would need to examine and evaluate evidence concerning whether the 1949 Armistice Lines are "secure boundaries" within the meaning of Security Council resolutions 242 and 338. This, in turn, would require examination of the threats facing Israel emanating from the OPTs and the broader region. In the context of the questions put to the Court, determination of territorial sovereignty is critical because without clarifying the respective claims of both parties to the conflict, it would be impossible to answer the question of the territorial scope of the Palestinian self-determination claim or of Israel's withdrawal from territory considered occupied. Furthermore, the Court would need to determine the territory over which Palestinians claim sovereignty and whether Palestine has historically made different assertions before different fora. The Advisory Opinion does not address any of the above issues and frankly does not have before it sufficient information to even make an educated guess.

79. As referred to earlier in this dissenting opinion, the Mandate for Palestine which was created by the Principal Allied Powers in 1920 following World War I and approved by the League of Nations in 1922, was primarily set up to reconstitute "a Jewish homeland in Palestine". Accordingly, the Jewish people obtained certain rights to settle in Palestine — which not only included the now disputed territories of the Gaza Strip, the "West Bank", and West Jerusalem, but also Transjordan. Whilst the exact nature of the rights conferred under the Mandate has been the subject of much discussion, the language of the Mandate shows that with respect to the territory then known as "Palestine", the Jewish people were the main beneficiaries of those rights. By incorporating the Balfour Declaration in the Preamble to the Mandate (in which "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country"), the Mandate clearly confirmed the right of the Jewish people to settle, self-determine and live peacefully in the Mandate territory (or at least in the part that remained after Britain transferred 70 per cent of the Mandate Territory to Jordan). The Mandate of Palestine did not provide for any other partition, other than the separation of Transjordan. It has been argued that the Palestinian Arab population living within the Mandate also had and continue to have a right to self-determination. However, the founding documents of the Mandate (including General Assembly resolution 181 (1947)) are silent on the issue of the self-determination of Palestinian Arabs living within the Mandatory territory, implying that the question of their self-determination was perceived as one of "internal self-determination" that would require

negotiation and mutual agreement[93]. Be that as it may, the rights of multiple nations to self-determination on a given territory should not disturb the application of the principle of *uti possidetis juris*[94].

H. The rights of the Arab-Palestinians to self-determination

80. Whilst there is no doubt that the right to self-determination is a right *erga omnes*, to which the Palestinian people are entitled, in the present context, that question raises issues of the territorial borders and the safety and security of both the prospective independent Palestinian State and the Israeli State coexisting side by side. These issues, including the proposed frontiers of the two States, territorial inviolability, and legitimate security concerns of both peoples, have not been addressed by the Advisory Opinion. By asking the Court to examine the policies and practices of one of the parties, while ignoring the policies and practices of the other party or those of interested third States, such as the Arab neighbours, and by asking the Court to determine the legal consequences of Israel's policies and practices, the Court cannot arrive at a balanced view that is in keeping with its judicial function and character. The practical and realistic solution is a consensual one, jointly arrived at by both parties to the conflict through good faith negotiations within the existing negotiation framework and implementation of existing Security Council resolutions.

81. International law arguably supports the right of Arab-Palestinians to self-determination but leaves it to the concerned parties (including the State of Israel which currently claims sovereignty over the disputed territory by virtue of *uti possidetis juris*) to agree upon the choice of means to fulfil that right. As is reflected in Security Council resolutions 242 and 338, international law does not allow the self-determination to conflict with the sovereign rights of an existing sovereign State, including its rights to territorial and secure and integrity, political independence defensible borders. If, pursuant to *uti possidetis juris*, all the territory covered by the Mandate of Palestine in May 1948 became the sovereign territory of Israel, then Palestinian self-determination will necessarily the form of autonomy that does not conflict with that sovereignty.

82. In view of the foregoing, any discussion regarding Israel's alleged occupation or annexation of Palestinian territory or its alleged prejudice to the rights of the Arab-Palestinians to self-determination, but which fails to consider the foregoing historical facts and principles of customary international law, is one-sided, imbalanced, and is unlikely to assist the General Assembly and Security Council in finding a permanent solution to the Israeli-Palestinian conflict.

I. Concerns over Israel's withdrawal from the disputed territories and its security

83. Although the General Assembly's questions are aimed at prompting the Court to recommend an "immediate end to Israel's occupation" and an "immediate and unconditional withdrawal" from the OPTs, the issue of Israel's ending the occupation and its withdrawal from the OPTs is more nuanced. It requires an assessment of the legal rights and obligations of both parties under the Oslo Accords, as endorsed by the Security Council resolutions 242 and 338. As recalled above, those resolutions recognized that the end of Israel's occupation entailed the fulfilment of *two interdependent conditions*, namely, "Israel's withdrawal from territories it had seized in the conflict" on the one hand, and "Palestine's recognition of Israel's sovereignty, territorial integrity and right to live in peace within secure and recognized boundaries free from threats or acts of force", on the other[95]. In other words, both Israel and Palestine need to move in tandem to secure the necessary

[93] Internal self-determination refers to the right of the people within a State to govern themselves without outside interference. It is a principle that promotes democratic freedoms and autonomy for minority groups within sovereign States. This concept is distinct from external self-determination, which relates to the right of peoples to determine their own political status and potentially form an independent State.

[94] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566.

[95] Security Council resolution 242 of 22 November 1967.

conditions — for Israel to withdraw from the Arab-occupied territories and for Palestine to provide the assurances and conditions that allow Israel to feel secure in so doing.

84. A balanced advisory opinion would inevitably need to examine both these conditions, especially given the latest attack by Hamas of Israel on 7 October 2023 and the ensuing Gaza war, a matter that is *sub judice* before the Court in contentious proceedings[96]. Clearly, the Advisory Opinion in subparagraph 4 of the operative clause looks at the obligation of Israel to rapidly withdraw from the OPTs whilst completely ignoring the security concerns of Israel and her citizens, including the settlers.

J. Indiscriminate application of the law of belligerent occupation to the West Bank, Gaza and West Jerusalem

85. Article 42 of the Hague Regulations, which reflects customary international law[97], states that "territory is considered occupied when it is placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[98] There are many examples of territories in the world that could be regarded as "occupied" under the Fourth Geneva Convention, including, Western Sahara, Northern Cyprus, Abkhazia, Eastern Ukraine and Crimea. Yet State practice has not been as critical of the occupations in these examples as it has in the case of Palestine.

K. An occupation through the lawful use of force (self-defence) is not unlawful

86. Security Council practice does not provide any support for the view that "the notion of 'illegal occupation' may extend to occupation resulting from a lawful use of force"[99]. Given the circumstances of Israel's occupation of the territories in question in 1967, this should suffice. Although several General Assembly resolutions specifically addressing the Israeli occupation of Arab territories refer to the occupation as "illegal", a review of the voting records shows that none of the Western democracies supported the resolutions asserting the illegality of the Israeli occupation[100].

87. Historically, Israel assumed control over the disputed territories (i.e. the West Bank, the Gaza Strip and Jerusalem) in June 1967 in response to a clear and present threat, initiated by a group of Arab States, intent on annihilating the Jewish State. The legitimacy of Israel's control of these territories at that time was generally uncontested as it was understood that it had done so within the framework of the legitimate exercise of its right of self-defence. While the international community did eventually develop a framework for the resolution of this war (UN Security Council resolutions 242 and 338, discussed above), it was not contended at that time that Israel's control of these territories, pending such resolution, was illegal. Accordingly, it is difficult to ascertain at what point in history, and pending a negotiated settlement, when Israel's presence in and control of the disputed territory, became an illegal occupation, as opined by the majority.

[96] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, filed before the ICJ on 29 December 2023.

[97] Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 43, The Hague, 18 October 1907, 36 Stat. 2295, 205 Consol. TS 277 (hereinafter "Hague Convention (IV)").

[98] *Ibid.*, Art. 42. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 229-302.

[99] A. Zemach, "Can Occupation Resulting from a War of Self-Defense Become Illegal?" (2015), *Minnesota Journal of International Law*, 316 (hereinafter "Zemach"), at 327 citing in relation to the Israeli-Palestinian conflict, Security Council resolution 242 (1967), Security Council resolution 252, Security Council resolution 478, Security Council resolution 497 (1981).

[100] *Ibid.*, pp. 327-332.

L. A lawful occupation does not become unlawful due to passage of time

88. State practice and *opinio juris* do not support the existence of a rule of customary international law providing that a lawfully created occupation may subsequently become illegal on account of passage of time. In its Advisory Opinion of 2004 on the *Wall*, the Court found Israel responsible for several breaches of the law of belligerent occupation, but it refrained from characterizing the Israeli occupation as "illegal", or otherwise to opine on the legality of Israel's presence in the West Bank. The issue of whether and how to limit the duration of occupation, with emphasis on the Arab-Israeli situation, was a focus during the drafting process of the Additional Protocols. While Additional Protocol I did not contain a provision proscribing the length of an occupation, it did not adopt the approach of Article 6 (3). Instead, the drafters included Article 3 *(b)* which mandated application of the Conventions and the Protocol until the "general close of military operations and, in the case of occupied territories, on the termination of the occupation". According to the Commentaries, it was argued that this provision would then supplant Article 6 (3). Neither the Hague Regulations nor the Fourth Geneva Convention limits the duration of the occupation, nor requires the occupant to restore the territories to the sovereign before a peace treaty is signed. Judge Rosalyn Higgins has similarly noted that "there is nothing in either the [UN] Charter or general international law which leads one to suppose that military occupation, pending a peace treaty, is illegal"[101]. It is indisputable that Israel's continued presence in the disputed territories is in large part due to genuine security concerns, as well as due to its own sovereignty claims to those territories, which can only be settled through negotiations.

M. Israel's settlements in the disputed territories accord with Article 6 of the Mandate

89. The view that Israel's establishment of settlements in the disputed territories is illegal and amounts to unlawful "annexation" rests entirely on Article 49 (6) of the Fourth Geneva Convention, which provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies". The Court has no probative evidence before it that (except possibly members of the Israeli Defence Forces), any of the Israeli citizens that have moved into the disputed area since 1967 were forced or coerced to do so by the Israeli Government. It is quite possible that some of the residents in these areas have legitimate title deeds predating 1967. Labelling all settlements in East Jerusalem and the West Bank as "illegal" both misrepresents the spirit and letter of Article 49 (6) of the Fourth Geneva Convention. Moreover, such a view contradicts Article 6 of the Mandate for Palestine which encouraged Jewish settlements throughout the Mandate and is wholly inapplicable based on Israel's claim to sovereignty pursuant to *uti possidetis juris*.

N. The negotiation framework and not the unilateral recognition of Palestine remains the only avenue for a permanent solution to the Israeli-Palestinian conflict

90. As stated earlier, Israel and the representatives of the Arab-Palestinians chose to negotiate the terms of Palestinian autonomy or self-determination under the terms and conditions set out in the Oslo Accords which instruments remain valid and binding, notwithstanding that their practical implementation and impact have been significantly hindered by ongoing wars, change in Palestinian leadership and other political developments. Israel alone is not to blame for the decades-long impasse, as has been illustrated by the numerous wars and attacks that have been directed against that State by its adversaries. Final status issues, including permanent borders of a prospective Palestinian State, the administration of Jerusalem, and the return of refugees, are amongst the issues that the parties to the conflict agreed would be determined through negotiation. Seeking or obtaining unilateral

[101] R. Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", 64 *Am. J. Int'l L.* 1, 8 (1970).

recognition of Palestinian statehood or independence within the territory of a sovereign State breaches the Oslo Accords and can only exacerbate the conflict.

91. The complex arrangements made under the Oslo Accords dividing the disputed territories into Areas A, B and C, have arguably resulted in a special legal régime (*lex specialis*) in relation to the post-1967 territories. As instruments of international law, they impose a complex matrix of mutual rights and obligations, limiting the application of the general principle of law. The Oslo Accord II prohibits both parties from initiating "any step that will change the status of the West Bank, including East Jerusalem and the Gaza Strip, pending the outcome of permanent status negotiations". The future status of these territories and the nature of an independent or autonomous Palestinian entity can only be settled through good-faith negotiations reflecting a balance of competing interests.

VII. CONCLUSION

92. For all the above reasons, I am of the view that the Court should have declined to give its Advisory Opinion in the present case. Instead, Israel and Palestine, the two parties to the conflict, should be encouraged to return to the negotiating table and to jointly find a lasting solution. The United Nations and international community at large, should support these two parties to do so. In rendering its Advisory Opinion, the Court should have been careful to guard its judicial character and integrity by ensuring that the nuanced and more complex issues that require resolution through negotiation, are left to the negotiation framework already agreed upon by the parties to the Israeli-Palestine conflict.

(Signed) Julia SEBUTINDE.

[Original: English]

DECLARATION OF JUDGE TOMKA

[Original English text]

1. Having co-signed with Judges Abraham and Aurescu our joint opinion, I wish to add a few additional observations.

2. The request of the General Assembly of the United Nations for an advisory opinion concerns issues which have been on its agenda from the very beginning of its activities, following the notification by the United Kingdom of its intention to transfer the mandate of Palestine to the Organization. Based on the recommendation of the Special Committee on Palestine, established in May 1947, the General Assembly adopted on 29 November 1947 resolution 181 (II), which set out a Plan of Partition envisaging the creation of two independent States, one Arab, the other Jewish, and calling upon the inhabitants of Palestine to take the steps as may be necessary on their part to put this plan into effect. While the Jewish people welcomed the Plan and declared the independence of their State, the State of Israel, on 14 May 1948, the Arab population of Palestine and the Arab States rejected it. Instead, five Arab States launched an armed attack against the nascent State of Israel.

3. The Arab leaders claimed the whole territory of Palestine for an Arab State, rejecting the Partition. Had they accepted it and declared an independent Arab State in the territories as envisaged in the Plan, the tragedy since afflicting the region could have been averted, as the Arab population of Palestine would have been able to exercise its right to self-determination and establish a State of its own.

4. It now rather appears that it is Israel, or at least the important political circles within that State, which would like to claim, if not the whole territory of Palestine, at least its major part, as its own territory. This is demonstrated by various statements of Israeli leaders, including the Prime Minister, and by Israel's continued policy of settlements in the West Bank, including East Jerusalem. That policy has been pursued since shortly after the 1967 armed conflict (the "Six-Day War"), despite Israel being aware that establishing settlements in the occupied territory and transferring its population therein would be contrary to Article 49, paragraph 6, of the Fourth Geneva Convention[102]. Since then, Israel has entrenched its policy to expand the settlements in the West Bank, despite its commitment to refrain from such activities in the Oslo II Accord. I fully agree with the Court's view that such settlements are illegal and are to be viewed as an effort at annexing parts of the West Bank, following the *de jure* annexation of East Jerusalem in 1980.

5. The Security Council, in its resolution 478 (1980), rightly determined that all legislative and administrative measures and actions taken by Israel which had altered or purported to alter the character and status of Jerusalem, and in particular the "basic law" on Jerusalem, were null and void and had to be rescinded forthwith.

6. In my view, the Court does not clearly distinguish between the nullity, which affects the act in question, depriving it of its validity in international law, and the responsibility that affects the State author of the act which is null[103].

[102] This warning was clearly stated in the opinion of the Legal Advisor of Israel's Ministry of Foreign Affairs submitted on 18 September 1967 as a "Top Secret" document to the Political Secretary to the Prime Minister and Head of his office, who transmitted it to the Minister of Justice. Excerpts from the opinion may be found in Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967-1977* (New York, 2006), p. 9.

[103] On this point, see Joe Verhoeven, "Les nullités du droit des gens", in Prosper Weil (ed.), *Droit International 1* (Paris, Pedone, 1981), pp. 102-105.

The act in question does not affect the legal régime of the occupation and Israel remains bound by its obligations under international law as an occupying Power.

7. The Court goes too far, however, when it opines that Israel's continued presence in the Occupied Palestinian Territory (in other words, Israel's occupation) is unlawful as such.

The unlawfulness depends on the manner in which occupation has been established. This has to be determined under the rules governing the use of force. The term "occupation" describes a factual situation to which international law attaches certain legal consequences. Under customary international law, as reflected in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907[104], a territory is considered occupied when it is actually placed under the authority of the hostile army. The Court was not asked, nor was it in a position, to determine whether the recourse to force by Israel in 1967, which resulted in the occupation of the West Bank (including East Jerusalem) and the Gaza Strip, was unlawful or not. Despite that, the Court opines that certain subsequent actions by Israel "*render[ed]*" Israel's presence in the Occupied Palestinian Territory unlawful (Advisory Opinion, para. 261), a formula which would seem to imply that the occupation resulted from an act that was not unlawful.

8. Although I do not share the Court's view that Israel's continued presence in the Occupied Palestinian Territory is unlawful, I agree that all States are under an obligation to not recognize the situation arising from its presence in that territory and to refrain from rendering aid or assistance to Israel in maintaining that situation. The main reason for my position is that I believe that States should not assist Israel in its aim to annex a major part of the Occupied Palestinian Territory and to treat it as its own territory. On the contrary, States should, within their power, lend their assistance to reach the overall goal of achieving peace in the Middle East, that is to say, the goal of achieving a situation in which the State of Israel and the State of Palestine live side by side, in peace and security within their internationally recognized boundaries.

For the same reasons, I also support the view that the United Nations, and especially the Security Council and General Assembly, should consider the modalities for bringing to an end as rapidly as possible the presence of the State of Israel in the Occupied Palestinian Territory. This can be done only when security is guaranteed for both States. I believe that achieving the above goal is long overdue and that all relevant actors should redouble their efforts to that effect. This remains the unfulfilled historical responsibility of the United Nations.

(Signed) Peter TOMKA.

[104] The same provision was already contained in the Regulations annexed to the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899, adopted at the Hague Peace Conference.

[Original: English]

JOINT OPINION OF JUDGES TOMKA, ABRAHAM AND AURESCU

[Original English text]

Scope of the Opinion — Unfounded inclusion of Gaza in the conclusions of the Opinion.

Failure to apply distinction between the rules on the conduct of an occupation and those on the use of force — Incorrect conclusion that Israel's presence as an occupying Power in the OPT is illegal — Israel's policies and practices in the OPT having no effect on the legal status of the occupation — Lack of link between the conclusion on the annexation of (parts of) the occupied territory and the conclusion that the occupation itself is illegal — Erroneous identification of the occupation itself as the wrongful act and of its legal consequences — Termination of the annexation as the correct legal consequence — Obligation to end the occupation as soon as no longer needed for security reasons — Israel's withdrawal from the OPT subject to guarantees of its right to security.

The Oslo Accords and the relevant Security Council resolutions not duly taken into account — Ignoring of the close relationship between the right to self-determination of the Palestinian people and the right to security of Israel and of Palestine, as well as between this "package" and the negotiation framework for the "two-State solution" — Failure to take into account the right to security of Israel and of Palestine.

Incorrect identification of the annexed territories — Only East Jerusalem and the West Bank Area C settlements annexed by Israel — Israel's obligation in Oslo II not to alter the status of West Bank resulting in illegality of any new settlements in Area C and beyond it.

Lack of comprehensive, balanced and nuanced approach in the Opinion — Failure to address Palestine's responsibilities and obligations — Israel and Palestine under obligation to resume without delay direct negotiations leading to the "two-State solution" — Failure to draw attention of Security Council and General Assembly to the need to reinforce efforts for achieving the "two-State solution" and to encourage all States to support Israel, Palestine and the United Nations to this end.

I. INTRODUCTION

1. We had to vote against certain points in the final conclusions (para. 285) of the present Advisory Opinion, particularly points 3 and 4. We are indeed not convinced that "Israel's continued presence in the Occupied Palestinian Territory is unlawful" (point 3), nor that, as a consequence of this statement, which, for the reasons set forth below, has no legal basis, "Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible" (point 4).

2. We fully agree with the assertion, already formulated in the *Wall* Advisory Opinion delivered by the Court in 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 184, para. 122), according to which the Palestinian people has the right to self-determination.

3. We are also convinced that a large number of Israel's policies and practices in the territories it occupies since 1967 are in breach of its obligations under international law. In this respect, we can endorse most of the observations presented in section IV of the Opinion, on the basis of which the Court concludes that these "policies and practices" are unlawful. In particular, we share the view that the general and systemic practice of establishment and development of settlements in the West Bank is contrary to Article 49 of the Fourth Geneva Convention, as the Court already observed in 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 184, para. 120). More generally, we believe that numerous aspects of Israel's policy, especially over the past twenty years, can only be understood as aiming to gradually incorporate the majority of Area C of the West Bank into Israel's own territory (in addition to the formal annexation of East Jerusalem in 1980). The implementation of such an objective, as the Court observed in 2004 within the narrower context of construction of the wall, "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (*ibid.*, para. 122). What was true in the limited context of the Opinion delivered in 2004 is even more so in the broader context of Israel's "practices and policies" in the Occupied Palestinian Territory considered in the present Opinion.

4. Nevertheless, based on a rigorous legal analysis, we cannot draw the same conclusions as those set out in the Court's replies.

5. Indeed, for the first time, the Court does not only declare that Israel's practices in the territories it occupies are unlawful, in light of the obligations incumbent upon it as an occupying Power, but it also asserts that Israel's very presence in the territories is unlawful and that it must therefore withdraw from them without any prior guarantee, particularly regarding its security, even though the respect of Israel's right to security is one of the essential elements to consider in order to achieve a lasting peace.

We are of the view that, by doing so, the Court has embarked on a legally wrong path and reached conclusions that are not legally correct.

We will explain the reasons for our disagreement in more detail in the remainder of this opinion.

6. In short, the Opinion provides no convincing reason that would justify moving from the finding that Israel's "practices and policies" in the Occupied Palestinian Territory are, in many instances, unlawful, to the conclusion that the very presence of Israel in the territories is unlawful. In our view, on this point, there is a missing link in the Opinion's reasoning for reasons we will expand upon below. The Court chose to portray the Israeli-Palestinian conflict in a biased and one-sided manner, which disregards its legal and historical complexity. It gives little weight to the successive resolutions by which, from 1967 to present, the Security Council established and endorsed the legal framework for resolving the conflict based on the coexistence of two States and on the right of each of the two peoples to live in peace and security. When it does not ignore these resolutions, it makes a selective reading of them.

7. Moreover, we believe that the Opinion's legally incorrect conclusions stem, to a large extent, from a misappreciation of the Oslo Accords signed between the representatives of Israel and Palestine. These Accords, along with the relevant resolutions of the Security Council, define the fundamental framework of a peaceful resolution of the conflict aiming at implementing the "two-State solution", as explained below.

8. The final conclusions of the Opinion are clearly inspired by those of the two Advisory Opinions that the Court has rendered in the past on situations where one State was present on a territory on which its presence, or its sovereignty, was contested: the 1971 Opinion relating to South Africa's presence in Namibia (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16), and the 2019 Opinion relating to the Chagos Archipelago (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 95).

In both cases, the Court concluded that the presence of the State in question in the considered territory was illegal and had to cease "immediately" (*Namibia*) or "as rapidly as possible" (*Chagos*).

9. In our view, the two situations previously examined by the Court are entirely different from the one at issue in the present case. In this case, we are dealing neither with a presence maintained by a mandatory Power in violation of a Security Council decision declaring this presence illegal after the General Assembly terminated the mandate, nor with a situation in which a colonial Power failed in its obligation to complete the decolonization process, nor with any other situation comparable to the above.

10. The Israeli-Palestinian conflict is of a different nature. It must be approached in a balanced, nuanced and comprehensive manner that is entirely absent from the Opinion rendered. For many decades, the Israeli and the Palestinian peoples have been in conflict — a conflict with many complex legal, political and historical aspects — related to the territory of Palestine, entrusted by mandate of the League of Nations to the United Kingdom in 1922. The rights of one cannot be exercised to the detriment of the rights of the other. The "two-State solution", required by successive Security Council resolutions, which we will analyse below, is the only one that can respond to the legitimate need for security of both Israel and Palestine. This solution can only arise from a comprehensive understanding reached through negotiations, which must take into account all rights and interests involved: the right of the Palestinian people to self-determination is not incompatible with that of Israel to exist in security, while Palestine's right to security must also be taken into account. The right to self-determination and the right to security must be implemented simultaneously in order to achieve the coexistence of the two States, which will also mark the end of Israel's presence as an occupying Power in the Palestinian territory.

11. As Judge Higgins recalled in her separate opinion attached to the *Wall* Opinion, in the successive resolutions of the Security Council "the key underlying requirements have remained the same — that Israel is entitled to exist, to be recognized, and to security, and that the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), separate opinion of Judge Higgins*, p. 211, para. 18).

We believe that this statement remains valid today. While it is true that Israel's current policy — which has not always been the same — does not tend towards such a result, this is not a reason to ignore the legitimate concerns of this State regarding its security, and to completely depart from the framework outlined by the Security Council, as the present Opinion does.

II. The temporal and territorial scope of the questions posed to the Court

12. The questions put to the Court by the General Assembly refer to Israel's policies and practices in the "Occupied Palestinian Territory since 1967". There is no doubt that, in the General Assembly's intention, what it designates as the Occupied Palestinian Territory encompasses the West Bank, East Jerusalem and the Gaza Strip. Besides, the questions are drafted in the present tense.

13. However, we believe that the Court should have limited its Opinion to the West Bank, including East Jerusalem, and should not have included the Gaza Strip in its analysis and its findings for the following reasons.

14. The situation in the Gaza Strip has undergone a fundamental change following the murderous attacks committed by Hamas from Gaza on Israeli territory on 7 October 2023 and Israel's large-scale military operation that followed.

The request for the Advisory Opinion was submitted prior to these events, which the General Assembly could not have foreseen. One can infer from this that the situation in Gaza after 7 October 2023 is not included in the scope of the questions put to the Court. It is therefore appropriately that the Opinion refrains from taking any position on the events that have occurred in Gaza after 7 October 2023. Moreover, had the Court taken a stance on this situation in the present Opinion, it would have risked prejudging some questions raised in two contentious cases currently pending before the Court. We are of the view that, as a general rule, an advisory opinion should not interfere with the resolution of pending contentious cases.

15. With regard to the prior period, it should be noted that since 2005 the Gaza Strip has been in a fundamentally different situation than that of the West Bank. In 2005, Israel withdrew from the territory of the Gaza Strip and dismantled the settlements which it had established, while maintaining the control over the airspace and maritime zones, and land borders. Shortly after the Israeli army's withdrawal, the Hamas movement gained control of the administration of Gaza's territory.

16. The Court did not have evidence before it which would allow it to assert whether and to which extent the control Israel continued exercising over the Gaza Strip after the 2005 withdrawal was justified by security motives, considering, in particular, the military actions conducted by Hamas directed at Israeli territory, even before 7 October 2023. Moreover, nearly all of Israel's "policies and practices" mentioned in the Opinion refer to the situation in the West Bank.

17. Due to insufficient information presented to it, the Court should have concluded that it was unable to properly pronounce itself on the situation in Gaza prior to 7 October 2023. In these circumstances, we can only regret that, in its conclusions, according to which "Israel's continued presence in the Occupied Palestinian Territory", which includes Gaza, "is illegal" (para. 267) and that "Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible" (para. 285), the Opinion makes no distinction whatsoever between the West Bank, including East Jerusalem, and Gaza, referring to the "Occupied Palestinian Territory" as a whole.

III. The issue of the legality of the occupation

18. One of the most questionable aspects of the Opinion lies in the lightness with which it addresses the question of the legality of the occupation itself, a question to which it answers in the negative without relying on any convincing legal basis.

19. According to the Opinion, Israel's policy of establishing and developing settlements in the West Bank aims at gradually incorporating this territory into that of the State of Israel and demonstrates an aim to annex, driven by an "intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian

Territory" (para. 252). The Court asserts that Israel's policies and practices constitute violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination. Up to this point, we can follow the reasoning and we do not have substantial objections.

20. But then the reasoning abruptly takes an entirely different turn. The Opinion concludes from the foregoing that "Israel's continued presence in the Occupied Palestinian Territory is illegal" (para. 267), this illegality applying, moreover, to the entire territory occupied by Israel in 1967, including Gaza, and without making any distinction between the various parts of the West Bank. In other words, according to the Opinion, it is not only Israel's conduct in the Occupied Palestinian Territory that is illegal, but its very presence, and thus the occupation itself.

21. We cannot subscribe to such a conclusion, which is not based on any serious or sound legal reasoning.

22. We do not question whatsoever the assertion that "[t]he annexation of occupied territory by an occupying Power is unlawful" (para. 175) and that "occupation can under no circumstances serve as the source of title to territory" (para. 253). We are of the view, and so is the majority of the Court, that Israel's policy for quite a long time already turns its back on the principle according to which an occupying Power cannot pursue a policy aimed at extending its sovereignty over the whole or part of the territory it occupies by incorporating it, *de jure* or *de facto*, into its own territory.

But we do not see how we can go from the finding that the annexation policy pursued by the occupying Power is illegal to the assertion that the occupation itself is illegal. Yet that is exactly what the Opinion does, without any explanation of even minimal legal substantiation.

23. The rules governing the conduct of an occupation and the obligations of the occupying Power, on the one hand, and those concerning the use of force and its consequences, on the other hand, constitute two distinct sets of rules. The question of whether and to what extent the occupying Power's conduct complies with its obligations in the occupied territory, irrespective of the legality of the occupation, must be examined under the first set of rules. The question of the legality of the occupation itself must be examined under the above-mentioned second set of rules. The Opinion recalls this distinction (para. 251) without, however, drawing the correct conclusions.

24. By pursuing a policy of gradual annexation of part of the Occupied Palestinian Territory, namely Area C of the West Bank, Israel fails to comply with the obligations imposed on it as an occupying Power. The same stands true when it violates various specific obligations laid down by international humanitarian law, such as the obligation not to transfer its own population into the occupied territory or not to take discriminatory measures against the population of the territory.

25. However, it cannot be concluded from the above that the occupation itself is illegal, which is a question of a fundamentally different nature. The Opinion does not justify in any way, except through general and vague formulations, the abrupt transition from the finding that, by its conduct in the occupied territories, the occupying Power fails to comply with its obligations to the assertion of the illegality of the occupation itself. The illegality of the conduct of the occupying Power, even when it consists in seeking to annex the occupied territory, cannot deprive the occupant's presence of its character: this presence is and remains an occupation under international law. As for the question of whether this presence is illegal, as we mentioned earlier and as the Opinion itself seems to acknowledge, it falls under the application of a different set of rules.

26. The emphasis in the Opinion on the right to self-determination of the Palestinian people and its "inalienable" character cannot conceal the erroneous nature of the reasoning followed. It is evident that "occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination" (para. 257). But this does not support the conclusion the Opinion reaches regarding the illegality of the occupation. It is not the occupation itself which

violates the right to self-determination; it is the annexation and the practices related to it. By its very nature, any military occupation hinders the full exercise by the population of the occupied territory of its right to self-determination. This alone cannot render the occupation unlawful. To rule on the legality of a prolonged occupation, security considerations, which are essential for this purpose but almost entirely ignored in the Opinion, must be integrated into the analysis. We will return to this point later.

27. Accordingly, we are of the view that "Israel's policies and practices" in the Occupied Palestinian Territory do not affect the "legal status of the occupation", if this encompasses, as the Opinion states (para. 82), the legality of Israel's presence in this territory as an occupying Power. To the question *(b)* posed by the General Assembly, the Court should have therefore responded in line with the above. Such a response, which we believe to be the only legally correct one, would have spared the Court from taking a stance on the legality of the occupation itself, an issue on which it was not directly asked to pronounce itself. In our opinion, it would have been sufficient to note that this issue is not affected by the "policies and practices" in question.

28. We will add the following remarks to the preceding analysis.

29. First, the Opinion declares Israel's continued presence illegal in the whole of the Occupied Palestinian Territory, including the Gaza Strip. Considering that this illegality is inferred — wrongly in our view — from the settlement and the annexation policies, there is an incomprehensible discrepancy between the cause and the consequences. Indeed, the policy aiming at annexation clearly concerns the settlements in Area C of the West Bank, and not the Gaza Strip. The latter was evacuated by the occupying army in 2005, and the settlements that had been established there were dismantled. The Opinion does not refer to any element that would demonstrate the existence of an intent or policy aiming to annex the Gaza Strip. Consequently, we believe that, besides the fact that the reasoning of the Opinion is flawed in its very principle, it is tainted by an internal inconsistency. The only justification provided by the Opinion in support of the conclusion that the occupation has become unlawful in the whole of the Occupied Palestinian Territory, including Gaza, is that this territory constitutes a territorial unit "the integrity of which must be respected" (para. 262). Such a justification is by no means convincing. There is no legal connection whatsoever between the assertion (which is correct per se) that the Palestinian people should be able to exercise its right to self-determination on the whole of the Occupied Palestinian Territory and the extension of the "illegality" of the occupation (which as such, as shown in this joint opinion, has no legal basis) to all various parts of this territory. In reality, this discrepancy only underscores the fundamental flaw that taints the entire reasoning.

30. Second, the consequences that the Opinion draws from the position it adopts, in terms of international responsibility, are not those it would have drawn if it had adopted a legally correct analysis of the wrongful act.

When an occupying Power annexes, *de facto*/implicitly or *de jure*/explicitly, the occupied territory, it results in an unlawful situation that must cease, given its continuous character, under the law of international responsibility. This means that the occupying Power must cease the annexation and nullify all its effects. It remains bound to fully comply with its obligations under the legal régime of occupation, which, legally, has not ceased to apply.

Instead, the Opinion, as it erroneously defines the wrongful act not as the annexation but as the occupation itself, concludes that it is Israel's very presence in the Occupied Palestinian Territory that must cease "as rapidly as possible" (para. 267). Based on erroneous premises, the Opinion can only reach a false conclusion, which we cannot endorse.

The fact that the Opinion, probably in order to avoid too blunt a legal criticism as to the conclusion that the occupation itself became illegal, uses a terminology referring to the illegality of the "continued presence" of Israel in the Occupied Palestinian Territory "as an occupying Power" cannot disperse the erroneous character of that conclusion. The "occupation" and the "continued presence" of a State "as an occupying Power" in a territory which is not under its sovereignty are perfectly identical notions.

31. Third, given the central role that the concept of annexation plays in the Opinion's reasoning, it is surprising and regrettable that the Court did not meaningfully clarify the terminology by distinguishing between the different terms employed. The Opinion sometimes asserts that Israel proceeded to the annexation of large parts of the West Bank and East Jerusalem (para. 173); it sometimes describes this annexation as "gradual" (para. 252); it sometimes uses the distinction between *de jure* annexation and *de facto* annexation. In our view, this latter distinction is a source of confusion. Both types of annexation involve effective control of the territory, but they differ in the way in which the State expresses its intention to hold the territory permanently. *De jure* annexation entails a formal declaration of the State by which it claims permanent sovereignty over a territory it occupies. *De facto* annexation, by contrast, is not accompanied by an explicit declaration of sovereignty over the annexed territory, the intention to exercise permanent sovereignty being rather inferred from the situation on the ground. This means that, essentially, a *de facto* annexation is an implicit or informal annexation as opposed to the explicit and formal annexation that is *de jure* annexation. But both are intended to produce legal effects. In the present Opinion, the Court could have clarified the terminology, particularly because, without such a clarification, another term, that of "gradual" or "creeping" annexation, cannot be properly defined. Unfortunately, the Opinion (para. 160) does not fully clarify the distinction between these types of annexation, and limits itself to stating that both the *de jure* and the *de facto* annexations share the same objective of asserting permanent control over the occupied territory.

32. Finally, in the alternative, we believe that, even if the Court had been consulted by the General Assembly on the question of the legality of the occupation, which is not the case, and if, consequently, it had needed to address this question, it would have been impossible for it to conclude to its illegality. The information before the Court and the law it is bound to apply cannot support such a conclusion, for several reasons.

33. The legality *ab initio* of a situation of military occupation mainly depends on the question of whether the military action which gave rise to the occupation can be considered lawful or unlawful in terms of *jus ad bellum*. But the Court did not receive sufficient information to rule, on an objective basis, on the respective responsibilities of the various parties involved in the armed conflict of 1967. The Court therefore cannot assess the legality of Israel's use of force which is at the direct origin of the occupation at issue in the present case. Assessing the legality of this use of force, in the specific context of the events preceding the outbreak of the conflict, would involve ruling on complex issues of fact and law. This could only be done on the basis of complete information — which the Court does not possess — and an adversarial debate — which has not taken place.

It is therefore rightly that the Opinion refrains from taking a stance on the legality of Israel's use of force in 1967. Consequently, it is not possible to assert, in this Opinion, that the state of occupation is illegal *ab initio*, that is, since June 1967.

34. Obviously, it is not impossible that, even if an occupation is initially lawful, it ceases to be so at a certain point in time.

35. However, the mere passage of time does not suffice to render an occupation illegal, regardless of its duration. It is evident that an occupation is, by nature, a temporary situation that is destined to end at one point or another. However, international law does not lay out any time-limit beyond which an occupation would become *ipso facto* illegal. It all depends on the circumstances. Clearly, a duration of 57 years is exceptionally long, with few historical parallels. But that is not enough: this duration must be considered in light of the exceptionally complex history and nature of the Israeli-Palestinian conflict and the many successive attempts at resolution, the failure of which cannot be attributed to a single party.

36. In fact, the relevant question is whether the occupying Power — Israel — could today completely withdraw from the occupied territories "as rapidly as possible", in the absence of any guarantee, without exposing its security to substantial threats. In the current context, we find it quite difficult to answer this question in the affirmative. Israel's full withdrawal from the occupied territories and the implementation of the right to self-determination by the Palestinian people is intrinsically linked to Israel's (and Palestine's) right to security.

The Hamas movement, which has gained control and subsequent administration of the Gaza Strip shortly after the withdrawal of the occupying forces on the ground, and which positions itself as a competitor to the Palestinian Authority for the political leadership of Palestinians in the Occupied Palestinian Territory as a whole, denies the very legitimacy of the existence of the State of Israel; it thus opposes the "two-State solution". From this perspective, the fact that "the existence of the Palestinian people's right to self-determination cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right" (para. 257) cannot limit Israel's right to security. This right is an intrinsic part of the State's fundamental right "to exist in peace and security" (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 183, para. 118) or "to survival" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 96), in other words, of the sovereignty.

37. The Opinion disregards all the preceding considerations. It relies on the implicit idea that Israel does not have serious security concerns, or that such concerns, if they exist, are irrelevant. We disagree. Without diminishing Israel's responsibility in the current deadlock in any way, or denying the illegality of several aspects of its policy in the Occupied Palestinian Territory and of its refusal to respect the rights of the Palestinian people and of the Palestinians, we believe it is simply fair to also acknowledge that this State faces serious security threats, and that the persistence of these threats could justify maintaining a certain degree of control on the occupied territory, until sufficient security guarantees, which are currently lacking, are provided. It is difficult to see how such guarantees could be provided outside the conclusion of a comprehensive settlement, which Israelis and Palestinians have indeed approached at times in their conflicted history.

38. It is regrettable that the Opinion, instead of taking into account the legitimate rights and interests of all parties involved, chose to portray the facts in an incomplete and one-sided manner, drawing an implicit parallel between the Israeli-Palestinian conflict and the two situations on which the Court has previously been asked to provide an opinion (*Namibia* and *Chagos*), from which it, however, radically differs.

39. Furthermore, to be fully carried out, the assessment of the legality of the occupation should also have included the consideration of two essential elements: the Oslo Accords and the relevant resolutions adopted by the Security Council from 1967 to present, which have significant effects in this regard.

These documents, and their legal consequences, will be examined in the next section of this opinion.

IV. The legal impact of the Oslo Accords and of relevant Security Council resolutions

40. We are of the opinion that the legal impact of the Oslo Accords[105] and of the relevant Security Council resolutions should have been duly taken into account by the current Opinion. The combined legal effects of the Oslo Accords and of the relevant Security Council resolutions are pertinent not just for Israel and Palestine, but also for the United Nations organs involved in the Middle East peace process and for the international community as a whole.

41. Indeed, it is striking that the Opinion ignored these important legal sources, which were very selectively cited and considered in the Opinion, and especially their significant legal effects for the proper analysis of the legality of the occupation, for the responsibilities and obligations of both Israel and Palestine, as well as for the

[105] Oslo I Accord (The Declaration of Principles on Interim Self-Government Arrangements, signed on 13 September 1993 in Washington, DC, between the State of Israel and the Palestine Liberation Organization (PLO) in the presence of PLO chairman, Israeli Prime Minister and US President, by the representative of PLO, Israeli Foreign Minister, the US Secretary of State and Russian Foreign Minister) and Oslo II Accord (The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Taba, Sinai Peninsula, Egypt, by Israel and the PLO on 24 September 1995 and on 28 September 1995 by Israeli Prime Minister and PLO Chairman and witnessed by US President as well as by representatives of Russia, Egypt, Jordan, Norway and the European Union in Washington, DC)

future efficient unfolding of the negotiations which should result in the "two-State solution" "where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders, consistent with international law and relevant UN resolutions" (Security Council resolution 2735 (2024), para. 6)[106].

42. Actually, a correct combined interpretation of the Oslo Accords and of the relevant Security Council resolutions clearly illustrates their legal effects, which continue to be valid at present. These legal effects relate to the close relationship between, on one hand, the package "right to self-determination — right to security" (these two rights being intrinsically interconnected) and, on the other hand, (1) the issue of the legality of occupation, as well as (2) the way this package needs to be implemented within the negotiation framework agreed between Israel and Palestine and supported by the relevant Security Council resolutions. Naturally, these legal effects impact the obligations of both Israel and Palestine related to the issue of the legality of occupation and to the implementation of the parameters established within the negotiation framework.

43. Thus, it is regrettable that the Opinion dismissed the Oslo Accords as being quasi-irrelevant. This approach is wrong for several reasons. First, the Oslo Accords, the relevance of which was emphasized by many participants to these proceedings, are the main instruments of the Israeli-Palestinian relationship. They have not ceased to be in force. Second, from a legal standpoint, the two Oslo Accords, in particular Oslo II, continue to be applicable to almost all aspects of daily life in Palestine, and are intended to govern the multidimensional relationship between Israel and Palestine. Despite their initial temporary purpose, they created a certain sense of stability. This stability based on having a clear set of rules in place may explain why neither of the parties has denounced the Accords.

44. But, most importantly, the 1993/1995 Oslo Accords formally adopted, between Israel and Palestine, the package "right to self-determination — right to security", based on the Security Council resolutions 242 (1967) and 338 (1973), with direct impact on the conditions for ending the occupation of the Occupied Palestinian Territory, as well as the framework for negotiations ultimately leading to the "two-State solution" — which again will signify the end of the occupation. Indeed, the occupation being temporary by nature, the occupying Power is under an obligation to end the occupation as soon as it is no longer necessary to ensure its security. The Opinion failed to articulate this reasoning.

45. Thus, Oslo I is the first international instrument where Israel recognized the existence of the Palestinian people (Oslo I, preambular paragraph). It also provides for recognition of the two sides' "mutual legitimate and political rights", which assume to "strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement" (*ibid.*). It also envisages that negotiations would be conducted by the two parties during a transitional period, "leading to a permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973)". Article I (Aim of the Negotiations) repeats the reference to the two Security Council resolutions:

> "It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council resolutions 242 (1967) and 338 (1973)." (Oslo I, Article I.)

The reference to the two resolutions, especially to resolution 242 (1967), is of particular relevance, since it mentions the "right to live in peace within secure and recognized boundaries free from threats or acts of force". The term "recognized" (boundaries) should be interpreted as a reference to the territorial definition of the Palestinian State as resulting from the permanent status negotiations, while the term "secure" (boundaries) should be interpreted as a reference to the right to security of Israel and to the right to security of the Palestinian State.

[106] The "two-State solution" was mentioned for at least 204 times in participants' written and oral statements, it was expressly mentioned by 47 out of 59 participants and a large majority (34 participants) has expressed support for a negotiated "two-State solution".

46. In other words, the permanent peace settlement based on the "two-State solution" is directly linked with the right to security: the boundaries, which define the territory of both States, including the Palestinian one, are connected with ensuring the security of the two States, Israel and Palestine. Article V (Transitional Period and Permanent Status Negotiations) of Oslo I also mentions the important issues to be covered by the negotiations: Jerusalem, Palestinian refugees, settlements, security arrangements, borders and other issues (see also the Agreed Minutes of Oslo I in Article IV (2)), thus again putting in connection the main elements of the permanent status: self-determination (the realization of which is dependent on the outcome of the negotiations on, *inter alia*, territory, borders, settlements) and security.

47. Oslo II also includes the above-mentioned elements, especially the reference to the determination of the parties to live in peaceful coexistence and mutual dignity and security, while recognizing their mutual legitimate and political rights, the reference to the permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973), and the above-mentioned link between self-determination and security.

48. Israel's right to security, but also that of Palestine, which represent the second element of the above-mentioned package along with the right to self-determination, as main elements of the "two-State solution", are of particular relevance. Regrettably, the right to security was almost completely ignored by the current Opinion.

49. But, in our view, the package "right to self-determination — right to security" does not exclusively refer to Israel's right to security. The Security Council resolution 242 (1967) sets out that to achieve a just and lasting peace in the Middle East, the relevant parties must respect and acknowledge "the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force". This connection between the outcome of the Middle East peace process and the right to security of all States in the region — the wording being not limited to the States existing at the moment of the adoption of the resolution, but extending to future ones as well, thus including the Palestinian State — is essential.

50. The obligation to implement resolution 242 (1967) "in all of its parts" is reaffirmed in Security Council resolution 338 (1973) and on many occasions thereafter. For instance, resolution 1515 (2003) "*[e]ndorses* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" and "*[c]alls* on the parties to fulfil their obligations under the Roadmap . . . and to achieve the vision of two States living side by side in peace and security". It has a balanced approach, by "*[r]eiterating* the demand for an immediate cessation of all acts of violence, including all acts of terrorism, provocation, incitement and destruction", by "*[r]eaffirming* its vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders", thus recalling the package "right to self-determination — right to security (of both sides)". At its turn, resolution 2334 (2016) of 23 December 2016 reaffirms resolutions 242 (1967), 338 (1973) and others, and

> "*[u]rges* . . . the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving, without delay, a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace",

this last principle representing another term for the package "right to self-determination — right to security". The most recent Security Council resolution — 2735 (2024) — also restated

> "its unwavering commitment to the vision of the two-State solution where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders, consistent with international law and relevant UN resolutions",

thus reiterating the mentioned package.

51. It is important to note that not only the resolutions adopted under Chapter VII of the Charter of the United Nations are binding. As the Court has explained in the *Namibia* Advisory Opinion, a careful analysis of the language of a resolution is required before a conclusion can be made as to its binding effect (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114). Regarding the Middle East peace process, the Security Council, in exercising its primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, adopted numerous relevant resolutions, some of them cited above. The analysis of those resolutions shows, in our view, that they are not merely declaratory, but mandatory and legally binding as far as the principles which they constantly reaffirmed on this matter, are concerned. We regret that the Opinion chose to ignore their relevance and value.

52. But unfortunately, the Opinion also ignores the Court's own previous findings in the *Wall* Opinion. Paragraph 118 of that Opinion acknowledges the intrinsic interdependence between the right to self-determination and the right to security: it mentions in essence that the existence of the Palestinian people "has . . . been recognized by Israel in the exchange of letters of 9 September 1993 between Mr Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr Yitzhak Rabin, Israeli Prime Minister", while in the same correspondence "the President of the PLO recognized 'the right of the State of Israel to exist in peace and security'", in other words, Israel's right to security. The *Wall* Opinion, in its same paragraph 118, referring to Oslo II repeated provisions regarding the "legitimate rights", "considers that those rights include the right to self-determination". In another paragraph of the *Wall* Opinion (para. 162), the Court also notes that "the situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973)" and refers to the "Roadmap" approved by Security Council resolution 1515 (2003) towards the "two-State solution". In this way, the Court also endorsed the negotiation framework defined by the above-mentioned Security Council resolutions.

53. But the current Opinion neglects not only the above-mentioned references in the *Wall* Opinion, but also the General Assembly resolution 77/247 of 30 December 2022, which itself includes the Request for the current Opinion and represents its legal basis, and which refers in detail to the package and negotiation framework mentioned above. Thus, this resolution recalls "the relevant resolutions of the Security Council, and stress[es] the need for their implementation", it also stresses the

> "urgent need for efforts to . . . restore a political horizon for advancing and accelerating meaningful negotiations aimed at the achievement of a peace agreement that will bring a complete end to the Israeli occupation that began in 1967 and the resolution of all core final status issues, without exception, leading to a peaceful, just, lasting and comprehensive solution of the question of Palestine".

It also noted the

> "need for full compliance with the Israeli-Palestinian agreements reached within the context of the Middle East peace process, including the Sharm el-Sheikh understandings, and the implementation of the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict".

Finally, resolution 77/247 also reiterates the "demand for the full implementation of Security Council resolution 1860 (2009)", which, at its turn, calls for

> "renewed and urgent efforts by the parties and the international community to achieve a comprehensive peace based on the vision of a region where two democratic States, Israel and Palestine, live side by side in peace with secure and recognized borders, as envisaged in Security Council resolution 1850 (2008)".

54. The current Opinion ignores as well the fact that despite periods of violence and allegations by each side that the other failed to adhere to its commitments, neither the Israeli and Palestinian sides, nor the General Assembly, nor the Security Council have abandoned the central precept that direct negotiation on the basis of the "land for peace" principle is the path to comprehensive, just and lasting peace and security.

55. Another relevant element concerns the legal impact of the understanding reached between the parties in the Oslo Accords on the issue of settlements in the Occupied Palestinian Territory, a matter yet again ignored by the current Opinion. "Settlements" in Oslo II encompass "settlements in Area C" (Oslo II, Article XII (5)). The parties to the Oslo Accords agreed that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations" (Oslo II, Article XXXI (7)). We are of the view that this obligation of Israel not to alter the status of the West Bank implies that any new settlements created in Area C and beyond it (if any) after 1995 (when Oslo II was concluded) are in breach also of this Accord.

56. After thoroughly analysing the situation, both factual and legal, we are convinced that the post-1995 settlements combined with other measures, such as the expulsion of the local Palestinian population or the application of Israel's domestic legislation to the occupied territory, are indicative of the intent to annex the territory comprising these settlements of Area C, but not the West Bank as a whole. Unfortunately, the Opinion does not make such necessary distinctions.

57. Before concluding this section, we point out that the Opinion fails to take into account certain provisions of the Oslo Accords which are relevant for a complete analysis concerning the legality of the occupation. For instance, the Opinion includes no analysis of Israel's right to security as confirmed by the Accords. In Oslo I it is agreed that "Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order" (Oslo I, Article VIII; see also Annex II of the Agreed Minutes of Oslo I). In Oslo II the parties agree, *inter alia*, to "take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority and against their property, and shall take legal measures against offenders" (Oslo II, Article XV(1)). They also agree that they will

> "act to ensure the immediate, efficient and effective handling of any incident involving a threat or act of terrorism, violence or incitement, whether committed by Palestinians or Israelis. To this end, they will cooperate in the exchange of information and coordinate policies and activities. Each side shall immediately and effectively respond to the occurrence or anticipated occurrence of an act of terrorism, violence or incitement and shall take all necessary measures to prevent such an occurrence." (Oslo II, Annex I, Article II (2))

At the same time, Article XIII (2) *(a)* of Oslo II includes a provision underlining the importance of Israel's right to security: "Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism."

58. Of course, we are of the view that the provisions of the Oslo Accords, freely agreed by the parties, cannot be interpreted as derogating from the rules of international humanitarian law or international human rights law. Nor can such provisions entitle Israel to claim the respect of certain of its rights in the absence of the observance by Israel of its obligations set forth by these Accords.

59. We believe that the above elements are particularly relevant, since this Opinion does not deal, like the *Wall* Opinion, with "only one aspect of the Israeli-Palestinian conflict" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 160, para. 54), but with much more general, numerous and far-reaching elements of what the Court characterized in that Opinion as the "*greater whole*" (*ibid.*). A "greater whole" which made the Court state in the *Wall* Opinion that "it would

take this circumstance carefully into account in any opinion it might give" (*ibid*.). Unfortunately, the Opinion does not do that.

V. Conclusion

60. Based on the preceding analysis, we have to express our deep regret that this Advisory Opinion did not take account of and develop further on the legal issues of pressing concern discussed above.

Thus, on the issue of the legality of occupation, the Court should have responded in the sense that "Israel's policies and practices" in the Occupied Palestinian Territory do not affect the "legal status of the occupation", as explained above. Such a response, which we believe to be the only legally correct one, would have spared the Court from taking a stance on the legality of the occupation itself, an issue on which it was not asked to pronounce. Since the Court has taken a stance on this issue, it should have done so correctly by taking into account all relevant parameters, which it did not do.

In this respect, a sound legal analysis would have compelled the Court to take into account the Oslo Accords, Israel's and Palestine's rights to security and the relevant Security Council resolutions, as well as the interdependence between the right to self-determination and the right to security, thus allowing the Court to fully contribute to the Middle East peace process, in conformity with its functions to interpret and apply international law to the complex set of circumstances incident on the matter. Unfortunately, the Advisory Opinion preferred to undertake a narrower analysis and reached conclusions that do not have a proper legal basis in international law.

61. The Court could have thus elaborated a more comprehensive, balanced and nuanced Opinion that would have been more beneficial for future Israeli-Palestinian peace negotiations, thus becoming a step forward and an efficient instrument for Israel and Palestine to resume negotiations on the implementation of the "two-State solution" and for the two States to manage to live side by side in peace and security. In this way, this Advisory Opinion could have served as a guidepost to the Security Council and the General Assembly, that are directly responsible for supporting the efforts of Israel and Palestine to find a peaceful and sustainable solution.

62. It is thus regrettable that the Court did not discuss and establish, along with the findings (which we support) related to Israel's breaches of international law (including the impeding of the exercise of the right to self-determination of the Palestinian people) and the responsibilities and obligations stemming from them, Palestine's responsibilities and obligations arising from the intrinsic interdependence between the right to self-determination of the Palestinian people and the rights to security of Israel and of Palestine, and from the negotiation framework. As Israel must respect and facilitate the exercise of the right to self-determination of the Palestinian people and the right to security of the Palestinian State, Palestine must respect the right to security of Israel, offer guarantees for its implementation, and co-operate with Israel for this purpose. The intrinsic interdependence of these two rights (to self-determination and to security), as resulting from the Oslo Accords and the relevant Security Council resolutions, creates a legal obligation of their simultaneous implementation.

63. It is equally regrettable that the Opinion did not state that both Israel and Palestine are under the obligation to resume without delay the direct negotiations for the permanent status leading to the "two-State solution", based on the negotiation framework defined by the Oslo Accords and the relevant Security Council resolutions. It is also unfortunate that the Opinion did not draw the attention to the Security Council and General Assembly of the need to reinforce the efforts for achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and thus to the establishment of a Palestinian State, with the aim of reaching the objective of the two democratic States, Israel and Palestine, living side by side in peace and security, with secure and recognized borders. We regret that the Opinion does not encourage all States to support Israel, Palestine, and the United Nations in their efforts to achieve the objectives mentioned above, which include the full realization of the right to self-determination of the Palestinian people.

64. We therefore express our concern that the current Opinion will hardly serve the objective of achieving the “two-State solution”, thus allowing for the peaceful coexistence of the Israeli and Palestinian peoples.

(Signed) Peter TOMKA.

(Signed) Ronny ABRAHAM.

(Signed) Bodgan-Lucian AURESCU.

[Original: English]

SEPARATE OPINION OF JUDGE YUSUF

*The excessively prolonged character of Israel's occupation is a separate and additional ground for the illegality of Israel's presence in the Occupied Palestinian Territory — The law of occupation is founded on the premise that occupation must be temporary — Prolonged occupation is contrary to this basic tenet of the law of occupation (*jus in bello*) — Prolonged occupation is more akin to colonial occupation or conquest than to belligerent occupation — As such, it is unlawful under* jus in bello *— Israel's prolonged occupation also defies* jus ad bellum *— Prolonged occupation, as a continued use of force, must be justified as an exercise of the right to self-defence — Israel's prolonged occupation is neither necessary nor proportionate and is therefore an illegal use of force.*

I. INTRODUCTION

1. In this Advisory Opinion, the Court concludes, in reply to the second question posed by the United Nations General Assembly (hereinafter the "General Assembly"), that Israel's continued presence, as an occupying Power, in the Occupied Palestinian Territory is illegal. The Court reaches this conclusion in view of Israel's violation of two fundamental rules and principles of general international law and of the United Nations Charter in the context of a belligerent occupation. These are the prohibition of the acquisition of territory by force and the right of peoples to self-determination (Advisory Opinion, para. 261). For the reasons explained below, I am of the view that the Court should also have reached this conclusion in view of the illegality of an excessively prolonged occupation under international law.

2. The rules of customary law governing belligerent occupation had their origin in the European public law of the nineteenth century (*jus publicum europaeum*). At the time, those rules were not considered to be applicable to "colonial occupation" of non-European territories. This exemption of colonization from the *jus in bello* made it easier for European powers to realize their colonial ambitions and to conquer foreign lands without any legal limitations. However, the belligerent occupation of the territory of those who belonged to the self-styled circle of "civilized nations" had to be regulated and temporarily limited under the laws of war embodied in the aborted Brussels Project (1874), the Oxford Manual (1880) and the Hague Regulations (1907). Such territories could not be subjected to an indefinite "colonial occupation" but had to be returned to their sovereign soon after the cessation of hostilities, most often after one year.

3. It is only with the outlawing of colonialism following the gradual implementation of the United Nations Charter principle of equal rights and self-determination of peoples that the concept of "colonial occupation" was done away with in international law. This was done, among others, through the General Assembly resolutions codifying customary international law on decolonization (e.g. resolution 1514 (XV)) or elaborating on the fundamental principles of the United Nations Charter (e.g. resolution 2625). At the same time, the concept of belligerent occupation and its temporary character were further refined in the Fourth Geneva Convention and came to be widely accepted as the only legal standard governing occupation in international law.

4. Thus, any belligerent occupation which substitutes an indefinite occupation for the legally sanctioned temporariness of belligerent occupation takes on the characteristics of colonial occupation or of conquest, both of which are contrary to the United Nations Charter and to contemporary principles of international law. The most relevant issues to be considered in such a case are: first, the extent to which the prolonged occupation has departed from the tenets and rules of the law of belligerent occupation (*jus in bello*); and secondly, whether or not this prolonged occupation is contrary to the rules concerning the prohibition of the use of force (*jus ad bellum*). A prolonged occupation which runs afoul of both sets of rules can offer no justification under international law of the continued presence of the occupying Power in the occupied territory.

II. The prolonged occupation of the Occupied Palestinian Territory: denying the applicability of the law of belligerent occupation (*jus in bello*)

5. As noted in the Advisory Opinion, the nature and scope of the powers and duties of an occupying Power "are always premised on the same assumption: that occupation is a temporary situation to respond to military necessity, and it cannot transfer title of sovereignty to the occupying Power" (para. 105). In this respect, certain individual rules of the law of occupation are identified in the Advisory Opinion as being particularly illustrative of the premise that occupation must be temporary:

> "Under Article 64 of the Fourth Geneva Convention and the rule enshrined in Article 43 of the Hague Regulations, for example, the occupying Power is obliged to respect, in principle, the laws of the occupied territory in force. Similarly, under the fifth paragraph of Article 50 of the Fourth Geneva Convention, the occupying Power may not hinder the application of a series of preferential measures adopted prior to the occupation; and, under the first paragraph of Article 54, it may not alter the status of public officials or judges in the occupied territory. Furthermore, the rule set out in Article 55 of the Hague Regulations confers on the occupying Power only the status of administrator and usufructuary of public buildings, real estate, forests and agricultural estates in the occupied territory." (*Ibid*., para. 106.)

6. The above rules require an occupying Power to preserve as much as possible the *status quo ante* in the occupied territory and to hold it in a certain kind of trust for the occupied population until such time as control over the territory is returned to the rightful sovereign. In the words of the Advisory Opinion, "[t]hese provisions emphasize that occupation is conceived of as a temporary state of affairs, during which the exercise by the occupying Power of authority over foreign territory is tolerated for the benefit of the local population" (para. 106).

7. This is supported by the Commentary of the International Committee of the Red Cross on Article 47 of the Fourth Geneva Convention, which reads as follows:

> "[T]he occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights. This is what distinguishes occupation from annexation, whereby the Occupying Power acquires all or part of the occupied territory and incorporates it in its own territory."[107]

8. It is evident from the foregoing that occupation must always be a temporary state of affairs. It is true that the rules of the law of occupation do not expressly impose precise time-limits according to which the occupying Power must terminate its occupation and withdraw from the occupied territory. However, if occupation were to be allowed to continue indefinitely, thus gradually transforming itself into conquest or colonization, the legal tenets underlying the régime governing belligerent occupation, such as the protection of the interest of the occupied people and the return of sovereignty, would be rendered meaningless.

9. In the case of the Occupied Palestinian Territory, Israel has maintained an occupation for over 57 years. The Security Council had already by 1980 reaffirmed "the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem" (Security Council resolution 476 (1980)). It is notable that, already in 1980, the Security Council deemed the occupation prolonged. In the words of Mr Riyad Mansour of the Palestinian delegation during the oral proceedings: "If the occupation was deemed prolonged in 1980, how should it be characterized today, nearly 45 years later?"[108] Indeed, this situation can no longer be considered, in 2024, only as a prolonged occupation, but has to be characterized as an "excessively

[107] Jean S. Pictet, International Committee of the Red Cross, Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War (1958), p. 275.

[108] See CR 2024/4, p. 113, para. 28 (Mansour (Palestine)).

prolonged occupation". Since 1980 — or even much earlier, when it was first called upon to withdraw from territory occupied in 1967, in Security Council resolution 242 (1967) — Israel has continued to disregard various resolutions of the Security Council and the General Assembly calling for an end to the occupation.

10. Israel's excessively prolonged occupation has subjected the Palestinian people to a régime of indefinite alien subjugation and domination which is contrary to all rules and tenets of the law governing belligerent occupation. This is reflected in the realities on the ground, which also include, *inter alia*, Israel's transfer of its civilian population into the occupied territory, the confiscation of land, the exploitation of natural resources, the extension of its domestic law into the occupied territory and the forced displacement of, and discrimination against, the Palestinian population. It is also corroborated by Israel's repeated denials that the Fourth Geneva Convention is applicable to the Occupied Palestinian Territory and its consequent rejection of the rules and principles of the law on belligerent occupation.

11. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court felt obliged to clarify the legal situation regarding the applicability of the Fourth Geneva Convention by affirming that

> "the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories." (*I.C.J. Reports 2004 (I)*, p. 177, para. 101).

In the present Advisory Opinion, the Court has also confirmed that the Fourth Geneva Convention is applicable throughout the Occupied Palestinian Territory, including the Gaza Strip (see Advisory Opinion, paragraphs 78 and 96).

12. Israel's excessively prolonged occupation, which has lasted for more than half a century, violates the basic tenet that belligerent occupation must be temporary, which is one of the main features distinguishing such occupation from colonial occupation and conquest. Moreover, an indefinite prolongation of occupation has a direct bearing on the very legality of the occupation. Any military occupation of foreign territory that changes the characteristics of belligerent occupation under international humanitarian law and decouples it from its normative framework must be considered unlawful. It follows that Israel's prolonged occupation of the Occupied Palestinian Territory is to be considered unlawful by dint of its prolonged character in disregard of the law of belligerent occupation.

III. The prolonged occupation of the Occupied Palestinian Territory: defying the rules of the law on the use of force (*jus ad bellum*)

13. As stated by the Court in the present Advisory Opinion, "an occupation involves, by its very nature, a continued use of force in foreign territory. Such use of force is, however, subject to the rules of international law governing the legality of the use of force or *jus ad bellum*." (Para. 253.) A prolonged occupation cannot be justified on the basis of those rules unless the conditions for lawful self-defence continue to exist throughout the period of occupation. In other words, the occupying Power must be able to show, at all times, that the maintenance of its prolonged occupation is due to military necessity, which has to be proportionate to legitimate military objectives. However, the self-defence rationale cannot be invoked against a potential or future threat that might emanate from the occupied territory.

14. Israel's maintenance of its excessively prolonged occupation of the Occupied Palestinian Territory does not meet these standards. It does not satisfy the criteria of necessity and proportionality for self-defence under Article 51 of the United Nations Charter. Moreover, the violation by Israel of the basic tenets of the law of

occupation may point to an illegitimate continued use of force aimed at creating a perpetual situation of conflict to justify a prolonged occupation. However, if the prohibition of the use of force under the United Nations Charter is to be meaningful, the exception of self-defence cannot be allowed to prolong unlawfully a belligerent occupation.

15. The Security Council had already determined in its resolution 242 (1967) that the state of belligerency, following the June 1967 war in which the Palestinian territories were occupied by Israel, had to be terminated. Thus, in paragraph 1 of the above-mentioned resolution, the Security Council

> "[a]ffirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
>
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

16. Although the law of occupation (*jus in bello*) does not impose, as pointed out above, a precise time-limit for the termination of belligerent occupation, the issue of the legality of the continued use of force, in the form of belligerent occupation, is determined by the law on the use of force (*jus ad bellum*). It is under this law that whether the conditions for self-defence still exist must be established. Indeed, the duration of a belligerent occupation is subject to an *ad bellum* test whereby, if the continued use of force can no longer be justified on grounds of self-defence against an imminent threat or use of force, it must be terminated.

17. In light of the above, a prolonged and indefinite use of force against an occupied population constitutes a breach of the law on the use of force. It cannot be justified for more than half a century on military necessity. It goes beyond the specific defensive needs which might have originally justified it, if they ever existed, and turns it into alien subjugation and domination of a people which is contrary to the principles and purposes of the United Nations Charter. Thus, Israel's prolonged occupation is also to be considered unlawful in view of its continued violation of the law on the use of force (*jus ad bellum*).

(Signed) Abdulqawi Ahmed YUSUF.

[Original: English]

DECLARATION OF JUDGE XUE

1. I voted in favour of all paragraphs in the operative part of the Opinion. I generally agree with the reasoning and conclusions reached by the Court. In this declaration, I wish to clarify a few points with regard to the application of the principle of self-determination in the present case.

2. The right of the Palestinian people to self-determination was well elaborated and affirmed by the Court in the *Wall* Advisory Opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 182-183, para. 118). In the present case, the Court has further determined the scope of this right and the effects of Israel's policies and practices on the exercise of this right by the Palestinian people. It states that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (see paragraph 233). I share this view but with a nuance.

3. Under contemporary international law, it is well established that the principle of self-determination applies to all peoples under colonialism, alien subjugation, foreign domination and exploitation (Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV), adopted on 14 December 1960; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), adopted on 24 October 1970). This principle has obtained a peremptory character in international law with regard to peoples in those contexts. Foreign occupation, by definition, is a type of foreign domination. By virtue of the principle of prohibition of acquisition of territory by force, it must be temporary in nature and terminated as soon as possible.

4. Given the ample evidence as demonstrated in the Opinion, Israel's prolonged occupation of the Palestinian territory, coupled with its policies and practices adopted therein, has severely impeded the Palestinian people from exercising its right to self-determination. The situation on the ground in the Occupied Palestinian Territory in the past half-century, as recorded in the voluminous documents of the United Nations, has gone from bad to worse. Referring to Israel's discriminatory treatment of the Palestinian people, Archbishop Desmond Tutu of South Africa once remarked:

> "I have been very deeply distressed in all my visits to the Holy Land, how so much of what was taking place there reminded me so much of what used to happen to us Blacks in Apartheid South Africa. I have seen the humiliation of the Palestinians at the roadblocks and recall what used to happen to us in our motherland" (Transcript of Archbishop Desmond Tutu's keynote address at the Old South Church, Boston, Massachusetts, USA, 13 April 2002; see also an editorial by Archbishop Desmond Tutu in *The Guardian*, 29 April 2002, entitled "Apartheid in the Holy Land").

The effects of Israel's occupation in that regard have little difference from those under colonial rule, which has been firmly condemned under international law (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 95).

5. I am of the opinion that the peremptory character of the right to self-determination of the Palestinian people rests on this solid basis of international law, rather than the special circumstances of Israel's occupation. The Court's pronouncement would be more convincing if that idea were further developed in the Opinion.

6. My second point relates to the Court's conclusion that Israel's continued presence in the Occupied Palestinian Territory is unlawful. In substance, I am convinced that there are sufficient legal and factual bases to

support that conclusion, and indeed, those reasons are scrupulously presented and analysed in the Opinion. Regarding the conclusion, however, a question may be raised as to whether the General Assembly and the Security Council in their resolutions have indeed taken the view that the effects of Israel's policies and practices have rendered illegal the continued presence of Israel in the Occupied Palestinian Territory; legality of occupation is purportedly governed by the principle of non-use of force and the law of occupation.

7. There is no doubt that the resolutions adopted by the General Assembly and the Security Council have categorically condemned and opposed Israel's policies and measures aimed at changing the legal status, geographical nature and demographic composition of the Occupied Palestinian Territory and declared that those policies and measures are "invalid and cannot change the status" of the Occupied Palestinian Territory. Strictly speaking, those resolutions did not directly address the legality of Israel's continued presence in the Occupied Palestinian Territory, per se, but the legality of the policies and measures taken by Israel. Legality of the continued presence of Israel and legality of Israeli policies and practices may arguably be two different things, as stated by the Court, which are governed by separate rules (*jus ad bellum* and *jus in bello*). The questions that are placed before the Court for an advisory opinion are nevertheless intended to address the link between the two. In the Court's view, when the unlawfulness of Israel's policies and practices is decided, the subsequent question for the Court to answer should logically be the legality of the continued presence of Israel in the Occupied Palestinian Territory. That is to say, when certain acts are found internationally wrongful, in principle, they should not be permitted to continue to exist, which consequently may have a bearing on the lawfulness of the continued presence of Israel in the occupied territory.

8. When the General Assembly requests the Court to address the legal consequences of Israel's breach of its obligation to respect the right of the Palestinian people to self-determination and to answer whether Israel's policies and practices have affected the legal status of the occupation, the matter before the Court becomes one for the Court itself to decide. The resolutions adopted by the General Assembly and the Security Council not only provide credible evidence of Israel's wrongful conduct but also contain views and positions of the Member States on such conduct. It is in that context, I believe, that the Court refers to the resolutions in reaching its own conclusions on the questions before it.

9. Some participants argue that Israel has the right to maintain its presence in the Occupied Palestinian Territory, in particular for its security needs. I agree with the Court that Israel's policies and practices, as they have presented themselves, are not justified by its security concerns. The Court found that, apart from annexation of large parts of the occupied territory in the West Bank and East Jerusalem, changes effected by Israel's policies and practices "manifest an intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian Territory" (see paragraph 252). Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people.

10. The Palestinian people's right to self-determination was recognized at the very outset in the partition plan stated in the General Assembly resolution 181 (II) and reaffirmed in subsequent resolutions. As the Court points out in the Opinion, the ultimate realization of the right of the Palestinian people to self-determination lies in the final settlement of the conflict between the State of Palestine and the State of Israel. Before that goal is reached, in any event, Israel must immediately cease its internationally wrongful acts and observe its international obligations in the Occupied Palestinian Territory.

(Signed) XUE Hanqin.

[Original: English]

SEPARATE OPINION OF JUDGE IWASAWA

The Advisory Opinion does not address conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023 — The Court adopts the "functional approach" regarding the application of the law of occupation to Gaza after 2005.

The Court should have paid more attention to the discriminatory aspect of the dual legal system introduced by Israel in the West Bank — The Court concludes that the "separation" implemented by Israel in the West Bank between the Palestinian population and settlers constitutes a breach of Article 3 of CERD, without qualifying it as apartheid.

The Court concludes that Israel's continued presence in the Occupied Palestinian Territory is illegal because its policies and practices violate the prohibition of the acquisition of territory by force and impede the right to self-determination — The illegality of Israel's continued presence relates to the entirety of the Occupied Palestinian Territory, including Gaza — Israel has an obligation to bring to an end its continued presence in the Occupied Palestinian Territory "as rapidly as possible" — Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally.

1. To answer the questions posed by the General Assembly, the Court first examines their scope and meaning (Advisory Opinion, paras. 72-83). With regard to their temporal scope, the Court notes that

> "the request for an advisory opinion was adopted by the General Assembly on 30 December 2022, and asked the Court to address Israel's 'ongoing' or 'continuing' policies and practices . . . [T]he policies and practices contemplated by the request of the General Assembly do not include conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023." (para. 81.)

This is an important temporal limitation of the Opinion.

2. Regarding their territorial scope, the questions posed by the General Assembly refer to Israel's policies and practices in "the Palestinian territory occupied since 1967". It is reasonable to consider that this phrase refers to "the Occupied Palestinian Territory" as used by United Nations organs since 1967 and by the Court in the *Wall* Advisory Opinion. There is no question that "the Palestinian territory occupied since 1967" or "the Occupied Palestinian Territory" includes not only the West Bank and East Jerusalem, but also the Gaza Strip. The Security Council has confirmed that "the Gaza Strip constitutes an integral part of the territory occupied in 1967" (resolution 1860 (2009), preamble). In the present Opinion, the Court affirms that "'the Palestinian territory occupied since 1967' . . . encompasses the West Bank, East Jerusalem and the Gaza Strip" (Advisory Opinion, para. 78).

3. Nevertheless, the situation of Gaza is distinct. In 2004, Israel decided to "disengage" from Gaza with the intention of no longer occupying the territory[109], while continuing to "guard and monitor the external land perimeter of the Gaza Strip, . . . maintain exclusive authority in Gaza air space, and . . . exercise security activity in the sea off the coast of the Gaza Strip"[110]. Although Israel withdrew all its land forces and evacuated its settlements in Gaza in 2005, it continued to exercise key elements of authority with respect to Gaza (Advisory Opinion, paras. 89 and 93). In these circumstances, views are divided as to whether, after 2005, Gaza remained

[109] "Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the areas of Gaza Strip territory which have been evacuated. As a result, there will be no basis for claiming that the Gaza Strip is occupied territory." Israel Ministry of Foreign Affairs, "The Disengagement Plan — General Outline", 18 Apr. 2004, Sec. 2, i.

[110] *Ibid.*, Sec. 3, i.

"occupied" within the meaning of the law of occupation and whether the law of occupation continued to apply to Gaza.

4. Article 42 of the Hague Regulations defines occupation as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Based on this provision, as well as on Article 6 of the Fourth Geneva Convention, effective control has generally been accepted as the test for determining the existence of an occupation.

5. One view is that Gaza remained occupied and that the law of occupation continued to apply to Gaza after 2005. This view is shared by the United Nations Fact-Finding Mission on the Gaza Conflict[111], the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967[112], the European Union[113], and several NGOs. The General Assembly has repeatedly affirmed that the Fourth Geneva Convention is applicable to "the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967", which includes Gaza (e.g. resolution 73/97 (2018), para. 1).

6. An alternative view is that, after 2005, Gaza was no longer occupied within the meaning of the law of occupation. This view relies on, *inter alia*, the Court's decision in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*. In that case, the Court explained the criteria for determining the existence of an occupation as follows:

> "under customary international law, . . . territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised . . .
>
> In order to reach a conclusion as to whether a State . . . is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question." (*Judgment, I.C.J. Reports 2005*, pp. 229-230, paras. 172-173.)

Applying these criteria, the Court concluded that Uganda had established and exercised authority in Ituri as an occupying Power, but not in any other areas (*ibid.*, pp. 230-231, paras. 176-177).

7. The International Committee of the Red Cross ("ICRC") has put forward another approach regarding the application of the law of occupation. According to the ICRC,

> "Israel still exercises key elements of authority over the [Gaza] strip, including over its borders (airspace, sea and land — [with] the exception of the border with Egypt). Even though Israel no longer maintains a permanent presence inside the Gaza Strip, *it continues to be bound by certain obligations under the law of occupation that are commensurate with the degree to which it exercises control over it*."[114]

[111] "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict", UN doc. A/HRC/12/48 (2009), para. 276.

[112] "Human Rights in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967", UN doc. A/HRC/7/17 (2008), paras. 9-11.

[113] European Coordination of Committees and Associations for Palestine, "EU Heads of Missions' Report on Gaza", 2013.

[114] "International humanitarian law and the challenges of contemporary armed conflicts: Report", document prepared by the ICRC, Geneva, Oct. 2015, 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015, p. 12 (emphasis added). See also ICRC, "Article 2", in *Commentary on the First Geneva Convention*, 2016, pp. 110-112, paras. 307-313; Tristan Ferraro (Legal Advisor, ICRC), "Determining the beginning and end of an occupation under international humanitarian law", *International Review of Red Cross*, Vol. 94, No. 885, Spring 2012, p. 157.

This approach, referred to as the "functional approach", is not concerned with the status of the territory as such. Its focus is rather on whether a State continues to be bound by certain obligations under the law of occupation. This approach also finds support in the decision of the Eritrea-Ethiopia Claims Commission[115].

8. In the present Opinion, the Court subscribes to this approach. The Court declares that,

> "[w]here an occupying Power, having previously established its authority in the occupied territory, later withdraws its physical presence in part or in whole, it may still bear obligations under the law of occupation to the extent that it remains capable of exercising, and continues to exercise, elements of its authority in place of the local government" (Advisory Opinion, para. 92).

Applying this approach to Gaza, the Court concludes:

> "Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip . . . despite the withdrawal of its military presence in 2005 . . .
>
> In light of the above, the Court is of the view that Israel's withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation. Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip." (paras. 93-94.)

Thus, while the Court makes clear that Israel continues to be bound by certain obligations under the law of occupation, it does not take a position as to whether Gaza remained "occupied" within the meaning of the law of occupation after 2005.

The situation in Gaza has drastically changed since 7 October 2023. However, events taking place after that date are beyond the temporal scope of the Court's inquiry (para. 1 above).

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9. I agree with the Court's analysis on Israel's adoption of "discriminatory legislation and measures" for the most part, but, in my view, the discriminatory aspect of the dual legal system introduced by Israel in the West Bank deserved more attention. The Court addresses the dual legal system in the section on Israel's "settlement policy", concluding that Israel has exercised its regulatory authority as an occupying Power in a manner inconsistent with the rule reflected in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention (Advisory Opinion, paras. 134-141). It does not give full attention to the discriminatory aspect of the dual system. In the section on Israel's "discriminatory legislation and measures", the Court only cursorily touches on this issue, merely stating in the context of Article 3 of CERD that settlers and Palestinians are subject to distinct legal systems (para. 228).

10. The extraterritorial application of Israeli domestic law to the West Bank has created two different legal systems. While settlers are subject to Israeli criminal law, Palestinians living in the West Bank are governed by military law[116] and prosecuted in military courts[117]. Differential treatment between Palestinians and settlers is also found in the national health insurance law, taxation law, election law, and in the enforcement of traffic laws.

[115] Eritrea-Ethiopia Claims Commission, *Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14. 21, 25, 26*, Decision of 19 Dec. 2005, United Nations, *Reports of International Arbitral Awards*, Vol. XXVI, Part VIII, pp. 307-308, para. 27.

[116] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (2022), para. 46.

[117] "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/43/67 (2020), para. 29.

There exists an institutional and legislative separation in the planning and building régime as well[118]. The dual legal system is supported by the 2018 Basic Law, which stipulates that "[t]he State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and consolidation" (para. 7).

11. The dual legal system introduced by Israel in the West Bank treats Palestinians and settlers differently based on, *inter alia*, race, religion, or ethnic origin, and amounts to discrimination. The United Nations High Commissioner for Human Rights has affirmed that "[t]he extraterritorial application of Israeli domestic law to settlers creates two different legal systems in the same territory, on the sole basis of nationality or origin. Such differentiated application is discriminatory"[119]. Similarly, the Independent International Commission of Inquiry on the Occupied Palestinian Territory concluded that "[t]his dual legal system provides greater enjoyment of human rights for Israelis than for Palestinians and is therefore discriminatory"[120].

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12. Applying the concept of apartheid to Israeli policies and practices in the Occupied Palestinian Territory is no easy task, particularly because there is no universally accepted definition of apartheid. Apartheid is both a violation of international human rights law and an international crime, and thus may entail State responsibility and individual criminal responsibility. With respect to apartheid as a violation of international human rights law, Article 3 of CERD stipulates that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction". CERD, however, does not define apartheid. On the other hand, apartheid as an international crime is regulated by the 1998 Rome Statute of the International Criminal Court and the 1977 Additional Protocol I to the Geneva Conventions. Like genocide, the international crime of apartheid requires the presence of *dolus specialis* towards a particular group. The 1973 Apartheid Convention has a dual character. While it declares that apartheid is an international crime, it also contains certain inter-State obligations for the suppression of apartheid. There are significant differences in the definition of apartheid in Article 7 (2) *(h)* of the Rome Statute and Article 2 of the Apartheid Convention. For example, under the Rome Statute, there must be an institutionalized régime of systematic oppression and domination by one racial group over another to meet the elements of the crime of apartheid.

13. The questions of the General Assembly concern Israel's "discriminatory legislation and measures" under international human rights law and not apartheid as an international crime. The Court explains that Article 3 of CERD refers to "two particularly severe forms of racial discrimination: racial segregation and apartheid" (Advisory Opinion, para. 225) and concludes that "Israel's legislation and measures constitute a breach of Article 3 of CERD" (para. 229). In its reasoning, the Court emphasizes the "separation" implemented by Israel in the West Bank between the Palestinian population and settlers (paras. 226-229), without qualifying it as apartheid.

[118] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (2022), para. 46.

[119] E.g. "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/34/39 (2017), para. 9.

[120] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (2022), para. 47.

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14. The first part of question *(b)*, which calls on the Court to ascertain how Israel's policies and practices affect the legal status of the occupation, seeks an assessment by the Court of the effect of Israel's policies and practices on the legality of its continued presence in the Occupied Palestinian Territory. The Court analyses this question in light of two fundamental rules of international law, namely the prohibition of the acquisition of territory by force and the right to self-determination. These rules are found in the Charter of the United Nations and customary international law. On the other hand, the law of occupation does not regulate the legality of a State's military presence in a foreign territory, but sets out the occupying Power's rights and duties, which continue to apply even if its presence in the territory is illegal (see Advisory Opinion, para. 251).

15. The prohibition of forcible acquisition of territory is a principle of customary international law. The Friendly Relations Declaration adopted by the General Assembly in 1970 provides that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal" (resolution 2625 (XXV), Annex, first principle). The Security Council also has repeatedly emphasized "the inadmissibility of the acquisition of territory by [force]" (e.g. resolution 242 (1967)) (see Advisory Opinion, paras. 175-176). The prohibition of the acquisition of territory by force precludes any forcible acquisition of territory, regardless of whether that force is unlawful or otherwise permitted under international law. Israel's policies and practices amount to the annexation of large parts of the Occupied Palestinian Territory and thus violate the prohibition of the acquisition of territory by force (para. 179).

16. The determination of whether the obligation to respect the right to self-determination has been violated is complex in situations of occupation. Occupation in all its forms, by its very nature, affects the exercise of the right to self-determination of the people living in the occupied territory. Thus, occupation itself cannot constitute a violation of the obligation to respect the right to self-determination. In the present Opinion, the Court analyses whether Israel's policies and practices impede the right of the Palestinian people to self-determination in light of four elements that compose this right (Advisory Opinion, paras. 236-242) and concludes that Israel's policies and practices are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination (para. 243).

17. Based on the finding that Israel's policies and practices violate the prohibition of the acquisition of territory by force and impede the right to self-determination, the Court concludes that Israel's continued presence in the Occupied Palestinian Territory is illegal (Advisory Opinion, paras. 261-262 and point (3) of the operative clause). In some parts of its reasoning, the Court curiously states that it is the effects of Israel's policies and practices which constitute a breach of international law (paras. 256-257). The Court should have avoided such construction and stated straightforwardly that it is Israel's policies and practices which violate the two aforementioned fundamental rules of international law, and that consequently Israel's continued presence in the Occupied Palestinian Territory is illegal. In any case, the conclusion that Israel's continued presence in the Occupied Palestinian Territory is illegal is not predicated on a finding that Israel violated its obligations under the law of occupation.

18. Although Israel has sought to exercise sovereignty over East Jerusalem and large parts of the West Bank, and not over the entire Occupied Palestinian Territory, I agree with the Court that the illegality of Israel's continued presence relates to the entirety of the Occupied Palestinian Territory, including Gaza, subject to the temporal limitation of the Opinion (para. 1 above). The Occupied Palestinian Territory constitutes a single territorial unit, the unity, contiguity and integrity of which must be respected. The Palestinian people must be able to exercise its right to self-determination over the entirety of the Occupied Palestinian Territory (Advisory Opinion, paras. 78 and 262).

19. Since Israel's continued presence in the Occupied Palestinian Territory is an internationally wrongful act of a continuing character, Israel is under an obligation to cease that act. This conclusion is consistent with the resolutions of the Security Council and the General Assembly. For example, the Security Council has emphasized the need for the "[w]ithdrawal of Israel armed forces from territories occupied" (resolution 242 (1967), para. 1 *(i)*) and the "necessity for ending the prolonged occupation" (resolution 476 (1980), para. 1). The General Assembly has repeatedly called for "[t]he withdrawal of Israel from the Palestinian territory occupied since 1967, including East Jerusalem" (e.g. resolution 77/25 (2022), para. 12 *(a)*).

20. Israel has an obligation to bring to an end its continued presence in the Occupied Palestinian Territory "as rapidly as possible" (Advisory Opinion, para. 267 and point (4) of the operative clause). Given its legitimate security concerns, Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally, particularly from the Gaza Strip in view of the ongoing hostilities since 7 October 2023. The Security Council and the General Assembly have reiterated the importance of the principle of land for peace and the two-State solution. For example, Security Council resolution 242 (1967) linked the end of Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the Palestinian people's right to self-determination with Israel's right to live in peace within secure and recognized borders free from threats or acts of force (para. 283). The precise modalities for ending Israel's illegal presence should follow from arrangements arrived at based on these principles under the supervision of the General Assembly and the Security Council (see para. 281 and point (9) of the operative clause).

(Signed) IWASAWA Yuji.

[Original: English]

SEPARATE OPINION OF JUDGE NOLTE

Factual and legal scope of the Court's analysis — Differences between advisory proceedings and contentious proceedings —Definition of apartheid —Racial segregation and apartheid —Qualified subjective element as part of the prohibitions of apartheid and racial segregation — Insufficient information before the Court to observe that Article 3 of CERD has been breached.

1. I write separately to express my view on two aspects of this Advisory Opinion. First, I will elaborate on the scope of the analysis of the Court. Second, I want to express my disagreement with the additional observation of the Court that Israel's policies and practices violate Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

THE SCOPE OF THE COURT'S ANALYSIS

2. The Court has responded to the request submitted by the General Assembly on the basis of a limited factual and legal assessment. As the Court states in paragraph 77,

> "the Court considers that, in its request, the General Assembly has not sought from the Court a detailed factual determination of Israel's policies and practices. The object of the questions posed by the General Assembly to the Court is the legal characterization by the Court of Israel's policies and practices. Therefore, in order to give an advisory opinion in this case, it is not necessary for the Court to make findings of fact with regard to specific incidents allegedly in violation of international law. The Court need only establish the main features of Israel's policies and practices and, on that basis, assess the conformity of these policies and practices with international law."

Thus, the Advisory Opinion has undertaken neither a "detailed factual determination" nor a legal determination of Israel's responsibility for individual acts. Instead, it offers a "legal characterization" of "the main features of Israel's policies and practices".

3. The way in which the Court defines the factual and legal scope of its analysis is in line with the Court's established approach in advisory proceedings. This approach is rooted in the differences between advisory proceedings, on the one hand, and contentious proceedings, on the other. These differences inform the standards by which the Court arrives at its factual and legal conclusions[121] and are critical for the character of those conclusions in the present case.

4. In contentious proceedings, the Court "decide[s] . . . disputes" in a binding and final manner[122]. These proceedings are retrospective: their contribution to the peaceful settlement of disputes consists in ending a dispute by making a binding determination that is endowed with legal certainty and finality, the *res judicata* effect. In contrast, advisory proceedings are consultative and prospective: the Court gives an advisory opinion on a legal question to provide guidance for the requesting organ's future conduct[123]. The conclusions of the Court in

[121] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72: "It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases. But according to the same article these provisions would be applicable only 'to the extent to which it [the Court] recognizes them to be applicable'. It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter."

[122] See Arts. 38, 59 and 60 of the ICJ Statute.

[123] See also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39 ("The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General

advisory opinions are not the end but the beginning of a process that seeks to establish and maintain peace through law. Indeed, "the requesting organ remains formally free to consider the consequences to be drawn from the Court's opinion"[124]. Therefore, the conclusions made in advisory proceedings complement and facilitate, but can never replace, other procedures for the peaceful settlement of disputes[125]. Indeed, this Court has emphasized that "the legal position of the State which has refused its consent to the present proceedings is not 'in any way compromised by the answers that the Court may give to the questions put to it'"[126].

5. The particular purpose of advisory proceedings explains why the factual assessment in this Advisory Opinion has a different focus and depth than factual determinations made in contentious proceedings. This does not mean that the standard of proof in advisory proceedings is lower. However, it is different from that in contentious proceedings, where the burden of adducing evidence lies with the parties[127]. In advisory proceedings the Court will examine the facts only to the extent necessary for its response to the legal question posed, and it will draw legal conclusions only to the extent permitted by those facts[128]. It is this well-established approach that has guided the Court in the present proceedings, as is recalled in paragraph 46 of the Advisory Opinion, according to which

> "what is decisive in these circumstances is whether the Court has before it sufficient information 'to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character' . . . [I]t is for the Court to assess, in each case, the nature and extent of the information required for it to perform its judicial function".

In cases involving very broad requests, such as the present one, the function of advisory opinions to provide guidance to the requesting organ justifies a particularly broad and merely illustrative approach to the factual assessment. However, this broad focus, together with the principle of consent to jurisdiction, precludes such assessment from having the conclusive effect attributed to factual assessments for the purpose of determining State responsibility in contentious proceedings.

6. The particular focus of the Court's factual assessment, its "bird's-eye view" of the situation, has implications for the legal scope of the Court's conclusions in the present case. Since the Court has not made a fuller determination of Israel's responsibility for its conduct in the Occupied Palestinian Territory, Israel's responsibility for specific conduct or situations would need to be established in other proceedings. For this reason, paragraph 77 clarifies that this Advisory Opinion is concerned with "the legal *characterization* by the Court of Israel's policies and practices" — not with a "legal *determination*". Any conclusive legal determination of Israel's responsibility for specific conduct would require a full investigation into the facts constituting such

Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.") and para 41; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 19 and 71.

[124] See K. Oellers-Frahm and E. Lagrange, "Article 96", in B. Simma, D. E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations. A commentary*, Volume II (4th edn.), OUP, 2024, p. 2601, para. 42. But see *Mara'abe* v. *The Prime Minister of Israel*, HCJ 7957/04, 15 September 2005, para. 56: "the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law (S. Rosenne, *The Law and Practice of the International Court*, 1920-1996 1754 (3rd edn.), 1997). The ICJ's interpretation of international law should be given its full appropriate weight."

[125] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, p. 20; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

[126] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, para. 42, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72.

[127] See also J.-P. Cot and S. Wittich, "Article 68", in A. Zimmermann, C. J. Tams, K. Oellers-Frahm, C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd edn.), OUP, 2019, p. 1863, para. 54.

[128] See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136, para. 56; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46.

conduct, including a careful consideration of whether Israel's security concerns may be legally relevant with respect to any specific situation.

7. It is regrettable that the Advisory Opinion and the reports on which it relies have not engaged more with security concerns which Israel has and expresses as reasons for its policies and practices. It is also regrettable that Israel did not comment on the substance of the questions put by the United Nations General Assembly, including regarding its security concerns. The Court could have better demonstrated that it has considered Israel's arguments to the extent that they are publicly available, including by drawing on decisions of the Supreme Court of Israel and the arguments put forward by the Israeli authorities in the respective proceedings[129], as well as Israel's submissions in other international fora[130]. I think that the persuasiveness of this Advisory Opinion would have benefited considerably from a visible engagement with information from official Israeli sources.

APARTHEID AND RACIAL SEGREGATION

8. The Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD (at paragraph 229) while leaving open the question whether it considers Israel's policies and practices to be a form of racial segregation or apartheid. In the absence of any discussion of the subjective element of apartheid, which is a core element of the prohibition, the Opinion cannot be understood as finding that the prohibition of apartheid has indeed been violated by Israel. Also, I am not convinced that the Court has sufficient information before it to conclude that Israel's policies and practices amount either to apartheid or to racial segregation.

9. Article 3 of CERD does not define the term "apartheid". Definitions of the crime of apartheid are contained in Article II of the 1973 Apartheid Convention and in Article 7 (2) *(h)* of the 1998 Rome Statute, but Israel is not a State party to either treaty. Moreover, these two treaties are of a different character than CERD, as they deal with the "crime of apartheid", and thus the responsibility of individuals for apartheid, whereas Article 3 of CERD contains a prohibition of apartheid addressed to States.

10. However, the Apartheid Convention and the Rome Statute can inform the interpretation of Article 3 of CERD as a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") and — to the extent that they reflect customary international law — as relevant rules of international law applicable between the parties under Article 31 (3) *(c)* of the VCLT. Despite their terminological differences, both definitions help to identify the meaning of apartheid under Article 3 of CERD in customary international law. They demonstrate that a high threshold must be met, as a matter of law, for identifying practices of apartheid.

11. The ordinary meaning of the term "apartheid", as informed by these two treaties, suggests that apartheid is a State-sanctioned and institutionalized régime of discrimination which has the purpose of establishing and maintaining domination and oppression by one racial group over another. This core definition of apartheid comprises three elements: first, the relevant policy and practice must concern the relationship between racial groups; second, the relevant policy and practice must display an objective element (*actus reus*) which consists

[129] Several recent decisions have been referred to in international reports, see e.g. *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, UN doc. A/77/328 (14 September 2022), para. 27 (regarding the legalization of outposts): footnote 46 (referring to HCJ Nos. 1308/17, 2055/17 (9 June 2022); footnote 48 (HCJ No. 6364/20 (27 July 2022); para. 63 (on forcible transfer and demolitions): HCJ No. 413/13 and case No. 1039/13 (4 May 2022); see also e.g. HCJ 2205/23, *Head of Council of 'Anin et al.* v. *Military Commander of the West Bank Area Judgment* (7 August 2023) (on the permit system in the OPT); HCJ 3571/20, *Khasib et al.* v. *Prime Minister of Israel* (1 May 2022) (on a request to dismantle a segment of the Wall); HCJ 2242/17 *Jahleen* v. *Head of the Civil Administration for Judea and Samaria* (24 May 2018) (on the exploitation of natural resources); *Hashiyeh and Hashiyeh* v. *Military Commander of the West Bank*, HCJ 6745/15, ILDC 2555 (IL 2015), 11 November 2015 (on punitive demolitions). See further for a comprehensive analysis: D. Kretzmer and Y. Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn.), OUP, 2021.

[130] See e.g. UN Economic and Social Council, "Information received from Israel on follow-up to the concluding observations on its fourth periodic report", 2022, E/C.12/ISR/FCO/4.

in the commission of "inhumane acts" of a structural and institutionalized nature[131]; third, the relevant policy and practice must be motivated by a subjective element (*mens rea*) which not only requires the intentional commission of inhumane acts of a certain gravity, nature and scale, but also that the purpose of these acts is the establishment and maintenance of an institutionalized régime of domination and oppression (*dolus specialis*)[132].

12. I have serious doubts that the information before the Court is sufficient to conclude that the subjective element of apartheid is present in the situation of the Occupied Palestinian Territory. Given the exceptional gravity of a violation of the prohibition of apartheid, a peremptory rule of general international law, claims against a State involving charges of apartheid "must be proved by evidence that is fully conclusive"[133]. The Court should only find that a State has the required *dolus specialis* of apartheid when the "only reasonable inference" from its conduct is an intention to maintain an institutionalized régime to systematically oppress and dominate a racial or ethnic group, in Israel's case the Palestinians relative to Israeli Jews[134]. This *dolus specialis* should only be considered as being established where other inferences are clearly implausible.

13. I doubt that the only reasonable inference which can be drawn from Israel's policies and practices in the Occupied Palestinian Territories is that of an intention to maintain an institutionalized régime to systematically oppress and dominate the Palestinians relative to Israeli Jews. Even if these policies and practices are discriminatory and disproportionate, and thus constitute large-scale violations of international human rights law and international humanitarian law — which, in my view, is undoubtedly the case — there are at least two other possible purposes which Israel may pursue by them. First, these policies and practices may be motivated by temporary, albeit long-term, security considerations (even if they are unjustified), and/or, second, they may be driven by the — misconceived and illegal — aim of asserting sovereignty over the West Bank, without the simultaneous intention of thereby permanently maintaining an institutionalized discriminatory régime for all inhabitants of the West Bank.

14. I have doubts that the ambition of Israel to annex the West Bank, as demonstrated by its radicalized more recent settlement policy and practice, necessarily implies that it now intends to institutionalize the — until then temporary and at least partly security-oriented — legal régime for the Palestinian inhabitants of the West Bank in relation to the settlers and the settlements, and thus to make it permanent. The intention to annex a territory and the decision to institutionalize a particular racially oppressive régime do not necessarily go together. In the present case they may well go together, but it is also possible that Israel does not intend the way in which it exercises its occupation of the West Bank, as regards the relationship between the Palestinians and the settlers, to become permanent and institutionalized. I think that there is insufficient information to draw a definite conclusion.

15. The decision as to which conclusion to draw from Israel's ambiguous approach with respect to the relationship between the Palestinian inhabitants of the West Bank and the settlers depends on a careful evaluation of the facts and related evidence. In my view, the information before the Court is not sufficient to conclude that other possible inferences are clearly implausible. In any event, the present Advisory Opinion neither defines the subjective element of apartheid nor explains how Israel's conduct in the present case fulfils this particular element. I therefore do not think that the Court's reasoning under Article 3 of CERD can be interpreted as finding that Israel's conduct amounts to apartheid.

[131] See Articles I and II of the Apartheid Convention: "policies [or] practices of racial segregation and discrimination"; Article 7 (2) *(h)* of the Rome Statute: "institutionalized regime of systematic oppression and domination".

[132] See Article II of the Apartheid Convention: "for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them"; Article 7 (2) *(h)* of the Rome Statute: "the intention of maintaining that regime".

[133] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 129, para. 209.

[134] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148 ("in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question").

16. Does the information before the Court suffice to find that Israel's practices and policies qualify as "racial segregation" in the sense of Article 3 of CERD? This raises the important question of how racial segregation is defined and how it is distinguished from apartheid. I am not convinced by the very narrow understanding of the term "racial segregation", according to which it is limited to practices that are equivalent to "apartheid" beyond the specific historical situation of South Africa[135]. The *travaux préparatoires* of Article 3 of CERD[136], as well as the definition in Article II of the 1973 Apartheid Convention, clarify that the concepts of apartheid and racial segregation are distinct yet closely interrelated practices. Racial segregation is the broader term, apartheid being the gravest form of racial segregation. Yet, both apartheid and racial segregation represent systemic and, as the Advisory Opinion puts it, "two particularly severe forms of racial discrimination" in the sense of Article 1 of CERD. I therefore believe that "racial segregation" also requires proof of the presence of a qualified subjective element, namely that a segregation along racial lines is intentional[137].

17. The policies and practices described by the Court in paragraphs 120 to 154 and 192 to 222 certainly constitute grave violations of human rights and they have segregative effects. However, in the absence of any engagement with the subjective element of racial segregation, i.e. proof that Israel by these policies and practices intends to establish a segregation along racial or ethnic lines, the analysis of Article 3 of CERD in paragraphs 226 to 229 of the present Advisory Opinion remains insufficient. In particular, the Court would have to show that any segregative effects are based on one of the prohibited grounds contained in Article 1 of CERD and not on citizenship. Indeed, in situations of occupation, a certain legal separation between the population of the occupying Power and the population in the occupied territories is even prescribed by the law of occupation. According to Article 43 of the 1907 Hague Regulations, the occupying Power must "respect[], unless absolutely prevented, the laws in force in the country". At the same time, Article 64 (2) of the Fourth Geneva Convention allows the occupying Power to

> "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the [Fourth Geneva] Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".

18. Thus, the law of occupation itself envisages a difference in treatment between the nationals of the occupying Power and the protected population in the occupied territory. This is not to say that Israel's segregative practices are justified under the law of occupation. However, given the overlap between the law of occupation and CERD in the present case, a conclusion that the segregation in the present case runs along racial or ethnic lines requires a particularly thorough analysis of the facts.

19. The Court may only "arrive at a judicial conclusion upon any disputed questions of fact" if it "has before it sufficient information and evidence"[138]. Since the Court did not identify enough information substantiating the existence of the subjective element required by Article 3 of CERD, it should have refrained from observing that Israel's legislation and measures constitute a breach of Article 3 of CERD. This would not have prevented the Court from observing that Israel's practices and policies have segregative effects which constitute violations of other provisions of CERD.

[135] This early understanding of Article 3 was influential during the first decades after the adoption of CERD, see M. Banton, *International Action against Racial Discrimination*, pp. 200-201; P. Thornberry, "Article 3", *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, 2016, pp. 247-248.

[136] See P. Thornberry, "Article 3", *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, 2016, who observes that States did not want to limit Article 3 to "apartheid" (pp. 243-246).

[137] In this vein: S. Schmahl, "Artikel 3", in Angst and Lantschner (eds.), *ICERD: Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung. Handkommentar*, Nomos, 2020, para. 12.

[138] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136, para. 56.

(Signed) Georg NOLTE.

[Original: English]

JOINT DECLARATION OF JUDGES NOLTE AND CLEVELAND

*Agreement with the Court's conclusion that Israel's presence in the Occupied Palestinian Territory is unlawful — The legality of the presence of occupying forces is determined by the rules governing the use of force (*jus ad bellum*) — Self-defence cannot justify the acquisition of territory — Israel's policies and practices express a clear intention to appropriate East Jerusalem and the West Bank in its entirety in breach of the* jus ad bellum *— The consequence of such a breach is the obligation to withdraw from the Occupied Palestinian Territory.*

1. We agree with the core conclusion of the Court that Israel's continued presence in the Occupied Palestinian Territory is unlawful. However, we think that a fuller explanation is necessary.

2. We note at the outset that the Court's Opinion appropriately does not address "conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023" (paragraph 81 of the Opinion), an ongoing armed conflict to which the questions of the General Assembly are not directed. With regard to the relevant situation, the Court states as follows:

> "The Court considers that the violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the Occupied Palestinian Territory. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful" (paragraph 261 of the Opinion).

There is broad agreement, which we share, that Israel's conduct as an occupying Power violates not only specific prohibitions of international humanitarian law and human rights law, but also the prohibition of the acquisition of territory by force and the right of the Palestinian people to self-determination (at paragraphs 179 and 243). In this joint declaration, we offer our views as to why the violation by Israel of the prohibition of the threat or use of force and the right to self-determination make its continued presence in the territory unlawful (at paragraph 261) and justify the Court's conclusion that Israel must withdraw from the Occupied Palestinian Territory "as rapidly as possible" (at paragraphs 267 and 285 (4)).

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3. Article 2, paragraph 4, of the United Nations Charter provides that "[a]ll Members shall 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". As the Court recognizes, for a situation to be characterized as one of occupation, there must be effective control of a foreign territory (at paragraph 90), while the *legality* of an occupation (in the sense of the lawfulness of the presence of the occupying forces in the occupied territory) is determined by the international rules regarding the use of force in foreign territory (*jus ad bellum*) (at paragraph 251). An occupation is an ongoing use of force and, thus, the military presence of a State in foreign territory may be unlawful either as a result of an unlawful use of force leading to the occupation, or because the ongoing use of force that an occupation represents can no longer be justified as legitimate self-defence or as authorized by the Security Council (Article 51 and Chapter VII of the United Nations Charter).

4. The Court has not addressed the question whether the presence of Israel in the Occupied Palestinian Territory since 1967 resulted from an initial lawful or unlawful use of force (see paragraph 57, "an armed conflict . . . broke out"). Even if Israel's initial use of force was justified as an exercise of the right of self-defence under Article 51 of the United Nations Charter, and Security Council resolutions 242 and 338 and the Oslo Accords — in aiming to "establish[] a just and lasting peace" — have a bearing on the application of the rules on the use of force, the relevant question before the Court today is whether Israel's continuing presence in the Occupied Palestinian Territory can still be justified under the *jus ad bellum*.

5. Israel points to ongoing security concerns to justify its presence in the Occupied Palestinian Territory. Indeed, it must not be forgotten that the legitimacy of Israel's existence as a State is called into question by a number of States and non-State actors, some of which are located in its vicinity, and that Israel has suffered numerous attacks coming from the Occupied Palestinian Territory. In this regard, we recall that the Court, in its Nuclear Weapons Advisory Opinion, pointed out that "the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake"139. Any such use of force, of course, must be employed within the strict confines of international law.

6. We also recognize that once a State has exercised its right of self-defence and, as a result, has occupied territory that is not its own, a reasonable period should be available for an occupying State to assess the situation on the ground and the extent to which its continued presence is necessary to ensure that remaining relevant threats warranting the ongoing use of force in self-defence are not revived; to negotiate, in good faith, an arrangement laying down the conditions for a complete withdrawal in exchange for security guarantees; and, eventually, to organize an orderly withdrawal of its troops. Accordingly, the confines laid down by Article 51 of the United Nations Charter, which include the requirements of necessity and proportionality with respect to acts undertaken in self-defence, need to be interpreted in such a way as to allow for such considerations in determining, after the end of major hostilities resulting from an exercise of the right of self-defence, when an occupation must come to an end.

7. On the other hand, as the Court explains, the threat or use of force to seek to permanently acquire territory is prohibited — indeed, it is absolutely prohibited. The right of self-defence can never justify the acquisition of territory by force, including such use of force for the protection of perceived security interests. Such acts are strictly prohibited by the United Nations Charter and by customary international law[140].

8. Israel has legitimate security concerns. Nevertheless, the presence of occupying forces can only be justified by a credible link to a defensive and temporary purpose; in our view, therefore, any possible justification is necessarily lost if such a presence is abused for the purpose of annexation and suppression of the right to self-determination. An occupying Power may violate certain of its obligations under international humanitarian law or human rights law, including in ways that infringe the right to self-determination, but such conduct does not render its military presence in the occupied territory unlawful, provided that the presence is justified by the right of self-defence. However, when the presence of occupying forces becomes a vehicle for achieving annexation, the occupying Power violates the prohibition of the acquisition of territory by force under the *jus ad bellum* and thereby loses any possible justification for the presence of its forces, including on the basis of the right of self-defence. Moreover, in the present case, no conceivable authorization by the Security Council of the presence of Israel's forces would extend to a policy and practice of annexation. Nor do the Oslo Accords provide a legal basis to this effect.

139 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 96.

140 See e.g. UNSC resolution 478 (1980) and UNSC resolution 479 (1981).

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9. The Court has established that Israel has entrenched its control, notably over East Jerusalem and Area C of the West Bank, through its settlements, land confiscations, application of Israeli law, and related policies and practices (paragraph 173 of the Opinion). Israel's assertion of permanent control extends to the West Bank as a whole, thereby depriving the Palestinian people of the territorial contiguity to which they are entitled. Israeli settlements and infrastructure in the West Bank have expanded inexorably since 1967, including deep into Area C and, more recently, Area B. They have also been located strategically in order to constrict increasingly Palestinian communities and fragment them from each other, entrenching Israeli control throughout the West Bank and constraining both the daily existence of Palestinians and the prospect for any viable and coherent Palestinian State[141].

10. Israel's intent to extend permanent sovereignty over the entire West Bank, as a matter of official policy, has been expressed at the highest levels of the Israeli Government. The 2018 "Basic Law: The Nation State of the Jewish People" explicitly establishes "the development of Jewish settlement as a national value" for which the State "shall act to encourage and promote its establishment and consolidation"[142]. The guiding principles of the current government coalition agreement support "the application of sovereignty in . . . Judea and Samaria" (i.e. the West Bank)[143]. A 2021 Israeli Defense Forces "topographical map" depicted "the state of Israel — including Judea and Samaria" as a single territory[144]. In September 2023, Prime Minister Benjamin Netanyahu spoke before the United Nations General Assembly holding a map that depicted Israel as encompassing the entire Occupied Palestinian Territory[145]. Such statements of intent have been accompanied by policies and practices, including the significant expansion of settlements deep into the West Bank, the continued construction of the wall, the reduction of legal and policy constraints on settlements and their placement under *de jure* civilian control to promote their expansion, all in the face of the clear proclamation by this Court, in 2004, regarding the illegality of settlements.

11. In our view, these developments, together with the others described by the Court, express the clear intention of Israel to permanently appropriate the West Bank in its entirety, within the meaning of the prohibition of the acquisition of territory by force.

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12. Furthermore, through the construction of settlements and related infrastructure, severe restrictions on movement within and between the parts of the Occupied Palestinian Territory, and other policies and practices detailed by the Court, Israel has exploited its use of force as an occupying Power across the Occupied Palestinian Territory in a manner that seeks to permanently obstruct the exercise of the right of the Palestinian people to self-determination, particularly its right to territorial integrity and political independence, including the right to an independent and sovereign State. This suppression is part and parcel of Israel's effort to permanently control the Occupied Palestinian Territory in violation of the *jus ad bellum*.

[141] See OCHA, Map of West Bank Access Restrictions, May 2023, https://www.ochaopt.org/content/west-bank-access-restrictions-may-2023.

[142] Basic Law: Israel as the Nation-State of the Jewish People, 19 July 2018.

[143] Coalition Agreement between the Likud Party and the Religious Zionist Party for the Establishment of a National Government, presented to the Knesset on 28 December 2022, Art. 118.

[144] Israeli Ministry of Foreign Affairs, "Topographical map of Israel", 24 October 2021, https://www.gov.il/en/Departments/General/topographical-map-of-israel.

[145] Netanyahu brandishes map of Israel that includes West Bank and Gaza at UN speech, *Times of Israel*, 22 September 2023, https://www.timesofisrael.com/liveblog_entry/netanyahu-brandishes-map-of-israel-that-includes-west-bank-and-gaza-at-un-speech/.

13. We also agree that Israel's violation of the right of the Palestinian people to self-determination applies to the *entirety* of the Occupied Palestinian Territory. The principle of the unity of the Occupied Palestinian Territory ultimately derives from the principle of territorial integrity. That principle applies not only to States; it may also apply to territorial units within which a people exercises its right of self-determination[146], and force cannot be threatened or used to frustrate it. It would, after all, undermine the principle of territorial integrity if the occupying Power could use force to fragment the occupied territory.

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14. Under the general rules of State responsibility, the legal consequence of violations by an occupying Power of international humanitarian law or human rights law is an obligation to "wipe out all the consequences" of the violation, through the cessation and reversal of that policy[147]. In the context of an unlawful settlement policy contrary to Article 49 of the Fourth Geneva Convention, for example, this would involve repatriating settlers, revoking and reversing acts supporting the settlement policy, and other forms of reparation. Yet, by itself, such a violation of the *jus in bello* would not give rise to a broader duty to bring the occupation itself to an end.

15. However, as we conclude above, and without prejudice to the exclusion from the Court's analysis of conduct by Israel in the Gaza Strip in response to the 7 October 2023 attack (see paragraph 2 above), the comprehensive nature of Israel's effort to transform the occupation of the Occupied Palestinian Territory into a form of annexation and permanent control, and the accompanying frustration of the Palestinian people's right to self-determination, renders Israel's presence in the Occupied Palestinian Territory unlawful. Accordingly, the breaches of the prohibition of the acquisition of territory by force and the right of the Palestinian people to self-determination entail the duty to end this unlawfulness, which gives rise, *inter alia*, to the duty to withdraw from the Occupied Palestinian Territory under the rules of State responsibility. We therefore agree with this aspect of the Court's conclusion.

16. The Court concludes that Israel must end its presence "as rapidly as possible". Notably, the Court did not adopt the formulation urged by some participants that Israel must end the occupation "immediately, totally and unconditionally". The Court's wording recognizes that there are significant practical issues that would make an "immediate" withdrawal and cessation of some aspects of Israel's presence not possible. Moreover, Israel's duty to end its presence does not mean that its duty to withdraw from the Occupied Palestinian Territory must necessarily be fulfilled in the same way, or at the same time, with respect to every part of that territory. While the duty to withdraw "as rapidly as possible" applies as a general matter, this duty nevertheless may be implemented differently depending on the situation that prevails in a particular part of the occupied territory.

(Signed) Georg NOLTE.

(Signed) Sarah CLEVELAND.

[146] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. 160.

[147] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47; Art. 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts.

[Original: English]

DECLARATION OF JUDGE CHARLESWORTH

Multiple and intersectional discrimination — Discriminatory effect of Israel's measures on women and on children.

Legality of Israel's effective control of the Occupied Palestinian Territory — Legal bases for the use of force — Relationship between security threats and armed attack — Right to self-defence — Necessity and proportionality.

1. I agree with the Court's replies to the questions posed by the General Assembly. In this declaration, I address two issues in the Advisory Opinion where I think that more detailed reasoning is desirable.

I. DISCRIMINATION ON MULTIPLE GROUNDS

2. The Court observes that the essence of prohibited discrimination in international law is the unjustified differential treatment between persons belonging to different groups (Advisory Opinion, paragraphs 190-191). It notes "that differential treatment might not be experienced by all members of the Palestinian group in the same way, and that some members of the group might be subjected to differential treatment on multiple grounds" (Advisory Opinion, paragraph 190). This recognition that individual members of a group may experience discrimination in different ways and on multiple grounds is important. Palestinians as a group share an ethnicity, but they also have many different identities individually — for example, in terms of age, disability and gender.

3. United Nations bodies that monitor the implementation of treaties prohibiting discrimination on specific grounds have identified the limitations of focusing on a single ground of discrimination. For example, in its General Recommendation No. XXV on gender-related dimensions of racial discrimination, the Committee on the Elimination of Racial Discrimination has stated

> "that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life."[148]

4. Discrimination on multiple grounds is related to the notion of intersectional discrimination. Intersectionality refers to the way that prohibited grounds of discrimination may intersect with and shape each other, entwining systems of domination and oppression. The Committee on the Elimination of Discrimination against Women has explained the idea of intersectionality as

> "a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of the Convention on the Elimination of All Forms of Discrimination against Women]. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual

[148] Committee on the Elimination of Racial Discrimination, "General Recommendation No. XXV on gender-related dimensions of racial discrimination", *General Assembly, Official records of the fifty-fifth session, Supplement No. 18*, UN doc. A/55/18 (Supp.) (20 March 2000), Annex V, para. 1; see also Committee on the Elimination of Discrimination against Women, "General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures", *General Assembly, Official records of the fifty-ninth session, Supplement No. 38*, UN doc. A/59/38 (Supp.) (18 March 2004), Annex I, para. 12.

orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men."[149]

5. A multiple or intersectional approach sheds light on the complexity of discrimination in this case: discrimination may be experienced differently by differently situated individuals sharing a Palestinian identity. Such a multidimensional account of discrimination acknowledges "the composite nature of the sources of discrimination and the synergy of their effects"[150]. It thus unsettles the idea that there can be a single comparator group. While discrimination on the basis of a single prohibited ground makes identification of a comparator group relatively straightforward, discrimination occurring at the intersection of two or more grounds renders comparison with another group more difficult.

6. Material before the Court indicates the existence of discrimination on multiple and potentially intersecting grounds. For example, when discussing Israel's settlement policy, the Court notes that Israel's control of water resources in the West Bank prioritizes water supply to Israeli settlements, at the expense of Palestinian communities (Advisory Opinion, paragraphs 128-129). It does not make the additional observation, however, that water shortages in some Palestinian communities have a particular effect on Palestinian women and girls, because they have additional needs of water for hygiene and privacy. Moreover, they bear responsibility for securing water for household use[151]. The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel has further noted that the decline of the agricultural sector as a result of Israel's policies has disproportionately affected employment opportunities for Palestinian women[152]. The Commission has concluded overall that Israel's policies and practices in the Occupied Palestinian Territory have had a pervasive discriminatory effect on Palestinian women by exacerbating their economic and social vulnerability[153].

7. The Court also records the discriminatory effect of the residence permit system in East Jerusalem on Palestinians generally (Advisory Opinion, paragraph 195). The Court finds that the system differentiates between Palestinians and settlers with respect to the enjoyment of the right to family life. It further observes that Palestinian women, who often rely on male spouses for their residence status, are particularly affected by the residence permit system. But the Court leaves unstated one manifestation of this disparate effect that is well documented in the sources on which the Court relies: Palestinian women may remain in violent or abusive marriages out of fear of deportation or separation from their children[154].

8. These situations indicate how being both Palestinian and female in the Occupied Palestinian Territory may interact to cause serious disadvantage. As in almost all societies, Palestinian women and men have different experiences of public and private life, although the boundaries between these realms are not fixed and are inevitably shaped by the occupation and its repercussions. Gender dynamics typically result in men being more

[149] Committee on the Elimination of Discrimination against Women, "General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", UN doc. CEDAW/C/GC/28 (16 December 2010), para. 18. See also Committee on the Elimination of Discrimination against Women, "General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19", UN doc. CEDAW/C/GC/35 (26 July 2017), para. 12.

[150] European Court of Human Rights, *Garib* v. *The Netherlands* (App. no. 43494/09), Judgment of 6 November 2017 (Grand Chamber), dissenting opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 35 (emphasis removed); see also Inter-American Court of Human Rights, *I.V.* v. *Bolivia* (preliminary objections, merits, reparations and costs), Series C No. 329, Judgment of 30 November 2016, para. 247.

[151] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (14 September 2022), para. 71.

[152] *Ibid.*, paras. 72-73.

[153] *Ibid.*, para. 78.

[154] Human Rights Committee, "Concluding observations on the fifth periodic report of Israel", UN doc. CCPR/C/ISR/CO/5 (5 May 2022), paras. 44-45; "Implementation of Human Rights Council resolutions S-9/1 and S-12/1: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/46/63 (11 February 2021), para. 45; Committee on Economic, Social and Cultural Rights, "Concluding observations on the fourth periodic report of Israel", UN doc. E/C.12/ISR/CO/4 (12 November 2019), para. 40.

in the public domain and women being assigned primary responsibilities for care for children and the elderly, and the home. Against this background, United Nations reports have documented that policies and practices of Israel in the Occupied Palestinian Territory, some of which are discussed in the Advisory Opinion, disproportionately affect women and girls[155].

9. Israel's policies and practices have a similarly marked effect in relation to children. For example, under Israel's residence permit system, residence permits are not automatically passed on to children[156], and the parents' residence permits are frequently revoked for the reasons identified in the Advisory Opinion (Advisory Opinion, paragraph 193). While the Court points out the adverse effect that this policy has on the reunification of families whose members reside in different parts of the Occupied Palestinian Territory (Advisory Opinion, paragraph 195), it does not mention that it prevents thousands of children from living with both of their parents[157]. Similarly, the effects of Israel's practice of property demolition are felt particularly by children, as the Advisory Opinion implies (Advisory Opinion, paragraph 217)[158].

10. In its Advisory Opinion, the Court has only examined legislation and measures that it considers to be "closely linked" to Israel's policies and practices of settlement and annexation (Advisory Opinion, paragraph 181). When analysing the effect of these measures on Palestinians, the Court has treated Palestinians as a group sharing a common race, religion or ethnic origin (Advisory Opinion, paragraph 223). While this is correct, this focus overshadows other types of discrimination that affect the daily lives of Palestinians.

II. The legality of Israel's effective control of the Occupied Palestinian Territory

11. In question *(b)*, the General Assembly requests the Court's opinion on the effect, if any, of Israel's policies and practices on "the legal status of the occupation". This expression is confusing, because occupation itself is a status: it is a state of affairs that consists in the exercise by a State of effective control over foreign territory, and to which international law attaches a series of specific rules (Advisory Opinion, paragraph 90). So, as the Court observes, the General Assembly's enquiry about the "*legal* status" of Israel's occupation is an enquiry about the character of Israel's occupation as legal or illegal under international law. In other words, it is an enquiry as to whether Israel's effective control of — its presence in — the Occupied Palestinian Territory has a valid legal basis or not (Advisory Opinion, paragraph 82).

12. While I support the Court's overall reply to this question, I think that the Court should have explained more fully the reasoning leading to the conclusion that Israel's effective control of the Occupied Palestinian Territory lacks a legal basis.

13. The Advisory Opinion reminds us that the legality of Israel's effective control of the Occupied Palestinian Territory must be assessed with reference to the rules concerning the use of force (Advisory Opinion, paragraph 251). The Opinion does not however fully articulate the grounds for, or the implications of, this point.

14. The state of occupation triggers the applicability of a specific body of rules — the law of occupation (see Advisory Opinion, paragraphs 85 and 96). It does not follow, however, that the applicability of other rules is suspended. As the Court observes in a different context, international human rights law remains applicable in

[155] For example, see Committee on the Elimination of Discrimination against Women, "Concluding observations on the sixth periodic report of Israel", UN doc. CEDAW/C/ISR/CO/6 (17 November 2017), para. 32 (a); "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem: Report of the Secretary-General", UN doc. A/78/502 (2 October 2023), para. 56.

[156] "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/37/43 (6 March 2018), para. 55.

[157] Committee on the Rights of the Child, "Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session (27 May-14 June 2013)", UN doc. CRC/C/ISR/CO/2-4 (4 July 2013), para. 29 *(a)*.

[158] See "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/52/76 (15 March 2023), para. 25.

situations of occupation (Advisory Opinion, paragraph 99). The same is true for the right to self-determination (Advisory Opinion, paragraph 95).

15. More importantly, the establishment of the occupation does not suspend the applicability of the rules concerning the use of force. Therefore, the occupying Power is not absolved of the obligation to uphold the prohibition on the use of force at all times (Advisory Opinion, paragraph 109). Indeed, the rules concerning the use of force are particularly relevant in situations of occupation, in view of the nature of an occupation. Occupation consists in the exercise by a State of effective control over foreign territory in the place of the local government (Advisory Opinion, paragraph 90). The establishment and maintenance of such effective control is made possible because the occupying Power deploys, and remains capable of deploying, its military presence in the occupied territory: it is authority backed by armed force — whether actual or threatened force. In other words, an occupation involves, by its very nature, a continued threat or use of force in foreign territory. For this reason, the occupation must at all times be based on a ground for the use of force that is accepted under the *jus ad bellum*.

16. The other side of this coin is that no other legal bases may be invoked for an occupation except for those that are available for the use of force under the *jus ad bellum*. The establishment of the occupation is a question of fact and, for this reason, it does not furnish the occupying Power with an additional legal basis for its maintenance beyond the established exceptions to the prohibition of the use of force. So, the existence of "security concerns" is not a legal ground for the maintenance of an occupation, nor indeed for its establishment, unless it can be translated into the currency of the accepted grounds for the use of force — for example, self-defence[159].

17. Moreover, because the rules concerning the use of force remain applicable throughout the occupation, it is neither necessary nor sufficient to determine whether the use of force that brought about the occupation was lawful. What matters is whether the legal basis for the use of force — in the present context, the legal basis for the occupation — is valid today. Therefore, I support the decision not to determine whether Israel's use of force in 1967 had a legal basis at the time, because it is unnecessary. With this in mind, I will examine the possible legal bases for Israel's continued threat or use of force, in the form of the occupation of the Occupied Palestinian Territory, taking account of Israel's policies and practices.

18. Israel's effective control of the Occupied Palestinian Territory is not based on enforcement action authorized by the Security Council under Chapter VII of the Charter of the United Nations. Starting from Security Council resolution 242 of 22 November 1967, several resolutions of the Security Council depart from the factual premise that Israel occupies the Occupied Palestinian Territory[160]. However, there is nothing in these resolutions to suggest that they were adopted under Chapter VII and thus as sanctioning enforcement measures by Israel to maintain or restore international peace and security.

19. Nor is Israel's effective control of the Occupied Palestinian Territory sanctioned by the Oslo Accords concluded between Israel and Palestine. The Oslo Accords were directed at the allocation of power between Israel and the institutions established and recognized in the Accords; they were intended to complement the applicable *jus in bello* régime (see, to that effect, Advisory Opinion, paragraph 102). However, the Oslo Accords are silent as to the grounds on which the occupation came about, or indeed the grounds on which it would cease. Instead, they record that the contracting parties' rights, claims and positions on these issues are preserved[161].

20. This leaves a single possibility: that Israel's occupation constitutes use of force in exercise of the right to self-defence under Article 51 of the Charter of the United Nations and under customary international law. Use of force in self-defence presupposes that "an armed attack occurs" against Israel, and that Israel's continued

[159] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 223-224, para. 148.

[160] See, for example, Security Council resolution 338 (1973) of 22 October 1973; and Security Council resolution 2334 (2016) of 23 December 2016.

[161] Oslo II Accord, Art. XXXI, para. 6.

effective control of the Occupied Palestinian Territory is a necessary and proportionate response to such an armed attack.

21. The application of the right to self-defence in the present situation may raise a series of additional legal questions, including whether the right is applicable in the face of attacks that are not attributable to a foreign State or of attacks that originate within the territory under occupation[162]. But I do not think that it is necessary to grapple with these issues here. I will thus assume that there is no legal rule barring Israel outright from occupying the Occupied Palestinian Territory in response to attacks against it.

22. The submissions of some participants, including Israel, as well as some documents submitted under Practice Direction XII, allude to the security threats faced by Israel. It is regrettable that the Court was not furnished with adequate information about such threats. In any event, the concept of a security threat is broader than the concept of an armed attack[163]. So, while security threats to Israel may well be real, they alone do not suffice to justify the use of force, unless they amount to an armed attack (see paragraph 16 above).

23. In this connection, it is worth recalling that, under customary international law, the population in the occupied territory does not owe allegiance to the occupying Power[164], and that it is not precluded from using force in accordance with international law to resist the occupation[165]. Therefore, the fact that the population in the Occupied Palestinian Territory resorts to force to resist the occupation does not *in itself* justify the maintenance by Israel of its occupation. Further, the continuation of Israel's effective control in the Occupied Palestinian Territory cannot be justified with reference to policies and practices that the Advisory Opinion considers to be in breach of international law — for instance, the maintenance of settlements.

24. On the assumption that Israel is the victim of an armed attack triggering the right to self-defence, does Israel's use of force — in the form of its continued occupation of the Occupied Palestinian Territory — fit within the "strict confines"[166] of the right to self-defence? In this regard, it is important to bear in mind the purpose of self-defence: namely, to halt or repel an armed attack until the Security Council takes action. The use of force in self-defence, then, is directed at restoring the situation as it was prior to the armed attack. This purpose distinguishes lawful self-defence from measures that aim to punish the aggressor for the harm inflicted. The latter measures constitute armed reprisals, which are prohibited under international law[167].

25. The legal standards of necessity and proportionality are well established in customary international law and are recognized in the Court's jurisprudence as the tools ensuring that forcible measures stay within the scope of the right to self-defence[168]. Necessity and proportionality are concepts sufficiently malleable to account for an infinite variety of situations, including situations that are said to involve the accumulation of a series of events which, taken together, might constitute an armed attack. These legal standards can be assessed objectively and independently of the subjective appreciation of the State purporting to act in self-defence[169]. For this reason, the standards of necessity and proportionality are well suited to assess whether the use of force employed by the victim of an armed attack serves the purpose of self-defence. In my view, three dimensions of Israel's policies

[162] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 194, para. 139.

[163] Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 224.

[164] See Art. 45 of the Hague Regulations; see also the third paragraph of Art. 68 of the Fourth Geneva Convention.

[165] See, for example, General Assembly resolution 37/43 of 3 December 1982, para. 2.

[166] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 223, para. 148.

[167] See General Assembly resolution 2625 (XXV) of 24 October 1970, Annex, first principle, sixth paragraph: "States have a duty to refrain from acts of reprisal involving the use of force." See also Institut de droit international, "Régime des représailles en temps de paix" (Rapporteur N. Politis), *Annuaire de l'Institut de droit international*, 1934, Vol. 38, p. 709, Art. 4.

[168] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 103, para. 194; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 245, para. 41.

[169] See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 196, para. 73.

and practices illustrate that the maintenance by Israel of its occupation does not qualify as an act of self-defence: their intensity, their territorial scope and their temporal scope.

26. The intensity, or the character, of Israel's effective control features in the Advisory Opinion. The Advisory Opinion observes that Israel has used the fact that it exercises effective control over the Occupied Palestinian Territory as an opportunity to assert permanent control over it (Advisory Opinion, paragraph 261). As the Advisory Opinion discusses in detail, Israel has engaged in the annexation of large parts of the Occupied Palestinian Territory, and it has taken steps to annex the entire West Bank (Advisory Opinion, paragraphs 162-173). This conduct violates the prohibition of forcible acquisition of territory (Advisory Opinion, paragraph 179). In addition to this, however, such conduct belies the proposition that Israel's effective control of the Occupied Palestinian Territory is a permissible use of force in self-defence. The assertion of permanent control over foreign territory is incompatible with the aim of preserving a State's territorial integrity, which is one of the key justifications for the right to self-defence. Rather than preserving the integrity of its territory, a State using force to annex foreign territory seeks to expand it at the expense of the local government. Moreover, the requirements of necessity and proportionality point to temporary forcible measures that are tailored to the specific threat posed by the armed attack. Where the armed attack is ongoing, the requirements of necessity and proportionality call for the imposition of forcible measures that may be adapted to the evolving nature of the attack and that remain under constant review in light of the circumstances. By contrast, the annexation of territory is, by its nature, intended to be permanent. When using force to annex foreign territory, then, the occupying Power anticipates that the armed attack to which its force responds will itself be permanent — that it will continue to occur in perpetuity.

27. The territorial and temporal scope of Israel's occupation also undermines the proposition that this occupation is justified on grounds of self-defence. As the Advisory Opinion points out, Israel has extended its effective control over the whole Occupied Palestinian Territory — the entirety of the territory in which the right of the Palestinian people to self-determination is exercised (Advisory Opinion, paragraph 262). Further, Israel has kept the Occupied Palestinian Territory under its control for over 57 years. Of course, international law does not, and could not, set categorical territorial and temporal limits to the use of force in self-defence, including in the form of occupation. Such limits are determined on a case-by-case basis by the requirements of necessity and proportionality. Under those requirements, targeted operations, including occupation, may be expected in the territory from which the armed attack originates, and for as long as the armed attack occurs. Yet, the longer time passes, the less plausible it is that an armed attack is, or indeed continues to be, occurring; and the less plausible it is that the continued occupation of an entire foreign territory is a necessary and proportionate measure in response under the right to self-defence. This is especially the case where this occupation extends to the entire territory over which a population exercises its right to self-determination.

28. For these reasons, I consider that Israel's continued effective control of the Occupied Palestinian Territory lacks a valid legal basis. Of course, Israel, as all States, has the inherent right to self-defence against armed attacks that occur against it. However, today and in the future, Israel's acts in self-defence must be exercised within the confines of international law, and especially in accordance with the requirements of necessity and proportionality — as is the case for all States.

(Signed) Hilary CHARLESWORTH.

[Original: French]

DECLARATION OF JUDGE BRANT

[Translation]

Agreement with the reasoning and conclusions of the Court — Violation by Israel of Article 3 of CERD — Racial segregation and apartheid — Evolutive interpretation — Constituent elements of apartheid — Fulfilment of the right of a people to self-determination impossible under racial segregation or apartheid — Cessation of international law violations needed to ensure peace and security of Israel and Palestine.

1. I would like to state at the outset that I fully subscribe to the reasoning and conclusions of the Court. However, I considered it necessary to elaborate on the aspect of the Advisory Opinion relating to the policies and practices of Israel in the Occupied Palestinian Territory that are alleged to constitute racial segregation or apartheid.

2. In paragraph 229 of the Advisory Opinion, the Court observes that "Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities". It concludes that, "[f]or this reason", Israel has violated Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

3. Israel ratified CERD on 3 January 1979. Article 3 of that Convention provides that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction".

4. I agree with the Court's conclusion that, by creating a physical and juridical separation within the Occupied Palestinian Territory, Israel has breached Article 3 of CERD prohibiting apartheid and racial segregation. However, since neither of these two concepts is defined in the Convention, I consider it necessary to make some observations in this regard.

5. The concept of "racial segregation", interpreted in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of CERD, means separating people, *de jure* or *de facto*, according to criteria based on race, colour, descent, or national or ethnic origin.

6. As for "apartheid", clarifying its constituent parts is indisputably important in my view, given the seriousness of practices of apartheid, whose prohibition is established in both treaty law and customary international law, and the fact that the crime of apartheid is recognized as a crime against humanity whose prohibition is a *jus cogens* norm that creates rights and obligations *erga omnes*.

7. In my opinion, the Court could have used evolutive treaty interpretation to clarify the constituent elements of this crime. The Court has previously adopted such an approach in interpreting a treaty instrument. In its *Namibia* Advisory Opinion, it stated that, "[m]indful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account" the evolutionary nature of the definitions of certain concepts and "cannot remain unaffected by the subsequent development of law" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53). In a recent case, moreover, the Court acknowledged that the subsequent practice and interpretation of certain States parties to a convention is "relevant when interpreting its provisions" (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024*, para. 93).

8. Following the entry into force of CERD on 4 January 1969, two international instruments defined and established apartheid as a crime against humanity: the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter the "Apartheid Convention") and the Rome Statute of the International Criminal Court (hereinafter the "Rome Statute"). Israel is not party to either of these instruments.

9. Nevertheless, the treaty practice of the 124 States parties to the Rome Statute and the 110 States parties to the Apartheid Convention cannot be overlooked. In my view, it clearly constitutes practice that is relevant for defining the elements of apartheid as set out in CERD. I would add that the States parties to the Apartheid Convention — which entered into force on 18 July 1976, seven years after CERD — were mindful of the pre-existing obligation prohibiting practices of racial segregation and apartheid set forth in CERD, this being expressly recalled in the preamble of the Apartheid Convention. Moreover, as regards the definition contained in the Rome Statute, although this was developed in the context of individual criminal responsibility, I see no reason to conclude that apartheid should be defined differently in relation to the international responsibility of States.

10. The Apartheid Convention stipulates that the crime of apartheid applies to "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them". The Rome Statute, for its part, defines the crime of apartheid in its Article 7 (2) *(h)* as follows: "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". Three elements are thus present in both definitions, namely:

(i) the material element constituted by the commission of inhuman acts;

(ii) the contextual element of an institutionalized régime of systematic oppression and domination by one racial group over another; and

(iii) the intentional element constituted by the intent to maintain the aforementioned régime.

The Court could have interpreted Article 3 of CERD based on the three elements common to both of these instruments. The relevance of such a definition has been confirmed by the International Law Commission which, in its Draft Articles on Prevention and Punishment of Crimes Against Humanity, reproduces verbatim the definition set out in the Rome Statute comprising the three above-mentioned elements. It should be noted that the State of Israel did not object to this definition[170].

11. I would further observe that Article II of the Apartheid Convention states that this crime "shall include similar policies and practices of racial segregation and discrimination". The question that arises, therefore, is whether apartheid, within the meaning of Article 3 of CERD, must be interpreted as having a broader scope than racial segregation or whether it is to be considered as limited to practices of segregation. In this case, the Court found that the discriminatory practices put in place by Israel in the Occupied Palestinian Territory have resulted in the physical separation of the populations (para. 227 of the Opinion). Moreover, Israel's settlement policy seeks to fragment the Palestinian people and territory by isolating towns and villages from each other (paras. 164 and 238 of the Opinion), which some participants characterized as "strategic fragmentation". This clearly constitutes racial segregation. The Court further observed in Part V of the Opinion that there is also juridical separation, as well as myriad breaches of the rights of Palestinians for the benefit of the Israeli settlements established in the occupied territory and the State of Israel itself. In short, the Court found that Israel has violated

[170] Comments and observations received from Governments, international organizations and others, 21 Jan. 2019, doc. A/CN.4/726, *ILC Draft Articles on Crimes Against Humanity — Israel's initial comments and observations*, 30 Nov. 2018, para. 5.

Article 3 of CERD, but did not consider it necessary in this instance to define the concepts of racial segregation and apartheid.

12. In any event, a régime of racial segregation or apartheid makes the fulfilment of the Palestinian people's right to self-determination impossible. As duly noted by some participants, the discriminatory nature of these policies and practices suppresses the equality, identity and dignity at the heart of self-determination.

13. Moreover, although I consider Israel's security needs to be legitimate, this does not justify either policies and measures of segregation or apartheid. On the contrary, requiring respect for international law, and its peremptory norms in particular, as well as for human rights and international humanitarian law is in the ultimate interest of Israel. The prolonged occupation, creeping settlement and annexation of occupied lands, and the discriminatory legislation and measures that accompany them, undermine Palestine's — equally legitimate — right to security. Only respect for international law can bring peace to the two peoples and lasting security for Israel and Palestine. Justice, peace and security cannot wait any longer.

(Signed) Leonardo BRANT.

[Original: French]

SEPARATE OPINION OF JUDGE GÓMEZ ROBLEDO

[Translation]

*Effectiveness of the Advisory Opinion for the United Nations —Statehood of Palestine: conditions required under international law —Recognition of right to self-determination as a peremptory norm of international law (*jus cogens*): from unlawful occupation to foreign domination in accordance with resolution 1514 (XV)*.

1. I fully subscribe to all the findings of the Court that the continued presence of Israel in the Occupied Palestinian Territory is illegal; that Israel is under an obligation to bring to an end its unlawful presence as rapidly as possible; that it must cease all new settlement activities immediately, evacuate all the settlers from the Occupied Palestinian Territory and make reparation for the damage caused to all the natural or legal persons concerned in the said Territory (see paragraph 285 (3), (4), (5) and (6)). I also support the findings of the Court that all States are under an obligation not to recognize and not to render aid or assistance in maintaining the unlawful presence of Israel in the Occupied Palestinian Territory (see paragraph 285 (7)). Finally, I fully agree that international organizations, including the United Nations, have an obligation of non-recognition and that the General Assembly and the Security Council need to consider the precise modalities and what further action is required to bring to an end as rapidly as possible the unlawful presence of Israel in the Occupied Palestinian Territory (see paragraph 285 (8) and (9)).

2. While the Advisory Opinion surely meets the expectations raised, I would nevertheless like to stress the importance of its effect as regards the role of the United Nations in contributing to the settlement of the situation in Palestine. It is, of course, not for the Court to tell the General Assembly how to relaunch the peace process and put an end to the Israeli-Palestinian conflict, and the Court, quite rightly, reminds the General Assembly and the Security Council of their responsibilities (paragraphs 281 and 285 (9)). The Court must encourage the United Nations to redouble its efforts, as it did in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*I.C.J. Reports 2004 (I)*, pp. 200-201, paras. 161-162) and as it recalls today in the present Advisory Opinion (paragraph 282). However, the Court must ensure that its Advisory Opinion is capable of being fully effective. In other words, the political organs of the United Nations must be able to put this Opinion to full use in seeking a just and definitive solution to the conflict, in accordance with international law.

In this regard, two aspects of the Court's reasoning could usefully be developed further, with the hope that the analysis below will make it possible to broaden the scope of the Advisory Opinion.

3. The first aspect is the question of Palestine's statehood, which, in my view, is beyond doubt; the second aspect concerns the characterization of the right to self-determination as a peremptory norm of general international law (*jus cogens*).

I. The statehood of Palestine

4. The Advisory Opinion should have been explicit with regard to the statehood of Palestine. In United Nations resolutions it is customary to state that the settlement of the conflict lies in "the two-State solution" or "the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders" (see, for example, A/RES/78/78[171] and S/RES/2735 (2024)[172]). Yet the use of such language or of that adopted by the Court in its Opinion — namely "including [the] right [of the Palestinian people] to an independent

[171] Available at: https://documents.un.org/doc/undoc/gen/n23/398/12/pdf/n2339812.pdf?token=pDhf7MarMvHKsz4oI6&fe=true.

[172] Available at: https://documents.un.org/doc/undoc/gen/n24/165/11/pdf/n2416511.pdf?token=3HdqH2zaL2Oa0xOYpU&fe=true.

and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States" (paragraph 283) — appears to cast doubt on the existence of Palestine as a State today, as if that State had to be *created* or *formed* in a future that is at the very least uncertain, further to negotiations aimed at a just and lasting peace in the Israeli-Palestinian conflict. This kind of language contributes to making the situation of one of the parties (Palestine) even more unequal in relation to the other (Israel), and from the outset distorts the parameters of the negotiations that will have to take place between them. However, just as the existence of Palestine should no longer be in question, nor should there be any further discussion about the legal personality of Palestine, as the State with which Israel will have to have amicable and neighbourly relations. The ambiguity inherent in the words "its right to an independent and sovereign State" is a further obstacle to the full implementation of the right of the Palestinian people to self-determination, in that it contributes indirectly to the position that the proclamation of the State of Israel on 14 May 1948 was somehow made in respect of territory belonging to no one or *terra nullius*[173], since the Arab States had refused the United Nations Partition Plan in General Assembly resolution 181 (II) of 1947, and the rights of the United Kingdom as a mandatory Power had ceased on 15 May 1948, the date its High Commissioner left, marking the end of the British Mandate over Palestine[174]. Is it necessary to recall that, during that Mandate, Palestine had a government, police, a currency and laws that came from a "constitutional" framework dating back to 1922, even if it fell to the United Kingdom to promulgate all such provisions?

5. This current of opinion, which holds sway in Israel today by virtue of political parties that represent extremist religious positions, would have it that the practice of settling large swathes of the Occupied Palestinian Territory is justified quite simply by the divine plan of land promised to Abraham and his descendants, to the extent that since 1967 the West Bank has not been referred to by its name as such, but, on the contrary, by the biblical place names of Judea and Samaria.

6. It could of course be argued that Palestine's status as a State is implicit in the many resolutions of the General Assembly and the Security Council, since they recommend that the settlement of the conflict should be based on the existence of "two States".

Yet Israel has done and continues to do everything in its power to set aside the commitments it made under the 1947 Partition Plan — on which its declaration of independence was based — and the 1993 and 1995 Oslo Accords. The peace process cannot be the same when the occupying Power does not accept the legal personality of Palestine, claims that the Fourth Geneva Convention does not apply to the Occupied Palestinian Territory and, moreover, contests that the territory is occupied. This attempt to make Palestine *invisible*, to the extent that its existence is denied, is, in my view, a further impediment to the right of the Palestinian people to self-determination. Worse still, this form of denial clearly echoes the arguments of the protagonists in the conquest of the Americas in the 16th century, arguments that were defeated at the time by the renowned Francisco de Vitoria, who refused to accept that the new continent could be considered as a *res nullius* on the ground that it

[173] On the concept of *terra nullius*, see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 38-39, paras. 79-80.

[174] See basic principle 1 *(a)* of the Basic Law: Israel as a Nation State of Jewish People, of July 2018, amended in May 2022, which proclaims that the "Land of Israel is the historical homeland of the Jewish People, in which the State of Israel was established". Basic principle 1 *(c)* of the Law also provides that the "realization of the right to self-determination in the State of Israel *is exclusive to the Jewish People*" [emphasis added]. Available in English at: https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf. See also the statements of Golda Meir, the fourth prime minister of Israel, who claimed "[i]t was not as if there was a Palestinian people in Palestine and we came and threw them out and took their country away from them. They did not exist", available at https://www.jewishvirtuallibrary.org/golda-meir-quotes-on-israel-and-judaism. See also *The New York Times*, "A talk with Golda Meir", where she reasserts her position that "there never was a Palestinian nation", available at: https://www.nytimes.com/1972/08/27/archives/a-talk-with-golda-meir.html. Lastly, see the more recent speech by the Minister of Settlements and National Missions, Orit Strook, before the Knesset where she states that "[t]here is no such thing as a Palestinian people, there is no such people", available at: https://x.com/MiddleEastEye/status/1760273162976059627.

was inhabited by people without civilization[175]. For both Vitoria and Bartolomé de Las Casas, the indigenous populations were the real owners of the lands coveted by the Spanish[176].

It would therefore have been helpful if the Court had expressly stated that the existence of the Palestinian State is established under international law, just as it did in respect of the Palestinian people when it observed that its existence "is no longer in issue" and that "[s]uch existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 182-183, para. 118)[177]. Let us not forget that the Palestinian Authority was able to establish itself in Gaza pursuant to the above-mentioned Oslo Accords and that the takeover of this territory by Hamas in June 2007 is an issue that is internal to Palestine and did not entail any cession of sovereignty, since Israel had moreover withdrawn from this part of the Occupied Palestinian Territory in 2005 while retaining effective control over it (paragraphs 93 and 94). The foregoing cannot be understood as meaning that the right of the Palestinian people to self-determination has been fully achieved. As the Court has observed, that right has been, and continues to be, violated by Israel. However, stating that that right includes the right to a *sovereign and independent State* has the effect of reducing it, at the very best, to a right *in statu nascendi* (see paragraphs 237 and 283).

7. In this regard, it may be noted that the statehood of Palestine, whose existence was proclaimed on 15 November 1988 by the Palestine National Council based on resolution 181 (II) referred to above[178], is a reality for the vast majority of States, since it is acknowledged by the General Assembly in resolution 43/177 of 15 December 1988. In 2012, by resolution 67/19, the General Assembly granted Palestine the status of non-member observer State at the United Nations, while the Palestinian Authority, as the representative of the Palestinian people, has exercised its authority in certain parts of Palestinian territory since 1993.

8. More recently, on 1 May 2024 the General Assembly, pursuant to resolution 76/262[179], debated the veto cast by the United States in the Security Council on 18 April 2024 which, despite the support of 12 members and the abstention of the United Kingdom and Switzerland, prevented the adoption of draft resolution S/2024/312 submitted by Algeria recommending the admission of the State of Palestine to the United Nations. During the debate, the United States declared that the vote at issue did not reflect opposition to Palestinian statehood but was an acknowledgment that it can only come from negotiations between the two parties (see General Assembly, debate on the United States veto of the draft resolution submitted by Algeria on the admission of the State of Palestine to the United Nations, seventy-eighth session, 74th and 75th plenary meetings). It is to be recalled that the Court ruled on this question in its Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations* under Article 4 of the Charter, in which it found that

> "a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said

[175] M. Rodríguez Molinero, *La doctrina colonial de Francisco de Vitoria o el derecho de la paz y de la guerra. Un legado perenne de la escuela de Salamanca*, Librería Cervantes, Salamanca, 1993, pp. 55-68.

[176] G.C. Marks, "Indigenous Peoples in International Law: the significance of Francisco de Vitoria and Bartolomé de Las Casas", *Australian Yearbook of International Law*, Vol. 13 (1991), pp. 35-51.

[177] In this context, it should be recalled that, in its Declaration of Independence of 14 May 1948, Israel stated that it was "prepared to cooperate with the agencies and representatives of the United Nations in implementing the resolution of the General Assembly of the 29th November, 1947", namely the Partition Plan that recognizes the existence of two peoples, Jewish and Palestinian, and provides for the creation of two "independent Arab and Jewish States and [a] Special International Regime for the City of Jerusalem" (see A/RES/181(II) B, para. 3).

[178] See Palestinian Declaration of Independence, Algiers, 15 November 1988.

[179] Resolution 76/262 requires the General Assembly to meet within ten working days each time a veto is cast in the Security Council preventing the adoption of a draft resolution (A/RES/76/262).

> Article" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948,* p. 65, operative clause, para. 1).

9. This Opinion was implemented by the General Assembly, which adopted resolution 506 (VI) entitled "Admission of new Members, including the right of candidate States to present proof of the conditions required under Article 4 of the Charter", dated 1 February 1952, and in which it establishes that the judgment of the United Nations on the admission of a State

> "ought to be based on facts such as: the maintenance of friendly relations with other States, the fulfilment of international obligations and the record of a State's willingness and present disposition to submit international claims or controversies to pacific means of settlement established by international law"

and not on any other condition (A/RES/506 (VI) A). Palestine fully meets these conditions.

10. Following the failure to adopt the above-mentioned draft resolution S/2024/312, on 10 May 2024 the General Assembly adopted resolution ES-10/23 with 143 votes in favour, that is two thirds of Member States. Under this resolution, the General Assembly decides to extend the rights of Palestine as an observer State and stresses "its conviction that the State of Palestine is fully qualified for membership in the United Nations in accordance with Article 4 of the Charter".

11. The International Criminal Court (ICC), for its part, was invited by the Prosecutor to pronounce on the scope of its territorial jurisdiction in Palestine, further to Palestine's decision of 22 May 2018 to defer the situation there to it, the Palestinian State having acceded to the Rome Statute on 2 January 2015. In its decision of 5 February 2021, Pre-Trial Chamber I considered that the ICC could exercise its criminal jurisdiction over the situation in question and found that its territorial jurisdiction extended to Gaza and the West Bank, including East Jerusalem[180]. While it is true that the ICC was careful to note that its mandate did not permit it to pronounce on the statehood of Palestine, this decision nonetheless confirms that Palestine cannot be treated otherwise than as a State under international law.

12. The foregoing all serves to reinforce the idea that Palestine is a State entity capable of carrying out the obligations contained in the Charter. It should be noted in this regard that the history of the United Nations shows that Members can be admitted even though their status as a State *remains to be fully realized*, as was the case with India[181]. For a very long time, there were doubts as to whether a particular micro-State met all the criteria to be identified as a State under international law and, consequently, whether that State could be admitted to the United Nations, on account of it having an extremely small territorial base and the exercise of important sovereign powers being devolved to another State[182]. Ultimately, all those that have applied have been admitted to the United Nations.

13. As stated above, I am convinced that Palestine must be considered a State under international law. Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which has been in force since

[180] International Criminal Court, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*, ICC-01/18, 5 February 2021, p. 55, para. 118.

[181] India is considered a founding member of the United Nations and took part in the 1945 San Francisco Conference, although it did not gain its independence until 1947. According to a commentary on Article 4 of the United Nations Charter, "[i]t is first of all stated that the candidate must be a State. Yet the Charter does not give any definition of a State". However, India, which attained independence in 1947, took part in the 1945 San Francisco Conference, because it was already clear that "India, Ukraine and Belarus would be admitted as founding members while their status as sovereign States was open to discussion" (J.-P. Cot, A. Pellet and M. Forteau, *La Charte des Nations Unies : commentaire article par article*, Economica, Paris, 2005, p. 521) [*translation by the Registry*].

[182] This is the case, for example, with the Vatican City State or the Principality of Monaco. The former's international legal personality is exercised by the Holy See under the Lateran Pacts of 1929, and a number of State competences of the latter are to this day exercised by France under numerous bilateral agreements.

26 December 1934, provides that "[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states". The question of Palestine's lack of effective control over the entirety of Palestinian territory in no way detracts from the fact that Palestine meets the criteria to be identified as a State, as defined in the Montevideo Convention. A State's lack of control over part of its territory has no direct impact on its statehood. The late James Crawford appears to acknowledge that after 1993, under the Oslo Accords, and with all the well-known limitations, there was some transfer of territorial control to the Palestinian Authority in so-called Areas A and B of the West Bank[183]. He contends, moreover, that there is no rule of international law prescribing a minimum area of territory for a State[184]. A State can exist even when another State claims its territory, and it does not vanish when it loses control over part of its territory[185]. The existence of the Palestinian State should not be called into question, and neither should the possibility for it to be admitted as a full Member State of the United Nations. The distinguished Australian jurist concludes his analysis with what is, to my mind, a very pertinent reflection, from which the Court should have drawn inspiration:

> "There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts."[186]

14. Furthermore, it should be recalled that the existence of a State does not depend on recognition by other States or by any international organization. The recognition of a State by another has only a declaratory effect. It does not constitute the State, it does not create it but "merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law" (Article 6 of the above-mentioned Montevideo Convention). Article 13 of the Charter of the Organization of American States, for its part, confirms the declaratory nature of recognition when it provides that "[t]he political existence of the State is independent of recognition by other States". This belief is not limited to regional international law and academia. As new States were beginning to emerge in the wake of decolonization, Professor Marcel Sibert stated that

> "[f]rom the fact that recognition is declaratory and can in no way confer international legal personality, it may be deduced that it cannot be arbitrarily refused without the refusing State thereby breaching international law . . . From the fact that recognition is declaratory rather than capable of conferring something, it must also be deduced that recognition cannot be conditional."[187]

15. Recognition can nevertheless reinforce the legitimacy of a State and its capacity to take action at the international level, which is not insignificant, as is the case for Palestine. Indeed, the majority of States (149 to date) have already unilaterally recognized Palestine as a State. Furthermore, Palestine has bilateral relations with more than 140 States and is party to some hundred multilateral conventions. I therefore do not understand the Court's excessive caution in this regard.

16. However, the question that should have been developed by the Court is that of the *consolidation and viability of the State of Palestine*. The Advisory Opinion could have taken the current situation into account by recognizing that what is important now is to consolidate the State of Palestine and make it viable, including by settling *through negotiations* the question of boundaries, the sharing of natural resources, the return of refugees

[183] J. Crawford, *The Creation of States in International Law (2nd Edition)*, Oxford Public International Law, 2007, p. 442.
[184] J. Crawford, "State", in *Max Planck Encyclopaedia of International Law*, para. 15.
[185] *Ibid.*, para. 19.
[186] J. Crawford, *The Creation of States in International Law (2nd Edition)*, Oxford Public International Law, 2007, pp. 447-448.
[187] M. Sibert, *Traité de droit international public : le droit de la paix*, Dalloz, Paris, 1951, p. 192 [*translation by the Registry*].

and reparation for wrongful acts committed by Israel, but without using ambiguous language that casts doubt over the existence, under international law, of the State of Palestine.

17. To conclude, the Court should have seized the opportunity presented to it by this Advisory Opinion to make a definitive pronouncement on the statehood of Palestine. Such a declaration would have rendered the Advisory Opinion fully effective, for the purpose of launching negotiations between two States, on an equal footing, under the best possible conditions and without any possibility of questioning whether, despite a prolonged occupation that has led to the annexation of large swathes of Palestinian territory, Palestine, as a full subject of international law, is an established fact that should be beyond legal doubt.

II. The right to self-determination as a *jus cogens* norm

18. The Court considered that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (paragraph 233). This right derives from the United Nations Charter (Article 1, paragraph 2, and Articles 55 and 56, which provide for the development of international relations based on respect for human rights and self-determination). It was developed in General Assembly resolution 1514 (XV) and in principle VII of resolution 1541 (XV) on decolonization, both dating back to 1960. General Assembly resolution 2621 (XXV) of 1970 declares that "the further continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the principles of international law" (A/RES/2621 (XXV)). For its part, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which is annexed to General Assembly resolution 2625 (XXV) of 1970, stresses the importance of the right to self-determination as a fundamental principle of international law.

19. The right of peoples to self-determination thus emanates, to a very great extent, from the universal parliament that is the United Nations General Assembly. In this context, I think it is worth recalling the still very pertinent question of the legal value of United Nations resolutions. The great Mexican jurist Jorge Castañeda tells us that:

> "[t]here is no essential reason why other international organs, which are broadly representative, cannot validly express, on behalf of the international community, what it considers to *be* international law at a given time . . . Assembly resolutions *do not create the law, but they can prove, with authority, that it exists*"[188].

20. Antonio Gómez Robledo, for his part, adopting the concept of the duality of functions dear to Georges Scelle, points out that the General Assembly, in the form of a resolution that *stricto sensu* has the status of a recommendation, gives rise to a source of international law as authentic as that of custom, and which, given the extraordinary speed of modern means of communication, does not have to conform to the old, slow pace of traditional custom. On that basis, he questions how there can be any doubt that the right to self-determination emanates from an authentic source of international law, when it is the legal conscience of mankind that recognizes and proclaims it[189].

Concerning the identification of *jus cogens* norms, Antonio Gómez Robledo also tells us the following:

> "For our part, we think that it is not possible for all the resolutions of the General Assembly to be endowed with the character of *ius cogens* . . . , but only those resolutions that are to some extent legislative and address the highest interests of the international community . . . General Assembly

[188] J. Castañeda, "Valeur juridique des résolutions des Nations Unies", *Recueil des cours de l'Académie de droit international de La Haye*, t. 129, p. 317, 1970 [*translation by the Registry*].

[189] A. Gómez Robledo, *El derecho de autodeterminación de los pueblos y su campo de aplicación*, Instituto Hispano-Luso-Americano de Derecho Internacional, Undécimo Congreso, Madrid, 4-12 October 1976, p. 19.

> resolutions would thus not have the status of a generative source . . . but that of a testimonial source. Resolution 1514 (XV), for example, would provide ample proof of this assessment. When for fifteen years (1945-1960) an overwhelming majority of Member States of the United Nations argued in favour of decolonization and the enshrinement of the right to self-determination of peoples, the resolution of the General Assembly simply authenticates an international custom that lacks in neither *diuturnitas* nor *opinion iuris*."[190]

21. The Court has previously declared that the right of peoples to self-determination is a fundamental right that creates an obligation which, by its very nature, concerns all States and therefore has an *erga omnes* character (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 102, para. 29, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 155 and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* p. 139, para. 180). It reiterates this once again in the present proceedings, and also refers to the prohibition of the acquisition of territory by force and certain obligations incumbent on Israel under international humanitarian law and human rights law as obligations *erga omnes* (paragraph 274).

22. Although, in the past, the Court has not expressly characterized the right to self-determination as *jus cogens*, that characterization could already be inferred from the legal consequences repeatedly identified by the Court as a result of its violation, such as the obligation not to recognize or render aid or assistance in maintaining the illegal situation and to co-operate to bring it to an end (see, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 200, para. 159 and *Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* p. 139, paras. 180 and 182). The Court has established these consequences in the present proceedings, linking them to the nature and importance of the rights and obligations at issue, which require all States "not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory" and "not to render aid or assistance in maintaining the situation created by Israel's illegal presence" (paragraph 279, see also paragraph 275). It is, however, regrettable that the Court has not *directly* established the link between the finding that the right to self-determination has the status of a peremptory norm and the consequences of its violation.

23. In this regard, the consequences identified by the Court arising from violations of the right to self-determination, considered in the light of obligations *erga omnes*, are in line with the provisions of Article 41, paragraphs 1 and 2, of the Articles on the Responsibility of States for Internationally Wrongful Acts[191].

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[190] A. Gómez Robledo, "Le *ius cogens* international, sa genèse, sa nature, ses fonctions", *Recueil des cours de l'Académie de droit international de La Haye,* t. 172 (III), pp. 174-177, 1981 [*translation by the Registry*].

[191] Article 41:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

In its commentary on Article 40, the International Law Commission (ILC) observed that "the peremptory character of certain other norms seems also to be generally accepted" and "the obligation to respect the right of self-determination deserves to be mentioned" (Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, commentary on Article 40, *Yearbook of the International Law Commission* (*YILC*), 2001, p. 113, para. 5). The ILC also referred to the *East Timor* case, in which the Court found that "[t]he principle of self-determination of peoples . . . is one of the essential principles of contemporary international law" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), which, according to the ILC, "gives rise to an obligation to the international community as a whole to permit and respect its exercise" (Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, commentary on Article 40, *YILC*, 2001, Vol. II, Part 2, p. 113, para. 5).

See also Article 26 of the Articles on the Responsibility of States for Internationally Wrongful Acts: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory

24. In this context, it may be recalled that, in conclusion 19 of its Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), the International Law Commission (hereinafter the "ILC") addressed the specific consequences of serious violations of peremptory norms of general international law (*jus cogens*), namely the obligation to co-operate, the obligation not to recognize and not to render aid or assistance in maintaining a situation created by a serious breach of those norms[192]. The ILC also recognized the peremptory nature of the right to self-determination by including it in its non-exhaustive list of peremptory norms of general international law in the annex to conclusion 23 of its above-mentioned Draft Conclusions[193].

25. It is precisely the legal consequences of the violation of the right to self-determination that argue in favour of that right being recognized as a hierarchically higher norm, rather than the fact that these are obligations *erga omnes* which give rise to standing but do not, as such, create peremptory norms. That is why the Court takes a fundamental step forward in this Advisory Opinion, even though it still appears to hold back to some extent in this regard.

26. More broadly, the dictum of the Court proceeds from an observation on the "centrality" of the right of self-determination in international law. It should be noted that the reference to a situation of foreign occupation (paragraph 233) has the merit of referring the question to the very core of the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)), which declares that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation". Thus, a prolonged foreign occupation, such as the one under consideration in these proceedings, becomes alien domination within the meaning of resolution 1514 (XV) and therefore justifies the right to self-determination being elevated to the level of a peremptory norm in international law.

27. Furthermore, the Court has long recognized that norms such as the prohibition of genocide and torture are *jus cogens* (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64

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norm of general international law". In its commentary on Article 26, the ILC stated that "[t]hose peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination" (Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, commentary on Article 26, p. 85, para. 5).

[192] In the commentary on draft conclusion 19 referred to above, the ILC noted the following:

> "While in both advisory opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* the Court does not make an explicit reference to peremptory norms of general international law (jus cogens), the norms to which the Court attached the duty to cooperate to bring to an end serious breaches are peremptory in character".
>
> It explains that there is a "significant overlap between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* such that the deduction that the Court in these decisions was referring to peremptory norms of general international law (*jus cogens*) is not unwarranted" (see Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with commentaries, commentary on draft conclusion 19, p. 72, para. 6).

[193] Conclusion 23. Non-exhaustive list.

"Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (jus cogens), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(a) The prohibition of aggression;
(b) the prohibition of genocide;
(c) the prohibition of crimes against humanity;
(d) the basic rules of international humanitarian law;
(e) the prohibition of racial discrimination and apartheid;
(f) the prohibition of slavery;
(g) the prohibition of torture;
(h) the right of self-determination."

and p. 52, para. 125; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I),* p. 111, para. 161; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I),* p. 47, para. 87; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II),* p. 457, para. 99. See also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I),* p. 140, para. 93, where the Court addresses the relationship between *jus cogens* and rule of State immunity).

28. In conclusion, by attaching all the consequences of a violation of a peremptory norm of general international law (*jus cogens*) to Israel's multiple and ongoing violations of the right of the Palestinian people to self-determination, the Court unambiguously places itself on the side of

> "[the] collective guarantee of respect for rules deemed essential for the maintenance of the values of the international community at a certain point in its development as an entity governed by law, [which] is the only logical outcome in view of the importance attached to these rules. This is consistent with the evolution of human rights law"[194].

Thus, the Court gives the primacy of the right to self-determination its full import and weight in the hierarchy of the fundamental rights and duties that structure the contemporary international order. This is of prime importance and should be recalled at all times and in all places to all people.

The Court also confers on the right of peoples to self-determination its full axiological nature, as a concept that reflects and, at the same time, inspires a world view.

(Signed) Juan Manuel GÓMEZ ROBLEDO.

[194] J. M. Gómez Robledo, "L'avis de la Cour internationale de Justice sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé", *Revue générale de droit international public*, July-September 2005, No. 3, p. 534 [*translation by the Registry*].

[Original: English]

SEPARATE OPINION OF JUDGE CLEVELAND

People of Palestine and Israel have right to self-determination — Israel's lack of participation in proceedings — General Assembly request addresses only one party.

*Failure of Court to examine long-standing situation in Gaza — Temporal scope of Opinion excludes Israel's response in Gaza Strip to 7 October 2023 attack —*Jus ad bellum *determines legality of Israel's presence in Occupied Palestinian Territory — Court does not substantiate conclusion that Israel's presence is unlawful with respect to Gaza — Court should have identified legal obligations of Israel regarding Gaza.*

Annexation in context of prohibition of acquisition of territory by force involves use of force to control foreign territory with intent to exercise permanent control — Court finds this violated in East Jerusalem and West Bank.

Conclusion that obligation to respect right to self-determination is a peremptory norm should be understood in context of alien subjugation and foreign domination — erga omnes *character of self-determination informs Court's conclusions on responsibility of States and United Nations.*

1. In resolution 181 of 1947, the General Assembly proposed the partition of Mandatory Palestine into two States, Jewish and Arab, which it expected to come into existence within two months of Britain's withdrawal and no later than 1 October 1948. Israel accepted the partition proposal and declared independence in May 1948. Israel was admitted as a UN Member State in 1949 on the basis of, *inter alia*, its acceptance in principle of an Arab State in the remainder of Palestine (General Assembly resolution 273 (III)). In 1993, the Palestine Liberation Organization (PLO) renounced violence and recognized the State of Israel and its right to live in peace and security. Israel in turn recognized the PLO as the legitimate representative of the Palestinian people.

2. In light of the General Assembly's request, the Court's Opinion understandably focuses on the enduring denial of the right to self-determination of the Palestinian people in the Occupied Palestinian Territory. It finds that "[a]s a consequence of Israel's policies and practices, which span decades, the Palestinian people has been deprived of its right to self-determination" (Advisory Opinion, para. 243), a conclusion I share. However, the right to self-determination has not been fully realized for the people of either Palestine or Israel. The people of Israel, too, have the right to self-determination, including the right to political independence, to territorial integrity, and to live in peace and security within recognized borders. Violent attacks against the State of Israel and its people, and the refusal of other States to recognize the legitimate existence of the State of Israel — including a number of the States participating in these advisory proceedings — also violate this right. The right of the peoples of both Palestine and Israel to live in peace within secure and recognized borders is an essential element to securing regional peace (UNSC resolution 242 (1967); UNSC resolution 338 (1973); UNSC resolution 1515 (2003); UNSC resolution 2334 (2016)).

3. Regrettably, the Court makes no meaningful effort to grapple with the assaults on the right to self-determination that have confronted the people of Israel since the State's inception. In addition to addressing the ongoing obstacles to the right of self-determination of the Palestinian people — which are myriad and egregious — I believe that, in rendering this Opinion, the Court had a responsibility to acknowledge, and to take into greater account, the ongoing threats to Israel and its people.

4. It also is unfortunate that Israel did not meaningfully participate in these advisory proceedings. Israel submitted a five-page written statement to the Court, together with annexes. It chose not to participate in the oral proceedings, despite the fact that up to the opening of those proceedings, the Court had reserved three hours for Israel to present its views — the same amount of time allocated to the observer State of Palestine, and six times the amount allocated to any other participant. This is an advisory proceeding, and no State was under an

obligation to participate, including Israel. Israel's participation in the oral proceedings, however, would have benefited the Court. Conversely, the failure of a State to participate cannot prevent the Court from fulfilling its responsibilities in replying to an advisory request.

5. Finally, it is regrettable that the General Assembly's request focused only on the conduct of Israel in relation to Palestine, as opposed to the legal consequences arising from the policies and practices of all relevant actors in the Israel-Palestine situation. Israel and its population have also suffered grievous harms to their rights under international law in the period covered by the request. Resolution of the Israel-Palestine situation will not be achieved until the harms committed by all relevant actors are acknowledged and addressed.

6. That said, I agree with most of the Court's conclusions, within the framing of the issues by the Court. In addition to my joint declaration with Judge Nolte, which addresses the question of the legality of Israel's continuing presence in the Occupied Palestinian Territory, I write separately to set forth my views on the Court's approach to the question of Gaza, the concept of annexation and self-determination as a peremptory norm of international law.

I. THE QUESTION OF GAZA

7. The situation in the Gaza Strip has been tragic for decades and, as the Court has observed, is now "catastrophic" and "disastrous" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Order of 24 May 2024*, para. 28). It is unclear, however, what legal and practical conclusions can be drawn from the Court's Opinion regarding Israel's long-standing conduct toward the Gaza Strip. The circumstances of the current armed conflict in the Gaza Strip are not before the Court in this Advisory Opinion, and the temporal scope of the Opinion established by the Court makes the application of the Court's conclusions to Gaza difficult. In my view, the Court also does not substantiate its conclusion that the unlawfulness of Israel's presence, and the concomitant duty to withdraw, apply to the current situation in the Gaza Strip.

8. On the other hand, the Court could, and should, have addressed other questions regarding Israel's responsibilities and the legality of Israel's policies and practices with respect to the Gaza Strip which existed before 7 October 2023 and which are ongoing. I address some of these below.

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9. With respect to the temporal scope of the Advisory Opinion, the Court significantly states that "the policies and practices contemplated by the request of the General Assembly do not include conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023" (Advisory Opinion, para. 81). The Court then underscores this important temporal limitation on the Opinion just before providing its reply to the General Assembly's request, reiterating that its reply "rests on the totality of the legal grounds set forth by the Court above, each of which is to be read in the light of the others, taking into account the framing by the Court of the material, territorial and temporal scope of the questions (paragraphs 72 to 83)" (*ibid.*, para. 284). This clarifies, at a minimum, that the Opinion does not address Israel's response to the 7 October 2023 attack and the resulting devastating situation in Gaza. Nor does it address how the current conflict may affect the legality of Israel's pre-existing and continuing military engagement with the Gaza Strip.

10. Otherwise the Opinion says very little about Gaza. In identifying the applicable law in paragraphs 88 to 94, the Court observes that after its withdrawal in 2005, Israel continued to exercise certain key elements of authority with respect to the Gaza Strip, including "control of the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone"

(para. 93). In this regard, it concludes that aspects of the law of occupation continued to apply with respect to the Gaza Strip, commensurate with Israel's degree of effective control (para. 94). However, the Court does not identify which obligations continued to bind Israel after 2005, nor does it find any violations of such obligations. In fact, the Court's determination that the law of occupation continued to apply with respect to the Gaza Strip plays no subsequent role in the Court's analysis.

11. The Court's failure to identify what responsibilities Israel retained under the law of occupation in relation to Gaza, and its failure to draw any conclusions therefrom, leaves the status of Gaza in this period, and Israel's corresponding obligations, in a state of great uncertainty.

12. The Court's detailed discussion of Israel's settlement policies and annexation of parts of the Occupied Palestinian Territory does not address Gaza (Advisory Opinion, paras. 111-179). The Court's analysis of "related discriminatory legislation and measures" notes restrictions on movement between Gaza, the West Bank and East Jerusalem (*ibid.*, paras. 202-203) but makes no specific finding of discrimination with respect to Israel's policies and practices regarding Gaza. The Court's finding of a violation of Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination is expressly limited to Israel's policies and practices in East Jerusalem and the West Bank (*ibid*., para. 226).

13. By contrast, the Court's consideration of the right to self-determination unquestionably applies to all Palestinians in the Occupied Palestinian Territory, including in the Gaza Strip. The Palestinian people constitute a people (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 182-183, para. 118), and the Occupied Palestinian Territory "constitutes a single territorial unit, the unity, contiguity and integrity of which are to be preserved and respected" (Advisory Opinion, para. 78). As the Court affirms, as part of its right to self-determination, the Palestinian people has the right to the integrity of its territory and population, to permanent sovereignty over its natural resources and to freely determine its political status and to pursue its economic, social and cultural development across the Occupied Palestinian Territory (*ibid.*, paras. 238-241). Thus, violations of the right to self-determination that result from Israel's unlawful conduct necessarily obstruct the enjoyment of this right throughout the Occupied Palestinian Territory, regardless where in the territory Israel's policies and practices took place.

14. Most notably, Gaza is absent from the key findings underlying the Court's conclusion that Israel's presence in the Occupied Palestinian Territory is unlawful. As the Court makes clear, it is the violation of the rules regarding the use of force, the *jus ad bellum*, that makes the presence of an occupying Power unlawful (Advisory Opinion, paras. 251 and 253; see also joint declaration of Judges Nolte and Cleveland, para. 7). Instrumentalizing an occupation to achieve the acquisition of territory, as Israel has done in East Jerusalem and the West Bank, renders such presence unlawful, irrespective of any self-defence justification a State may have (joint declaration of Judges Nolte and Cleveland, para. 8).

15. None of the circumstances that lead the Court to conclude that Israel's presence violates the rules regarding the use of force apply to the Gaza Strip, however. The Court does not find that Israel has expanded settlements and related infrastructure in the Gaza Strip. Indeed, Israel evacuated its settlements from Gaza in 2005 (Advisory Opinion, paras. 68 and 114). The Court does not suggest that Israel has annexed, or has sought to annex, the Gaza Strip. Nor does it contend that Israel otherwise violated the prohibition on the use of force between 2005 and 2023 with respect to Gaza. Thus, the core conclusion of the Court — that Israel's policies and practices as an occupying Power violate the prohibition of the acquisition of territory by force, and thus exclude any justification of self-defence — is not applied to Gaza.

16. The Court nevertheless attempts, in the space of a single paragraph, to bring Gaza within its conclusion that Israel's presence in the "entirety" of the Occupied Palestinian Territory is unlawful, based on the integrity of the Occupied Palestinian Territory (Advisory Opinion, para. 262).

17. However, this solitary paragraph does not explain how a violation of the right to self-determination — in the *absence* of a violation of the prohibition of acquiring territory by force — renders an occupying Power's presence unlawful. Nor does it explain how such a violation can somehow override any legitimate exercise of the right to self-defence that Israel may have with respect to the Gaza Strip. As the Court's own examination of the question whether the Gaza Strip remained occupied after 2005 demonstrates, the question whether an occupation exists requires a separate analysis of the circumstances with respect to a specific region or territory (Advisory Opinion, paras. 88-94; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 230-231, paras. 174-178). The legality of a State's military presence in foreign territory likewise requires separate analyses if different circumstances prevail in different regions. It is not determined by a principle of territorial unity. Thus, a use of force that is lawful in one part of a territory may not be lawful in another.

18. Some information before the Court may suggest that Israel has sought to exercise permanent control over the entire Occupied Palestinian Territory, including the Gaza Strip, in order to facilitate the progressive annexation of parts of the territory and the alteration of its demographic character, and to obstruct the right to a Palestinian State. The Court, however, does not make such a determination. It does not conclude that Israel is trying to permanently control the Occupied Palestinian Territory as a whole, or the Gaza Strip. It simply does not address the question. In the absence of such a finding, a determination that Israel's presence in relation to the Gaza Strip violated the *jus ad bellum* would have required a finding that Israel's military presence pertaining to the Gaza Strip prior to 7 October 2023 lacked *any* legitimate self-defence justification. This would have required the Court to grapple with legal and factual considerations regarding the scope of Israel's legitimate right to use force to protect its territory and its people, which the Court does not remotely purport to confront (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 195, para. 141).

19. The temporal limitation imposed by the Court (Advisory Opinion, paras. 81 and 284) also makes very unclear what it means for the Court to say that Israel must withdraw from the Gaza Strip as rapidly as possible, somehow *without taking into account* the circumstances resulting from Israel's response to the 7 October 2023 attack.

20. There are understandable reasons for the Court's reticence with respect to its consideration of the Gaza Strip. The General Assembly's request of December 2022 asked the Court to examine Israel's policies of, *inter alia*, "settlement", "annexation" and "*related*" discriminatory measures, and their impact on the legal status of the occupation. This framing placed the lens primarily on East Jerusalem and the West Bank, where these policies and practices are in place (resolution 77/247 of 30 December 2022, para. 18). Participants in the advisory proceedings likewise focused their submissions primarily on these parts of the Occupied Palestinian Territory. The situation in the Gaza Strip after 7 October 2023, which emerged after the General Assembly adopted the request, was also difficult for the Court to consider, given that it involves an ongoing armed conflict and is the subject of two sets of contentious proceedings before the Court.

21. Accordingly, for the reasons above and those set forth in my joint declaration with Judge Nolte, I agree with the Court's reply that "the State of Israel's continued presence in the Occupied Palestinian Territory is unlawful" (Advisory Opinion, para. 285 (3)). This is correct with respect to East Jerusalem and the West Bank. However, I disagree that the Court established that this conclusion applies to the "entirety" of the Occupied Palestinian Territory (*ibid.*, para. 262). The combination of the Court's temporal limitation, and its failure to substantiate its *jus ad bellum* analysis with respect to Gaza, render this particular conclusion of the Court inapplicable to the current situation in the Gaza Strip.

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22. Nevertheless, I believe that, at a minimum, the Court could and should have made clearer certain responsibilities of Israel with respect to the long-standing tragic situation in the Gaza Strip, and it is regrettable that it did not do so.

23. First, as the Court notes, Israel's settlement policy in Gaza prior to 2005 "was not substantially different" from the current policy in East Jerusalem and the West Bank (Advisory Opinion, para. 114). For the reasons stated by the Court, the transfer of the population of an occupying Power into an occupied territory is prohibited under Article 49 of the Fourth Geneva Convention (*ibid.*, paras. 115-119). Thus, any future attempt to resurrect such a settlement policy with respect to the Gaza Strip would constitute a "flagrant violation" of this prohibition (UNSC resolution 465 (1980) of 1 March 1980; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 183-184, para. 120).

24. Second, with respect to Israel's obligations under the law of occupation regarding Gaza after 2005 (see para. 10 above), it is clear that Israel did not exercise effective control over most of the day-to-day government administration of the Gaza Strip — a responsibility which, after 2007, was under the control of Hamas. Israel, therefore, did not generally possess the effective control necessary, for example, to incur the obligation under Article 43 of the 1907 Hague Regulations to maintain public order within Gaza. Nevertheless, the Court could have found that Israel's control over the sea and air space of the Gaza Strip, as well as land crossings (which it shared in part with Egypt (Advisory Opinion, para. 89)), and its severe restrictions on, for example, imports of food, exports, and activities such as fishing in Gaza's maritime space (contrary to Israel's commitments under the Oslo Accords), brought with it, *inter alia*, aspects of the duty "to ensur[e] the food and medical supplies of the population" under Article 55 of the Fourth Geneva Convention, as well as the duty to facilitate humanitarian relief under Article 59 of that Convention.

25. The Court could also have considered whether aspects of Israel's restrictions on ingress and egress violated the economic and social rights and other human rights of the Palestinian population in the Gaza Strip. Furthermore, it is always the case that any use of military force that is disproportionate to a legitimate right of self-defence violates the *jus ad bellum*, and that any use of force that causes disproportionate civilian harm compared to the anticipated military advantage violates the *jus in bello*.

26. Finally, I believe the Court's Opinion makes clear that it would violate the *jus ad bellum* for Israel to use its position as an occupying Power to seek to exercise permanent control over the Occupied Palestinian Territory as a whole, including the Gaza Strip. Such use of force also would further compound the violations of the Palestinian people's right to self-determination.

27. All these obligations with respect to Gaza remain ongoing.

II. THE CONCEPT OF ANNEXATION

28. It is perhaps unfortunate that the General Assembly framed part of question *(a)* in terms of "annexation". International law, in the form of Article 2, paragraph 4, of the UN Charter and of custom, prohibits the "acquisition of territory" through the threat or use of force. The critical question, then, is what constitutes an unlawful "acquisition" of territory that could place the conduct of an occupying Power in violation of this fundamental norm. "Annexation" in this sense can be (mis)understood as involving the assertion of formal sovereignty over a territory or the incorporation of foreign territory into a State's own territory — neither of which is required for a violation of the prohibition of the acquisition of territory by force. The Court at times appears to equate annexation with incorporation, which could suggest an unnecessary restriction on this prohibition (see e.g. paragraph 158 of the Advisory Opinion, defining annexation as "integration into the territory of the occupying Power"; and paragraph 170, stating that "Israel has also taken steps to incorporate the West Bank into its own territory").

29. While many participants in these proceedings contended that at least part of the Occupied Palestinian Territory has been annexed, few addressed the meaning of this concept. Japan, however, elaborated on the forcible acquisition of territory in its submissions, stating that the principle consists of "the establishment of control over the territory through forcible measures", coupled with "the intention to appropriate that territory permanently"[195]. Japan further maintained that this prohibition applies to "any unilateral attempts to change the peacefully established status of territories by force or coercion".

30. The Court's predominant reasoning is consistent with this approach. The Court makes clear that the essence of the prohibition of the acquisition of territory by force involves the use of force to control a foreign territory, with the intent of exercising permanent control. Thus, the Court observes that annexation "presupposes the intent of the occupying Power to exercise permanent control over the occupied territory" (Advisory Opinion, para. 158; see also paragraphs 159 and 161). It does not restrict "annexation" to the assertion of formal sovereignty or a situation of incorporation. Accordingly, the Court concludes that Israel's policies and practices in large parts of the Occupied Palestinian Territory, notably East Jerusalem and in the West Bank, "are designed to remain in place indefinitely and to create irreversible effects on the ground" (*ibid.*, para. 173). In other words, they are intended to be permanent. Such conduct violates the *jus ad bellum* prohibition of the acquisition of territory by force.

III. Self-determination as a peremptory norm

31. The Court declares, for the first time, that the right to self-determination is a peremptory norm of international law. In so doing, it states that "in cases of foreign occupation such as the present case the right to self-determination constitutes a peremptory norm" (Advisory Opinion, para. 233). Unfortunately, the Court provides no explanation of what it means by "cases of foreign occupation such as the present case", or how this formulation relates to the concept of a peremptory norm of international law.

32. The right to self-determination is fundamental. In its full articulation, it is also a broad and indeterminate right, with both external and internal aspects. The external aspect of self-determination has been most extensively elaborated with regard to the right of peoples to be free from alien subjugation and foreign domination in the context of decolonization (General Assembly resolution 1514 (XV) of 14 December 1960, para. 1). It is in this context that self-determination most clearly could be recognized as a peremptory norm.

33. In my view, in referring to "foreign occupation such as the present case", the Court was focusing on the features of Israel's occupation that are potentially analogous to a situation of foreign domination. These features include a situation of prolonged occupation characterized by annexation through permanent control and the accompanying suppression of self-determination, over a period of decades. Any foreign occupation, by definition, however lawful, will likely involve the temporary denial of aspects of the right to self-determination. Therefore, by using the formulation "foreign occupation *such as the present case*", the Court intended to make clear that it is the particular features of Israel's prolonged occupation that analogize it to a situation of alien subjugation and foreign domination which implicate the right to self-determination as a peremptory norm.

34. The Court has recognized for decades that the right to self-determination is a foundational principle of the UN Charter and a fundamental human right, and that it gives rise to obligations *erga omnes* (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-32, para. 55; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88, and p. 199, para. 155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 131, paras. 144, 146, and p. 139, para. 180). The Court also focuses on the *erga omnes* character of the norm in this case. Indeed, in addressing the legal consequences that flow from Israel's violations

[195] Citing Rainer Hofmann, "Annexation" in *Max Planck Encyclopedia of Public International Law* (January 2020) and Coleman Phillipson, *Termination of War and Treaties of Peace* (EP Dutton 1916), p. 9.

of international law, the Court draws upon the character and importance of the obligations at issue as "*erga omnes*", not as peremptory norms of international law. It is the *erga omnes* character of the norms as "the concern of all States" that informs the Court's determination of the responsibilities of States and the United Nations (Advisory Opinion, paras. 274 and 280). I believe that this approach is correct and is consistent with the Court's prior case law.

35. In other words, the Court did not need the pronouncement that self-determination constitutes a peremptory norm of international law for its analysis and did not adopt it for that reason. The Court made the pronouncement because it believed it to be legally correct.

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36. On 7 October 2023, Hamas, the *de facto* governing authority in the Gaza Strip, together with other armed groups, violently attacked Israel and its citizens. By contrast, the observer State of Palestine took its grievances to the UN General Assembly and to this Court, by way of this request for an advisory opinion. It thereby sought to invoke the assistance of the UN organs in the peaceful resolution of disputes and the maintenance of international peace and security, consistent with the mandate of the UN Charter and this Court, and with the obligations of all Member States of the United Nations.

37. At the close of its Opinion, the Court recognizes that

> "the realization of the right of the Palestinian people to self-determination, including its right to an independent and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States, as envisaged in resolutions of the Security Council and General Assembly, would contribute to regional stability and the security of all States in the Middle East" (para. 283).

38. I hope that the Court's Advisory Opinion can be understood to contribute to that worthy goal.

(*Signed*) Sarah CLEVELAND.

[Original: English]

DECLARATION OF JUDGE TLADI

The situation in the Occupied Palestinian Territory is not a bilateral dispute — The policies and practices of Israel are in breach of peremptory norms of international law — The security concerns of Israel cannot override its international legal obligations — The policies and practices can be characterized as apartheid — The United Nations is under an obligation to consider further measures and modalities in the event of non-compliance.

I. INTRODUCTION AND CONTEXT

1. I have voted in favour of all the paragraphs of the operative clauses of the Court's Opinion and, overall, I am pleased with the outcome. Given the collective nature of the Court's decision-making process, the reasoning is not always going to be as clear as it could be, but this should not detract from the overall significance of the Opinion in the continuing search for peace in the Middle East. In this declaration, I wish to address certain salient points in the Advisory Opinion that merit some elucidation.

2. Some may question the main conclusion of the Opinion, namely that the continued presence of Israel in the Occupied Palestinian Territory ("OPT") is unlawful and, as a consequence, that Israel must terminate its presence. In this context, it may be questioned whether the breaches of international law by Israel necessarily lead to the conclusion that Israel's presence is unlawful and that it must therefore withdraw from the OPT. It is true that the mere fact of violation of certain rules of international law would not always lead to the unlawfulness of the presence itself. What the Opinion illustrates however, is that, the seriousness and magnitude of Israel's violations, as well as the nature of the rules breached, are such as to remove any pretences concerning the purpose of Israel's presence — transforming what *may have been* lawful presence based on occupation, to unlawful presence because such presence clearly amounts to a manifest violation of fundamental rules of international law prohibiting the acquisition of territory by force and the denial of the right of self-determination.

3. It is not just the fundamental character of the rules breached, or the egregiousness of the breaches, but also the fact that the breaches have continued, and indeed worsened, notwithstanding repeated calls for their cessation from multiple organs and entities that leads to the Court's conclusion. The seriousness and magnitude of the violations, in effect, unrobe the emperor, leaving the truth bare; it reveals that there is nothing about the enterprise in question that justifies it as a temporary occupation. It is simply annexation, which breaches the right of self-determination of the Palestinian people and the prohibition of acquisition of territory by force. Put differently, from the facts presented to the Court, it is clear that Israel has used occupation as a front to cover up its breaches of some of the most fundamental principles of international law. This is what I understand by the Court's reference to "sustained abuse by Israel of its position as an Occupying Power"[196]. Under these circumstances, any lingering suggestion that Israel's unlawful conduct somehow does not affect the lawfulness of its presence would have the effect of shrouding Israel's presence in the OPT with a cloak of legality — something which I find simply incomprehensible.

4. Many, on the other hand, will praise the Opinion, rightfully so, for confirming the unlawfulness of Israeli presence on the Occupied Palestinian Territory, and the duty on Israel to withdraw from that territory. Yet, this conclusion should hardly come as a surprise given the 2004 *Wall* Opinion and the terms of the question posed by the General Assembly in Resolution 77/247 which identified particularly important rules, namely the right of self-determination, rules of international human rights law, in particular those prohibiting discrimination, the prohibition of the acquisition of territory by force and the basic rules of international humanitarian law, against which to assess the policies and practices of Israel. As I will go on to expand below, serious violations of these fundamental rules of international law could scarcely have resulted in a different conclusion. With most legal

[196] Opinion, para. 261.

issues there are arguments and counterarguments that pull in different directions, even if there is an objectively correct legal position. The situation in the OPT, however, is one of the few cases in international law in which it is challenging to find legal and political arguments that pull in a direction in opposition to the Palestinian right of self-determination and in favour of the prolonged Israeli occupation of Palestinian territory and the subjugation of the Palestinian people. Even in the course of the current proceedings, States that can be described as "arguing on the side of Israel", with the exception of two States, namely Zambia and Fiji, took a decidedly procedural stance, arguing on jurisdiction and urging the Court either not to exercise its jurisdiction or to limit its jurisdiction. But given the clear facts and the state of the law, few States appeared willing to argue that the rules and principles referred to in the question put by the General Assembly have not been violated by Israel. The Court's finding that there have been grave and serious violations of the right of self-determination and the prohibition of the acquisition of territory by force, seen in that context, is not surprising or earth-shattering.

5. In this declaration, I wish to address five issues that arose in the context of these advisory proceedings, and which I believe warrant further analysis. First, I am troubled by arguments made by some participants in the course of these proceedings that seek to describe the Israeli occupation, and the consequences of that occupation, as a bilateral dispute between Israel and Palestine (see Section II below). The Court addresses this only briefly and in so doing misses an important normative opportunity. I will also, in this context, address the Court's over-indulgence of arguments concerning its discretion to decide to not respond to a request for an advisory opinion, particularly when the request comes from the General Assembly or the Security Council. The second, and perhaps the most important issue for me is the right of self-determination and its status as *jus cogens* (see Section III below). Third, I will explain why, in my view, the Court was correct to find that the policies and practices of Israel in the Occupied Palestinian Territory amount to apartheid (see Section IV below). Fourth, the Court does not directly and comprehensively address the issue of Israel's security concerns, a decision I fully understand. Nonetheless, since Israel's security concerns are at the heart of much of the justification for its policies and practices, it is important to say something about them, and I will do so in this declaration (see Section V below). Fifth, in the context of the consequences flowing from Israel's breaches for the United Nations, the Court states that the United Nations should consider the "precise modalities and further action required to bring to an end as rapidly as possible" the unlawful presence of Israel in the OPT[197]. While this conclusion is correct, I believe that the Court could have described more concrete action that the United Nations should consider to bring to an end the unlawful presence of Israel in the OPT and to have Israel comply with its obligations under international law. I will provide some thoughts on the concrete action that the United Nations might consider in furtherance of the Palestinian right of self-determination and compliance with the terms of the Court's Opinion in general (see Section VI below).

II. The Palestinian question is not a bilateral dispute

6. All the participants in these proceedings have accepted that the Court has jurisdiction to render the requested advisory opinion. Yet it has been suggested by some that the Court ought not to exercise its jurisdiction — the legal jargon in use for the plea to the Court not to exercise its jurisdiction is that the Court has discretion and should exercise that discretion to decline to render an opinion in respect of this question, even though it has jurisdiction. The reasons that have been put forward in these proceedings for the Court to so exercise its discretion are several. In addition to the reason that will be the subject of this section, namely that the question involves a bilateral dispute, it has also been said that any opinion rendered will not be of assistance to the General Assembly, that it would undermine the political peace process, that it would undermine the role of the United Nations Security Council, that the Court does not have sufficient information to render an opinion, and that the questions are formulated in a biased way. These reasons are, by and large, drawn from the Court's jurisprudence.

7. I have no intention to address each of these. However, I would like to make a general point about the discretion that the Court is said to have to decline rendering an opinion. According to what has now become the

[197] Opinion, para. 285 (9).

Court's jurisprudence, further entrenched by the current Advisory Opinion of the Court, the Court has the discretion to decide not to exercise its advisory jurisdiction if there are compelling reasons. This jurisprudence, at least in lip-service, suggests that this discretion is unfettered[198].

8. This notion of a discretion not to exercise jurisdiction validly established is now firmly part of the Court's jurisprudence and there is little chance of its displacement[199]. As a result, in respect of each Advisory Opinion in the future the Court will continue, to the detriment of many trees and our climate, to rehearse and formulaically repeat these grounds and explain why they do not apply in that particular case. In my view, whatever discretion the Court may have, is extremely narrow — so narrow that the Court should stop being as indulgent with arguments concerning discretion as it has been in the past. The narrowness of the discretion to decline to give an advisory opinion is acknowledged by the Court itself in numerous cases, where it has observed that the Court's answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, *in principle*, should not be refused"[200]. This is particularly the case where the request emanates from the other organs of the United Nations, i.e. the General Assembly or the Security Council. If a request should, in principle, not be refused, and if a refusal requires the existence of a *compelling* reason (the threshold for which is, in fact, so high that this Court has never found a reason compelling enough to refuse a request for an advisory opinion) then does the Court really have discretion in this matter? It would appear to me that what the Court has available to it is not discretion in the traditional sense, which is defined as "freedom in the exercise of judgment; the power of free decision-making"[201], but rather it has recourse to an overriding consideration of judicial propriety that can provide a legitimate excuse for refusing to reply to a request for an advisory opinion.

9. For the Court to refuse to respond to a request from the General Assembly or the Security Council *when it has jurisdiction to do so* would, in my view, amount to the Court second-guessing the decisions of the other principal organs in a way that would be legally problematic. This is not to say that the Court can never refuse to provide a requested opinion, even to the other principal organs of the United Nations. I can think of several reasons that the Court *might* exercise its very narrow discretion to decline to render an opinion. For example, I can imagine that the Court would not provide an opinion if the object of the question had since become moot[202], or where the request from an organ no longer enjoyed the support of many of its members that had previously supported the request (in a sense, piercing the "corporate veil"). The Court *might* also decline to offer an opinion where one principal organ makes the request, and the other expresses its displeasure at the request.

10. At any rate, the notion that the subject-matter of a request involves a bilateral dispute is not one which should prevent the Court from exercising its jurisdiction, notwithstanding the Court's previous statements that the bilateral character of an issue may be a compelling reason for declining to exercise its advisory jurisdiction[203]. In its current Advisory Opinion, the Court responds to the bilateral dispute objection by noting that it does not

[198] Georges Abi Saab, "On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice" in Laurence Boisson de Charzounes and Philippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999), at 37; see also, Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), p. 78.

[199] For the record, I share in Professor Abi Saab's view (*ibid.*) that the founding of this jurisprudence on *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, is erroneous because a careful reading of the Court's Opinion suggests that it was concerned not with "discretion" but with whether it had jurisdiction (based on a lack of competence of the Council of the League of Nations). But that is now water under the bridge and we have to accept that the earth is flat.

[200] See e.g. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71 (emphasis added); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I),* pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 156, para. 44.

[201] *Black's Law Dictionary* (11th ed., 2019), p. 585.

[202] See e.g. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46 ("The Court has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may 'render an application without object'").

[203] See e.g. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

regard the present case as only a bilateral matter between Israel and Palestine[204]. Rather, in the Court's view, "this issue is a matter of particular interest and concern to the United Nations" because the "involvement of the United Nations organs, and before that the League of Nations, in questions relating to Palestine dates back to the Mandate System"[205].

11. While I think this institutional reasoning is correct, I also think it is important to emphasize that, quite apart from this institutional reason linked to the United Nation's long-standing responsibility, the Israeli-Palestinian conflict cannot be seen as a bilateral dispute for a much more normative reason. While international law cannot as yet (and maybe never will), be described, as a solidarity-based system, it is beyond doubt that the international legal system has moved beyond the era of pure bilateralism, which was the hallmark of traditional international law. It is for this reason that international law concerned itself with the situation in my own country prior to 1994, even though it was technically, in a purely bilateralist tradition, an internal matter; it is because of this reason that international law concerns itself with alleged cases of genocide whether happening within the boundaries of one State or not; it is for this reason that cases of human rights violations are the subject of consideration by international bodies. Then how can a case where some of the most fundamental norms of international law, in particular norms of *jus cogens*, are at stake be a bilateral dispute. I find it morally unthinkable that it could even be contemplated that what is happening in Palestine is a purely bilateral dispute. It is not. There is little that is bilateral about the situation in Palestine. With or without the United Nations' special institutional responsibility, the depravation of some of the most fundamental rights of a people is an issue which concerns all of humanity. There is little bilateral about a situation in which generations of a people are forced to live a life of subjugation and indignity, as orphans without the rights that the rest of us take for granted.

12. The Court is, of course, not wrong to refer to the institutional reason, which is the United Nations' institutional responsibility. Already in 2004, the Court based its rejection of the bilateral dispute objection on this point, stating that, "[g]iven the powers and responsibilities of the United Nations in questions relating to international peace and security, . . . the construction of the wall must be deemed to be directly of concern to the United Nations" [206]. That reason, while also institutional in nature, went even further than the reason provided by the Court in the current Advisory Opinion because, over and above the institutional reasons, it gave substantive reasons related to peace and security.

13. The institutional reasoning given by the Court in the current Advisory Opinion does not account for the humanitarian reasons why the situation in the Occupied Palestinian Territory cannot be seen as a bilateral dispute. It leaves unaccounted for, the moral and social imperative why international law *must* concern itself with that situation and, more to the point, why international law must dictate the "international community's" centrality in resolving that situation. I regret that the Court did not take this opportunity to do so. For while it was understandable for the Court, in 2004, to rely on the United Nations' institutional responsibility, in 2024 it should have relied on the responsibility of the "international community" as such regardless of the historical institutional responsibility of the United Nations.

III. Peremptory character of the right of self-determination

1. General

14. The main finding of the Court is that the presence of Israel in the Occupied Palestinian Territory is unlawful and that, as a consequence, it is under a legal obligation to withdraw from, or to bring to an end its unlawful presence in, the Palestinian territory. The main basis for this finding is that Israeli presence in the Occupied Palestinian Territory constitutes a violation of the Palestinian right of self-determination, in addition to constituting a breach of the prohibition on the acquisition of territory by force. The Court reaffirms its previous

[204] Opinion, para. 35.
[205] *Ibid.*
[206] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 49.

descriptions of the right of self-determination as "one of the essential principles of contemporary international law" and that the obligation to respect this right is owed *erga omnes*[207]. These are not new, and the Court had previously used these descriptions[208]. What is new is the Court's explicit recognition of the right of self-determination as a peremptory norm of international law. At paragraph 233 the Court states that it "considers that, in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law". The qualifier "in cases of foreign occupation such as the present case" is rather unclear, but I understand it to mean that the element of the right of self-determination which is implicated in the present case, i.e. the right of the Palestinian people to not have their right of self-determination impeded by the ongoing foreign occupation by Israel, is assuredly a peremptory norm of international law. This statement would be without prejudice to the peremptory status of other elements of the right of self-determination (which were not at issue in this case). In the same way, stating that the (narrower) prohibition of aggression is a peremptory norm does not necessarily mean that the broader prohibition on the use of force is itself not peremptory.

15. While the Court's recognition of the peremptory status of self-determination is a welcome departure from its historical reluctance to refer to *jus cogens* in general, and in particular to describe self-determination as *jus cogens*, the Opinion retains some of its historical reluctance to recognize peremptory norms. For starters, a point I will return to later, the Court appears rather ambivalent about the role that the peremptory status of self-determination plays in the Opinion — I imagine that some will regard the Court's statement in this respect as *obiter*. Second, other norms that undoubtedly qualify as *jus cogens* are not referred to as such. These are the prohibition on the use of force, the prohibition of apartheid and some of the basic principles of international humanitarian law. I am less concerned about the Court's reluctance to refer to these obvious *jus cogens* norms as peremptory because, first, the prohibition on the use of force has already been described by the Court as *jus cogens* in a previous case[209], and secondly, the main finding of the Court in this case is based on self-determination. Further, I can understand the Court's reluctance to refer to *some* principles of international humanitarian law as peremptory without identifying which ones. At any rate, given the historical reluctance of the Court to refer to peremptory norms, with its residual effects in this Opinion, it is appropriate to say a few words about it.

16. The Court's historical reluctance to pronounce itself clearly on the peremptory status of norms that are widely accepted as having that character, in particular self-determination, is difficult to understand. There is no rational reason for this reluctance. Whether the speculation that the Court has historically avoided using the terms "*jus cogens*" and "peremptory norms" due to the influence of French judges on the Court, and France's reputation as being opposed to those terms, is true or not is irrelevant[210]. What is clear is that, to avoid identifying particular

[207] Opinion, para. 232.

[208] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 156.

[209] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 81.

[210] Catherine Maia, "Consécration du *jus cogens* : un dialogue à raviver entre cours internationale et régionales dans l'œuvre de reconnaissance de droits humains impératifs", *Civitas Europe*, Vol. 45 (2020), p. 302, fn 25 ("Précisons que cette reconnaissance explicite a été facilitée par le départ du juge français Gilbert Guillaume, qui a siégé à la CIJ de 1987 à 2005. On retrouve néanmoins cette position hostile au *jus cogens* chez d'autres juges français à la CIJ. V. notamment, dans l'arrêt de 2012 sur les *Questions concernant l'obligation de poursuivre ou d'extrader*, l'opinion individuelle du juge Abraham (§ 27) et l'opinion dissidente du juge *ad hoc* Sur (§ 4)"). See, in more detail, Catherine Maia "*Jus Cogens* and (in)Application of the 1969 Vienna Convention on the Law of Treaties in the Jurisprudence of the International Court of Justice", in Dire Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations* (Brill, 2021), pp. 342-365 ("It should be noted that [the first explicit recognition of *jus cogens*] was facilitated by the departure of the French judge Gilbert Guillaume, who sat on the ICJ from 1987 to 2005. However, [the criticism of *jus cogens* by French judges] can be found among other French judges at the ICJ. See, in particular, the separate opinion of Judge Abraham in [*Belgium* v. *Senegal*] ('the qualification of the prohibition of torture as a peremptory norm "is clearly a mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element") and the

norms as *jus cogens*, the Court employed a number of tools or methods including, (i) referring to descriptions by others that a norm is *jus cogens* without specifically expressing support[211], (ii) using terms that might be construed as synonyms for *jus cogens*[212], or (iii) using the related but distinct concept of *erga omnes*[213]. Sometimes the Court's recognition of a norm as *jus cogens* is couched in clumsy or convoluted language to create the impression of ambiguity, such as is arguably the case with the Court's reference to the *jus cogens* character of the prohibition on the use of force in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [214]. Why has the Court gone through so much trouble in the past to avoid describing self-determination as a peremptory norm? The question remains important here because even having referred to the right of self-determination as a peremptory norm of international law in the Opinion, the remnants of the Court's historical hesitance remain visible, as I will show below.

17. There may be one of several explanations for the Court's historical reluctance to explicitly acknowledge the peremptory status of norms, and in particular of the right of self-determination. First, it might be that describing self-determination as a peremptory norm was seen by the Court as unnecessary, or to use the language of Judge Abraham's separate opinion in *Belgium* v. *Senegal* in respect of the peremptory norm of prohibition of torture, a "mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element"[215]. In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (hereinafter "*Chagos*") too, apparently, the Court believed that to describe self-determination as a peremptory norm was unnecessary for the purposes of answering the question posed by the General Assembly[216]. The second

dissenting opinion of Judge *ad hoc* Sur, at para. 4 ('the reference to *jus cogens* which appears in the reasoning [is] a reference which is entirely superfluous and does not contribute to the settlement of the dispute, as will be seen. The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance has yet to be established')"). See, slightly more tentatively, Hélène Ruiz Fabri and Edoardo Stoppioni, "*Jus Cogens* before International Courts: The Mega-Political Side of the Story", *Law and Contemporary Problems*, Vol. 84 (2021), p. 157 ("Ten more years were necessary for the ICJ to mention *jus cogens* in its reasoning, and even then, the *jus cogens* argument was not conclusive. Whether such longlasting resistance was related or not to an intense internal lobbying of the French judge, well known for his strong opposition to *jus cogens*, is impossible to say. However, the ICJ stayed its hand for as long as it could, and in some ways, probably still does.").

[211] The best example of this tool is *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 190 ("The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*"). See also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 125, para. 61, and p. 135, para 80.

[212] The best example of this particular method is in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 79 ("Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.").

[213] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29*; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 199, para. 156.

[214] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 81.

[215] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, separate opinion of Judge Abraham, p. 477, para. 27 ("With regard to the prohibition on torture, the Judgment states (para. 99) that it is part of customary law and that it has even become a peremptory norm (*jus cogens*), but that is clearly a mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element.").

[216] See comment by then President of the Court, Judge Yusuf, during the annual interaction between the International Law Commission (ILC) and the President of the Court, A/CN.4/SR.3478, p. 10,

> "that the Court had deemed it unnecessary to address the matter of whether the right to self-determination was a peremptory norm of international law in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, because that had not been the point at issue. The General Assembly's question had been whether the decolonization process of Mauritius had been lawfully completed. The Court did not usually engage in rambling *obiter dicta* or make statements that were not directly relevant to its conclusions, especially in an advisory opinion."

possibility is that the Court simply did not accept until now that self-determination was a norm of *jus cogens*. Indeed, in the aftermath of *Chagos* it was argued by some that the Court's approach was evidence that it did not believe self-determination to be a peremptory norm[217]. Neither of these reasons are remotely convincing and I wish to address each in turn.

2. The necessity of referring to the peremptory character of self-determination

18. I begin first with the most probable reason for the Court's avoidance up to now of the issue of the peremptory status of self-determination, namely that it has been unnecessary. Indeed, one might point to the fact that there are other norms, such as the prohibition on the use of force, the peremptory status of which has to my knowledge only been questioned by one State — Morocco[218] — which the Court does not, in the current Advisory Opinion, describe as peremptory.

19. Justifying the Court's approach in *Chagos*, then former President of the Court, Judge Yusuf, suggested that to describe self-determination as a peremptory norm when it was not necessary would amount to "rambling" which the Court "did not usually engage in"[219]. Yet I can find many examples in the case law of the Court where the Court made statements that were not necessary for the resolution of the matter before it[220]. One could mention the famous dictum in *Barcelona Traction* in which the Court first made the distinction between obligations *erga omnes* and "those arising vis-à-vis another State"[221]. Similarly, the Court's recognition of the *jus cogens* status of the prohibition of torture in the context of *Belgium* v. *Senegal* was, as noted by Judge Abraham and Judge *ad hoc* Sur, not essential for the settlement of the dispute[222]. Neither, for that matter, was the Court's characterization of certain norms of international humanitarian law as "intransgressible"[223] — a term whose meaning continues to elude me. Indeed, it may even be argued that given the Court's reliance on General Assembly Resolution 2625 (XXV) in *Chagos*, it was also not necessary to characterize the right of self-determination as *erga omnes* there[224], i.e. the duty to co-operate and to render assistance flowed from the resolution. It is not only in respect of *jus cogens* norms and *erga omnes* character of obligations that the Court has made declarations that are not strictly necessary for the ultimate settlement of the case. The Court's invocation of "the concept" of sustainable development in *Gabčikovo-Nagymaros* was also unnecessary for its settlement of the dispute between Hungary and Slovakia[225]. In *Kasikili/Sedudu* the Court, having made an observation that its earlier findings were "sufficient to dispose of the matter" proceeded to add a fact that it itself described as "unnecessary"[226]. These are but random examples, and I am sure many more examples can be provided. Indeed, in this Opinion too the Court refers to many elements that play no role in the final conclusions

[217] See comments by Israel, in Peremptory norms of general international law (*jus cogens*): Comments and observations received from Governments, A/CN.4/748, 9 March 2022, p. 104 ("Indeed, in the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice itself appears to have deliberately refrained from referring to the right to self-determination as a jus cogens norm.").

[218] See Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace, 9 January 2024, PSC/PR/Comm.1196. Para. 38, which describes the prohibition on the use of force as *jus cogens*, is subject to asterisk, which reads: "One Member State, the Kingdom of Morocco, expressed a reservation regarding the reference to the concept of 'jus cogens' in Paragraph 38 of the present document."

[219] See fn 21 above, comment by Judge Yusuf.

[220] Indeed, in her separate opinion in *Wall,* Judge Higgins lamented the "irrelevant" invocation of the *erga omnes* nature of violations of humanitarian law by the Court. *Wall* Advisory Opinion, separate opinion of Judge Higgins, p. 217, para. 39.

[221] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.

[222] See fns 15 and 18 above.

[223] See fn 17 above.

[224] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180.

[225] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140.

[226] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1091, para. 69 ("The Court has reached the conclusion that there was no agreement between South Africa and Botswana 'regarding the . . . application of the [1890 Treaty]'. This *is in itself sufficient* to dispose of the matter. It is *unnecessary* to add that in 1984 and 1985 the two States had no competence to conclude such an agreement, since at that time the United Nations General Assembly had already terminated South Africa's Mandate over South West Africa" (emphasis added)).

drawn by the Court, like for example, the several symbolic references to the Oslo Accords. Can all these examples be described as "rambling *obiter dicta*"? I don't think so. They all perform important functions related to the judicial responsibility of the Court.

20. At any rate, and for avoidance of doubt, there are at least three reasons why it was *necessary* to opine on the peremptory status of self-determination in *this Opinion*. First, the peremptory status of self-determination was argued by a great many participants. The Court cannot, or should not, simply ignore arguments made by such a significant number of States. Second, whenever the Court invokes a rule of international law, it is important that it, to the extent that it is capable of doing so, fully describes the status of that rule. Describing the status of a rule that has been invoked is not mere *obiter*, just as much as describing the number of instruments in which that rule can be found is not *obiter* — it is part of judicial reasoning. Third, and more importantly, the consequences for third States for the breach of the right of self-determination identified by the Court in the current Advisory Opinion, i.e. the duty to co-operate to bring to an end Israeli presence in the Occupied Palestinian Territory[227], the duty not to recognize situations arising from Israel's presence and the duty not to render assistance in the maintenance of such situations, do not, in my view, flow from the breach of any rule of international law, but rather from the breach of peremptory norms[228]. I will address this aspect more fully below when I address the Court's ambivalence in connection with consequences for third States flowing from the unlawfulness of Israel's presence in the Occupied Palestinian Territory (Section IV below).

21. To summarize, the argument that the Court has not, in the past (and could have done so here), specified that the right of self-determination is a peremptory norm because it was not strictly necessary to do so, is flawed for at least two reasons. First, it is flawed because the Court routinely makes statements that are not strictly necessary for the resolution of the case before it. Second, it is flawed because in this case, the peremptory character of self-determination was essential for proper judicial reasoning.

I turn now to the second possible reason for the Court's past hesitance.

3. Uncertainty over the peremptory character of self-determination

22. Perhaps by choosing to remain silent about the peremptory status of the right of self-determination in the past, the Court was, in fact, signalling that it did not believe that the right of self-determination had reached peremptory status, or perhaps was uncertain about the peremptory status of the right. The significance of the Court's decision, particularly in light of its historical reluctance to refer to peremptory norms, cannot be overstated.

23. While the Court, consistent with its practice, does not provide evidence for the peremptory character of the right of self-determination, there have been several individual opinions by Members of the Court in the past that have done so[229]. That self-determination is widely regarded as having peremptory status is beyond doubt.

[227] While the duty to co-operate is not expressly mentioned in the relevant operative paragraph of the Opinion (para. 285 (7)), the Court does conclude in its reasoning that third States have such a duty which is a consequence of the breaches of the right of self-determination. See Opinion, paragraph 275 ("With regard to the right to self-determination, the Court considers that, while it is for the General Assembly and the Security Council to pronounce on the modalities required to ensure an end to Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the right of the Palestinian people to self-determination, all States must co-operate with the United Nations to put those modalities into effect.").

[228] See Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission (YILC),* 2001, Vol. II (Part Two), Art 41.

[229] See, e.g. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* separate opinion of Judge Robinson, paras. 70-77, which based the peremptory status of the right of self-determination on instruments of near-universal application, the Court's jurisprudence, an assessment of the views of States, views and international bodies, such as the ILC, and scholarly views. See also *ibid.*, separate opinion of Judge Sebutinde, paras. 30 and 31, relying on, *inter alia*, the international jurisprudence and the work of the ILC; *ibid.*, joint declaration of Judges Cançado Trindade and Robinson; *ibid.*, separate opinion of Judge Cançado Trindade, paras. 120-150.

Perhaps, the most succinct and clear statement supporting the peremptory character of self-determination is to be found in the declaration of Judge Sebutinde, our current Vice-President, in *Chagos*:

> "Characterizations of the right to self-determination as a peremptory norm stretch back many decades and are now far too common to ignore. Eminent jurists, including former and current Members of this Court, have recognized the peremptory character of the right to self-determination. It has also been recognized as a peremptory norm by courts and tribunals, United Nations Special Rapporteurs, ILC members, and the ILC itself. In 1964, when the Sixth Committee of the General Assembly discussed the ILC's draft articles on the law of treaties, many States endorsed the characterization of the right to self-determination as a peremptory norm and only one State voiced opposition. These statements and instruments inexorably demonstrate that the right to self-determination is a rule of special importance in the international legal order."[230]

24. The real elephant in the room, however, is the fact that the peremptory status of the right of self-determination has recently been questioned in some quarters. It is this elephant that I will turn my attention to. In particular, do the recent rejections of the peremptory status of self-determination in any way affect its claim to peremptoriness? Put in the context of the criteria for the identification of peremptory norms, does the fact that the peremptory status of the right of self-determination has been questioned recently imply that the right is not "accepted and recognized by the international community as a whole" as a peremptory norm[231]?

25. In assessing what impact, *if any*, recent objections to the peremptory status of the right of self-determination have had on its claim to peremptoriness, it is important to recall, first, that these objections come from relatively few States. In this connection, while a very large majority of States participating in the *Chagos* and current proceedings described the right of self-determination as having peremptory character[232], not a single State opposed this view (for context, it should be recalled that participants in both written and oral proceedings have the opportunity to respond to each other's arguments and claims, and often do, so that the claim of peremptoriness could have been responded to). A similar pattern can be observed in respect of the views of States commenting on the work of the International Law Commission. In 2001, when States commented on the final set of Articles on State Responsibility, not a single State questioned the peremptory status of the right of self-determination[233]. Further, in 2022, out of a total of 86 States commenting on the ILC Draft Conclusions on Peremptory Norms, the text of which included self-determination as an example of a peremptory norm, only

[230] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, separate opinion of Judge Sebutinde, p. 285, para. 30 (footnotes omitted).

[231] Conclusions 3, 6 and 7 of the Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), A/77/10.

[232] In the current proceedings, for example, statements representing the views of more than 100 States, have taken the view that self-determination is a peremptory norm: Chile, Lebanon, Algeria, League of Arab States (which comprises 22 Member States), Egypt, Saudi Arabia, Brazil, Jordan, Mauritius, Guyana, The Gambia, Ireland, Malaysia, Djibouti, Organisation of Islamic Cooperation (which comprises 57 Member States), South Africa, Palestine, Qatar, and African Union (which is comprised of 55 Member States).

[233] See the following summary records of the Sixth Committee of the General Assembly, during its 56th Session, where the Report of the ILC was considered in 2001: A/C.6/56/SR.11; A/C.6/56/SR.12; A/C.6/56/SR.13; A/C.6/56/SR.14 (here the delegate of India, without questioning the status of self-determination as a peremptory norm, circumscribed it as excluding secession); A/C.6/56/SR.15; A/C.6/56/SR.16; A/C.6/56/SR.17; A/C.6/56/SR.18; A/C.6/56/SR.19; A/C.6/56/SR.20; A/C.6/56/SR.21; A/C.6/56/SR.22; A/C.6/56/SR.23; A/C.6/56/SR.24.

Israel[234], the United States[235], Estonia[236], the United Kingdom[237], and Morocco[238], questioned the peremptory status of the right of self-determination.

26. These statistics provide context to illustrate that only a few States have questioned the peremptory status of self-determination — a norm which has long been regarded as peremptory. With this context in mind, the elephant in the room seems more like a gentle cat, sitting quietly in a corner minding its own business. The recent objections from only five States, cannot have the effect of casting doubt on what has, for a long time, been seen as an eminently uncontroversial proposition.

27. Thus, in my view, the Court was correct to identify explicitly the right of self-determination as a peremptory norm in its present Advisory Opinion. Should some point to the scant evidence put forward in the Opinion to support the peremptory character of self-determination; I can only say that it is not the practice of the Court to engage in a rambling exercise to support its conclusion about the status of particular rules of international law, and there is no reason why an exception should be made for self-determination.

4. Consequences flowing from peremptory norms

28. If there is one aspect of the Opinion that gives me cause for pause it is that having identified the right of self-determination as a peremptory norm, the Court adopts an ambivalent approach to the consequence of its finding. For instance, in paragraph 274, when preparing to identify the consequences of Israel's presence on the Occupied Palestinian Territory for third States, the Court "observes that the obligations violated by Israel include certain obligations *erga omnes.*" This language might suggest that the obligations for third States — what we might refer to as the Article 41 consequences for shorthand[239] — flow not from the peremptory status of the right of self-determination but rather from the *erga omnes* character of the obligations breached.

29. Given that States and commentators generally accept that the consequences in Article 41 of the Articles on State Responsibility attach to peremptory norms, the Court cannot put forward an alternative proposition in this Advisory Opinion without offering an explanation. While commenting on the ILC's 2022 Conclusions on Peremptory Norms, which, in Conclusion 19 affirms Article 41 of the Articles on State Responsibility, *not a single State* suggested that these consequences flowed, not from peremptory norms, but from the *erga omnes* character of some obligations. There is also very little, if any, literature presently supporting the view that the consequences in Article 41 flow from the *erga omnes* character of an obligation[240]. Domestic jurisprudence, a form of State practice, also generally accepts the traditional view[241]. Thus, for the Court to suggest that it was in

[234] ILC, Peremptory norms of general international law (*jus cogens*): Comments and observations received from Governments (A/CN.4/748), 9 March 2022, pp. 102-104.

[235] *Ibid.*, p. 113.

[236] UNGA Sixth Committee, Seventy-Seventh Session, Summary Record of the 22nd Meeting (A/C.6/77/SR.22), dated 12 December 2022.

[237] UNGA Sixth Committee, Seventy-Seventh Session, Summary Record of the 23rd Meeting (A/C.6/77/SR.22), dated 22 November 2022 (A/C.6/77/SR.23), p. 14.

[238] Le Royaume du Maroc, Commentaires et Observations sur le texte du projet de conclusions de la Commission du droit international relatif aux normes impératives du droit international général. See also UNGA Sixth Committee, Seventy-Seventh Session, Summary Record of the 24th Meeting (A/C.6/77/SR.24), dated 12 December 2022 (A/C.6/77/SR.24), p. 12.

[239] To clarify, when I say "Article 41 consequences" I refer to the consequences for serious breaches of a peremptory norm reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (Part Two), Art. 41.

[240] For examples of academic writings supporting the traditional view, i.e. the duties of non-recognition, non-assistance and co-operation to bring to an end any serious breach are consequences of breaches of peremptory norms, see Anne Lagerwall "The non-recognition of Jerusalem as Israel's capital: a condition for international law to remain relevant?", *Questions of International Law*, Vol. 50 (2018), p. 33; Rebecca J. Barber "Cooperating through the General Assembly to end serious breaches of peremptory norms", *International and Comparative Law Quarterly,* Vol. 71 (2022), p. 1.

[241] Examples of these are provided in paras. 3, 4, 6 and 13 of the Commentary to Conclusion 19 of the Conclusions on Peremptory Norms.

fact not the peremptory status of the norm but the *erga omnes* character of the obligations that forms the basis of these consequences, *would be* to establish an approach that is unsupported by the views of States, our sister entity the International Law Commission or academic writings. This in itself would be a questionable practice, but to do so without even engaging with the broadly accepted, dominant understanding would amount to a dismissiveness unbecoming of a court of justice.

30. Quite apart from the fact that this approach finds no support in the views of States, the ILC or in academic writings, it would be based on a complete miscomprehension of the relationship between peremptory norms and *erga omnes* obligations. The *erga omnes* character of *an obligation* is itself a consequence of the nature of *the norm* from which the obligation arises[242]. Consequent to this, the *erga omnes* character permits all States, even if not directly injured, to invoke the responsibility of another State for a wrongful act[243]. It is for this very reason, i.e., peremptory norms are concerned with the scope of secondary obligations while the *erga omnes* character of norms is concerned with the invocation of the secondary obligations, that the ILC decided to replace references to "serious breach of an obligation owed to the international community as a whole" with the category of "peremptory norms" in its Articles on State Responsibility during its 53rd Session in 2001[244].

31. The *erga omnes* character of the obligations does not *itself* create obligation on third States. A point that was articulated by Judge Higgins in her separate opinion appended to the *Wall* Advisory Opinion[245], where she expressed her disagreement with the Court's position that the consequences specified in the Opinion for the identified violations of international law (in paras. 154-159) flowed from the *erga omnes* character of the obligations breached. In her view, the *erga omnes* concept concerns "jurisdictional *locus standi*", which "has nothing to do with imposing substantive obligations on third parties"[246]. She thus concluded that the consequences specified by the Court did not "have anything to do with the concept of *erga omnes*"[247], and that "[t]he obligation upon United Nations Members of non-recognition and non-assistance [did] not rest on the notion of *erga omnes*"[248]. This is precisely why there is *virtually* no support for the view that the *erga omnes* character of the obligation also gives rise to the consequences identified in Article 41 of the ILC's Articles on State Responsibility. It should be recalled that not all *erga omnes* obligations derive from peremptory norms. Obligations arising from customary international law norms concerning common spaces, for example, also have an *erga omnes* character whether they flow from peremptory norms or not. Without ruling out the possibility, it is not at all clear to me that *all* obligations having an *erga omnes* character produce the threefold duties of non-recognition, non-assistance and co-operation as formulated in Article 41 of the Articles on State Responsibility. It is possible that they do, but it is not at all clear that this is the case. What is clear, however, is that peremptory norms do. Accordingly, for the sake of sound and coherent judicial reasoning, the Court ought to have tied explicitly the Article 41 consequences identified for third States in this Opinion to the peremptory status of the right of self-determination (or even better, explicitly reaffirmed the peremptory character of other norms discussed in the Opinion).

32. I am not averse to the Court deciding to develop the law in order to broaden the scope of Article 41 consequences to include all *erga omnes* obligations. However, first, if that is what the Court seeks to do, it should

[242] See para. 7 of the General Commentary to Chapter III of Part 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (Part Two). See also para. 4 of the Commentary to Conclusion 17 of the International Law Commission's Conclusions on Peremptory Norms of General International Law (*Jus Cogens*).

[243] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 17, para. 41; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 516, para. 108.

[244] Report of the Commission to the General Assembly on the work of its fifty-third session, *YILC*, 2001, Vol. II (Part Two), p. 22, para. 49.

[245] Admittedly, Judge Higgins' opinion would not support the conclusion that these consequences flowed from peremptory norms.

[246] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, separate opinion of Judge Higgins, p. 216, para. 37.

[247] *Ibid.*

[248] *Ibid.*, para. 38.

be transparent to avoid confusion and thus do so explicitly. Second, such a development should not be accidental and should be based on a clear and considered understanding of the distinction between *erga omnes* obligations and peremptory norms as legal concepts. *Erga omnes* obligations *arise from particular types of norms,* such as peremptory norms. But, in addition to peremptory norms, what other types of norms produce such obligations? In my view, and as already stated above, the only other type of norms that produce *erga omnes* obligations are, *because of their very character as not being capable of being owed bilaterally*, obligations concerning the commons. If the Court wishes to establish the principle that obligations arising from norms relating to common spaces produce Article 41 consequences, then the conflation between peremptory norms and *erga omnes* obligations in the context of Article 41 consequences may be justified, and I would have no objection against such a development. The extension of Article 41 consequences to all *erga omnes* obligations would be less justified and ineffective if it were done with primarily humanitarian objectives in mind. If the objectives were more humanitarian, then in my view, the effort should be directed at showing the peremptory character of the relevant norms rather than seeking to stretch the concept of obligations owed *erga omnes* beyond its current remit.

33. There is another consequence of peremptoriness that the Court, because of the remnants of its hesitancy, does not address, namely the implications of the right of self-determination for agreements relating to the Occupied Palestinian Territory concluded in the past and those that may be concluded in the future. This is the primary consequence of peremptoriness as provided for in Article 53 of the Vienna Convention on the Law of Treaties. To take as an example, one of the consequences flowing from the recognition of the right of the Palestinian people to self-determination must surely be that an agreement concluded to resolve the crisis may not derogate from the principle[249]. The closest that the Court comes to acknowledging this fundamental principle is paragraph 257 where it states that the right of self-determination "cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right". Two points are worth making about this formulation. The first, the Court is clearly making an attempt to avoid "yet another" reference to peremptory norms and instead refers to the concept of "inalienable" rights. Second, the Court avoids invoking issues of non-derogation and the language of Article 53 of the Vienna Convention on the Law of Treaties, by stating that the right of self-determination "cannot be subject to conditions" imposed by the State of Israel.

34. Reference might also be made to paragraph 263 of the Opinion, for example, where the Court recalls arguments by Israel, Fiji and Zambia to the effect that Israel's presence on Palestinian territory is justified by the Oslo Accords. In the same paragraph, the Court responds as follows:

> "The Court observes that these Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs."

35. This view reflects a perfectly reasonable interpretation of the Oslo Accords. But, at the same time, it is obviously an incomplete response to a rather complex question. In my view, a proper judicial response would have required the Court to consider the legal implications of the argument raised by these States and therefore the relationship between the right of self-determination and the Oslo Accords. Such a response would have to be based on Article 53 of the Vienna Convention on the Law of Treaties. In other words, *even if* the Oslo Accords justified the current presence of Israel on the Occupied Palestinian Territory, the Accords would, if they are in breach of the peremptory norm of self-determination, be invalid. Having laid out this basic proposition, the Court could then state that at any rate, the Oslo Accords ought to be interpreted in such a way as to render them

[249] See e.g. General Assembly Resolution 33/28 A of 7 December 1978, para. 4 ("*Declares* that the validity of agreements purporting to solve the problem of Palestine requires that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, and with the participation of the Palestine Liberation Organization"); General Assembly Resolution 34/65 B, para. 2 ("*Rejects* those provisions of the accords which ignore, infringe, violate or deny the inalienable rights of the Palestinian people, including the right of return, the right of self-determination and the right to national independence and sovereignty in Palestine").

consistent with the right of self-determination[250], which leads to the interpretation of the Accords offered by the Court. But to engage in this legal reasoning, the Court would need to acknowledge (yet again) the peremptory character of the right of self-determination (and the other norms in question). Unfortunately, because of its residual hesitancy to acknowledge peremptory norms, the Court skips several steps and jumps to conclusions which, without more, are devoid of legal reasoning.

IV. APARTHEID

36. The Court was able to find a breach of Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination, i.e. the prohibition of segregation and apartheid. I interpret this finding to be an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid, which itself is a peremptory norm of international law. I can understand that there is a reluctance to describe the policies of Israel in the OPT as apartheid. I suspect the main reason for this hesitation is that, to date, only the policies of the pre-1994 South African government in South Africa and elsewhere in Southern Africa have been described as apartheid. But recall, the term apartheid was coined by that régime not as a pejorative term, but as a positive concept to explain the benevolence of its policies as separate development, and moreover, at a time when many other States still practised racial discrimination themselves in some form or another[251]. Once the term attained a negative meaning, and international condemnation of racism swelled, no other State would self-describe its policies as apartheid.

37. But if we compare the policies of the South African apartheid regime with the practices of Israel in the OPT it is impossible not to come to the conclusion that they are similar. On the basis of the Court's finding concerning the various policies and practices it is hard not to see that Israeli policies, legislation and practices involve widespread discrimination against Palestinians in nearly all aspects of life much like the case in apartheid South Africa. There is for the most part an intentional effort to ensure separation of and discrimination between Israelis and Palestinians: separate roads, separate schools, separate facilities, and separate legal systems. Whether one speaks of the discriminatory detention practices, including detention without trial (not addressed in the Opinion but for which there is extensive information in the case file), residence permit system, restrictions of movement or demolition of property, deprivation of land, or the encircling of Palestinian communities into enclaves reminiscent of South African Bantustans from which I come, it is impossible to miss the similarities.

38. In the course of the proceedings, the Court heard many arguments about the definition of apartheid in customary international law since the Convention on the Elimination of All Forms of Racial Discrimination, to which Israel is a party, does not contain a definition. These proceedings may have provided the Court with an opportunity to provide a standard definition of apartheid under customary international law. That the Court did not do so should not detract from the cogency of its finding. Whether one relies on the definition in the Rome Statute or the definition in the Apartheid Convention, there seems to be a common core in all the definitions put forward by participants in the course of these proceedings, namely the existence of one or more racial groups, perpetration of one or more several inhuman acts against one or more of the racial groups in a systematic manner and the perpetration of those acts with the purpose of establishing and maintaining domination.

39. No one will seriously suggest that the first two of these elements are not present in the Occupied Palestinian Territory and so I do not intend to address these elements. Some may argue that the Israeli practices and policies do not rise to the level of apartheid because there is insufficient evidence that the third element is met, i.e. there is insufficient evidence that the enumerated inhuman acts were committed for the purposes of establishing and maintaining domination by one racial group. To this I would make only three brief points.

[250] See Conclusion 20 of the Conclusions on Peremptory Norms of General International Law (*Jus Cogens*).

[251] For a description of the struggle of anti-racism within the United Nations itself in the 1940s, see William A. Schabas, *The International Legal Order's Colour Line: Racism, Racial Discrimination and the Making of International Law* (Oxford University Press, 2023), p. 106 *et seq.*

40. First, in interpreting the phrase, it is important to recall that the Apartheid Convention definition is prefaced by the statement "which shall include policies and practices of racial segregation and discrimination as practiced in southern Africa . . .". As explained above, the policies and practices of Israel in the Occupied Palestinian Territory are, in many respects, alike to those of apartheid South Africa. The second point is that it would be incredibly rigid to insist on direct evidence of an intention to dominate. As the International Criminal Tribunal for the former Yugoslavia observed in the context of genocide, intention and purpose can be "inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group"[252]. I find it difficult to see how anyone can look at the policies and practices that have been detailed before the Court and find that, when taken together, the systemic character of these segregationist acts, including the explicit, legislated policy that self-determination in Palestine is reserved for Jewish persons only[253], do not reveal the purpose of dominating the Palestinians. As a third and final point, it should be recalled that it is not necessary for the purpose of establishing "the purpose of domination" for domination to be the sole, or even dominant reason, for the discriminatory measures. Apartheid South Africa, it will be recalled, promoted its policy not solely for the purpose of domination, but to ensure what it termed "equal but separate development"[254].

41. In the context of all of this, in my view, the Court was correct to find that the policies and practices of Israel in the Occupied Palestinian Territory are in breach of the prohibition of racial segregation and apartheid in Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination, a conclusion that implicitly recognizes the apartheid character of Israeli practices and policies in the OPT.

V. Israel's security concerns

42. The main issue raised in the defence of Israeli policies, not only in the context of the current proceedings, but also in the context of other proceedings before this Court, namely the *Wall* Advisory Opinion, *South Africa* v. *Israel*, *Nicaragua* v. *Israel*, is the amorphous "security concerns of Israel". Stripped bare to its essence, the argument seems to be that while the policies and practices of Israel impact negatively on the rights of the Palestinians, and prevent the full enjoyment of their rights under international law, because Israel finds itself under threat from Palestinians (and possibly others in the region), it should be permitted to continue with its policies until the threat to its security no longer exists (or at least it should be permitted to continue to deny Palestinians the enjoyment of their right of self-determination until this threat no longer exists). In these proceedings, the message was most clearly articulated by Fiji and Zambia. It has also been articulated by separate and dissenting opinions in *South Africa* v. *Israel*[255].

43. In its Opinion, the Court refers to the issue only briefly and does not offer any comprehensive response. For example, at paragraph 47 the Court notes that Israel's written statement, while mainly focused on jurisdictional matters and questions of judicial propriety, also referred to Israel's security concerns. The Court, understandably, only offers fleeting responses. For instance, it states, at paragraph 254 that Israel's security concerns cannot "override the principle of the prohibition of the acquisition of territory by force". However, given that the "security concerns" argument can form an important undercurrent of the defence of the relevant policies and practices, and "explanation" of the denial of the right of self-determination of the Palestinian people, I feel it important to address the question more explicitly.

[252] International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Jelisić,* Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, para. 47.

[253] Opinion, paras. 192-222.

[254] This policy was implemented by the National Party, following its election in 1948, through a series of racial legislation and measures.

[255] See for example, generally, dissenting opinion of Judge *ad hoc* Barak and dissenting opinion of Vice-President Sebutinde (especially paras. 8 and 25) in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 24 May 2024*.

44. I accept that security concerns are very important, and that Israel faces threats to its security, from amongst others Hamas, as the events of 7 October 2023 illustrate. Yet, as a first general point, when addressing security concerns, it should be recalled that all States, and not just Israel, have security interests. This includes Palestine. Often, when the "security concerns" claim is made, it is as if only Israel has security concerns or that somehow, Israel's security concerns override those of Palestine's. The second general point to make is that security interests *as such*, no matter how serious or legitimate, cannot override rules of international law, a point made by the Court. Indeed, save where called for by a specific rule, security concerns cannot even serve as a balance against rules of international law and certainly not against peremptory norms. Thus, the notion that the Palestinian right of self-determination must be balanced with, or is even subject to, Israeli security concerns is incongruous as a matter of international law. In fact, such arguments are not only incongruous, they also are dangerous. Allow me to illustrate by means of a "hypothetical" scenario: Imagine that one State believes, legitimately perhaps, that another State joining a defence alliance is a threat to its security interests. Can such a State decide to use military force to prevent the other State from joining the defence alliance? If so, we are moving dangerously into the Athenian paradigm where "the strong do what they can and the weak suffer what they must".

45. I should not be misunderstood. International law is not agnostic to security concerns. International law finds different ways to protect security interests. Treaty rules, for example, can permit States to depart from protected rights in the interest of State security. More pertinent to the issues in the current proceedings, security interests are protected through rules of international law such as the duty to co-operate, and the law of the Charter on the prohibition on the use of force (including self-defence and the rules on the collective security framework). But the notion of security interests does not constitute an independent legal rule, or exception, permitting a State to depart from fundamental rules of the system.

46. In the context of the current proceedings, for example, the Court has found violations of a number of rules of international human rights law and international humanitarian law. It is possible, of course, to identify a particular rule within the relevant treaty permitting, for security purposes, the impugned conduct. A typical example is Article 4 of the International Covenant on Civil and Political Rights, which permits derogation from obligation under the Covenant for purposes "strictly required by the exigencies" of a situation "which threatens the life of a nation". I leave aside whether the policies of Israel meet the requirement of Article 4 or whether its declaration of a derogation can be valid after such a long period of time. For current purposes, it is only important to point out that the security interest as such would not constitute an independent *legal* basis for departing from a rule of law in the Covenant. The legal basis would, in fact, be Article 4 of the Convention. The same point can be made in respect of Article 12 (3) of the Covenant which provides for restrictions to the right of liberty of movement on the basis of reasons related to the protection of national security. Again, national security does not provide an autonomous legal basis for restricting the right. The legal basis is the treaty provision. Similarly, Article 49 of the Fourth Geneva Convention permits an Occupying Power to effect transfers of population "if the security of the population or imperative military reasons so demand". Any transfer of the population would be consistent with international law if "imperative military reasons" so demand not because of an autonomous argument based on security concerns but because the treaty rule provides for an exception.

47. At places, the Opinion might be read as suggesting that "security concerns" are in themselves a basis for departing from the rules of international law. For example, at paragraph 205, the Court considers whether Israeli restriction of freedom of movement of persons could be justified by reference to security concerns and concludes in the negative because the security concerns are related to illegal settlements. Nonetheless, it should be recalled that even there, Article 12 of the Covenant provides for the possibility of restriction of the right "to protect national security [and] public order (ordre public)". The consideration of security concerns must thus be seen in that context.

48. Two particular legal bases addressing Israel's security concerns may be referred to. These are self-defence and the United Nations Security Council framework for addressing the Middle East conflict. In relation to the situation in the Occupied Palestinian Territory, the self-defence argument is multifaceted and

raises different issues depending on the context in which it is raised. It may be raised in the context of Israeli occupation as such, i.e. the occupation itself is an act of self-defence (or was established pursuant to an act of self-defence), or it may be raised in the context of particular practice, policies or acts, such as the construction of the wall or various military operations launched against the Palestinian territory. In whatever context it is raised, it is important to emphasize that self-defence is subject to strict requirements, including that of an armed attack from a State, proportionality and necessity. Moreover, given the overall situation of occupation, the self-defence argument (in the context of particular acts or practices, such as military operations) will run up against the Court's finding in the *Wall* Advisory Opinion to the effect that self-defence does not apply (or "has no relevance") because Israel "exercises control in the Occupied Palestinian Territory and that . . . the threat which it regards as justifying [forcible measures] originates within, and not outside, that territory"[256]. For present purposes, I can say only that any one of these provides insurmountable hurdles for anyone seeking to justify Israeli practices and policies as acts of self-defence.

49. It is the second argument i.e. the Security Council framework, that I wish to focus on. The argument, as I understand it, is that the framework established by the Security Council requires that the right of self-determination of the Palestinians cannot be addressed without also addressing the security concerns of Israel. These two issues, it is argued, should be seen as inextricably linked and, as such, the withdrawal of Israel from the Occupied Palestinian Territory must occur concurrently or simultaneously with the attainment of Israel's security. The basis for this contention is to be found in the provisions of Security Council 242 (and subsequent resolutions which affirm resolution 242). I leave aside the question whether these resolutions are law — or establish binding obligations under Article 25 of the Charter of the United Nations — and whether, assuming they do establish legal obligations under Article 25 of the Charter, they can take priority over the right of self-determination which has peremptory character. I also leave aside the fact that those that focus on simultaneous achievement of self-determination and security concerns as the pathway to the two-State solution seem to have no qualms with the fact that Israel already enjoys *fully* its right of self-determination without insisting on the simultaneous or concurrent enjoyment of the same right by Palestinians or the simultaneous or concurrent achievement of the security of Palestinians.

50. United Nations Security Council Resolution 242, the content of which was endorsed in Resolution 338, affirms that the solution to the Middle East situation requires the "application of both the following principles", and then refers to (i) the "[w]ithdrawal of Israel armed forces" from the occupied territory and (ii) the "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force". Presumably it is the word "both" that forms the basis of the belief that one element ("occupation") cannot be addressed outside the other ("security").

51. The rules of interpretation of resolutions of political organs of international organizations are, in general, with the necessary adjustments, similar to the rules for interpreting treaties[257]. The golden rule being the ordinary meaning to be given to the words of the resolutions in their context and in light of the object and purpose of the resolution. First, it bears mentioning that there is nothing in the language of the resolution that suggests that at issue is the security *of Israel*. The resolution speaks of "political independence of *every State in the area* and their right to live in peace within secure and recognized boundaries free from threats or acts of force". Let's not forget, Palestine has none of these! It's political independence is severely compromised; the

[256] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 194, para. 139.

[257] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 442, para. 94. See Sâ Benjamin Traoré, *L'interprétation des résolutions du Conseil de Sécurité des Nations Unies — Contribution à la théorie de l'interprétation dans la société internationale* (Helbing 2020). See also, Alexander Orakhelashvili "Unilateral Interpretation of Security Council Resolutions: UK Practice", *Goettingen Journal of International Law*, Vol. 2, No. 3 (2010), p. 825.

occupation by Israel, which has now morphed into annexation, ensures that it does not have recognized borders; it is decidedly not free from threats, so that its security concerns remain unachieved.

52. Second, and more importantly, there is nothing in the ordinary meaning of the words of Resolution 242 that suggests that the two elements are interdependent, at least not in the sense that they must be simultaneously or concurrently achieved. As observed above, the insistence on interdependence in the sense that one element cannot be finalized before the other, is presumably based on the word "both" in Resolution 242. Yet, the fact that both elements are essential to "the establishment of a just and lasting peace in the Middle East" does not preclude that one is acted upon before the other, or even as I see it, that one is finalized as a precursor to the finalization of the other.

53. Finally, this reading of the resolution, i.e. that the two elements are not forever and inextricably tied at the hips, is clear from the fact that the Security Council itself has on occasion addressed the question of occupation without, at the same time addressing the second element. In Resolution 476, for example, the Council reaffirmed "the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem" without referring at all, not even in the preamble, to the second element.

54. In conclusion, security concerns apply to all States. All States have a legitimate interest in peaceful existence without threats to their security. How States promote and protect their security, however, is subject to international law and security interests cannot override legal rules, and certainly not the most fundamental rules having the character of *jus cogens*.

VI. Consequences for the United Nations

55. I am generally comfortable with the consequences identified by the Court. I would have been particularly pleased if the Court had spelt out other consequences flowing from the peremptory status of the norms in question, such as the implications for a potential final status agreement, i.e. that any such agreement must be consistent with the right of self-determination, or had the Court engaged with the (rather difficult) question of whether the peremptory character of the norms in question has any impact whatsoever on the question of reparations — I believe it does, but I understand that this would be going against the grain, something a court of law should avoid doing unless it has a watertight basis.

56. In addition to consequences for the United Nations and for third States, the Court also concludes that the United Nations "should consider . . . further action required to bring to an end" the unlawful presence of Israel in the OPT as rapidly as possible. This is an important statement, but what does it mean? Is it a legal consequence? Is it a duty? Why use "should" as opposed to "under an obligation" as is the case for the other consequences? Does this suggest that this recital is, in fact, of no legal consequence?

57. No! I believe this recital to be a legal consequence of the breaches in question and that the United Nations organs have a duty to "consider" what further action is required, particularly in the event that Israel does not comply with the legal consequences identified in the Opinion. The requirement for the United Nations to consider further measures follows from the Court's emphasis on the "necessity for the United Nations . . . to redouble its efforts" in the context of the Middle East peace process[258]. Indeed, the Security Council itself has committed to, "in the event of non-compliance by Israel [with its own determinations] . . . to examine practical ways and means in accordance with relevant provisions of the Charter of the United Nations to secure the full" compliance by Israel with international law[259]. The Court, of course, has to be careful not to impose on the political organs of the United Nations, which would amount to usurpation of their responsibilities. But stating that the United Nations is under a duty to consider further action is not inconsistent with the respect

[258] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 200, para. 161.

[259] Security Council Resolution 476 (1980) of 30 June 1980, para. 6.

for the discretion that the political organs have in addressing matters they are seized with[260]. However, once a judicial determination has been made by the Court that fundamental rules having peremptory status have been breached, the discretion is no longer *whether* to take action but only *what* action to take. Thus, while the Court states that the United Nations "should" consider what action, I understand this "should" to mean, is obliged to. I understand that the Court uses "should" only to emphasize that it is not for it to dictate to the political organs of the United Nations what action they should take.

58. Political organs have a wide margin of discretion in their consideration of what action to take, so long as such action is consistent with international law. The Charter provides a number of options, including enforcement action, to ensure compliance. But there are other ways. For example, the political organs could, as a way of solidifying the basis on which Palestine and its people can enjoy self-determination, act positively on Palestine's request for membership in the United Nations. To this end, it is to be noted that earlier this year, the General Assembly has taken the steps to accord the State of Palestine rights akin to those of a Member State[261]. Similarly, the political organs could consider curtailment of Israel's participation in the activities of the United Nations, or similar action, as was done in respect of South Africa in 1974[262].

59. Political organs of the United Nations also have an important role to play in ensuring Israel's compliance with its reparation obligation identified in the Opinion[263]. As the Court observed, Israel "has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons, and populations" that have suffered any form of material damage as a result of Israel's wrongful acts under the occupation (para. 271). These rules were recently reaffirmed by the General Assembly in its Resolution A/RES/ES-11/5 dated 15 November 2022, titled "Furtherance of remedy and reparation for aggression against Ukraine".

60. In view of the nature and scale of the violations of international law identified by the Court, and the potentially large pool of claimants resulting therefrom, the United Nations might want to consider the establishment of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of Israel identified in the Opinion. The revitalization and expansion of the mandate of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD), which was established by the General Assembly in 2006 following the issuance of the *Wall* Advisory Opinion, is relevant in this respect[264].

VII. Conclusion

61. In this Opinion, for the first time, the Court has held that the presence of Israel on the Occupied Palestinian Territory is unlawful. It has come to this conclusion because policies and practices on the Occupied Palestinian Territory have revealed the true purpose of Israel as being the forceful acquisition of the Palestinian territory in violation of fundamental rules of international law, some of which are peremptory norms of international law. In particular the Court found breaches of the right of self-determination, the peremptory

[260] For an expression of this discretion, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* p. 139, para. 179, and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II),* p. 421, para. 44.

[261] A/ES-10/L.30/Rev.1.

[262] On November 12, 1974, the President of the General Assembly ruled that the South African delegation to the General Assembly could not continue to participate in the work of the Twenty-Ninth Session of the Assembly because the delegation's credentials had not been accepted by the Assembly. The text of the ruling is given in *Resolutions of Legal Interest Adopted by the General Assembly at its Sixth Special Session and Twenty-Ninth Regular Session*; the ruling is referred to, but not reproduced, in *Resolutions Adopted by the General Assembly at Its Twenty-Ninth Session*, 29 UN GAOR, Supp. (No. 31) 10-11, U.N. Doc. A/9631 (1974). See also, G.A. Res. 3206, 29 U.N. GAOR, Supp. (No. 31) 2, UN Doc. A/9631 (1974); 29 U.N. GAOR, Annexes (Agenda Item 3) 2, UN Doc. A/9779 (1974).

[263] Opinion, paras. 269, 270 and 285 (6).

[264] UNRoD was established in accordance with General Assembly resolution ES-10/17 of 15 December 2006, and serves as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the Wall by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem.

character of which the Court confirmed in the Opinion, the prohibition of the acquisition of territory by force, the prohibition of segregation and racial discrimination and basic rules of international humanitarian law.

62. These norms, even those not identified as such by the Court, are generally regarded as having peremptory status. The Court's conclusion that these norms have been egregiously and systematically violated by Israel in the Occupied Palestinian Territory should be applauded as an important contribution to the development of international law and the reinforcement of some of its most fundamental tenets: force cannot be used to acquire territory, the right to self-determination of peoples is sacrosanct, the obligations of an occupying power towards protected persons continue as long as the occupation persists, the practice of racial segregation and apartheid is not exclusive to Southern Africa, to name but a few tenets.

63. Yet, as important as these fundamental principles of international law are, ultimately the main purpose of an advisory opinion should not be just the development of rules of international law and the contribution to doctrine. The main function of any advisory opinion should be to assist the organization requesting it to address whatever problem it may be faced with. In this context, the main function of the current Opinion is to assist the General Assembly, and indeed the United Nations as a whole, in resolving the decades-long subjugation of the Palestinian people. The 285 paragraphs of this Advisory Opinion will be meaningless if the United Nations does not act upon the advice provided by the Court to promote the resolution of this conflict which is a large stain on the claim that there exists an international community, for how can any community permit such indignity and suffering as that imposed on the Palestinian people.

(Signed) Dire TLADI.