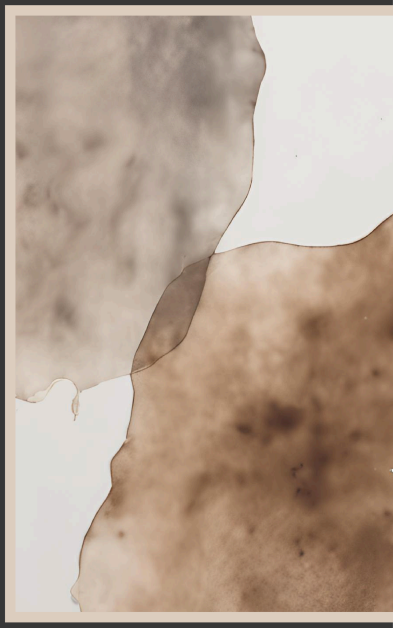
The 2024 ICJ Advisory Opinion on the Occupied Palestinian Territory



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Max Steinbeis Verfassungsblog gGmbH
Elbestraße 28/29
12045 Berlin
verfassungsblog.de
kontakt@verfassungsblog.de

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ON MATTERS CONSTITUTIONAL

Contributing Authors

Yussef Al Tamimi

Yussef Al Tamimi is an Assistant Professor of Law at the Central European University. He holds a Ph.D. from the European University Institute and an LL.M. from Yale Law School.

Kai Ambos

Kai Ambos is a Professor of Criminal and International Law at the University of Göttingen and a Judge at the Kosovo Specialist Chambers in The Hague. He writes in his academic capacity.

Jinan Bastaki

Jinan Bastaki is an Associate Professor of Legal Studies at New York University, Abu Dhabi.

Amichai Cohen

Amichai Cohen is a Professor of Law at the Ono Academic College, and a Senior Fellow at the Israel Democracy Institute.

Mohamed M. El Zeidy

Mohamed M. El Zeidy (Ph.D. and LL.M. Ireland) is the Senior Legal Advisor to the President of the Kosovo Specialist Chambers and former Legal Officer at the International Criminal Court. He served as a Judge, Senior Public Prosecutor and currently a Counselor at the State Lawsuits Authority, Egyptian Ministry of Justice.

Matthias Goldmann

Matthias Goldmann is a Professor of International Law at the EBS University in Oestrich-Winkel and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

Aeyal Gross

Aeyal Gross is a Professor of Constitutional and International Law at Tel Aviv University.

Tamar Hostovsky Brandes

Tamar Hostovsky Brandes is a Senior Lecturer at Ono Academic College Faculty of Law in Tel Aviv.

Ardi Imseis

Ardi Imseis is an Associate Professor of International Law, Queen's University. He is Author of "The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity" (Cambridge 2023). He served as Legal Counsel to the State of Palestine in the proceedings. He writes in his personal capacity.

Maryam Jamshidi

Maryam Jamshidi is an Associate Professor of Law at the University of Colorado Law School, where she writes and teaches about international law, national security, and tort law.

Florian Jeßberger

Florian Jeßberger is a Professor of Criminal Law and Director of the Franz von Liszt Institute for International Criminal Justice at Humboldt-Universität zu Berlin.

Victor Kattan

Victor Kattan is Assistant Professor in Public International Law at the University of Nottingham School of Law where he is the Deputy Director of the Nottingham International Law and Security Centre.

David Kretzmer

David Kretzmer is Emeritus Professor, Hebrew University of Jerusalem.

Shastikk Kumaran

Shastikk Kumaran is an Examination Fellow at All Souls College, the University of Oxford. He was recently the Bonavero Institute Student Fellow to the European Centre for Constitutional and Human Rights.

Barak Medina

Barak Medina holds the Landecker-Ferencz Chair in the study of Protection of Minorities and Vulnerable Groups at the Faculty of Law of the Hebrew University of Jerusalem.

Kalika Mehta

Kalika Mehta is Postdoctoral Researcher and Lecturer at the Chair of Criminal Law, International Criminal Law and Legal History, and at the Centre for British Studies at Humboldt-Universität zu Berlin.

Jasmine Moussa

Jasmine Moussa is the Legal Advisor to the Minister of Foreign Affairs of Egypt and has acted as Counsel for Egypt before the International Court of Justice and the International Tribunal for the Law of the Sea.

Andreas Piperides

Andreas Piperides is a Ph.D Candidate in Public International Law at the University of Glasgow and a Graduate Teaching Assistant in Public International Law, International Humanitarian Law, and International Human Rights Law.

Yaël Ronen

Yaël Ronen is a Professor of Law at the Academic Center for Science and Law at Hod Hasharon, and a Senior Research Fellow at the Minerva Center for Human Rights at the Hebrew University in Jerusalem. She is the Academic Editor of the Israel Law Review, published by Cambridge University Press.

Yuval Shany

Yuval Shany is the Hersch Lauterpacht Chair of Public International Law at the Hebrew University of Jerusalem, and a Senior Fellow at the Israel Democracy Institute.

Omar Yousef Shehabi

Omar Yousef Shehabi is a Doctoral (JSD) Candidate at Yale Law School. He was most recently a visiting Professor of law at McGeorge School of Law, University of the Pacific, and an Acting Assistant Professor at New York University School of Law. He has served as a Legal Officer with the UNRWA and with the United Nations Secretariat, and a Legal Advisor to the Palestinian negotiating team in permanent-status negotiations with Israel.

Ariel Zemach

Ariel Zemach is a Senior Lecturer at Ono Academic College, Israel. He holds a J.S.D. and an LL.M. from Columbia University School of Law and an LL.B. from The Hebrew University of Jerusalem.

Content

Kai Ambos

The 2024 ICJ Advisory Opinion on the Occupied Palestinian Territory

An Introduction

The recent Advisory Opinion of the International Court of Justice (ICJ) on the "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem"[1] (AdvOp) offers a comprehensive analysis of the (un)lawfulness of Israeli policies and practices in the Occupied Palestinian Territory (OPT). It thereby goes well beyond the 2004 *Palestine Wall* Advisory Opinion[2] which limited itself to an assessment of the legality of the Wall without however providing a full-fledged legal analysis of the Israeli occupation. Now the Court finds that the series of individual violations of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) – *inter alia*, Israel's settlement policy, annexation/acquisition of territory by force, adoption of discriminatory legislation and measures, and denial of Palestinian self-determination (AdvOp, para. 103 ff.) – have cumulatively turned the arguably *ab initio* lawful occupation into an unlawful one (para. 244 ff.). This finding of unlawfulness results in Israel's obligation to withdraw from the OPT "as rapidly as possible" (para. 261, 267). What is more, the occupation's unlawfulness renders it an international wrong under the Law of State Responsibility. As such, the decision has consequences not only for Israel, but also for third States as well as international and regional organisations in terms of non-recognition and non-cooperation (para. 265 ff.).

The UN General Assembly (GA) has affirmed and welcomed the AdvOp by Resolution A/RES/ES-10/24[3] adopted on 18 September 2024 with 124 votes in favour, 14 against and 43 abstentions (for the explanations of votes [incomplete] see the 55th plenary meeting[4]; Germany abstained[5]). These introductory remarks are not the place to undertake a closer analysis of this Resolution but it should be pointed out that the GA goes beyond the AdvOp in at least two respects. First, it demands an end of the occupation not

only "without delay" but, more concretely, "no later than 12 months from the adoption of the present resolution" (para. 2). Secondly, it demands compliance from Israel not only with regard to the AdvOp (e.g. regarding the cease of settlement activity and evacuation of settlers) but also with regard to the ICJs provisional measures orders in the *South Africa v. Israel* case[6] (para. 3(f)).

The AdvOp has received considerable attention in the international media and the legal blogsphere (see especially *EJIL: Talk!*[7], *Just Security*[8] and *Opinio Juris*[9]), including the respective podcasts. However, the discussion has remained piecemeal and ad hoc. With this edited volume, we seek to provide a more systematic and comprehensive coverage of this landmark decision that reflects a diversity of perspectives and brings together both Israeli and Palestinian voices. We can now happily present the result of this joint effort to the public: a total of 18 contributions, mainly written by scholars with an Israeli and Palestinian background and by a few from Egypt, Germany, India and Singapore. The contributions cover fundamental political, historical, and ethical aspects of the Israeli-Palestinian conflict, address the legal questions surrounding the Israeli occupation, the relevance (or lack thereof) of security considerations and the legal (and political) consequences of the unlawfulness of the occupation as well as some additional issues such as the relevance of the AdvOp for International Criminal Law (ICL), the question of apartheid, and Israeli domestic law.

David Kretzmer argues that the principle *uti possidetis juris*, raised in the Dissenting Opinion of Vice-President Sebutinde and according to which a new State established in formerly colonial territory inherits the former (colonial) borders is untenable in the situation of Israel. The reason is that at the time of independence Israel's leaders accepted the principle of partition. No claim was made then or subsequently that the State of Israel inherited the

borders of Mandatory Palestine and legislative acts reveal that Israel even regarded territories not within the UN Partition Plan borders as occupied territory.

Omar Yousef Shehabi discusses the impact of the AdvOp on a negotiated settlement. In his view the Opinion, in pronouncing that the Palestinians' right of self-determination is a peremptory norm which must be realised without conditions set by Israel as occupying Power, rejected the premise that this right can exclusively be fulfilled through bilateral negotiations. By logical extension, the Opinion calls into question the continued viability of the interim arrangements in the OPT set by the Oslo Accords.

Barak Medina takes issue with the Court's central finding that the occupation is illegal and thus Israel the aggressor which implies that an end to the conflict depends solely on Israel withdrawing from the OPT. He challenges the Court's choice to not even consider the possibility that the occupation is a means of self-defence invoking the doctrine of double effect.

For **Ardi Imseis** the AdvOp constitutes a seismic change in international law and practice on the question of Palestine, in so far it has shifted what was hitherto an almost exclusive focus on *how* Israel has administered its 57-year occupation of the OPT under IHL and IHRL, to the requirement that Israel *end* its occupation of that territory unconditionally and as "rapidly as possible". In addition, the Opinion stands out as the first time an international judicial authority has broached the subject of whether and under what circumstances a belligerent occupation of foreign territory can become unlawful over time through widespread and systematic violations of fundamental norms of international law, heralding an implied collapse of the *jus ad bellum* and the *jus in bello* distinction.

Jasmine Moussa analyses the separation between *jus ad bellum /in bello* as arising from the AdvOp. While the separation is widely

regarded as axiomatic, it was challenged by many States appearing before the Court, some of which implied that Israel's policies and practices, as violations of *jus in bello*, rendered the occupation unlawful under *jus ad bellum*. This line of reasoning also appeared in the Separate Opinion of at least one of the Judges and several commentators on the subject. The Court ultimately reaffirmed the separation with a twofold argument, namely qualifying the "legality of the occupation" as a *jus ad bellum* question, and framing Israel's policies and practices (prolonged occupation, annexation, and settlement policy) as violations of *jus ad bellum*. While the Court rightly concludes that Israel's continued occupation of the OPT violates the prohibition of acquisition of territory through force, the AdvOp is a missed opportunity to clarify the limits of necessity and proportionality in relation to occupation.

Ariel Zemach argues that the Court's determination that Israel's annexation policies render its continued presence in the West Bank unlawful finds no basis in the international prohibition against the use of force. Moreover, the Court's determination circumvents the Law of State Responsibility that determines the consequences of Israel's unlawful annexation policies.

Aeyal Gross finds that the ICJ has *de facto* adopted the functional approach to occupation with regard to Gaza. The Opinion is thus a critical point in the development of the law of occupation, in that it transcends a binary approach to the question of the existence of occupation, in favour of a more nuanced approach that enables holding that a territory is occupied, but not in an "all or nothing" way. More generally, Gross sees the Opinion as rejecting a more restrictive approach to the question of whether occupation exists in a territory or not in favour of a more flexible approach.

Shastikk Kumaran criticizes the Court's (ambiguous) finding with regard to Gaza. In his view, the Court wrongly relied on purely

"external" methods of control and should have referenced Israel's exercises of administrative authority over Gazans. The Court's approach also exposes a lacuna in the protection available for civilians in "enclosure" situations such as sieges.

Yuval Shany and **Michael Cohen** discuss three possible rationales for the Court's rejection of the relevance of Israel's security concerns: Lack of proof of serious and legitimate security concerns by Israel, the insufficiency of broad security concerns to justify the continued use of force and the insufficiency of broad security concerns to deny realization of Palestinian self-determination. The authors stipulate that as long as international law doctrine on the duty to end a belligerent occupation despite the prevalence of serious security concerns remains contested, and as long as security conditions in the region remain extremely unstable, it is unlikely that a withdrawal will be deemed practicable – putting aside other political and legal considerations concerning Israel's presence in the area. They therefore prefer the approach taken by the minority Judges – Judges Tomka, Abraham and Aurescu – which in their view mediates better than the majority's approach between a possible interpretation of international law norms, the prevailing diplomatic framework (which calls for negotiated security arrangements) and the very real security concerns of Israel.

Jinan Bastaki also deals with the alleged Israel security concerns to justify its occupation of the OPT as well as its practices against Palestinians in the OPT. Yet, Bastaki stresses that, while international law accepts that States may employ otherwise prohibited actions in exceptional circumstances and within certain constraints, the AdvOp firmly affirms that security cannot justify illegal actions such as annexation or prolonged occupation, emphasizing that Israel's security interests cannot override estab-

lished legal principles. The author further discusses the Court's rejection of Israel's security arguments, reaffirming that the rights of the Palestinian people, including their right to self-determination, cannot be compromised by security claims. Overall, the Opinion serves to limit State practices predicated upon security when they violate essential rights and when the security claim is based upon an illegal situation created by the very State which invokes security concerns.

Yael Ronen takes issue with the Court's instruction that States are under an obligation "not to recognize as legal the situation arising from the unlawful presence of the State Israel in the Occupied Palestinian Territory" (para. 279). She argues that this is an obligation without substance because presence as an occupant, even if maintained illegally, is – unlike purported annexation – a factual situation.

Yussef Al Tamimi and **Andreas Piperides** discuss possible implications of the AdvOp for the United Kingdom (UK) and Cyprus with regard to the UK's arms and surveillance support to Israel through its military bases in Cyprus. The authors argue that the third State obligations identified by the Court, including the duty not to render aid or assistance in maintaining the illegal situation, also apply to the current war in Gaza.

Matthias Goldmann analyses the obligations of non-recognition and non-assistance of other UN Member States with respect to the OPT as well. While uncertainties regarding the legal basis of such obligations may be resolved, it remains unclear, he argues, how to draw the line with regard to forms of assistance that indirectly contribute to occupation, particularly military cooperation.

Maryam Jamshidi analyses the possibility of unseating the Israeli Government from the GA in case of non-compliance with the

Advisory Opinion of 19 July 2024. She argues that the AdvOp provides a particularly strong legal basis – grounded primarily in the right to self-determination – to unseat Israel's government from the GA until it complies with the Opinion – as the Assembly did with the State of South Africa fifty years ago.

Mohamed El-Zeidy focuses on the legal findings of the ICJ concerning the Oslo II Accord, and argues in favour of its relevance in deciding the jurisdictional question raised by the UK before the International Criminal Court (ICC). The author also addresses whether invoking this question through a procedure of an *amicus curiae* during the warrant of arrest stage fits neatly within the ICC's procedural regime, and it concludes that it does not.

Florian Jeßberger and **Kalika Mehta** argue that the AdvOp, although not framed in the international criminal law paradigm, may have implications for the ongoing Palestine situation before the ICC and potential domestic prosecutions for the commission of international crimes based on the principle of universal jurisdiction. This concerns, *inter alia*, the elements of crimes against humanity of apartheid and forcible transfer. Taking in addition earlier decisions of the ICJ into account, such as on genocide (from Serbia/Bosnia to Ukraine and Gaza), it appears as if the ICJ is on the verge of becoming, reluctantly perhaps, a protagonist of international criminal justice.

Victor Kattan argues that, reading between the lines, the expression "systemic discrimination", which the Court referred to in para. 223 of the AdvOp, was used as a synonym for "apartheid". Even though the Court did not link this description to a breach of Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), there does not appear to be any substantial difference between apartheid and systemic discrimination. This is because the word "systemic" is associated with crimes

against humanity which is how apartheid is defined as a crime in international law.

Tamar Hostovsky Brandes examines the relationship between the AdvOp and Israeli law with respect to the duty to distinguish between Israel and the OPT. She argues that while the Opinion requires States to distinguish between Israel and the OPT in their dealings with Israel, and to omit acts that may strengthen Israel's hold of the Territories, calls for such distinction are a civil tort under Israeli law and those making them can be denied entry to Israel. As a result, Israelis are unlikely to support the Opinion. This will contribute to the growing gap between the international discourse and the domestic discourse in Israel with respect to the OPT.

We hope that this edited volume stands as a positive counter-example to the general climate of silencing, censorship, and distrust, which is widely felt in the current academic and non-academic discourse in Germany and elsewhere.[10] By bringing together a diversity of perspectives from scholars with a variety of backgrounds, we hope to enable a more open and constructive dialogue with respect to the issues this volume discusses.

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Political and Historical Considerations

Omar Yousef Shehabi

The Advisory Opinion and a Negotiated Settlement?

The accepted framework for settling the Palestine question through bilateral negotiations, in legal terms, does not survive the Advisory Opinion of 19 July 2024[1]. The degree to which the Advisory Opinion catalyses a new political framework remains to be seen. But the Advisory Opinion gives the Palestinians newfound agency in shaping one.

International authority on the Palestine question remains vested in the United States despite its waning global influence and its obstinate refusal to exercise that authority relative to Israel. The United States predictably will act to nullify the Advisory Opinion's effect. It will block any effort in the Security Council to reformulate the political framework. It will take coercive measures against the Palestinians as they pursue alternative ways to change the framework. And it will allow Israel to mete out further punishment upon the Palestinians for this "diplomatic terrorism"[2]. But the overwhelming vote in favour of the General Assembly resolution endorsing and implementing the Advisory Opinion demonstrates that Palestine enjoys broad, if not always deep, support.[3] The global revulsion at Israel's destruction of Gaza, a large swath of the West Bank and now Lebanon creates an opening for a new political paradigm. The tolerance of the Palestinian authorities and the Palestinian people for further pain at Israeli and American hands principally will determine whether and how that paradigm takes shape.

Overriding the Oslo Framework

But as for the Advisory Opinion itself: the Court could hardly have been more categorical, consistent with the prerogative of the General Assembly and Security Council to decide the "precise modalities" for ending Israel's unlawful occupation, in re-

jecting the necessity or primacy of bilateral negotiations to vindicate the Palestinian people's right of self-determination (para. 281). To the United States (whose written statement and written comments used the phrase "direct negotiations" 18 times in total[4]) and others who claimed the opinion would undermine *the* negotiation process prescribed in the Oslo Accords, the Court's response was appropriately curt: "whether the Court's opinion would have an adverse effect on *a* negotiations process is a matter of conjecture" (para. 40, emphasis added). By this rejoinder, the Court acknowledged that whatever vestiges of the Oslo Accords' interim arrangements may remain – and the Opinion brings that into question, as I shall discuss – Oslo as a framework for bilateral negotiations has expired.

The Court's review of recent UN engagement on the Palestine question supports this view. It cited Security Council Resolution 1515 of 2003 (para. 69), which endorsed the Quartet "Roadmap" towards the establishment of a Palestinian State. It also cited Resolution 2234 of 2016 (para. 71), which called for intensified "international and regional diplomatic efforts" to achieve a settlement based on the terms of the Madrid Conference, the Arab Peace Initiative and the Quartet Roadmap, never mentioning the Oslo Accords. But it did not cite Resolution 1850, which declared "the irreversibility of the bilateral negotiations". Judges Tomka, Abraham and Aurescu in their joint opinion expressed regret that the Court thereby "dismissed the Oslo Accords as being quasi-irrelevant"[5] (para. 43).

In fact, the Court's rejection of Oslo as a compulsory negotiation framework was categorical. It resolved that the Palestinian people's right of self-determination, as a peremptory norm, "cannot be subject to conditions on the part of the occupying Power", whether set within the framework of a negotiation or any other

form of consensual dispute settlement (para. 257). The General Assembly implemented this principle in demanding that Israel quit the occupied territory within a year (para. 1).

Voiding Resolution 1850

Nor can the Palestinian right of self-determination, in view of its peremptory character, be subordinated to any conflicting Security Council decision. Take Resolution 1850, which in prescribing negotiation as the sole means of settling the Palestine question deviated from general international law. Articles 2(3) and 33 of the Charter do not prescribe a method by which States must discharge their duty of peaceful settlement, nor dictate that parties may only pursue one method at a time. The ICJ has recognised the legitimacy of negotiating concurrently with other methods of pacific settlement, including judicial resolution (*Aegean Sea Continental Shelf*[6] (1978), para. 29;[7] *Diplomatic and Consular Staff*[8] (1980), para. 43). Furthermore, no matter how attenuated or protracted a negotiation process, "if a dead lock is reached, or if … one of the Parties definitely declares himself unable, or refuses, to give way … there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation" (*Mavrommatis Palestine Concessions*[9] (1924)). Two decades of fruitless negotiations proved exactly that. We need no longer debate whether the right of States to choose between pacific settlement methods is *jus dispositivum* and/or whether Resolution 1850 lawfully displaced it: it is now void insofar as it purported to deny the Palestinians recourse to all peaceful means of dispute settlement in fulfilment of their right of self-determination.

Implications for the duty of collective cooperation

The Opinion, as bold and groundbreaking as it undoubtedly was, might have gone further. The Court elaborated, in greater detail than in the *Namibia* Advisory Opinion, the diplomatic implications of States' duty to cooperate in bringing an unlawful territorial situation to an end. It could similarly have defined the political implications, specifically, that any State which obstructs the Palestinian people in their resort to peaceful means other than negotiation, i.e. blocks the Palestinians from exercising their right of self-determination without the agreement of the occupying Power, would breach its duty of collective cooperation to bring an end to a serious breach of a peremptory norm.[10] This, nevertheless, is the logical consequence of the Court's conclusion. It follows that coercive non-forcible measures against Palestine and its officials for pursuing peaceful means other than negotiation might be a prohibited intervention (see *Military and Paramilitary Activities*[11] (1986), para. 205).

The time for negotiations has passed

Those desperate to breathe life into the *ancien régime* of negotiation will point to the separate opinions of a handful of judges who would have qualified Israel's obligation to withdraw "as rapidly as possible" (para. 285(4), *dispositif*). Judges Nolte and Cleveland saw "significant practical issues" which render it impractical for Israel to withdraw "in the same way, or at the same time, with respect to every part of the occupied territory"[12] (para. 16). Judge Iwasawa, referencing the principles of Security Council Resolution 242, stated that the withdrawal "should follow from arrangements arrived at on the basis of these principles under the supervision of

the General Assembly and the Security Council"[13] (para. 20). But even these separate opinions did not suggest that Israel, as an illegal occupier, retained discretion over these decisions, let alone that the timing, means or conditions of withdrawal would be determined by negotiated agreement between illegal occupier and occupied. Certainly, nothing in the *Opinion of the Court* supports this view. The Court twenty years ago in the *Wall* Advisory Opinion[14] concluded with a call for a "negotiated solution" (para. 162). Not this time. While it quoted part of its exhortations from the *Wall* Advisory Opinion, it conspicuously omitted the negotiations part (paras. 282-283). Judges Tomka, Abraham and Aurescu, by their objection, confirmed that this omission was deliberate (para. 43).[15]

The status of Oslo's interim arrangement

So neither Oslo's framework of bilateral negotiations nor the principle that negotiation is the sole legitimate method for peaceful settlement of the Palestine question survives the Advisory Opinion. What about Oslo's interim arrangements? The Court again demonstrated its historical reluctance to engage with the concept of peremptory norms, which Judge Tladi detailed and criticised[16] (para. 16). While recognising the right of self-determination in the Palestine context as a peremptory norm, the Court soft-pedalled the politically sensitive consequences of that conclusion, including the viability of the Oslo II interim agreement that gives effect and legal veneer to Israel's suppression of Palestinian self-determination. Stating that "the Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law…", the Court chipped away in measured terms at certain interim arrangements (para. 102). For example, it deemed Oslo's water allocation incompatible with Israel's obliga-

tion under the law of occupation to act as administrator and usufructuary of natural resources and with the Palestinians' right to permanent sovereignty over natural resources (PSNR), but without drawing a connection between PSNR and the right of self-determination (para. 133). Elsewhere, the Court sought to *reconcile* certain aspects of the interim arrangements with the law of occupation (para. 140) as support for its conclusion that Israel's "sustained abuse" of its position as an occupying power rendered its presence unlawful (para. 261).

Some may see here the Court implicitly applying the *Namibia* exception to the non-recognition principle. In this view, a declaration that the interim arrangements as a whole conflict with the right of self-determination and are void would, practically speaking, only hasten the end of limited self-rule in the Palestinian Bantustans on the West Bank. This, the argument goes, would deprive the Palestinians of certain "advantages derived from international cooperation"[17], such as recognition of the Palestinian passport by States which consider its validity contingent on the Oslo Accords. I suggest a simpler explanation. In judicial proceedings as in its international relations, caution rules the day. Oslo's interim arrangements reflect and express Israel's denial of Palestinian self-determination. But they also have allowed the Palestinian authorities to pursue self-determination from within the self-determination unit.[18] The Court was presumably careful in its treatment of the Oslo Accords not to provide Israel with a pretext to expel the Palestine Liberation Organization (PLO) from the occupied territory and revoke what remains of Palestinian self-rule.

A "rather complex question"

Nevertheless, recognition of self-determination in the Palestine context as a peremptory norm has profound consequences for Oslo's viability. Judge Tladi characterised the relationship between the right of self-determination and the Oslo Accords as a "rather complex question" and suggested the Court should have, at minimum, declared that the Accords must be interpreted in a manner consistent with the right (para. 35).

With respect to Judge Tladi, whose declaration was a *tour de force*, such a pronouncement would have been in error. The Vienna Convention on the Law of Treaties (VCLT) is applicable *mutatis mutandis* to international agreements like the Oslo Accords between States and other subjects of international law like the PLO. Article 44(5) VCLT denies separability to a treaty procured through threat or use of force in violation of *jus ad bellum* (i.e. coercion, Article 52). The Advisory Opinion acknowledged that "an occupation involves, by its very nature, a continued use of force in foreign territory" (para. 253). Because Israel's occupation is unlawful, so is the use of force which sustains it. Article 44(5) also denies separability to a treaty concluded in violation of an *existing* peremptory norm (Article 53). The Court did not specify when the right of self-determination of the Palestinian people acquired peremptory status. In my view, because self-determination as a peremptory norm emerged in the colonial context, the Palestinian right of self-determination acquired a peremptory character once the Israeli occupation became effectively "indistinguishable from unlawful regimes such as colonial domination or apartheid" (written statement of Jordan[19], para. 5.13.).

But whether this describes the Israeli occupation when the Oslo Accords were concluded 30 years ago and whether Israel's use

of force to maintain the occupation then violated *jus ad bellum* are purely academic questions. Under Article 64 VCLT, provisions of a treaty predating a new peremptory norm (*jus cogens superveniens*) remain valid only if they are properly separable from the remainder of the treaty.[20] Under Article 44(3), separability requires that the ground of invalidity "relates solely to particular clauses". In my view, Oslo's incompatibility with the right of self-determination lies in its structure: while Israel devolved certain competences to a Palestinian "Council", it retained overriding authority over every last detail of the *modus vivendi* the agreements established. No provision of the agreements, no matter how quotidian, operates outside this structural denial of Palestinian self-determination. None survive recognition of the peremptory character of this right.

A new legal paradigm for the question of palestine

I am not naïve: the vestiges of Oslo's interim arrangements will apply *de facto* until and unless Israel decides otherwise. The United States and certain other States will still demand that the Palestinians negotiate with their captor. But neither am I jaundiced: the Advisory Opinion *has* overhauled the law governing the Palestine question. International authority, whether expressed by Security Council resolution or US *diktat*, may no longer *lawfully* insist on the exclusivity or even the primacy of negotiation. For that Palestinian officialdom deserves its flowers. The long game – enhancing Palestine's legal subjectivity by accretion – has paid a handsome dividend in this Advisory Opinion. Now these officials must hold their nerve. They may draw inspiration from their people who remain steadfast and unbowed.

Reshaping narratives

I close with a personal reflection on this edited volume and the broader conversation amongst international lawyers on the Palestine question.

I have a law degree from an Israeli university. I know personally several of the Israeli contributors to this volume and I collaborate with other Israeli academics from time to time. They, like all others, are entitled to contribute to the legal literature on Palestine.

But I regret that too many Israeli voices in this conversation are constitutionally unable to see that we Palestinians are the protagonists in our own story, our condition, our struggle for freedom. We, too, are the protagonists in this Advisory Opinion, which is principally about the Palestinian people's unqualified and overriding right of self-determination. Israel is not the principal in the Advisory Opinion. It is the antagonist: the military occupier which, through spectacular violence, denies Palestinians their right of self-determination and maintains domination over them by enforcing a system of apartheid in their territory.

By the standard of Palestinian legal academics, I am a conservative: a legal Realist who appreciates that we are a small fish swimming in a big, reactionary pond. My work has accordingly emphasised the need to preserve institutions like the PLO and UNRWA that, while diminished, are irreplaceable and indispensable to our steadfastness, our political aspirations and our eventual freedom. I have never opposed dialogue with Israel or with Israelis. But like all my compatriots, I have tired of the solipsistic Israeli narrative that has lost currency in all quarters except perhaps the United States Congress and the international law establishment: Israel the perennial victim, righteously established and peace-loving in its first two decades, burdened and corrupted by an occupation it never

wanted and which the incorrigible Arab natives will not allow to end.

This hoary narrative survives in part because Israeli legal apologia follows a pattern: signal humanity by opening with criticism of some "excess" of Israeli practices before leaping to the defence of the policy and worldview that undergird those practices. In this view, Israeli security is a preeminent and overriding consideration, which is a polite way of saying that Israeli lives simply mean more than Palestinian lives. This is not an *ad hominem* attack but methodological observation. It is a matter of time before international lawyers, too, come to reject this narrative and its embodiment in legal scholarship. In the meantime, it must be called out.

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5. ICJ, Joint Opinion of Judges Tomka, Abraham and Aurescu *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
6. ICJ, *Aegean Sea Continental Shelf Case (Greece v Turkey)*, Judgment of 19 December 1978.
7. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*.
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13. ICJ, Separate Opinion of Judge Iwasawa *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
14. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 09 July 2004.

15. ICJ, Joint Opinion of Judges Tomka, Abraham and Aurescu *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
16. ICJ, Declaration of Judge Tladi *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
17. ICJ, *Legal Consequences for States of The Continued Presence of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971.
18. This is emphatically *not* to say, as Judges Tomka, Abraham and Aurescu do, that Oslo's interim arrangements "have created a certain sense of stability" (Joint Opinion, para. 43). In the West Bank, excluding East Jerusalem, where the interim arrangements nominally still apply, 700 Palestinians have been killed by Israeli forces or Israeli settlers in the past year, the highest total since United Nations began recording casualties in the occupied territory 20 years ago. 2023 also set a record for settlement construction, with more settlement "outposts" legalised under Israeli law in 2023 than the prior seven years combined, see Tani Goldstein, '2023 Sets Record for Settlement Construction and Outpost Legalization', *The Times of Israel* (08 August 2023), https://www.timesofisrael.com/2023-sets-record-for-settlement-construction-and-outpost-legalization-watchdog/.
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David Kretzmer

The Principle of Uti Possidetis Juris and the Borders of Israel

Most of the writing on the ICJ Advisory Opinion on the "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including Jerusalem"[1], has related to the opinion of the Court itself, and to the attached individual opinions and declarations of the judges who agreed with most, if not all, of the Court's conclusions. In this short contribution, I shall relate to an argument raised in the Dissenting Opinion of Vice-President Julia Sebutinde.[2]

The uti possidetis argument

The argument, previously raised in an article by Avi Bell and Eugene Kontorovich, is that the borders of Israel are determined by the principle *uti possidetis juris*.[3] According to this principle, when a new State is established in territory that was previously subject to a colonial regime, the borders of that State are the administrative borders of the territory that had been subject to colonial rule. This rule applies even if there are ethnic or national minorities in that territory who wish to exercise their right to self-determination in a separate State. Bell and Kontorivich argued, and in her opinion Judge Sebutinde adopted their argument, that since Israel is the only State that arose in the territory of Palestine after the British withdrew from the Mandate in May 1948, Israel's borders are the international borders of Palestine that existed during the Mandate. Hence Israel is the sovereign power in the whole territory of Palestine "from the river to the sea". Israel may negotiate with other States to modify those borders, but the starting line is the borders of Mandatory Palestine.

Bell and Kontorovitz point out in their article that the "critical time" for determining the borders of a newly independent State is the date of independence. Later developments may serve as

evidence about the intention when the new State was established, but cannot abrogate the original intention. It is clear, then, that the time for applying *uti possidetis* in the case of Israel is the date of its establishment as an independent State, namely 15 May 1948, while subsequent events may reveal how the leaders of Israel related to its borders on that date.

Other scholars have related to the *uti possidetis* argument. Thus, for example, writing before Bell and Kontorovich, Malcolm Shaw argued that the object of the *uti possidetis* principle is to promote stability and avoid conflict when colonial rule comes to an end.[4] Hence the international community may depart from the principle when it is of the opinion that applying it might endanger peace and security. In Shaw's opinion, this was the situation when the United Nations General Assembly adopted the Partition Plan (UNGA Res 181(II), 29 November, 1947). Under this Plan, after the British Mandate over Palestine ended, two separate States, an Arab State and a Jewish State, were to be created in the territory of the Mandate. The borders of the two States were part of the Plan.

Ariel Zemach presented similar arguments, but also raised another reason why the principle does not apply in the case of Israel.[5] Zemach argued that while the *uti possidetis* principle overrides the right of an ethnic/national *minority* to self-determination, it has never been applied to allow a minority in a former colonial territory to demand sovereignty in the whole of that territory, thereby frustrating the right to self-determination of the national *majority* in the territory. In this context, it is appropriate to point out that according to the report of the United Nations Special Committee on Palestine (UNSCOP) that recommended partition of Palestine into two States, at the end of 1946, the Jews comprised only one third of the population in the territory of the British Mandate.[6]

Rejecting the argument

Shaw and Zemach's grounds for rejecting the application of the *uti possidetis* principle in the case of Israel/Palestine are convincing. At the same time, I contend that there is another more cogent reason for rejecting the Bell/Kontorovich/Sebitunde argument. That reason is that at the time of independence Israel's political leaders did not claim that the new State was established in the whole of the territory of the Mandate. In fact, the founding fathers of the State of Israel claimed the opposite: they accepted the principle of partition even though they were not happy with the Partition Plan proposed in General Assembly Resolution 181 and did not intend to accept the borders laid out in that Plan.[7]

The reasons for accepting partition of Palestine were complex. In the first place, the leaders of the Yishuv (the Jewish community in Palestine) wanted to obtain international legitimacy for the Jewish State. They realised that achieving this goal was dependent on accepting the UN Partition Plan. The representatives of the Jewish Agency, who represented the Yishuv on the international level in the pre-State era, and immediately after the Declaration of Independence, worked hard to persuade UN member States to support partition,[8] and General Assembly Resolution 181 is expressly mentioned in the Declaration on the Establishment of the State of Israel of 14 May 1948. Furthermore, in secret talks with King Abdallah of Jordan before the surrounding Arab countries invaded Palestine on 15 May 1948, representatives of the Yishuv made it clear that they were committed to the principle of partition and would not agree to a plan that contradicted it.[9] Secondly, the leaders of the Yishuv realised full well that there could be a Jewish State only if there were a large Jewish majority in it. Establishing

the State in the whole of Mandatory Palestine would have meant that the Jews were a minority in their own State.

The conduct of the political leaders of Israel after the State was established reveals quite clearly that they never imagined, let alone claimed, that the State had been established in the whole of Palestine. The Provisional Government of the State related to territories held by the Israeli Defence Forces (IDF) that were not included in the Jewish State under the UN Partition Borders as occupied territory.[10] Hence it was of the opinion that special legislation was required in order to apply the law of Israel in such territories. It therefore tabled legislation that was enacted by the Provisional Council of State, which served as the State's legislative body before the first elections. This legislation, the Area of Jurisdiction and Powers Ordinance,[11] of 26 September 1948, provides:

> *"Any law that applies in the whole of the State of Israel will be regarded as applying in all the territory both of the State of Israel as well as in any part of the Land of Israel which the minister of defence defines in a proclamation is being held by the IDF."*

We see then that both the executive and legislative organs of the newly independent State made a clear distinction between the territory of the State and other territory in the Land of Israel that had been part of the British Mandate territory. There could hardly be more persuasive evidence that neither of these organs thought that the borders of the State of Israel had been determined by the principle of *uti possidetis*.

According to the UN Partition Plan, Jerusalem and its environs were not supposed to be part of either of the two States envisioned in that Plan, but a *corpus separatum* that would be subject to international control. After the IDF took control of West Jerusalem in

1948, it was regarded as occupied territory, and not part of Israel's territory.[12] In a meeting of the UN Security Council that took place on 22 May, 1948, Abba Eban, the Jewish Agency representative who represented the Provisional Government of Israel, was asked which territory was held by the Israeli forces. Eban replied:

> *"The Provisional Government of Israel actually exercises control at present over the entire area of the Jewish State, as defined in the resolution of the General Assembly of 29 November 1947. In addition, the Provisional Government is now exercising control over the city of Jaffa; northwestern Galilee, including Acre, Zib, Basea and the Jewish settlements up to the Lebanese frontier; a strip of territory alongside the road from Hulda to, Jerusalem; almost all of new Jerusalem and of the Jewish quarter within the walls of the Old City of Jerusalem.*
>
> ***The above areas outside the territory of the State of Israel are under the control of the military authorities of the State of Israel**, who are strictly adhering to international regulations in this regard. The southern Negeb is an uninhabited area over which no effective authority has ever existed."*[13]
> (emphasis added)

Here then is more evidence that the Provisional Government of Israel, comprised of members of political parties that enjoyed the support of the majority of the Yishuv, did not consider that Israel had been established in the whole of Mandatory Palestine.

In 1949 Israel conducted negotiations with the surrounding Arab States that led to the signing of Armistice Agreements between Israel and Egypt, Jordan, Syria and Lebanon. The Armistice Agreement between Israel and Egypt of 24 February 1949 states

that the Demarcation Line established between the parties "is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to the rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question." (Article V. 2). The Armistice with Jordan of 3 April 1949 does not contain a similar clause. It does, however, state (Article II) that:

1. The principle that no military or political advantage should be gained under the truce ordered by the Security Council is recognised;
2. It is also recognised that no provision of 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, the provisions of this Agreement being dictated exclusively by military considerations.

Following the signing of the Armistice Agreement with Jordan there was uncertainty about the legal status of the Armistice lines between Israel and Jordan. On the one hand, the Agreement states that its provisions are "dictated exclusively by military considerations", thereby seemingly implying that those lines are only the dividing lines between two armies, and not lines defining the political borders of the State of Israel. On the other hand, both sides to the Agreement committed themselves to refrain from use of force against the other, recognized the right of each party to its security and to be free from attack by the other party, and declared that "establishment of an armistice between the armed forces of the two Parties is accepted as an indispensable step toward the liquidation of armed conflict and the restoration of peace in Palestine" (ibid., Article I).

Under the Armistice lines, Israel had more territory than the territory allotted to the Jewish State under the UN Partition Plan.

Since Israel's leaders feared that there may be pressure to force Israel to withdraw to the Partition Plan lines, Israel had a political interest in promoting recognition of the Armistice lines as its political border.[14] Hence, quite soon after the end of the War in 1949, senior officials presented arguments that the Armistice lines were the recognized borders of the Jewish State. A main example is a letter dated 23 October 1949 from Shabtai Rosenne, legal adviser of the Israel Ministry for Foreign Affairs, to Abba Eban, head of Israel's delegation to the UN. In this letter Rosenne argues that Israel has sovereignty over all the territory that is under its control. According to Rosenne, this sovereign territory includes West Jerusalem, which, under Resolution 181, was supposed to be part of the *corpus separatum* that would not belong to either of the two States that would come into being in Palestine after the Mandate ended.[15] Rosenne subsequently delivered and published a public lecture in which he argued that the Armistice Lines are Israel's political borders.[16] As legal adviser to the Israel Ministry of Foreign Affairs, it is inconceivable that Rosenne would publicly have presented a view on the State's borders that was incompatible with that of his government.

During the 1950's, Israel's leaders called on its neighbours to enter into negotiations on permanent peace agreements. Speaking in the Knesset in May 1954, Foreign Minister Moshe Sharett declared that Israel was prepared to enter into negotiations that would be based on "Israel as it is, with its territory and population, that is to say Israel in its existing borders…".[17] Had the decision-makers in Israel been of the opinion that Israel had inherited the borders of Mandatory Palestine, one would have expected its Foreign Minister to claim that these borders would be the starting point for negotiations, but that in a peace agreement Israel might be prepared to consider modifying them. Sharett did nothing

of the sort. Once again this is clear evidence that none of Israel's decision-makers thought that the *uti possidetis* principle was relevant in determining the borders of the Jewish State.

In order to accept that Israel's borders were determined by the *uti possidenti* principle, we have to believe that none of the branches of Israel's government were ever aware that Israel's sovereign territory included the whole of the West Bank and Gaza. After the June 1967 Six Day War the Israeli authorities related to the territories that had been taken by the IDF as occupied territory in which Israeli law did not apply. Hence, they thought it necessary to pass special legislation in order to apply Israeli law in East Jerusalem.[18] Furthermore, the authorities never once argued before Israel's Supreme Court that these territories were part of the State's sovereign territory. In a joint judgment of ten judges handed down in 2005, in referring to the West Bank and Gaza, the Supreme Court declared:

> *"According to the legal outlook of all Israel's governments as presented to this court – an outlook that has always been accepted by the Supreme Court – these areas are held by Israel by way of belligerent occupation... The legal regime that applies there is determined by the rules of public international law and especially the rules relating to belligerent occupation."*[19]

Evidence of the approach of Israel's legal authorities is also contained in the first Military Order promulgated when Israel took control over the West Bank in June 1967. That Order provided that the military courts that had been established to try residents of the West Bank who were charged with security offences must apply the Fourth Geneva Convention, 1949, that applies to the protection of persons in occupied territory.[20] Some months later, the section in

the Military Order relating to the Geneva Convention was revoked and the government raised doubts whether the Convention applied.[21] However, these doubts were not based on the claim that the West Bank is part of Israeli territory, but on the claim that since Jordan was not the sovereign power in the West Bank when Israel occupied the area, the Convention did not apply to this specific occupation.[22] The Israel Supreme Court has ruled that there was never any doubt that the Hague Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land apply in the West Bank.[23] The Court regularly resorts to Article 43 of those Regulations that defines the obligations of an occupying power in occupied territory.[24]

It is indeed true that the "critical time" for application of the *uti possidetis* principle is the date of independence. But subsequent developments provide crucial evidence whether the newly created State intended to inherit the borders of the departing colonial regime. I have shown that neither at the time of independence nor later, when Israel gained control over the West Bank, did any of its governmental organs claim that Israel's sovereign territory extends "from the river to the sea".

Conclusion

Vice-President Sebutinde's view that under the principle of *uti possidetis juris* Israel's political borders are those of Mandatory Palestine faces an insuperable obstacle. All the cases in which this principle has been applied are cases of border disputes between States in which one State rests its claim on the colonial borders (or, in the case of the dissolution of an empire, on the administrative borders between different parts of the empire), or in which a national minority demands not to be part of the State that is estab-

lished in those borders. There is no precedent for application of the *uti possidetis* principle when not only the newly established State itself does not claim that it is inheriting the colonial borders but shows in its actions that it does not regard those borders as its borders.

That a State's appetite for territory grows, when 20 years after independence it expands its control beyond its independence borders, can in no way change the fact that it did not claim to have inherited the borders of the colonial power that ruled the territory before it became independent. International law does not force a State to accept the colonial borders even though for various reasons it never claimed that these were its borders, and agreed to partition of the colonial territory so that another people living there could have their own State in the territory. The principle certainly does not apply when the agreement of the new State to partition of the colonial territory followed the view of the international community that two separate States should be created in the territory that had been administered by the departing mandatory power.

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4. Malcolm N. Shaw, 'The Heritage of States: The Principle of "Uti Possidetis Juris" Today' (1996) *British Year Book of International Law*.
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6. UN, 'Special Committee on Palestine – Report to the General Assembly' (A/AC.13/82), 31 August 1947, p. 23. According to the Report, at the end of 1946 there were 605,225 Jews in a population that numbered 1,846,000.
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8. Alan Dowty (ed.), *The Israel/Palestine Reader* (Polity, 2018).
9. See the report of Golda Meyerson on her talks with King Abdallah in Ruth Gavison (ed), *The Two State Solution: The UN Partition Resolution of Mandatory Palestine: Analysis and Sources*, (Bloomsbury Academic, 2013); Ephraim Karsh, 'The Collusion That Never Was: King Abdallah, the Jewish Agency and the Partition of Palestine' (1999) 34:4 *Journal of Contemporary History*.
10. In an interview for the oral history project of the United Nations, Shabtai Rosenne, the first legal adviser of Israel's Foreign Ministry, stated that until the second truce with the invading Arab States in July 1948, his "basic instruction was to remain with the framework of the partition resolution". Only later was the instruction changed. The reason for the change was the failure of the UN to do anything about the siege on Jerusalem. UN Oral History Project, 'Interview with Shabtai Rosenne, by Jean Krasno', 12 June 1990.
11. As the Provisional Council of State was not an elected body, the laws it enacted were termed "ordinances". These ordinances have the status of primary legislation in Israel's legal system.

12. See Proclamation No. 1, Rule of Israel Defence Force in Jerusalem, 12 Official Gazette (2.8.1948), 66. This Proclamation (signed by Minister of Defence David Ben Gurion), defines Jerusalem as "the occupied territory", and provides that the law of Israel will be applied in the occupied territory.

13. UN Security Council '301st Meeting, The Palestine Question' (S/PV.301), 22 May 1948.

14. Israel's fears of pressure to withdraw to the Partition Resolution lines were not unbased. At one stage in late 1948 President Truman was of the opinion that if Israel refused to relinquish control over the Negev that had been allocated to the Arab State in exchange for recognition of its control over the Galilee that was allocated to the Arab State, he would demand full implementation of the Partition Plan: Michael J. Cohen, *Truman and Israel* (University of California Press, 1990), p. 260. Also see Hagai Eshed, '10 Years of Israel's Foreign Policy: "Continuing the War of Independence by Other Means"', *Davar*, 13 April 1958, p. 14. The fear that there would be pressure to return to the Partition lines, or at least to relinquish control over some of the territory not included in the Jewish State under the Partition Resolution, was a constant concern of Israeli decision makers. See, e.g., the briefing of Minister of Foreign Affairs, Moshe Sharett, to the Israeli delegation to the 1949 Lausanne Conference convened by the UN Conciliation Commission for Palestine (UNCCP). Sharett explained that the Armistice Lines serve as a barrier against attempts to reduce the territory of the State or in some other way to change the borders of the State without its consent. Foreign Ministry documents, Book 4, Item 146, p. 307-308. Also see the cable to the Director General of the Foreign Ministry dated 4 August 1949, in which a member of Israel's delegation to the Lausanne Conference reports on a meeting with a senior USA official who said that Israel would have to relinquish control over some of the territory that was not allocated to her under GA Res 181. Ibid., Item 149, p. 316-317. The Foreign Ministry documents are available at https://search.archives.gov.il/search/0b0717068893ebe1

15. Ministry of Foreign Affairs of Israel, FO/I/31452(19).

16. This lecture was published in Shabtai Rosenne, *Israel's Armistice Agreements with the Arab States: A Juridical Interpretation* (Blumstein's Bookstores, 1951), reviewed by Norman Bentwich in (1952) 15:3 *Modern Law Review*. Referring to the Armistice Lines with Jordan, Rosenne wrote: "It is possible, however, that the juridical function of these lines is far greater, and that they are indistinguishable from international frontiers proper." (ibid., 47).

17. The Knesset Plenary Records (Divrei Haknesset), '1958', 10 May 1954.

18. Law to Amend the Government and Law Ordinance (Amendment no. 11), 5727-1967 (27 June 1967). On the basis of its authority under this Law the Government of Israel issued an Order applying Israel's law, jurisdiction and administration in East Jerusalem: Government of Law Order (No. 1), 5727-1967.

19. Supreme Court of Israel, *Gaza Shore Regional Council v. The Knesset* (1661/05), Judgment of 9 June 2005, para. 3.

20. David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Oxford University Press, 2021), p. 55.

21. Ibid., 56
22. Meir Shamgar, "The Observance of International Law in the Administered Territories" (1971) *Israel Yearbook of Human Rights*.
23. Supreme Court of Israel, *Gaza Shore Regional Council v. The Knesset* (1661/05), Judgment of 9 June 2005, para. 4.
24. Kretzmer and Ronen (fn. 20), Chapter 8.

Legality of Occupation

Barak Medina

The Legality of the Occupation and the Problem of Double Effect

The conflict between Israel and Palestine, or more accurately, between the two Peoples, has persisted for over a century. A tragic reminder of the unbearable costs of this conflict is the deadly October 7 attack by Hamas on Israel, and the ensuing war, which has led to horrific consequences, with thousands of Israelis and Palestinians killed, many severely injured, and extensive damage to the civilian infrastructure in the Gaza Strip. In these circumstances, an important question arises: what role should international law and international tribunals play in mitigating the grave harm to all those involved in the conflict?

The distinction between Israel's "policies and practices" and the legality of occupation

One well-developed aspect within international humanitarian law (*jus in bello*) is the examination of the legality of specific practices and policies of the parties involved, irrespective of the conflict's origins. This element is well addressed in the recent Advisory Opinion[1] of the International Court of Justice on the legal consequences of Israel's occupation. As is common in asymmetric warfare, the Court focuses exclusively on the actions of one party, namely the State actor, an approach which creates an inherent bias and raises doubts about the fit of IHL norms to modern warfare. At the same time, the decision provides a comprehensive, and thus important legal analysis of central aspects of Israel's "policies and practices". The Court explains why Israel's settlement policy, land confiscation, exploitation of natural resources, and more are illegal, as they violate the duty to exercise power for the benefit of the local population. Subject to the inherent limitations of IHL, this part of the Advisory Opinion is sound and its validity stands re-

gardless of one's position on the conflict itself, its underlying causes, and possible resolutions. However, the second, more fundamental aspect of the decision, which addresses the legality of the occupation itself, is more contentious.

An important potential role of international law and international tribunals is to assist the parties to resolve the conflict by examining the legality of their use of force (*jus ad bellum*). A finding that the use of force by one party is unjustified and therefore illegal could potentially assist, even if only indirectly, in paving the way to resolving the conflict. This aspect is at the heart of the Advisory Opinion under consideration here. The Court's central finding is that Israel's occupation itself, irrespective of the specific policies and practices it employs, is illegal. The Court asserts that the occupation violates the Palestinian people's right to self-determination, a right which "cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right" (para. 257). Consequently, it determines that "Israel has an obligation to bring an end to its presence in the Occupied Palestinian Territory as rapidly as possible" (para. 267). The implicit assumption of this approach is straight-forward: the Court views Israel as the aggressor, implying that an end to the conflict depends solely on Israel halting its unjustified and thus illegal use of force against the Palestinians, particularly by withdrawing from all Occupied Palestinian Territory.

The missing analysis: the occupation and self-defence

The use of force, in itself, is not inherently illegal. A country may justifiably use force, which may result in temporary occupation if such measures are required for self-defence against deadly attacks. From the Israeli perspective, the occupation is necessary to pre-

vent, in the absence of a peace agreement, what legendary Foreign Minister Abba Eban referred to as "Auschwitz lines"[2]. Surprisingly and without any explanation, the Court decided to completely ignore the possibility that the occupation is a means of self-defence. The Court mentions in passing that "Israel's written statement [...] contained information on [its] security concerns" (para. 47), but it avoided addressing these concerns or even mentioning their nature. This choice to ignore the possibility that the occupation is aimed at and needed for self-defence is incompatible with both law and morality.[3]

Israel's prolonged occupation likely serves two purposes: one, which is impermissible, is the acquisition of territory; the other, which is permissible, is to address security concerns. It is questionable to conclude, as the Court did, that the occupation is illegal because "Israel's security concerns [cannot] override the principle of the prohibition of the acquisition of territory by force" (para. 254). As long as the (temporary) acquisition of territory is a side-effect of the permissible purpose, the occupation may be justifiable, subject to proportionality constraints, despite the existence of the additional, unjustifiable aim (this situation is related to the doctrine of double effect in ethics). Israel's security concerns cannot justify the acquisition of territory by force; but they may justify continuing the occupation, until the security concerns are met.

The omission to consider the possibility that the occupation is needed to meet Israel's security concerns appears to be a deliberate choice by the Court. Consider, in this respect, two aspects of the decision – one of form and the other of substance.

Regarding form, in describing the factual background of the conflict, the Court is careful to avoid mentioning any aggression committed by the Palestinian side, possibly assuming that such

omission is essential to avoid addressing Israel's security concerns. For instance, in describing the 1948 war, the Court wrote:

> *"On 14 May 1948, Israel proclaimed its independence with reference to the General Assembly resolution 181(II); an armed conflict then broke out between Israel and a number of Arab States, and the Plan of Partition was not implemented."*
> (para. 53)

The description of an armed conflict that "then broke out", as if it was a force of nature rather than what it really was – an illegal use of force against Israel by the Palestinians and the Arab countries supporting them – serves the Court's narrative of ignoring the risks to Israel's very existence. The same is true regarding the three other major rounds of violence in the region: the 1967 war is described as a conflict that simply "broke out between Israel and neighboring countries" (para. 57), again ignoring the fact that the war resulted from explicit threats against Israel by Arab countries, which were also translated into acts of aggression. Similarly, the Court stated that "in October 1973, another armed conflict broke out between Egypt, Syria, and Israel" (para. 60), omitting any reference to the identity of the aggressors, namely the Arab countries. Most importantly, the Court used similar language when referring to the terror attacks launched by Hamas: "following an increase in acts of violence from the West Bank in the early 2000s, Israel began building a 'continuous fence'" (para. 67). The Court referred here to "acts of violence", avoiding the term terror and the fact that these "acts of violence" resulted in the murder of more than 1,000 Israeli citizens; and it chose to refer to the perpetrators as some mysterious people "from the West Bank", concealing the fact that they were organized Palestinian militant groups, who operated from

areas under Palestinian Authority control following the Oslo Accords. This deliberate choice of words is telling.

The legality of Israel's blockade of the Gaza Strip before October 7

As for substance, the Court's profound mistake is illustrated by its legal analysis of the situation in the Gaza Strip before October 7. According to the Court, Israel's disengagement from Gaza in 2005 did not end its occupation, because, so goes the argument, Israel maintained effective control "over, *inter alia*, the airspace and territorial waters of Gaza, as well as its land crossings at the borders, [and] supply of civilian infrastructure, including water and electricity [...]" (para. 89). According to the Court, even this type of occupation is illegal, as a matter of *jus ad bellum*, because it "impairs the enjoyment of [the Palestinians'] right to self-determination" (para. 241). Leaving aside the debate whether Israel remained an occupying power, my interest here is with the conclusion that the Court derived from this finding, namely that this form of (so-called "functional") occupation was inherently illegal.

I suggest that this approach contradicts basic common sense. To see why, a brief reminder of the recent history of the Gaza Strip is in order. In 2005, Israel unilaterally uprooted all its settlements in Gaza and ended its control over this 360 square-kilometer area (which is supposed to be part of the future Palestinian State, along with the 5,800 square-kilometer area known as the West Bank). Israel's disengagement granted Egypt exclusive control over Gaza's southern border, beyond Israel's reach. Israel handed power in Gaza to the Palestinian Authority, led by the PLO, the representative of the Palestinian People (the entity which also rules parts of the

West Bank, according to the 1993 Oslo Accords). However, in 2007, Hamas took control of the Gaza Strip (after winning the elections there), murdering hundreds of PLO officials and supporters. Since then, Hamas and other terrorist organizations have launched constant attacks against Israel, imposing life-threatening risks on nearly 100,000 people living in Israel's Western Negev. While Israel allowed thousands of Palestinians to enter Israel for work, it also imposed a blockade on the borders it controls. This measure was designed to prevent Hamas from obtaining weapons, while allowing supplies for the civilian population. However, as tragically revealed on October 7, 2023, this measure proved futile. The border between the Gaza Strip and Egypt was effectively breached, enabling Hamas to obtain a vast number of weapons. It turned the Gaza Strip into a fortress and trained its army of 50,000 strong militants to attack Israel, a plan ultimately carried out on October 7.

Given these facts, the Court's approach is wrong on two main levels. Assume, counter-factually, that Israel's control over part of the borders of the Gaza Strip is sufficient to classify it as an occupying power. One difficulty is the Court's ruling that it was impermissible for Israel – in terms of *jus ad bellum* – to take the measures it did from 2007 until the war. As indicated, these measures could not have achieved any aim other than meeting Israel's most urgent security concerns. The finding that Israel was not allowed to employ even the very mild measures it did, irrespective of whether they were proportional or not, simply because they somehow "impair the enjoyment [of the Palestinians] of the right to self-determination" is hard to understand even if it were made before the October 7 massacre. Making such a ruling, as the Court did, *after* Hamas committed the very horrors that Israel's "occupation" was aimed at preventing, proving that Israel's security concerns are real, casts doubt on the Court's impartiality.

But the Court's even more troubling mistake is one that has a direct effect on the analysis regarding the legality of the occupation of the West Bank. The case of the Gaza Strip illustrates, in the most tragic way, the consequences of Israel unilaterally ending the occupation, without a peace agreement. The Israeli government was right in bringing an end to the occupation of the Gaza Strip. It was wrong, however, in doing so without any agreed-upon arrangements with the Palestinian Authority, which would have put in place safeguards to ensure that these arrangements are fulfilled. The Court's finding that Israel must repeat the 2005 disengagement and implement it unilaterally in the West Bank, and that it is even denied the power to limit the Palestinians' ability to bring weapons into the area, as this would amount to a continuation of the occupation which is absolutely prohibited, is, to use an understatement, unsound.

The way forward: the role of the ICJ in achieving peace

The approach reflected in the ICJ Opinion assumes that all it takes for restoring justice and resolving the conflict is for Israel to end the occupation. This simplistic position is not only legally flawed but also politically counterproductive. It is an approach that is rejected by an overwhelming majority of the Jews in Israel, from all sides of the political spectrum. The many Israelis (probably around one-half of the population) who strongly support the cause of fulfilling the Palestinians' right to self-determination, are also rational individuals, who care for their lives, and thus just as strongly object to a unilateral withdrawal from the West Bank, without a peace agreement.

To assist in resolving the conflict, what is needed is a much more nuanced, well-informed approach, which addresses the just

concerns of both sides. The current Israeli government should be criticized for its principled objection to the establishment of a Palestinian State next to the State of Israel. Similarly, the Palestinian leadership should be criticized for its principled objection to the existence of Israel as a Jewish and democratic State, and for security arrangements that will minimize the risk of a repeat of the Gaza Strip scenario. Both sides should be pushed to resume negotiations in good faith and to accept the principle of two States. The Advisory Opinion is a missed opportunity in pushing both sides towards the inevitable two-states solution.

In my view, the Court should have ruled that Israel is permitted to continue the occupation, as long as two conditions are met: first, its practices and policies are compatible with IHL; and second, the Israeli government explicitly declares that the occupation is a provisional measure of self-defence and that it is committed to the establishment of a Palestinian State in this territory, next to Israel, subject to a peace agreement.

References

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Ardi Imseis

A Seismic Change

Serious Breaches of Fundamental Norms of International Law in Occupied Territory and the Collapse of the Jus ad Bellum/Jus in Bello Distinction

It is no understatement to say that the 19 July 2024 ICJ Advisory Opinion ("Opinion") concerning the "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem"[1] constitutes a seismic change in the international law and practice on the question of Palestine. In one fell swoop, the ICJ has shifted what was hitherto an almost exclusive focus of the international community on *how* Israel has administered its 57-year occupation of the Occupied Palestinian Territory (OPT) under International Humanitarian Law (IHL) and International Human Rights Law (IHRL), to the requirement that Israel *end* its occupation of that territory as "rapidly as possible". In receiving the Advisory Opinion through Resolution ES-10/24 of 18 September 2023, the General Assembly has demanded:

> *"that Israel brings to an end without delay its unlawful presence in the Occupied Palestinian Territory, which constitutes a wrongful act of a continuing character entailing its international responsibility, and do so no later than 12 months from the adoption of the present resolution."*

This shift from what I have called the "managerial" and "humanitarian" approach of the United Nations on the OPT to one that is *emancipatory* in outlook, is the single most important takeaway of the case.[2] At last, the international community has set a specific deadline by which Israel must withdraw from the OPT.

It is now incontestable that Israel's presence in the OPT is not merely unlawful, but – being an ongoing use of force – amounts to an aggression of a continuing character against the territorial integrity and political independence of the State of Palestine and a violation of the right of the Palestinian people to self-determina-

tion contrary to the UN Charter and general international law.[3] As *jus cogens* norms, neither of these violations can be justified under any circumstance, including on grounds of purported "security" or "self-defence". Not only is Israel under an unambiguous obligation to end its illegal presence in the OPT unconditionally, totally, "as rapidly as possible" and "without delay" (i.e. by 17 September 2025) in line with the Law of State Responsibility, but it must also make full reparation for damage caused to any natural or legal persons concerned going back to 1967, including restitution, compensation and satisfaction (Opinion, paras. 270, 285). Furthermore, third States and international organizations, including the United Nations, are under an obligation to not recognize as legal the situation arising from Israel's continued presence in the OPT, nor render aid or assistance in the maintenance of that situation (Opinion, para. 285). The scope of these latter obligations is very broad, and cuts across a host of bilateral and multilateral relations with Israel, both public and private. This includes military, economic, political, academic, social, and cultural relations that "entrench" or even merely "concern" Israel's continued illegal presence in the OPT or in any way impede the Palestinian people's right to self-determination resulting from that illegal presence (Opinion, paras. 278, 279). In short, the ICJ has provided a boon to the Palestine freedom and anti-apartheid movement by reaffirming the obligation of all States to distinguish in their dealings with Israel between the OPT and Israel.

An implied collapse of the jus ad bellum with the jus in bello?

But beyond the Palestine question, as such, the Opinion is notable for another thing upon which only a few scholars, including myself, have written.[4] It represents the first time an international judicial

authority has broached the subject of whether and under what circumstances a belligerent occupation of foreign territory not otherwise tainted by an initial illegal use of force (an open question in this case, which the Court did not deal with) can become unlawful over time. In so doing, it has dared to tread, if only impliedly, upon a received wisdom of international law that holds as sacrosanct the fundamental distinction between the law governing the use of force (*jus ad bellum*) and the law governing how force is used in armed conflict, including the law of belligerent occupation (*jus in bello*).

The conventional wisdom requires the distinction between the *ad bellum* and *in bello* law on the theory that to collapse them would frustrate the object and purpose of IHL, which is to limit the means and methods of armed conflict and to protect persons who are not, or are no longer, directly participating in hostilities. Because of its humanitarian purpose, IHL and its application must remain agnostic as to who is legally to blame for the commencement and continuation of armed conflict under the *ad bellum* law. If it were otherwise, so goes the thinking, the incentive of parties to an armed conflict to abide by the *in bello* law would be reduced under the weight of competing accusations of aggressive war, thereby resulting in greater harm during the course of hostilities to persons otherwise entitled to be treated humanely in line with the *in bello* rules.

In the past, members of the Court have maintained respect for this fundamental distinction in their consideration of situations of belligerent occupation. For example, in *Armed Activities* (*DRC v. Uganda*)[5] the distinction was affirmed, in part, by Judge Koojimans where he opined in *obiter dictum* that: "[i]t goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but

the rules governing its regime do not characterize the origin of the result as lawful or unlawful" (Separate Opinion of Judge Koojimans[6], para. 60).

In the Opinion, the Court appears to continue this approach. This is evident in para. 251, where the Court expressly recalls the distinction between the *jus ad bellum* and the *jus in bello*, indicating that "the 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". The Court accordingly determines that "[i]t is 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 to its reply to the" question of how Israel's policies and practices affect the legal status of its occupation of the OPT (ibid.). So far so good.

So where does the collapse of the fundamental distinction appear in the Opinion? Simply put, it arises from the fact that the base upon which the Court concludes that Israel's continued presence in the OPT is unlawful *ad bellum* rests on its prior evaluation of underlying policies and practices of Israel in the OPT *in bello*. In short, it is the cumulative effect of discrete violations over time of the *jus in bello* that results in the overall conclusion that Israel's continued presence in the OPT is violative of two fundamental norms of international law of *erga omnes* character and is therefore unlawful as a matter of the *jus ad bellum*: namely, the inadmissibility of the acquisition of territory by force, and the violation of a people's right to self-determination (Opinion, para. 261).

To be fair, the Court is not the progenitor of the implied collapse between the *jus ad bellum* and the *jus in bello*. Rather, the Court is merely a prisoner of the facts and law before it. And, broadly speaking, it adeptly handles these facts and this law in

three separate but connected steps that have confounded at least one commentator[7] but which, if followed carefully, make eminent legal sense. A summary of the Court's three step approach – tracking closely the order of the questions put to it by the General Assembly in resolution 77/247 of 30 December 2022 – is as follows.

(1) The Court commences its substantive analysis of the questions put to it by noting that under IHL "occupation is a temporary situation to respond to military necessity, and it cannot transfer title of sovereignty to the occupying Power" (Opinion, para. 105). It then examines the legality of various Israeli policies and practices in the OPT. This assessment is rooted, first and foremost, in Israel's illegal settlement policy – a violation of Article 49 of the Fourth Geneva Convention (Opinion, paras. 111-119). From there, among the other policies and practices determined by the Court to be illegal, all of which are connected to the settlement policy, are the following:

- Confiscation or requisitioning of Palestinian land in violation of Articles 46, 52, and 55 of the 1907 Hague Regulations (Opinion, paras. 120-123);
- exploitation of Palestinian natural resources in violation of Article 55 of the 1907 Hague Regulations (Opinion, paras. 124-133);
- extension of Israeli law and regulatory authority in the OPT in violation of Article 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention (Opinion, paras. 134-141);
- forcible transfer of the Palestinian population in violation of Article 49 of the Fourth Geneva Convention (Opinion, paras. 142-147);

- failure to protect and ensure Palestinian rights to life, humane treatment and freedom from violence in violation of Article 46 of the 1907 Hague Regulations and Article 27 of the Fourth Geneva Convention (Opinion, paras. 148-157).[8]

(2) Far from amounting merely to discrete violations of the *in bello* law, the Court then moves on to consider their cumulative effect over 57-years. It indicates, in no uncertain terms, that Israel's policies and practices "amount to annexation of large parts" of the OPT because they "are designed to remain in place indefinitely and to create irreversible effects on the ground" (Opinion, para. 173). It then concludes that "to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force" (Opinion, para. 179).

As part of this step, the Court then turns to assessing whether Israel's "legislation and measures" related to its "policies and practices" in the OPT are "discriminatory" (Opinion, paras. 180-184). For this, it necessarily turns to IHRL, without abandoning the overall context of the *jus in bello* within which that law must be interpreted given Israel remains an occupying Power in the territory. Applying this framework, the Court determines that "the regime of comprehensive restrictions imposed by Israel on Palestinians in the Occupied Palestinian Territory" – including on residency rights, freedom of movement and demolition of property – "constitutes systemic discrimination based on, *inter alia*, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD" (Opinion, paras. 192-223). Not losing sight of the founda-

tional problem of the settlements, 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", leading it to conclude "that Israel's legislation and measures constitute a breach of Article 3 of CERD" by which States parties – including Israel – "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." (Opinion, paras. 224-229).

A final part of this stage of the Court's analysis is its opinion concerning self-determination. Building on its determination in *East Timor*[9], subsequently affirmed in the *Wall*[10] and *Chagos*[11] opinions, that the obligation to respect self-determination of peoples is of *erga omnes* character, the Court indicates for the first time that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (Opinion, paras. 230-235). Set against this *jus in bello* frame of reference (i.e. "in cases of foreign occupation"), the Court then determines after careful analysis that "Israel's unlawful policies and practices" that it has reviewed under the *in bello* law "are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination" (Opinion, para. 243).

(3) At this stage, the Court does not have very far to go to come full circle with its analysis. It recalls that "the Israeli policies and practices" that it has assessed to be in violation of the *jus in bello* "have brought about changes in the physical character, legal status, demographic composition and territorial integrity of the Occupied Palestinian Territory" and that "[t]hese changes manifest an intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian Territory" in violation of the *jus ad bellum*

(Opinion, para. 252). The Court then correctly affirms 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 while integrating parts of their territory into the occupying Power's own territory" (Opinion, para. 257). It then concludes that:

> *"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."* (para. 261)

In sum, the Court essentially answers the following question that I have set out in various forms in my writings over the years, as follows: Where a prolonged occupant engages in serious violations of IHL, including with consequences that systematically violate certain of its obligations *erga omnes* and/or obligations of a *jus cogens* character under general international law derogation from which is not permitted, how can it be said that the regime of force maintaining the situation thus remains "legal"?[12]

In short, as affirmed by the Court, it can't.

Ripple effects

Aside from the groundbreaking impact the Opinion will have for the international law on the question of Palestine, there is little doubt that it has clear implications for other situations of prolonged foreign military occupation. The most obvious of these are

the situations in the occupied Syrian Golan Heights and the occupied Western Sahara. In both of those cases the occupying Powers – Israel and Morocco, respectively – have pursued many of the same (and sometimes identical) structural violations of the *jus in bello* with the aim of frustrating self-determination of the protected population and annexing its territory in violation of the *jus ad bellum*. It remains to be seen what the international community does in those situations in light of this Opinion.

References

1. ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.
2. Ardi Imseis, *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (Cambridge University Press, 2023), p. 173.
3. The fact that the Court has not used the noun "aggression" in its majority opinion is irrelevant in this respect. The Court has authoritatively determined that every element of the definition of "aggression" as it applies to State responsibility has been violated by Israel in the OPT (see e.g. para. 252 re "territorial integrity"). The relevant definition of aggression is set out in General Assembly (GA) Resolution 3314 (XXIX) of 14 December 1974 which provides that "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. According to the GA, the use of the term "State" in this definition "is without prejudice to questions of recognition or to whether a State is a Member of the United Nations".
4. See Orna Ben-Naftali, Aeyal Gross, Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 23:3 *Berkeley JIL*; Yaël Ronen, 'Illegal Occupation and Its Consequences' (2008) 42:1-2 *Israel Law Review*; UN, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' (A/72/43106), 23 October 2017; Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967-2020' (2020) 31:3 *European Journal of International Law*; Ralph Wilde, 'Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation' (2021) *Palestine Yearbook of International Law*; and Ata R. Hindi, 'Unlawful Occupation: Assessing the Legality/Illegality of Occupations, Including for Serious Breaches of Peremptory Norms' (2023) 4 *TWAIL Review*.
5. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005.
6. ICJ, Separate Opinion of Judge Kooijmans *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
7. Marko Milanovic, 'A Hypothetical Scenario on Illegal Occupation' (2024) *EJIL:Talk!*.
8. The Court also cites in this context Article 6 & 7 of the International Covenant on Civil and Political Rights.
9. ICJ, *Legal Consequences of the Separation Of the Chagos Archipelago From Mauritius in 1965*, Advisory Opinion of 25 February 2019.
10. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 09 July 2004.

11. ICJ, *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995.
12. Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967-2020' (2020) 31:3 *European Journal of International Law*, p. 1072. See also Ardi Imseis, 'Prolonged Occupation: At the Vanishing Point of the *Jus ad Bellum/Jus in Bello* Distinction' (2023) 58:3 *Texas International Law Journal*.

Ariel Zemach

From Illegal Annexation to Illegal Occupation

The Missing Link in the Reasoning of the International Court of Justice

In its recent Advisory Opinion[1], the International Court of Justice held that Israel's policies aimed at the assertion of permanent control over the West Bank, manifested primarily in the settlement enterprise, amount to the annexation of large parts of the West Bank. Israel's annexationist policies, the Court concluded, violated the international prohibition against the use of force and its corollary principle of the non-acquisition of territory by force, as well as the right of the Palestinian people to self-determination. The Court then proceeded to conclude that Israel's violation of these international norms renders Israel's continued presence in the Occupied Palestinian Territory (OPT) unlawful, giving rise to a duty of Israel to terminate such presence "as rapidly as possible". Rejecting this analysis, Judges Tomka, Abraham, and Aurescu pointed to "a missing link" in the reasoning of the Court, maintaining that "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".[2]

I will assume, as did several of the Judges, that the Court's determination that the continued presence of Israel in the West Bank is unlawful is tantamount to a determination that the Israeli occupation of that territory is illegal. As this determination was not premised on a finding that the occupation was *unlawfully born*, I will proceed from the assumption that the Israeli occupation initially resulted from the lawful use of force by Israel in self-defence.

Attempting to bridge the gap between the illegality of the annexation and the illegality of the occupation, several of the Judges concurring with the Opinion asserted that Israel's annexation policies render the occupation a violation of the international prohibition against the use of force. I argue that the Court's determination that the continued presence of Israel in the West Bank is unlawful finds no basis in the prohibition against the use of

force. Moreover, the Court's determination circumvents the Law of State Responsibility.

But first a word on the significance of the concept of illegal occupation. The illegality of an occupation eliminates the distinction between legitimate and illegitimate interests of the occupier. A policy aimed at the annexation of an occupied territory clearly advances the latter. But circumstances underlying a lawful use of force in self-defence resulting in an occupation typically give rise also to legitimate security interests that an occupier may promote by maintaining the occupation and negotiating the terms of its termination.[3] An occupation becoming illegal renders such interests legally immaterial. Illegality of the occupation spells a duty of the occupier to withdraw from the occupied territory unconditionally and "as rapidly as possible" (Advisory Opinion, paras. 261, 267), regardless of grave risks to its national security, which may result from such withdrawal.

The international prohibition against the use of force

Several of the Judges took the view that the continued Israeli occupation of the West Bank amounted to a violation by Israel of the prohibition against the use of force.[4] According to this view, the legality of the use of force that is inherent in a belligerent occupation is governed by *jus ad bellum*, which consists in the international prohibition against the use of force and its exceptions under the UN Charter. In the absence of Security Council authorization, *jus ad bellum* allows a state to occupy foreign territory only as an extension of the self-defence exception to the prohibition against the use of force. The boundaries of this exception are delineated by the requirements of necessity and proportionality. An occupation that exceeds these boundaries can no longer be justified under the

self-defence exception and is therefore illegal under the prohibition against the use of force.

Addressing the scope of the self-defence licence for occupation, Judge Yusuf noted, "the self-defence rationale cannot be invoked against a potential or future threat that might emanate from the occupied territory".[5] Judge Charlesworth took a similar position.[6] This view seems inconsistent with UN Security Council Resolution 242, which ties a withdrawal of Israel from occupied territories to the "establishment of a just and lasting peace in the Middle East"[7]. Judges Nolte and Cleveland offered a broader construction of the self-defence exception, allowing the occupier "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".[8] They noted, however, that the self-defence justification for the occupation is lost when the occupation "is abused for the purpose of annexation and suppression of the right to self-determination". The abovementioned Judges agreed that by becoming a vehicle for promoting annexation the Israeli occupation exceeded the self-defence exception and thereby became an unlawful use of force.

According to this approach, the licence granted to an occupier under *jus ad bellum* to advance legitimate security interests by maintaining the occupation depends on the occupier not exploiting the occupation to also advance illegitimate interests that concern annexation. This approach seems inconsistent with the application of *jus ad bellum* to situations that do not involve occupation. Consider the case of a State that has lawfully resorted to war having sustained an armed attack. In the course of the war, the attacked State pursues military operations aimed at promoting interests that are alien to the law of self-defence and thereby exceeds

the necessity boundary of the right to self-defence. Such conduct amounts to the violation of the prohibition against the use of force by the attacked State, which would generate legal consequences under the Law of State Responsibility. But this violation does not give rise to a duty of the attacked State to cease promoting the lawful ends of self-defence through the use of force. The right to self-defence does not become void and the legitimate interests associated with it do not become legally immaterial only because the attacked state advanced illegitimate ends as well.

There is no reason to assume that the right to self-defence lends itself to forfeiture more readily under circumstances of occupation than in other situations governed by *jus ad bellum*. Hence, *jus ad bellum* does not deprive an occupier that used a lawfully created occupation to advance both legitimate interests (security) and illegitimate interests (annexation) of the right to self-defence as grounds for promoting the former. International law responds to the use of an occupation as a platform for annexation through the application of the Law of State Responsibility, not through a construction of the right to self-defence that equates exceeding the boundaries of this right with forfeiting it. Annexationist policies, consisting of the occupier's refusal to negotiate in good faith the termination of the occupation and of actions on the ground aimed at perpetuating the occupation, violate the prohibition on the use of force, and the consequences of such violation under the Law of State Responsibility are discussed below.

The assertion that *jus ad bellum* may prohibit lawfully created occupation also stands in tension with the definition of "acts of aggression" adopted in UN General Assembly Resolution 3314[9] ("Resolution 3314") and subsequently affirmed in the Rome Statute of the International Criminal Court (Article 8 bis). "Acts of aggression" do not amount, in themselves, to the "crime of

aggression".[10] The definition of "acts of aggression" is closely linked to the prohibition against the use of force in international law.[11] Resolution 3314 and the Rome Statute list among the acts that qualify as "acts of aggression" the "invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof"[12]. This provision includes within the category of "acts of aggression" any annexation of occupied territory regardless of whether or not the occupation was born through an unlawful use of force. The characterization of *the occupation itself* as an act of aggression appears to be restricted, however, to occupation *born* through an unlawful use of force ("resulting from ... invasion or attack").[13] Characterizing a lawfully created occupation as an act of aggression because of attempts by the occupier to assert permanent control over the occupied territory would typically be linked to the duration of the occupation. Yet the duration of the occupation was considered immaterial for the purpose of characterizing an occupation as an act of aggression ("... however temporary"), which suggests that such characterization depends only on the circumstances underlying the formation of the occupation.

Resolution 3314 and the Rome Statute extend the category of "acts of aggression" also to "[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement"[14]. This provision does not refer to lawfully created occupation either. Rather, it concerns, among others, occupation created by illegal use of force consisting of the refusal on the part of foreign armed forces to

withdraw from territory once the invitation extended to them by the sovereign has expired.

The law of state responsibility

The leap from illegal annexation to illegal occupation circumvents the Law of State Responsibility, which is the body of secondary norms of international law that determine the consequences of the breach of primary international norms. Having concluded that Israel's annexation of the West Bank violated the prohibition against the use of force and the right of the Palestinian people to self-determination, the Court did not directly proceed to examine whether the legal consequences of *these* violations give rise under the Law of State Responsibility to a duty of Israel to withdraw from the occupied territory. The reason for the Court's rejection of a straightforward application of secondary norms to the violation of primary norms appears to be that such analysis would not accommodate a duty of Israel to terminate the occupation.[15]

The Law of State Responsibility, codified by the International Law Commission (ILC) in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts[16] ("Draft Articles"), requires a State to first cease its internationally wrongful conduct, if it is continuing (Draft Articles, Article 30). The annexationist policies of Israel that violate the prohibition against the use of force and the right of the Palestinian people to self-determination consist of the refusal of the occupier to negotiate, in good faith, the end of occupation and of actions on the ground aimed at perpetuating the occupation, primarily manifested in the settlement enterprise. The obligation of cessation pertains to *these* unlawful forms of conduct and entails a duty of the occupier to negotiate in good faith a political solution that would end the occupation and to

cease all actions that promote annexation (Joint Opinion of Judges Tomka, Abraham, and Aurescu, para. 30; Zemach[17], pp. 336-37). However, such duties are by no means tantamount to an obligation to withdraw from the occupied territory unconditionally.

The Law of State Responsibility also requires a State "to make full reparation for the injury caused by the internationally wrongful act" (Draft Articles, Article 31). The primary form of reparation is restitution (Draft Articles, Article 34). The ILC defined the obligation to make restitution as a duty "to re-establish the situation that existed before the wrongful act was committed" (Draft Articles, Article 35). This definition does not support a duty of an occupier to withdraw from the occupied territory where the occupation has been established before the violation of international law by the occupier. Rather, restitution under the said circumstances concerns the re-establishing of the *status quo ante* that existed during the state of occupation and before the wrongful act. Hence, an attempt on the part of an occupier to annex the occupied territory, a conduct that follows the establishment of occupation, does not result in a duty of the occupier to end the occupation, although restitution would require the occupier to eliminate the consequences of its annexationist policies (e.g. a duty to remove settlements). Note that the ILC has rejected a wider definition of restitution, defining it as "the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed" (Draft Articles, p. 96). The ILC reasoned that this wider definition would require engaging in an undesirable "hypothetical inquiry into what the situation would have been if the wrongful act had not been committed" (Draft Articles, p. 96).

To be sure, the distinction between a duty of the occupier to withdraw from the occupied territory and its duty to negotiate, in good faith, such withdrawal would be an empty one if it were

evident that the occupier could secure its legitimate interests through good-faith negotiations that it nevertheless refuses to hold. However, this is not the situation regarding the security threats faced by Israel and the range of security guarantees that Israel may consequently insist upon as conditions for ending the occupation.

Conclusion

The Advisory Opinion does not explain how the unlawfulness of Israel's annexation policies gives rise to the illegality of the occupation itself. Several of the Judges stated, however, that such policies render the occupation a violation of the prohibition against the use of force. I have argued that the assertion that the occupation of the West Bank has become illegal finds basis neither in the prohibition against the use of force nor in the Law of State Responsibility that determines the consequences of Israel's unlawful annexation policies.

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Jasmine Moussa

The Advisory Opinion on Israel's Policies and Practices in the Occupied Palestinian Territory

Revisiting the Distinction Between Jus Ad Bellum and Jus in Bello

The fundamental distinction between *jus ad bellum* and *jus in bello* – described as "perhaps the most important principle of IHL"[1] – is a vital bulwark against attempts to override International Humanitarian Law (IHL) by appealing to *jus ad bellum* considerations. It is at the heart of the principle of "equality of belligerents" which guarantees that IHL will apply to all parties to an international armed conflict, irrespective of the justification for the initial recourse to force. By the same token, *jus in bello* must be respected independently of any argument concerning *jus ad bellum*.

The separation principle, and its legal, moral, pragmatic and policy foundations, have been discussed and defended at length by scholars (see Mačák[2] and Moussa[3]). Although there have been challenges to the principle,[4] to a great extent it has become a paradigmatic feature of contemporary legal thinking on the conduct of war.[5]

The Advisory Opinion on the Legality of the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem[6] (AdvOp) raises a different – and rather underexplored – problematique in applying the separation principle: Is it possible for IHL considerations to affect the legality of a conflict under the *jus ad bellum*? In terms of the first part of question (b) put forward by the General Assembly to the Court, how do the policies and practices of Israel in the Occupied Palestinian Territory (OPT) (namely the prolonged occupation, annexation, and settlement policy), "affect the legal status of the occupation"?

Some States appearing before the Court held that both parts of this question, namely Israel's "policies and practices" and the "legal status of the occupation", exclusively raised questions of IHL. According to this view, occupation is strictly a category of *jus in bello*. The issue turned, in part, on how the phrase "legal status of the occupation" was to be understood, whether, in the words of

the United States, as the "fact of occupation"[7] or rather, in the words of Switzerland, as the "lawfulness of the occupation"[8]. The Court adopted the second view, interpreting the phrase "legal status of the occupation" to mean the legality of Israel's "continued presence" in the occupied territory. While the AdvOp acknowledged that Israel's policies and practices violated the *jus in bello*, it found that they simultaneously violated the *jus ad bellum*, and it was this second category of violation (together with the frustration of the Palestinian people's right to self-determination) that rendered Israel's continued presence in the OPT unlawful. This chapter intends to analyse this aspect of the Court's opinion.

Unpacking the Court's pronouncements on the separation principle

The Court was very careful to ground its reasoning on a strong affirmation of the separation principle. After discussing the temporary nature of occupation under *jus in bello*, the Court stated that "the fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law" (para. 109). It proceeded to state that "the legality of the Occupying Power's *presence* in the occupied territory must be assessed in light of other rules" (para. 109, emphasis added). In paragraph 251, the Court states:

> *"[It] considers 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 bel-*

> *lo) .... The 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 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 to its reply to the first part of question (b) of the request for an advisory opinion by the General Assembly."*

The Court concluded – by a majority of eleven votes in favour and four against – that Israel's "continued presence" in the OPT was unlawful, in view of its violation of the prohibition of the acquisition of territory through force and the right of the Palestinian people to self-determination (para. 261).

The extent of disagreement on the application of the separation principle by the Court is reflected in the pleadings, as well as the numerous declarations, separate and dissenting opinions of the Judges.

The separation principle: divergent views

Throughout the proceedings before the Court, States argued either explicitly or implicitly that Israel's violation of the *jus in bello* – specifically the law of occupation – rendered the occupation, as a whole, unlawful. For instance, the State of Palestine[9], Algeria[10], and Egypt[11] argued, *inter alia*, that the prolonged nature of the occupation and its permanent character – evidenced by Israel's settlement policy, displacement of Palestinians, annexation of Palestinian land including East Jerusalem, and other measures aimed to alter the demographic situation – rendered the occupation itself unlawful.

On the other hand, the United States argued that the legal status of a belligerent occupation does not change if the occupation is prolonged or if illegal violations of *jus in bello* are committed by the Occupying Power. In the words of Marko Milanovic, "as *a matter of IHL*, an occupation is neither legal or illegal, just like an armed conflict is neither legal or illegal. It simply exists or not".[12]

In his Separate opinion, Judge Yusuf adopts the first approach.[13] He considers Israel's belligerent occupation of the OPT illegal by reference to both the *jus in bello* as well as the *jus ad bellum*. First, in terms of the *jus in bello*, he considers that an occupation that changes the characteristics of belligerent occupation under IHL (its temporary character/protection of the interests of the occupied people/ return to sovereignty) cannot be considered lawful. This line of reasoning, which argues that Israel's occupation of the OPT is unlawful for violating its own, intrinsic, basic tenets and principles goes beyond the Court's findings and is defended by Gross.[14]

With respect to the *jus ad bellum*, Judge Yusuf agrees with the Court's finding that Israel's occupation of the OPT violates the *jus ad bellum*, albeit for different reasons. He observes that Israel's excessively prolonged belligerent occupation of the OPT constitutes a continued and indefinite use of force that requires fidelity to the criteria of necessity and proportionality (notwithstanding the question of the legality of the initial recourse to force). Judge Yusuf opines, "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" (para. 14). To qualify Israel's belligerent occupation as a use of force, Judge Yusuf invokes Security Council Resolution 242, which required the termination of the state of belligerency and withdrawal of Israeli forces. In his view, a prolonged and indefinite use of force

cannot be justified under the principles of necessity and proportionality and thus, in and of itself, constitutes a breach of the prohibition of the use of force. Similarly, according to Judges Nolte and Cleveland, the conditions of necessity and proportionality cannot be met when the occupation "becomes a vehicle for achieving annexation"[15] (para. 8).

In their Joint opinion, Judges Tomka, Abraham and Aurescu disagreed with the Court's reasoning and conclusions.[16] According to their view, Israel's settlement policy and annexation of parts of the OPT, constitute violations of the *jus in bello* rather than the *jus ad bellum* as they relate to the legality of the conduct of the occupation and not its very existence. Israeli policies and practices such as annexation, population transfers, etc. are wrongful acts by reference to IHL, and they must therefore cease, but the same does not hold true of the occupation itself. According to this view, the Court erred in concluding that policies such as annexation rendered the occupation unlawful under the *jus ad bellum*.

The three Judges also posit that the assessment of the continued legality of the occupation (notwithstanding any assessment of its legality *ab initio*) would have to be made in light of Israel's right to security, existence, and "survival". They conclude that Israel's security threats may justify "maintaining a certain degree of control on the occupied territory" (para. 37).

By implying that what they presume to be *jus in bello* considerations (the prohibition of annexation and settlement) can be overridden by the *jus ad bellum* considerations of "existence" and "survival", this analysis clearly draws inspiration from the *Advisory Opinion on the Threat or Use of Nuclear Weapons*[17]. In this Advisory Opinion, the Court – after having affirmed that the threat or use of nuclear weapons would be "generally" contrary to IHL – stated in the controversial paragraph 2(E) of the *dispositif* that it could not

"conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". Interpretations of this Advisory Opinion that subordinate the *jus in bello* to the *jus ad bellum* by reference to the notion of "State survival" are reminiscent of the *Kriegsraison* doctrine which posited that obligations under the laws of armed conflict "may be displaced by urgent and overwhelming necessity"[18].

The Court's technique: framing Israel's policies and practices as violations of both jus ad bellum and jus in bello

To reach the conclusion that Israel's policies and practices rendered the occupation unlawful, while maintaining a strict decoupling of the *jus ad bellum* from the *jus in bello*, the Court employs two principal methods. First, it considers that the legality of the occupation is subject to the rules of *jus ad bellum*, as occupation involves a continued use of force. Second, it frames Israel's policies and practices in the conduct of the occupation as both violations of IHL and of the law on the use of force simultaneously.

Under the first proposition, the Court begins by stating that occupation, or the exercise of effective control, must be consistent with the prohibition of the acquisition of territory through force and the principle of self-determination of peoples (para. 109). It observes that occupation cannot serve "as the source of title to territory or justify its acquisition by the occupying Power" (para. 253). Without discussing Israel's "security concerns" in any detail, the Court asserts – and rightly so – that such concerns "cannot override the principle of acquisition of territory through force" (para. 254).

The Court further analyses Israel's settlement policy, and the associated transfer of parts of Israel's civilian population into the OPT, confiscation and requisitioning of land, extension of Israeli law, forcible transfer and displacement of the Palestinian population, concluding that they constitute breaches of the relevant provisions of the Geneva Conventions and Hague Regulations (which constitute part of the *jus in bello*).

The Court then clarifies that these same policies and practices "are designed to remain in place indefinitely and to create irreversible effects on the ground" and are thus tantamount to annexation (para. 173). The Court thus frames these Israeli measures in terms of violations of *jus ad bellum*, as they evidence an intention to create a permanent Israeli presence in the OPT. In other words, Israel's measures demonstrate *corpus* (effective control) and *animus* (intention to appropriate the territory permanently), the two pre-conditions for annexation.[19] This is found by the Court to be "contrary to the prohibition of the use of force in international relations and its corollary, the principle of non-acquisition of territory through force" (para. 179). This assertion by the Court is by no means novel[20] and does not mean that Israel's violations of IHL render the occupation unlawful under *jus ad bellum*, but rather that Israel's measures must be considered – separately and in their own right – under the *jus ad bellum*.

The Court does not delve into any analysis of whether Israel's occupation conforms to the limitations of necessity and proportionality, presumably to avoid the complex question of whether Israel's initial and subsequent uses of force could qualify as self-defence. It is also possible that the Court found it unnecessary – as a matter of judicial economy – to address the complex and highly contextual assessment of proportionality, given that annexation is categorically prohibited under *jus ad bellum*. Whatever the

Court's reasons, the omission has been criticized as a gap in the Court's reasoning and a missed opportunity to clarify the law in this area.[21]

Concluding remarks

With the extent of disagreement shown above regarding the fundamental principle of separation of *jus ad bellum* and *jus in bello*, the Court's pronouncements on the complete separation of these two bodies of law are a welcome contribution to a controversial theoretical debate. The Court's technique – namely considering the legality of occupation as a matter of *jus ad bellum*, while framing Israel's measures in the OPT as evidence of prohibited annexation also under *jus ad bellum* – served the purpose of answering the questions put forth by the GA while maintaining the separation principle. However, further elaboration by the Court could have contributed to clarifying much of the confusion and addressing the shortcomings of its own previous jurisprudence on the matter.

The author appeared on behalf of the Arab Republic of Egypt in the Advisory Opinion and is currently Legal Advisor to the Foreign Minister of the Arab Republic of Egypt. All views expressed in this chapter are the author's own and do not represent any of the institutions to which she is affiliated.

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Aeyal Gross

The Functional Approach as Lex Lata

The ICJ Advisory Opinion and the Status of Gaza

The Advisory Opinion on the Israeli occupation of the Occupied Palestinian Territory[1] rendered by the International Court of Justice (ICJ) found that Israel's continued presence in the Occupied Palestinian Territory (OPT) is unlawful. In this contribution, I address the Advisory Opinion's take on the question of whether occupation exists, in particular through its approach to the question of the status of Gaza.

The ICJ noted in its opinion that Gaza is "an integral part" of the territory occupied by Israel in 1967, but also mentioned that under the "disengagement plan", Israel withdrew its army and removed the settlements from the Gaza Strip in 2005 (para. 88). However, the ICJ pointed to reports addressing Israel's continued control of the airspace and territorial waters of Gaza, land crossing and borders, supply of civilian infrastructure and other elements of life in Gaza (para. 89). Thus, the Court asks whether the Israeli withdrawal of its physical military presence on the ground affects its obligations under the law of occupation in that area. This is its answer:

> *"Where a State has placed territory under its effective control, it might be in a position to maintain that control and to continue exercising its authority despite the absence of a physical military presence on the ground. Physical military presence in the occupied territory is not indispensable for the exercise by a State of effective control, as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time."*
> (para. 91)

> *"The foregoing analysis indicates that, for the purpose of determining whether a territory remains occupied under interna-*

tional law, the decisive criterion is not whether the occupying Power retains its physical military presence in the territory at all times but rather whether its authority 'has been established and can be exercised' (Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907)."
(para. 92)

"Where 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."
(para. 92)

"Based on the information before it, the Court considers that Israel remained capable of exercising, and continued to exercise, certain key elements of authority over 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, despite the withdrawal of its military presence in 2005."
(para. 93)

"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"
(para. 94)

I argue that in this answer, the ICJ has adopted the functional approach to occupation – an approach I have developed in my work since shortly after the disengagement.[2] The ICJ's Opinion is thus a critical point in the development of the law of occupation, in that it transcends a binary approach to the question of the existence of occupation, in favour of a more nuanced approach that enables holding that a territory is occupied, but not in an "all or nothing" way. More generally, we can see the Opinion as rejecting a more restrictive approach to the question of whether occupation exists in a territory or not, a view that did appear in some recent case law discussed below, in favour of a more flexible approach to the question, which was taken in some of the most important cases on occupation, but was threatened by the restrictive cases. I will further argue that the adoption of the functional approach aligns with a normative approach to the question of the existence of occupation, one that goes beyond what I call a "merely factual" approach. I developed the distinctions between a "merely factual" and a "normative" approach to occupation, and between a "conceptualist" and a "functional" approach to occupation in my book *The Writing on the Wall*[3], where I argued that adopting a normative and functional approach is necessary in order to develop the law of occupation in a way that creates accountability. In another publication, I addressed the way in which the ICJ's ruling that Israel's continued presence in the OPT is unlawful helps develop the law of occupation in the normative direction, rejecting the idea that occupation is a "merely factual" situation that cannot be held to be illegal.[4] In this contribution, I focus on the significance of the Court's development of the law of occupation in the functional direction.

The functional approach as an alternative to conceptualism

I developed the functional approach as a response to the debates regarding whether occupation ended (or did not end) in Gaza and Iraq in 2004-2005. Later, this approach was partly adopted by the ICRC.[5]

As I have recounted before,[6] for me, the post-disengagement discussion on whether Gaza is occupied or not, and the parallel discussion regarding Iraq,[7] echoed Felix Cohen's idea of legal concepts which are "thingified" as "transcendental nonsense" – "magic solving words" which do not really solve the problem.[8] Arguing whether a situation falls or does not fall into the legal category of "occupation" ignores that norms should not follow from abstract concepts, but rather the opposite. In Cohen's words, the meaning of a definition is found in its consequences. Accordingly, instead of a circular argument about whether a situation falls into the category of occupation or not, we should ask whether or not liability – in this case of the occupier – should be attached to certain acts. This correlates with the ICJ's approach in the Advisory Opinion, that "Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip". This answer, while anchored in an approach that occupation still exists in Gaza, considers Israel's obligations under the law of occupation as deriving from the actual use of power over certain functions of government. This approach allows us to consider how obligations follow from the exercise of power and control, in a situation where occupiers may have relinquished some control, but still continue to exercise much power over the territory. It aims to ensure that powers exercising control, even in scenarios that do not look like "classic" occupation, are prevented from avoiding responsibility and accountability for their actions, by denying, transforming, or

relinquishing some of the control. As I have shown in previous work, in the context of Gaza post-disengagement, this has implications for duties regarding issues such as the supply of electricity[9] and food security[10], but also duties for bodily damage and death inflicted upon Palestinians in Gaza.[11]

Powers and responsibilities of occupiers

The functional approach that rejects an "all or nothing" attitude to occupation goes hand-in-hand with the ICJ's rejection of the restrictive approach to the existence of occupation in the Advisory Opinion, especially when it rejects the idea of necessity of physical military presence on the ground. The European Court of Human Rights adopted the latter idea in the twin cases regarding Nagorno-Karabakh: *Chirgaov v. Armenia*[12], where it held that "physical presence of foreign troops is a *sine qua non* requirement of occupation" and emphasized the need for "boots on the ground"; and *Sargsyan v. Azerbaijan*[13], where it made similar determinations. Alongside the ICJ's own controversial decision in *DRC v Uganda*[14], these cases represent a restrictive understanding of when occupation exists, one which is rejected in the current Opinion in favour of the more flexible approach. The more flexible approach was famously taken by the International Military Tribunal in Nuremberg in the *List* ("Hostages") case[15] cited in the Advisory Opinion, but also in some decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY)[16] and of the Eritrea Ethiopia Claims Commission (EECC)[17], as well of the Israeli Supreme Court itself in the *Tsemel* case[18] on South Lebanon. Notwithstanding significant differences, all of these cases share a flexible interpretation of the law on the existence of occupation, which focuses on the protection of occupied people, even in cases of partial and limited control by the oc-

cupiers and regardless of whether an institutionalized occupation regime was established. The Advisory Opinion shifts the pendulum back to this position, rejecting the more restrictive approach taken in the cases cited above, as well as in most of the Israeli Supreme Court's post disengagement cases on Gaza.[19]

Addressing this case law in detail exceeds the scope of this chapter. However, I argue here that while *List* takes an expansive rather than restrictive approach to the question of the existence of occupation, its view that the powers of an occupier are as great as its responsibility does remain confined to a binary all-or-nothing approach to the question of occupation and of the duties of occupiers. In the Advisory Opinion, the Court seems to take the position, found also in EECC decisions, that responsibility follows from the exercise of power. This position then rejects the logic of *List*, that the powers of an occupier derive from the general responsibilities of the occupier, in favour of a position that the responsibilities of an occupier are as great as its power. Whereas the first position would mean that once a State is considered an occupier, it would have all the powers of an occupier in order to fulfill its responsibilities, the latter position means, as the ICJ in fact held now, that the responsibilities of the occupier would derive from the extent of power it exercises, or in the ICJ's words, remain commensurate with the degree of its effective control.

This point is critical, as some may wonder how, given the extent of Hamas' control of Gaza, including its ability to launch a major military attack from the territory, we can say that Israel still exercised some control over it, which amounts to occupation after disengagement and until October 7, 2023?

The answer lies in the fact that notwithstanding the expansive degree of Hamas' control, Israel's continued control of certain functions has significant impact on the local population. For ex-

ample, Israel's control of airspace, waterways and passages affects access to health services needed outside Gaza[20], food[21], education, and much more. On the other hand, between 2005-2024, Israel did not exercise policing functions in Gaza, and this has significance for the argument heard over the years and particularly after October 7, that Israel cannot invoke a right to self-defence concerning Gaza, given that it is still occupied territory and thus only law enforcement operations are allowed. (For a detailed discussion see Milanovic[22].) This argument falls into the same trap of binarism as of those arguing that Gaza was not occupied after the disengagement: if the acceptable position is that the right of States to self-defence is not relevant in territories they occupy, the claim that a law enforcement rather than self-defence standard should prevail in Gaza is hardly persuasive, given the absence, between 2005-2023, of permanent military presence and of an occupation regime engaged in police and law enforcement.[23] Thus, notwithstanding the many complex questions, an armed attack from Gaza on Israel is one that in principle can trigger the right to self-defence – of course, subject to the limits on the exercise of this right in *jus ad bellum* itself and on the rules on the ways in which force is used, which are anchored in *jus in bello* and in international criminal law.

In its Opinion, the ICJ, while generally stating it does not address Israel's actions after October 7, did note in passing that its statement on Israel's continued ability and actual exercise of control in Gaza is true "even more so" since October 7, 2023 (para. 93). The question of the status of Israel as occupier post-October 7 was addressed in an opinion written by a group of Israeli international law scholars (including myself)[24] and another opinion authored by Marco Longabardo[25]. Longabardo's opinion was submitted to the Israeli Supreme Court within the discussion of a petition dealing

with Israel's humanitarian duties in Gaza.[26] Addressing this situation is beyond the scope of this chapter, but I do note that the urgency of these opinions is clear given the need to accord Palestinians in Gaza a heightened level of humanitarian protection (especially, but not only, regarding access to food) in accordance with the law of occupation.[27] Clearly, the situation has entered new terrain now, with a new level of horrors[28] that must come to an end.

Lex ferenda or lex lata?

In any event, the ICJ's Advisory Opinion should remain instructive on an occupier's duties in situations different than the one we are currently facing, once the Israeli army has "boots on the ground" again in Gaza. Its most important contribution in this context is in affirming that control – which could take the form of "remote control", partial control, or mixed control involving both local *de facto* authorities and foreign armies – could all trigger duties under the law of occupation.

In a response submitted to the Israeli Supreme Court on September 12 in the context of the petition regarding Israel's humanitarian duties, the Israeli government argued that Israel was not an occupier in Gaza, neither before nor after October 7, and that the functional approach contradicts the logics of IHL and specifically of the law of occupation. It argued that the application of the laws of occupation is a "binary" matter, and that the functional approach should be rejected. The ICJ's statements on the matters in the Advisory Opinion were dismissed in this response as non-binding and *obiter dictum*, as well as based on lacking legal and factual analysis.

Indeed, as Marco Milanovic has shown, the Advisory Opinion leaves many questions regarding the status of Gaza uncertain. Moreover, the Opinion did not explicitly use the term "functional approach" (but see the Separate Opinion of Judge Iwasawa, who says the Court adopted this approach[29]). However, the Opinion's importance lies in the fact that contrary to what the Israeli Supreme Court held,[30] and contrary to the attempt of the Israeli government to dismiss the Opinion's statements on the matter, the Opinion shows that the functional approach, now adopted as *lex lata* not only by the ICRC but also by the ICJ, is not merely *lex ferenda* and is applicable in developing accountability of occupiers in diverse situations.

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Shastikk Kumaran

The ICJ's Treatment of Questions of Occupation in Gaza

In its recent Advisory Opinion, the ICJ highlighted that "Israel's withdrawal from the Gaza Strip [had] not entirely released it of its obligations under the law of occupation", specifically because, having "established its authority", it "remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip"[1] (para. 93).

Milanovic has highlighted that the Court's ruling was "ambiguous"[2]. Specifically, it is unclear whether the Court intended to describe Israel as having been an Occupying Power in Gaza post-2005, or whether it intended to delineate certain post-occupation obligations (as Judge Iwasawa considered in his Separate Opinion[3] at para. 8). The Court's findings are perhaps best read as suggesting that Israel remained an occupier post-2005. Such a reading is most compatible with its treatment of the Occupied Palestinian Territory (OPT) as a single entity throughout its Advisory Opinion in its assessment of Israel's policies and practices. The Court highlighted this, holding that – "from a legal standpoint, the Occupied Palestinian Territory constitutes a single territorial unit, the unity, contiguity and integrity of which are to be preserved and respected" (para. 78). Such a view is also perhaps most compatible with the Court's holding that Israel's obligations would remain commensurate with its degree of effective control, which appears to imply a continuing state of some form of occupation (para. 94).

The ICJ's treatment of the state of occupation in Gaza

However, the Court's approach in its Advisory Opinion is questionable. While it rightly accepted the functional approach to occupation, I doubt whether Israel was indeed capable of exercising its authority in Gaza sufficiently for its occupation to be found as having

continued post-2005 (and before the current Israeli military operation, which was temporally outside the Court's purview). Furthermore, in my view, the practices the Court relied on to find that Israel had indeed exercised elements of authority in Gaza – including restrictions on the movement of peoples and goods, the blockading of the Gaza Strip and the military buffer zone – are, as purely external methods of control, insufficient to constitute the "[exercise of] key elements of authority over the Gaza Strip" (para. 93). Instead, the Court should have relied on Israel's continued exercise of administrative authority vis-a-vis Gaza residents to find the existence of a state of occupation.

The Court appeared to accept a "functional" approach, as initially developed by academics like Scobbie[4] and Gross (particularly in the latter's book *The Writing on the Wall*[5]), to the continuation of occupation in its Advisory Opinion by relying on the ability to exercise authority rather than the actual exercise of authority over a territory. Gross' view had already found favour with a variety of States, academics (such as Jaber and Bantekas[6]) and international organizations, including the ICRC[7]. However, support for the "functional" approach was not universal. Shany has suggested that Israel cannot be an occupier without the physical presence of its troops but may still have obligations under human rights law and the *jus in bello*.[8] Additionally, states like Israel[9] and the U.S.[10] have rejected the claim that the former remained an occupier in Gaza post-2005.

The Court moved away from its previous traditional approach in *Armed Activities*, where they relied on the actual substitution of authority (via the Ugandan appointment of a governor in the Ituri province). This is easily justifiable because *Armed Activities* was concerned with when an occupation began, not ended. Either way, this approach is welcome – as Ferraro wrote, the previous test in

Armed Activities was illogical, and could have potentially led to a finding that Germany did not occupy Denmark because it "allowed the Danish government to function, despite its military supremacy"[11].

The Court should not have found that Israel remained capable of exercising its authority within Gaza. Firstly, the standard for whether Israel "remained capable of exercising its authority" would rely on whether, per the ICRC (at page 12), Israel could "reassert its *full* authority in a reasonably short period of time"[12] (emphasis added). The Court appeared to accept this position in its Advisory Opinion, holding that physical military presence was not required for a continuing state of occupation. Hamas launched a large-scale attack on 7 October 2023, killing over 1,100 people in Israel, including more than 700 civilians.[13] Despite a military response that has been often criticized in scale, including by Israeli allies, Israel has still, almost a year later, been unable to re-establish full control over the Gaza Strip, with a significant Hamas presence remaining and fighting continuing.[14] Even if full control was not necessarily required for an occupation to continue, Hamas retains significant administrative authority over Gaza, including running its Ministry of Health.[15] These facts suggest that Israel, particularly after Hamas established its administration of Gaza, has not been sufficiently capable of exercising its authority within the Gaza Strip, at least before Israel's recent military operation.

Second, the practices that the Court relied on were insufficient to suggest that Israel did indeed exercise its authority within Gaza, but the Court could have found the existence of a state of occupation with reference to other Israeli practices. The test (under the functional approach) that the ICRC supported in 2015 relied on the "exercise [of], *within all or part of the territory*, governmental functions acquired when the occupation was undoubtedly established

and ongoing" (emphasis added). While the usage of coercive measures to control the population of the Gaza Strip from outside undoubtedly has a significant humanitarian impact on Gaza residents, it would not be coherent as a matter of law to suggest that those practices alone would be sufficient for a state of occupation to continue. Rather, such entirely "external" control measures are better understood generally as being part of "sieges" or "blockades", although the existence of a siege/blockade is admittedly not necessarily incompatible with a state of occupation.

This is best seen from the commonalities between the Israeli practices relied upon by the ICJ and other situations more clearly recognized as siege operations. For instance, Syrian rebels (while unable to establish air superiority) sieged Syrian government forces in Nubl and al-Zahraa for more than three years, with residents having significantly restricted access to food and petrol, among other basic necessities.[16] Similar restrictions were seen in the Siege of Sarajevo, where the siege of the city by the Serbians left Bosnians without sufficient basic necessities and largely without the ability to freely move in and out of Sarajevo. While most such "siege" or "blockade" situations have never been adjudicated before an international court, the Geneva Conventions (GC) and their Additional Protocols (AP) appear to envision such situations as different to occupations – as seen by the distinct protections offered at times to "blockade" situations, including the requirement generally to allow relief according to Article 70 AP I, although this is also subject to agreement by the combatants (Article 70(1)). Of course, it must also be acknowledged that Israel's degree of control in this regard is more significant than in most other enclosure situations – as seen by its construction of a border wall around Gaza, the first iteration of which was as early as 1994, when Israel was undeniably an occupier of Gaza.

The similarities between the practices the Court relied on, and other situations of enclosure, suggest that the practices the Court relied on would best be treated (on the basis of *lex lata*) as forming a siege/blockade situation, rather than an occupation. As I have acknowledged, the elements constituting enclosure and occupation situations will often overlap, and both share the crucial commonality of a high degree of coercive control imposed on a local population. However, the presence of such practices alone cannot be sufficient for a state of occupation to exist without more. Such a view would unjustifiably lower the threshold for occupation and bring the law of occupation closer to the discredited Pictet theory, which, as Bothe summarizes (at page 38), suggests that "any successful invasion creates a situation of occupation"[17]. The Pictet theory has been criticized for multiple reasons – notably including the unrealistic obligations it would impose on States, which would discourage compliance with international humanitarian law (IHL).

The Court should have still found that Israel was an Occupying Power in Gaza, however. Israel continued exercising sufficient administrative authority in Gaza for the finding of a state of occupation, particularly through its continued administrative control over the Palestinian Population Registry (including in Gaza), which records Palestinian demographic information, both in the West Bank and the Gaza Strip, and enables a significant amount of Israeli control over the Gaza Strip.[18] Furthermore, Israel continued controlling some taxation destined for Gaza, purportedly for transfer to the Palestinian Authority, but those funds were temporarily frozen after October 7.[19] These manifestations of authority are themselves sufficient to find a continuing state of occupation. If that is insufficient, Milanovic wrote in 2009 that it might be possible to find some positive obligations owed to Gaza by Israel, perhaps as a result of reparational duties owed by Israel to Gaza as a

result of the occupation (to which the Court agreed in its Opinion).[20] Such post-occupation obligations could also be derived from an expansive understanding of Israel's duties as usufructuary under Article 55 of the Hague Convention (IV) of 1907, which would require Israel to not deplete the OPT of resources while also maintaining public buildings, real estate and certain other facilities. Israel, as usufructuary, could have a duty to replenish that which it had depleted or otherwise damaged under its occupation.

A lacuna in protection?

However, the difficulties posed by the unique occupation in Gaza, partially enforced through external control methods, expose a different problem – a lacuna in the protections available to civilians between the conflict/invasion stage and the occupation stage. There is a cliff-edge of protections between conflict and occupation situations – when a conflict becomes an occupation, civilians enjoy far more protections from the Occupying Power than they do when the state is merely conducting military operations within the territory. Alas – the protections of occupation do not apply in sieges/blockades (that are not also occupations), meaning that civilians do not enjoy the elevated humanitarian protections of occupation despite the significant and unique challenges that they face in such "enclosure" situations, including entrapment, displacement and more.

International law only provides few protections that are relevant to civilians in a "siege" stage. States are obligated not to use starvation as a method of warfare (Article 54(1) AP I), although a violation of that obligation would require deliberate intent (Commentaries to AP I[21], para. 2089), which would often be difficult to prove in scenarios of warfare. There is also a stronger obligation

under Article 70 of AP I to "allow and facilitate rapid passage of all relief consignments" in situations of conflict, although that would also be dependent on the agreement of the parties involved, and is certainly a weaker protection than the obligation under the law of occupation, where under Article 55 GC IV the occupier must even, unless impossible, "bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate". These protections do not go far enough, and can lead to insufficient humanitarian protection in "siege" situations.

The ICJ's proposed solution – imposing a "sliding scale" of obligations depending on the degree of effective control in an occupation – does not adequately protect civilians in "enclosure" situations, as an initial establishment of authority leading to the finding of a state of occupation would still have to be found for those protections to apply. Such a solution still deprives protections for civilians in situations where there was never an occupation, such as the abovementioned Siege in Nubl and al-Zahraa. Furthermore, the ICJ remained ambiguous, not going into any detail on precisely how the obligations owed would vary with the degree of effective control, including on whether there were any irreducible core obligations. This can reduce the certainty of the protections available in individual occupations, as Judge Cleveland appeared to endorse in her Separate Opinion[22] (para. 11), particularly given the varying elements of control between different occupations.

Instead, specific, stronger protections that go beyond weak existing protections must be adopted for "enclosure" situations. This would better protect civilians in such scenarios by moving away from the "cliff-edge" of protections under *lex lata* while providing States more certainty as to their IHL obligations. Moving away from the current bivalent distinction between occupation and inva-

sion would also better reflect the large number of conflict scenarios that exist in reality. States must work to adopt such protections with urgency, given the continuing frequency of "enclosure" situations in modern conflicts such as the Syrian Civil War and the Yugoslav Wars – and must endeavour to ensure a wide breadth of protections are indeed available to civilians.

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Security Considerations

Jinan Bastaki

Limiting "Security" as a Justification in the ICJ's Advisory Opinion

Security as both a legal and political concept allows the limitation and sometimes even derogation from legal rules; these departures are not absolute and have parameters. Yet, States often invoke security to justify disproportionate and outright illegal acts, which is aided by the fact that the precise contours of what is considered a legitimate security concern or threat is not clearly defined. Israel has often attempted to justify the measures it takes against Palestinians in the OPT as due to "security" considerations. In the Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem[1] ("AdvOp"), some States that submitted written statements to the ICJ, including Israel itself, cited Israel's security concerns as a matter that the Court needed to take seriously and that may have justified Israel's occupation per se as well as its policies and practices therein. While the Court was not convinced by this argument – far from it, declaring Israel's *occupation* of the OPT illegal, and not simply *the way* it has conducted its occupation – it did not expand greatly on the issue of security, as Israel did not provide a comprehensive submission. That said, the Separate and Dissenting opinions delved into some of the security arguments.

This chapter will examine where the Court rejected and/or limited some of these security justifications, making at least two important points: first, that security concerns, no matter how legitimate, could not justify annexation (manifestly illegal) nor an open-ended occupation (implicitly illegal). In fact, the Court affirmed that, more broadly, Israel could *not* invoke security considerations to override legal principles (AdvOp, para. 254). Second, Israel could not claim to be protecting security interests when those interests exist due to illegality to begin with, such as settlements and settlers.

Security in international law

The United Nations is committed to the maintenance of "international peace and security". The latter – "security" – more generally enables States to act in otherwise prohibited ways. Article 2(4) of the UN Charter prohibits the threat or use of force, but Article 51 permits the use of force in self-defence in case of an armed attack. Derogations in human rights law can be invoked during public emergencies "threatening the life of the nation" (Article 4, ICCPR), subject to certain limitations. Article 27 of the Fourth Geneva Convention ensures that protected persons are to be respected and treated humanely, yet "the Parties to the conflict may take such measures of control and *security* in regard to protected persons as may be necessary as a result of the war" (emphasis added). Article 5 similarly states that if a person is "definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State". Article 64 similarly allows the Occupying Power to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to … ensure the security of the Occupying Power". None of these exceptions are absolute and in general must be both necessary and proportional. But who gets to decide what is a legitimate security concern to begin with? And what is the status of these principles in situations of alien occupation and colonial domination where the populations are fighting for their right to self-determination?

The ICJ has dealt with arguments predicated upon security justifications on a case-by-case basis. In the *Nuclear Weapons* Advisory Opinion, the Court stated that it could not decide whether "the

use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake" would be contrary to international law as it stood at the time (*Nuclear Weapons* case[2], 1996, para. 97). Indeed, a classic and agreed upon security issue in international law is the threat of an external armed attack, though it is not limited to that. In the *Nicaragua* case[3], the ICJ stated that "the concept of essential security interests certainly extends beyond the concept of an armed attack" (para. 224). It did not elaborate extensively on what security interests covered exactly, merely stating that it did not consider that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, were "necessary" to protect the essential security interests of the United States (para. 224). In the *Oil Platforms* case, the United States argued that, *inter alia*, the movement of maritime commerce, its naval vessels in the Gulf, and its citizens' financial losses were "essential security interests" (*Oil Platforms* case[4], 2003, para. 49). The Court did not comment on whether those qualified as legitimate security concerns, focusing instead on a specific attack that the US had identified. Since the United States had resorted to force, the ICJ stated that they could only do so if they were acting in self-defence to an armed attack by Iran, which was not the case. Thus, while the ICJ had not come to any conclusion on the use of nuclear weapons in 1996, seemingly leaving the door open for States to use such deadly and indiscriminate force in "extreme" situations, when it came to security justifications for actual acts committed, the Court has used the tests of necessity and proportionality as a limitation to the use of force.

Rejecting the security argument

In Israel's written submission, it complained that the questions asked by the General Assembly to the Court did not take into account "acts that continue to endanger Israel's civilians and national security on a daily basis" and that "they fail to recognize Israel's right and duty to protect its citizens, as well as the well-established principle… that any resolution of the Israeli-Palestinian conflict must effectively address Israel's legitimate security concerns".[5] Other States, such as Fiji and Zambia, also referenced security concerns, without identifying how or whether Israel's occupation and practices prevented these security threats from materializing. The presumption is that these security concerns justified the actions that Israel was taking. Israel's own Supreme Court ruled in 1979 that civilian settlements could serve legitimate security considerations,[6] and in 1993 that the question of settlements was an inherently political issue and therefore non-justiciable[7].

The Joint opinion by Judges Aurescu, Abraham, and Tomka expanded upon the security aspect.[8] They stated that Israel's policies in the OPT were "not a reason to ignore the legitimate concerns of this State regarding its security" (para. 11). The real question for these judges was whether Israel's full withdrawal would expose it to security threats (para. 36), in effect conditioning the end of the occupation upon mitigating these potential security risks. They then identified Hamas and its, in their words, denial of "the very legitimacy of the existence of the State of Israel" and competition with the Palestinian Authority over power as such threats, concluding 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" (para. 37). It is curious that they mentioned Hamas' denial of the legitimacy of Israel as a security threat, and not, for example, its actions. Similarly, though coming to a wholly different conclusion, Judges Nolte and Cleveland also mentioned that "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" (para. 5) in the context of Israel's security concerns.[9] In Judge Cleveland's Separate opinion, she emphasized again, "… 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" Israel's rights, including the right to security (para. 2).[10] These Judges identified a more abstract security issue (non-recognition), but the relationship between this security issue and Israel's actions remains unclear. It should also be mentioned that the Israeli Knesset voted by an overwhelming majority against the establishment of a Palestinian State, first in February of 2024 (regarding the unilateral establishment of a State) and then later in July of the same year (regarding the establishment of a State in the context of a negotiated settlement).[11]

The ICJ for its part examined different practices and policies and, where relevant, briefly addressed the argument of Israel's security in its Advisory Opinion in relation to those practices, including the issues of prolonged occupation, settlements, annexation, discriminatory legislation and measures, and self-determination. Regarding Israel's exercise of sovereign power over the OPT, the Court stated that Israel's security concerns cannot "override the principle of the prohibition of the acquisition of territory by force" (para. 254). In terms of the Oslo Accords permitting Israel to be in the OPT to meet its security needs, the Court responded 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" (para. 263). The Advisory Opinion thus helps to blunt State arguments predicated upon security that use exceptions found in international law more broadly or in international agreements. Indeed, Judge Charlesworth emphasized that "the existence of 'security concerns' is not a legal ground for the maintenance of an occupation, nor indeed for its establishment..."[12] (para. 16). The Opinion unequivocally stated 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).

Moreover, the Court emphasized that the exceptional measures provided for in Article 64 of the Fourth Geneva Convention "cannot be invoked as a ground for regulation in these territories" (para. 139) since the very act of transferring its civilian population to the West Bank and East Jerusalem violates the Geneva Conventions. The Court reiterated this stating:

> *"To the extent that such concerns pertain to the security of the settlers and the settlements, it is the Court's view that the protection of the settlers and settlements, the presence of which in the Occupied Palestinian Territory is contrary to international law, cannot be invoked as a ground to justify measures that treat Palestinians differently."*
> (para. 205).

The illegal actions of Israel – transfer of its civilian population to occupied territory – cannot then be used as the foundation for relying on exceptions based on security arguments. Indeed, as Judge

Tladi explained, "security interests as such, no matter how serious or legitimate, cannot override rules of international law… 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"[13] (para. 44).

Judge Charlesworth, in particular, pointed out perhaps one of the most important aspects regarding the relationship between security and occupied territory, stating:

> *"… it is worth recalling that, under customary international law, the population in the occupied territory does not owe allegiance to the Occupying Power, and that it is not precluded from using force in accordance with international law to resist the occupation. 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… "* (para. 23).

While the Advisory Opinion itself does not make these points explicitly, it emphasizes the inalienable rights of the Palestinian people and their right to self-determination. The Declaration on Friendly Relations (GA Res. 2625 of 1970), which is seen as an authoritative statement of customary international law (see *Nicaragua* judgment[14], paras. 188, 191), recognizes the right to resist against forcible action that deprive people of their right to self-determination, in accordance with the Charter of the UN.

Conclusion

Security is frequently used by States to act exceptionally. While these exceptions exist in the law and may be warranted at times,

security has also frequently been used to justify conquest and occupation.[15] The ICJ's Advisory Opinion makes clear that security concerns, no matter how real, could not be used to deprive the Palestinian people of their right to self-determination, and certainly could not be used to protect manifest illegality; in particular, the settlements.

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Yuval Shany, Amichai Cohen

Security Considerations, the Duty to End Belligerent Occupations and the ICJ Advisory Opinion on Israeli Practices and Policies in the Occupied Palestinian Territory

In its Advisory Opinion[1] the ICJ held by a vote of 11:4 that "the State of Israel's continued presence in the Occupied Palestinian Territory is unlawful" and that "the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible". The basis for this conclusion is, however, less than fully clear (for a discussion, see Milanovic[2]). Whereas 14 out of the 15 judges seemed to be of the view that Israel's practices and policies are fundamentally incompatible with basic international law principles – in particular, with the right of the Palestinian people to self-determination and the prohibition against acquisition of territory by force – some of the judges did not consider that the first finding, regarding the illegality of practices and policies, should lead to the second finding, regarding the illegality of the continued presence. In fact, three judges who wrote a joint dissenting opinion on this point (Judges Tomka, Abraham and Aurescu[3]) opined that to do so would ignore Israel's real security considerations:

> *"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."*
> (para. 36)

Still, the majority on the Court rejected the proposition that Israel's "right to security" could serve as a possible justification for

its continued presence in the Occupied Palestinian Territory (OPT). The Opinion explained the approach taken on this question only in a cursory fashion, however. In para. 254 it noted that "Israel's security concerns [cannot] override the principle of the prohibition of the acquisition of territory by force" and in para. 283 it suggested that realization of the Palestinian right to self-determination leading to two States living side by side within secure and recognized borders will contribute to regional stability and security.

In this contribution, we discuss three possible rationales for the Court's rejection of the relevance of Israel's security concerns to its legal conclusions: Lack of proof of serious and legitimate security concerns by Israel, the insufficiency of broad security concerns to justify the continued use of force, and the insufficiency of broad security concerns to deny realization of Palestinian self-determination. We will then offer a few final observations – which tend to be aligned with the position of Judges Tomka, Abraham and Aurescu on the appropriate balance that should hold between security considerations and continued presence in occupied territories.

Three possible explanations for the Court's position

The first rationale for the Court's position rejecting Israel's security claims is that these claims were simply unpersuasive. A key passage in the Court's Opinion is para. 261 which reads 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."*

When read against the Separate Opinion of Judge Nolte and the Joint Declaration of Judges Nolte and Cleveland, it seems that the Court was not persuaded by Israel's claim that its presence in the West Bank is backed up by *genuine* and sufficiently weighty security considerations. Nolte alluded in his Opinion[4], *inter alia*, to the fact that Israel did not provide relevant information to the Court:

> *"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."*
> (para. 7)

Furthermore, Nolte and Cleveland[5] wrote jointly that:

> *"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."*
> (para. 8)

At the heart of this "abuse of right" approach (which finds an echo in the Opinion's reference to "sustained abuse"), there appears to be the following legal proposition: A legal occupation based on legitimate security concerns may evolve into illegal presence, if the justified temporary control of the occupied territory is used for other political agendas – annexation of land and/or prevention of the local population's right to self-determination. The problem with this approach is, however, that it implicitly assumes that: (a) States cannot have two distinct motivations which underlie their practices and policies; and (b) that establishing the illegality of one motivation necessarily undermines the credibility of the other, legal, motivation. We do not believe that there is much support in international law for such a doctrine. In reality, States often develop practices and policies for a variety of reasons (e.g. self-defence, deterrence and domestic politics) – some of which international law recognizes as valid reasons and some of which it does not, and the mixture of valid and invalid reasons has not been generally viewed as incompatible with international law.

Alternatively, Judges Nolte and Cleveland's assertion could be read to mean that the existence of an illegal annexationist aim suggests that the security concerns raised by Israel were merely pretextual in nature. Although we can accept that mixing claims regarding security concerns with policies designed to annex the occupied territories could and should raise suspicions about the genuineness of the security concerns alleged, they cannot be rejected on that basis alone. Such suspicions are merely the starting point of the discussion, and not the end of it. This is especially so if the evidence in support of security concerns is clear and overwhelming. Indeed, we are of the view that the evidence concerning the serious security challenges that would be facing Israel upon withdrawal from the occupied territories is compelling (see e.g.

Even[6]), especially after the 7 October 2023 attack from Gaza (an area from which Israel unilaterally withdrew in 2005, on this see also the chapters by Gross and Medina in this book). Such evidence, which is a matter of public record, also throws into doubt Judge Nolte's insinuation that Israel incurs some responsibility for the outcome of the Advisory Opinion due to its failure to provide more information to the Court about its security concerns.

Some of the judges appear to have taken, however, a different approach towards the question of evaluating Israel's security concerns. For Judges Charlesworth and Yusuf, the key issue appears to have been Israel's security concerns falling below the threshold for exercising a continuing right to use force under *jus ad bellum*. Charlesworth wrote in her Individual Declaration[7] (in para. 16) that "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". In the same vein, Yusuf wrote in para. 13 of his Individual Opinion[8] that "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".

This approach also finds some support in the Opinion, stating in para. 253 the following:

> *"The Court observes that 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."*

The position taken by President Yusuf and Judge Charlesworth regarding the outer limits of the use of force under *jus ad bellum* is controversial, however. Note that Judges Nolte and Cleveland, in their Joint Declaration, distanced themselves from the proposition offered by Charlesworth and Yusuf that Israel's security concerns fail to reach the *jus ad bellum* threshold of necessity and proportionality for self-defence. Instead Nolte and Cleveland[9] wrote 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."*
> (para. 6)

In other words, Judges Nolte and Cleveland maintained that the right to self-defence may also encompass the continued occupation of enemy territory that is necessary to ensure that military threats are not revived.

This latter position appears to be aligned with a doctrinal position on self-defence that considers that the overall use of defensive force may be commensurate not only with the aggressive force actually used, but also with the need to remove the threat of future aggression that is reasonably foreseeable. Support for this approach can be found in the writings of Dinstein[10] (pp. 266-267), Kretzmer[11] (p. 270) and Schmitt[12] (p. 28), to name just a few authors. It also finds support in State practice – from the push to unconditional surrenders of defeated powers in World War Two to the Iranian counter-offensive in the 1980-1988 Iran-Iraq war, which went far beyond repelling the initial invasion. By contrast, the position expressed by Judges Charlesworth and Yusuf is consistent with that of authors like Cassese[13] (p. 355) and Corten[14] (p. 489), who subscribe to a limited right of self-defence, aimed only at repelling and reversing the original attack. While it is fair to say that doctrine on the matter is not fully settled, it is important to note that Security Council Resolution 242 (1967)[15] – one of the most important international law documents dealing with the Israeli-Palestinian conflict – clearly supports the more expansive approach to use of force, since it ties Israeli withdrawal from territories it occupied in 1967 to peace and security arrangements. This approach implicitly accepts the prolonged control of the occupation regime pending appropriate security arrangements.

A third possible explanation for the Court's somewhat dismissive approach towards Israel's security concerns, which can be extracted from the Separate Opinions penned by ICJ judges, is that security concerns cannot override the right to self-determination of the Palestinian people. Judge Tladi[16] wrote in this connection 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."*
> (para. 44)

In the same vein, Judge Xue wrote in para. 9 that "Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people", alluding, *inter alia*, to their right to self-determination.[17] At the basis of this approach is the view that security concerns, in and of themselves, cannot serve as the basis for denial of self-determination. Measures restricting the realization of self-determination may take place, if at all, in the context of the exercise of specific rights under *jus ad bellum* – adding thereby another set of arguments in support of the narrow approach to self-defence, at least in situations involving the right to self-determination.

We do not believe that positions centered around the *jus cogens* nature of the right to self-determination resolve the debate over the outer-limits of necessity and proportionality relating to the right to self-defence. If the right to self-defence encompasses the security concerns claimed by Israel, then it would trump under Article 51 of the UN Charter all other Charter provisions, including those related to self-determination ("nothing in the present charter shall impair the inherent right of individual or collective self-defence…"). Moreover, belligerent occupation is, almost by definition, in unavoidable tension with the right of

self-determination, as it allows the temporary loss of control over a territory by its lawful sovereign – that is, by the lawful self-determination unit. Hence, underscoring the importance of self-determination does little to negate Israel's self-defence claim, if such a claim exists under international law.

In sum, we do not dispute the Court's finding that a major goal of the current Israeli government is to gradually annex parts of the OPT and that such a policy is unlawful under international law. However, the further conclusion that the Court drew from this finding, namely that Israel should withdraw from the OPT, regardless of any security concerns it alleges it has, does not seem to us to fully reflect international law doctrine. The Dissenting Opinion of Judges Tomka, Abraham and Aurescu seems to us to stand on much firmer doctrinal grounds than the majority's position. At the very least, the Court should have treated Israel's security concerns more seriously – as suggested by Judge Nolte – including assessing on the basis of publicly available evidence whether such concerns are genuine and how they should affect the manner of realization of Palestinian self-determination through moving towards ending the occupation. As it currently stands, however, the Court's advice is lacking in the quality of the factual and legal analysis offered.

Concluding remarks

Still, it may be the case that the majority of the Court did sense the *problématique* in downplaying Israel's security concerns. This, we believe, explains the somewhat qualified position the Court took regarding the temporal dimension of Israel's obligation to end its presence in the occupied territories. As mentioned above, the Court – not persuaded by Israel's claims regarding security concerns –

called on Israel to end its presence. However, the language used in the Opinion's *dispositif* remains somewhat open-ended:

> *"the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory* ***as rapidly as possible****"*.
> (emphasis added)

The specific formulation used was explained in the Joint Declaration of Judges Nolte and Cleveland as being made in recognition "that there are significant practical issues that would make an 'immediate' withdrawal and cessation of some aspects of Israel's presence not possible" (para. 16). Arguably, such practical issues could also include pressing security concerns. Still, given the Court's skepticism about Israel's security concerns, it appears as if the latitude afforded to Israel in this context remains quite limited.

Putting legal doctrine aside, the Court's skepticism towards Israel's security concerns does not bode well for the chances of implementation of those parts of the Advisory Opinion that call on Israel to unilaterally withdraw from the OPT. Israel's traditional position is that its national security will be seriously compromised if it withdraws from territories without putting in place robust security arrangements – in line with Security Council Resolution 242. This traditional position still enjoys some international support and has received strong validation from the events of 7 October 2023, which were perceived by many Israelis as the direct result of the 2005 unilateral withdrawal from Gaza without security arrangements.

As long as international law doctrine on the duty to end a belligerent occupation despite the prevalence of serious security concerns remains contested, and as long as security conditions in the

region remain extremely unstable, it is unlikely that a withdrawal will be deemed practicable – putting aside other political and legal considerations concerning Israel's presence in the area. It appears to us that also from this *realpolitik* viewpoint, the approach taken by Judges Tomka, Abraham and Aurescu mediates well between a possible interpretation of international law norms, the prevailing diplomatic framework (which calls for negotiated security arrangements) and the very real security concerns of Israel. Indeed, one sad lesson from the recent history of the Gaza Strip is that withdrawal without security arrangements creates conditions which empower extreme factions, and fosters security instability which harms the interests of both Israelis and Palestinians. Granted, the expansion of the settlements and settler violence also cause instability and unrest. Yet, the Court did not just call for halting these practices, and for third states and the UN to pressurize Israel to comply. The majority on the Court called for a complete withdrawal without any attempt to ensure that Israel's security concerns would be taken into account. As a result, it seems to us that many of Israel's allies would hesitate to call upon it to fully withdraw from the occupied territories under these circumstances. In fact, the less than fully nuanced position taken by the Court on the question of withdrawal actually seems to us to reduce the chances of a broad international consensus forming around the need to fully implement the Advisory Opinion.

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Legal Consequences

Yaël Ronen

Occupation, the OPT Advisory Opinion and the Obligation of Non-Recognition

In the Occupied Palestinian Territory (OPT) Advisory Opinion[1], the ICJ considered that Israel's abuse of its position as an Occupying Power, through *de jure* and *de facto* annexation of the OPT and continued frustration of the right of the Palestinian people to self-determination, renders Israel's presence in the OPT unlawful (para. 261). In determining the legal consequences of this illegal presence, the Court held by a vote of 12:3, that all States are under an obligation "not to recognize as legal the situation arising from the unlawful presence of the State Israel in the Occupied Palestinian Territory" (paras. 279, 285(7)). This holding was not accompanied by any concretization in either the Advisory Opinion or any of the many Declarations and Separate Opinions attached to it. This absence is hardly surprising given that the obligation of non-recognition is inapplicable to a situation of occupation, even if unlawful.

The issue before the Court

The phrase "situation arising from the unlawful presence" of Israel in the OPT appears nowhere in the Advisory Opinion prior to the discussion of the consequences of the illegality, nor is it explicated or developed anywhere. Nevertheless, as the Court was only asked to opine on the legal consequences of Israel's policies and practices for the status of the *occupation*, the phrase must be understood as relating to the legality of Israel's presence in the OPT as an *occupying power*. That said, the Court did not entirely refrain from commenting, *obiter dictum*, on the consequences of Israel's purported annexation of territory in the OPT, noting the obligation of non-recognition previously declared in this regard by Security Council and General Assembly resolutions (paras. 276-278).

The Court's wording evokes the obligation of non-recognition under general international law as it is articulated in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Articles 40, 41 stipulate that States are under a duty not to recognize as lawful "a situation created by a serious breach" of peremptory norms, namely one that is gross or systematic. Although the Court did not explicitly mention ARSIWA,[2] it is difficult to imagine that it considered an obligation to exist that was entirely separate from the existing articulation of the law but did not mention its basis or scope. Its characterization of Israel's abuse of powers as "sustained", of the occupation as "prolonged" and of the frustration of the right to self-determination as "continued" seem to place the violations of the peremptory norm squarely within the scope of ARSIWA Article 40.

As the examples provided by the International Law Commission show, "situations" that have been denied recognition along the lines of the obligation under ARSIWA Article 41(2) concern claims of sovereignty based on territorial acquisition or independence, when those are based on violations of the prohibition on the use of force or the right to self-determination. Examples include Iraq's claim of sovereignty over Kuwait in 1990, Russia's current claim of sovereignty over Crimea, the alleged independence of the South African Bantustans in the 1970s and 1980s and of the Turkish Republic of Northern Cyprus since 1983, as well as South Africa's claim over Namibia (indecisively alternating between sovereign and Mandatory power) from the 1960s until 1990. Exceptional in this regard is the *Bernard Mornah* case, where the African Court of Human and People's Rights mentioned the obligation of Member States of the African Union not to do anything that would give recognition to Morocco's occupation as lawful".[3]

The difficulty with what the Court said

A comparison of the Court's instruction "not to recognize as legal the situation arising from the *unlawful presence of Israel in the Occupied Palestinian Territory*", with the standard formulation in ARSIWA Articles 40-41 "not to recognize as legal the situation arising from the *breach of a peremptory norm*", indicates that "Israel's unlawful presence in the OPT" constitutes, in the eyes of the Court, a "breach of a peremptory norm". This raises various difficulties and questions.

Linguistically, the word "unlawful" seems superfluous: As the obligation is to deny the legality of a given situation, there seems to be no need to re-state the situation's illegality. It is nonetheless difficult to imagine that the Court failed on a basic issue of drafting. Why, then, did it not simply hold that the obligation is "not to recognize as legal the situation arising from Israel's ~~unlawful~~ presence in the Occupied Palestinian Territory"?

For one thing, it cannot be said that the *occupation* (or presence) arises from a breach of a peremptory norm. In fact, the occupation preceded the breach and enabled it. It is the *unlawfulness* of the occupation that arises from the breach. This might explain the insertion of the word "unlawful" despite its linguistic inappropriateness. A more flexible approach to the obligation might be to regard it as extending to a situation maintained in violation of a peremptory norm even if it was initially created lawfully. This was the approach adopted by the ICJ in the *Namibia* Advisory Opinion[4] (para. 126). But the question remains as to what "the situation" is.

However, the difficulties in applying the obligation of non-recognition in response to the illegality of Israel's presence in the OPT are fundamental and go much further. First, the obligation of non-recognition pertains to a claim of legal title (capable of be-

ing granted recognition or denied recognition), not to a fact (as cogently pointed out by Judge Kooijmans in a Separate Opinion in the 2004 *Wall* Advisory Opinion[5], para. 44). For example, Iraq's claim of sovereignty over Kuwait was based on annexation, in violation of the prohibition on the use of force. Consequent to this illegality, Iraq's claim to sovereignty was not recognized. Yet Iraq's (illegal) presence in Kuwait was certainly acknowledged as a matter of fact rendering its status there that of an occupant. In the same vein, Israel's claim of sovereignty over East Jerusalem (or exercise of sovereign acts over territory in the rest of the West Bank) is grounded in the violation of peremptory norms, thus the purported sovereignty must be denied recognition. But Israel's presence in the territory, while unlawful, is a fact. There is no "situation" arising from it.

Moreover, the obligation of non-recognition derives from the concept of *ex injuria ius non oritur*, namely that no one should benefit from their own wrongdoing. Non-recognition denies such benefit by invalidating the consequences of unlawful conduct. However, when it comes to the consequences of a State's presence in foreign territory, there are specific rules governing the matter of consequences, namely the laws of armed conflict, including the law of belligerent occupation. This law applies *irrespective of the legality* of the manner in which the occupation came about (para. 251). Effectively, the laws of armed conflict are *leges speciales* in relation to the obligation of non-recognition. To hold that similarly to sovereignty, an occupation created or maintained illegally is invalid and does not generate the same consequences as an occupation created or maintained legally, would constitute a major overhaul to the laws of armed conflict. The Court thus correctly emphasized that Israel remains bound to comply with its obligations under interna-

tional humanitarian law and international human rights law (para. 272).

What then, may the consequences be of not recognizing the legal consequences of the occupation because of its unlawfulness, if that is what the Court meant to instruct? One might query whether it is significant that the Court mentioned that Israel remains bound only by obligations, perhaps implying that the consequence of the illegality is that it may not benefit from its status. However, strictly speaking, neither the law of occupation nor international human rights law confer rights on the occupant. Rather, they curb its power. Conceptually, then, the same obstacle arises as before: Claims may be denied and rights may be withheld; power is a matter of fact. There are also practical difficulties in holding an occupant bound by obligations but devoid of power.[6]

All this does not mean that the creation or maintenance of an occupation in violation of the laws on the use of force or the right to self-determination does not generate consequences for third States. For example, as the Court noted, States must not "render aid or assistance in maintaining the situation created by Israel's illegal presence" in the OPT (para. 285(7)). It is possible to refrain from assisting the maintenance of a factual situation; but it is meaningless to speak of not recognizing that the situation prevails.

The difficulty with what the Court did not say

Against this background, it is not surprising that the Court did not suggest that the occupation be denied validity, as ought to be the consequence of the obligation of non-recognition. It is surprising, however, that the Court did not suggest *any* consequence for the obligation of non-recognition, nor indicate conduct that States must refrain from lest it imply their recognition of the legality of

"the situation arising from Israel's unlawful presence in the OPT". This silence contrasts with the detailed guidance that the Court provided *obiter dictum* on measures that States might take in order to comply with the obligation of non-recognition of Israel's purported sovereignty in the OPT. The examples it provides in this context include entry into treaties in which Israel purports to act on behalf of the OPT, and recognition of the OPT as falling within the jurisdiction of diplomatic missions accredited to Israel (para. 278).

Not only the Advisory Opinion but also the Separate Opinions and Declarations are almost mute on what the obligation of non-recognition entails. A few of them comment on whether the obligation derives from the *erga omnes* character of the norms or from their peremptory character, but there are no remarks on the *content* of the obligation.

The OPT Advisory Opinion is not the first time that the ICJ declares an obligation of non-recognition without clarifying its consequences. It did so in the *Wall* Advisory Opinion with respect to the illegal situation arising from the construction of the separation barrier.[7] Nor is the ICJ alone in declaring an obligation of non-recognition with respect to an occupation, and failing to elucidate it. In the above-mentioned *Bernard Mornah* case, the African Court reiterated that African Union Member States have the responsibility not to do anything that would give recognition to Morocco's occupation of Western Sahara, but stopped short of clarifying what that entails. Indeed, in the *Wall* Advisory Opinion, Judge Kooijmans considered the duty not to recognize the illegal situation created by the construction of the wall in the West Bank to be an "obligation without substance".[8]

Conclusion

The Advisory Opinion is significant in many ways – it puts to rest any doubt as to the status of the right to self-determination as a peremptory norm; it recognizes the notion of *de facto* annexation; it recognizes that the laws on the use of force continue to apply in armed conflict; and probably most innovatively, it holds that an occupation that is maintained in violation of these laws and the right to self-determination may not continue. As this chapter shows, the Advisory Opinion is also innovative in expanding the obligation of non-recognition beyond claim to sovereign title over territory. Yet how the obligation applies and what are its consequences remain a mystery.

An indecipherable judicial pronouncement is always problematic, but it is particularly so when at issue is an advisory opinion. As is well known, such an opinion is not binding by virtue of the institution's formal dispute-settlement authority. Unlike a verdict in contentious proceedings, which, even if obscure, at least resolves a particular dispute, an advisory opinion's main value is in providing guidance to the UN as well as to States seeking to conduct themselves in accordance with international law. Its sway lies solely in the quality of its opinions and their reasoning, as the views of persons most highly regarded for their professional expertise. If the Court fails to explain itself, what are States seeking its guidance expected to do?

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Yussef Al Tamimi, Andreas Piperides

Third State Obligations in the ICJ Advisory Opinion

Implications for the United Kingdom and Cyprus

On 2 September 2024, the United Kingdom Foreign Secretary David Lammy faced a series of questions in Parliament on the UK's arms and surveillance support to Israel through its military bases in Cyprus. Referring to the recent decisions by the International Court of Justice (ICJ or Court), the Member of Parliament asked the Foreign Secretary to clarify "what role, legally or otherwise, Britain has played in overflying Gaza with surveillance aircrafts, and explain the use of RAF Akrotiri as a staging post for aircrafts going to Israel, which many people believe are carrying weapons to be used to bomb Gaza". Foreign Secretary Lammy skirted the issue by commenting that he was "very comfortable with the support that we give to Israel" and that he "will not comment on operational issues". The exchange in Parliament came on the same day that the UK government announced its immediate suspension of around thirty arms export licences to Israel. That decision followed a government assessment which concluded that a clear risk exists that military exports to Israel might be used in violations of international humanitarian law (IHL). However, the decision pledged to keep in place the rest of the 350 UK licences to Israel and expressly excluded from the decision the supply of components for the F-35 joint strike fighter programme, a move mirroring the evasive policy of the Dutch government since a landmark decision by the Hague Court of Appeal in February ordered a halt on F-35 aircraft deliveries to Israel. This contribution considers how the third State obligations set out in the ICJ Advisory Opinion of 19 July 2024 bear on the United Kingdom's continued arms and intelligence assistance to Israel through its military bases in Cyprus.

Cyprus as a British launchpad and international law

The UK's arms and intelligence support to Israel takes place primarily through its military bases in Cyprus. These bases stand on land over which the UK retained control in the era of decolonization. Article 1 of the Treaty of Establishment of the Republic of Cyprus, signed on 16 August 1960, delineated the land borders of the newly founded Republic while simultaneously establishing two British Sovereign Base Areas (SBAs):

> *"The territory of the Republic of Cyprus shall comprise the Island of Cyprus, together with the islands lying off its coast, with the exception of the two areas defined in Annex A to this Treaty, which areas shall remain under the sovereignty of the United Kingdom. These areas are in this Treaty and its Annexes referred to as the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area."*

The bases on Akrotiri and Dhekelia were picked due to their strategic location and military establishments. Akrotiri was and remains an airbase of the British Royal Air Force (RAF), about 40 minutes flying time from Tel Aviv. The Ayios Nikolaos station in Dhekelia was established in 1947 with the transfer of British personnel and equipment from Palestine, and now houses the largest intelligence gathering site of the British Government Communications Headquarters (GCHQ) outside the UK, as well as personnel of its U.S. counterpart, the National Security Agency (NSA), the latter in violation of the agreement between the British and Cypriot governments.[1]

Under Article 2 of the Treaty of Establishment, the Republic of Cyprus is obliged to cooperate with the UK to ensure the security

and operation of the SBAs and the "full enjoyment by the United Kingdom of the rights conferred by this Treaty". Beyond the two military bases over which the UK claims sovereignty, Annex B provides a list of retained sites under the unimpeded administration of the UK with a "general right of use and control" (Annex B, Part II, S.1.4). These retained sites, which include the RAF satellite and radar centres in Troodos mountain (Schedule A, S.1. A.2 and A.3), are legally within the territory of the Republic of Cyprus but entirely outside its control, in a unique colonial legal situation that perhaps only resembles the U.S. base in Guantanamo Bay. In addition, the UK retained several rights of access and use over the whole island, most notably, for the purposes of the Gaza war, the right of British military aircrafts "to fly in the airspace over the territory of the Republic of Cyprus without restriction" (Annex B, Part II, S.4.2).

The legal status and obligations pertaining to the SBAs, which cover three percent of the island, equaling 99 square miles, is widely debated.[2] The parliament of the Republic of Cyprus adopted a resolution describing the Treaty of Establishment and the SBAs as "a colonial remnant" which defies international law and UN resolutions, most importantly on the right to self-determination.[3] The resolution also opposed the use of the SBAs for actions against other States. However, despite political and popular protests, the UK has continued to use Cyprus as a launchpad for attacks in the region, including in Syria and Yemen. The UK government disclosed the departure of 32 military aircrafts from the RAF airbase in Akrotiri to Israel from October to December 2023. It has been reported that these flights, along with flights of U.S. C-295 military transport planes from Akrotiri, have been transporting arms to Israel.[4] According to Haaretz, by the end of October 2023, German, Dutch, and Canadian military planes and personnel landed in Ak-

rotiri ready to be deployed.[5] At least 18 U.S. C-295 and CN-235 aircrafts, believed to be used by special forces, flew from Akrotiri to Tel Aviv since October 2023.[6] According to senior British sources, until February 2024, Israeli F-35 planes used the British airbase in Akrotiri.[7] By January 2024, RAF Shadow R1 planes, used for intelligence, surveillance, target acquisition and reconnaissance, had flown more than 50 missions over Gaza,[8] one recently recorded mission coinciding with the massacre in the al-Mawasi "safe zone" on 10 September 2024.[9]

Application of the ICJ Advisory Opinion to the war in Gaza

The Advisory Opinion of 19 July 2024 is an authoritative judicial pronouncement on the legal obligations that arise from the UN Charter, the decisions of the Security Council, international human rights law, international humanitarian law, and the law of State responsibility as it relates to occupied Palestine. The obligations laid out in these bodies of law, including the ICCPR, ICESCR, CERD, and the Fourth Geneva Convention, are binding on both the United Kingdom and the Republic of Cyprus based on their accession to these conventions and as a matter of customary international law.

An important preliminary question is how the third State obligations set out in the Advisory Opinion relate to the ongoing war in Gaza. The Opinion notes 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" (para. 81), but the Court goes on to draw conclusions that are pertinent to the current situation in Gaza. Notably, the Court finds that Israel continued to exercise control over key elements of authority in Gaza since its withdrawal in 2005, and that "[t]his is even

more so since 7 October 2023" (para. 93). The ICJ concludes that Israel continues to be bound by obligations under the law of occupation in Gaza commensurate with the degree of its effective control over Gaza (para. 94), a degree of control that has markedly increased since October 2023. Judge Iwasawa writes in his Separate Opinion that the Court subscribes here to a functional approach to the law of occupation, whereby the focus is not on the status of the territory as such, but rather on whether a State continues to be bound by certain obligations under the law of occupation (more on the functional approach in the Advisory Opinion see Milanovic[10]). The Court's conclusion about Gaza is to be read in light of its emphasis that the West Bank, East Jerusalem, and Gaza are "a single territorial unit, the unity, contiguity and integrity of which are to be preserved and respected" (para. 78). This emphasis on Palestine's territorial unity leads the Court to conclude that the illegality of Israel's presence relates to the entirety of the Palestinian territory, including Gaza (para. 262).

That the Court's findings on the illegality of the occupation and the subsequent legal consequences, for the occupier as well as third States, also apply to the current situation in Gaza, is evidenced by the disagreement it drew from four judges. In her Separate Opinion, Judge Cleveland argues that, in her view, the Court "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". Judge Cleveland's main disagreement is that, though Gaza is included in the considerations on Israeli violations of the Palestinian right to self-determination (paras. 239-241), Gaza is absent from the findings on Israel's violations of the prohibition of acquiring territory through the use of force. In Judge Cleveland's view, the Court did not explain how a violation of the right to self-determination, in the absence of a violation of the pro-

hibition of acquiring territory by force, rendered Israel's presence unlawful. Therefore, Judge Cleveland, and likewise Judges Tomka, Abraham and Aurescu, consider that the Court should have excluded Gaza from its conclusions on the illegality of Israel's presence. Judges Tomka, Abraham and Aurescu further add that it is "appropriately that the Opinion refrains from taking any position on the events that have occurred in Gaza after 7 October 2023".

However, it is not entirely accurate that the Opinion does not take any position on the events in Gaza since October 2023. As noted above, the Court states, following its consideration that "based on the information before it" Israel continued to exercise "key elements of authority over the Gaza Strip" following its withdrawal in 2005, that "[t]his is even more so since 7 October 2023" (para. 93). This statement is of no negligible import. If it is indeed correct, as Judge Iwasawa writes and several commentators have noted, that the Court subscribes to a functional approach to the law of occupation in the Opinion, whereby a State's obligations under the law of occupation is commensurate with the degree of its effective control over the occupied territory, then the Court's words suggest that it considers Israel's obligations under the law of occupation in Gaza have intensified under the current circumstances, given the vastly greater degree of the occupier's effective control over Gaza since October 2023. A reasonable interpretation of the Court's words suggests that the duty to withdraw from Gaza, the urgency of the withdrawal, and the obligations of third States to abstain from delaying that withdrawal through aid and assistance to the occupier, have all intensified under the current circumstances in Gaza.

The Advisory Opinion specifies nine third State obligations,[11] several of which are directly relevant to the role of military bases in Cyprus:

- Firstly, the ICJ provides that all States must co-operate with the modalities required by the UN General Assembly and Security Council to ensure an end to the occupation. The General Assembly Resolution passed on 18 September 2024 established those modalities, reiterating the obligations of third States set out in the Advisory Opinion. The Resolution calls upon all States to, among other measures, "take steps towards ceasing the importation of any products originating in the Israeli settlements, as well as the provision or transfer of arms, munitions and related equipment to Israel, the occupying Power, in all cases where there are reasonable grounds to suspect that they may be used in the Occupied Palestinian Territory".
- Secondly, the ICJ observes that all States are not to render aid or assistance in maintaining the situation created by Israel's illegal presence. Arms and intelligence assistance to the occupation army by third States play a vital role in maintaining the occupation. Much effort has been put by advocacy groups in the UK, as well as other countries, including the Netherlands, France, Belgium, Denmark, Germany and the United States, into taking legal action to halt arms supplies to the occupier with a clear risk to commit crimes against civilians in Gaza. An underreported and under-litigated element of assistance by third States concerns their vital intelligence support to the Israeli forces. For example, analyses by flight tracking experts suggests the possible involvement of UK surveillance drones flying over Gaza on the night of the al-Mawasi massacre in September 2024.
- Thirdly, all States are "to ensure that any impediment resulting from the illegal presence of Israel in the Occupied

Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end". The impediments currently experienced by the people of Gaza in the exercise of their right to self-determination are corporal – death, hunger, disease and climate all ravaging the population. Activities of the UK and Cyprus that maintain and aggravate these conditions must be brought to an end.

- Fourthly, the ICJ states that "all the States parties to the Fourth Geneva Convention have the obligation (…) to ensure compliance by Israel with international humanitarian law as embodied in that Convention". The UK government, by its own assessment, considers that a clear risk exists that military exports to Israel might be used in violations of IHL, giving the government reason to suspend export licences. This risk assessment should bear on all arms and surveillance assistance to the occupier whereby compliance with IHL cannot be ensured.

Concluding remarks

Litigation efforts by advocacy groups in the UK and other countries, including the Netherlands, France, Belgium, Denmark, Germany and the United States, have understandably focused on halting arms transfers to Israel. The transfer of these "shipments of death"[12] bear an immediate connection to the conditions on the ground, particularly visible in the litigation to halt the supply of components for the F-35 jet, used by Israel to drop 2000lb bombs on densely populated areas in Gaza and now Lebanon. The UK government excluded F-35 components from its suspension decision on 2 September, stating the importance of the fighter jet pro-

gramme for maintaining global security. The use of F-35 jets by Israel in the attack on Beirut on 27 September 2024, severely escalating and widening the conflict and shifting the rules of engagement, compels the foreign offices of the UK and other participating countries to rethink whether the F-35 programme in its current structure furthers global security.

Surveillance assistance by third States to the occupation receives relatively less attention, even though the UK, through its largest overseas intelligence office in the world in Dhekelia, appears to be a major intelligence partner to Israel. The UK's use of outposts in Cyprus to conduct activities that may aid Israeli war crimes carries serious national security risks for Cyprus. The passive and active participation by the Cypriot government, refusing to comment on the activities while continuing to conduct joint drills with Israel's air force, drew threats from the leader of Hezbollah to make Cyprus "part of the war". The UK military meanwhile told Parliament that there is no "formal requirement" to inform the Cypriot government of its military and intelligence actions from the island, while an SBA spokesperson stated that "any activity taking place on the British bases is always shared with the [Cypriot] government". These political gymnastics have sparked mass popular protests in Cyprus against the British bases, demanding an end to the supply of arms and intelligence to Israel from Cyprus. In this regard it is worth reiterating that multilateral arrangements, including the provision that obliges Cyprus to allow British military aircrafts to fly in the airspace over its territory, do not release the Republic of Cyprus from the duty to comply with its obligations under international law.

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Maryam Jamshidi

Unseating the Israeli Government from the UN General Assembly in Case of Non-Compliance with the Advisory Opinion of 19 July 2024

For years, Palestinian and non-Palestinian advocates and legal experts have argued that Israel's occupation of the Palestinian Territories (OPT), which includes the Gaza Strip, the West Bank, and East Jerusalem, is illegal. On 19 July 2024, the International Court of Justice (ICJ) issued an Advisory Opinion[1] (AdvOp) effectively concurring in that assessment and calling upon the UN and third States to address and rectify Israel's illegal activities in the OPT, including its unlawful presence in the territory. On 13 September 2024, the UN General Assembly (GA) passed a Resolution[2] (124 in favour, 14 against, and 43 abstentions[3]) demanding that Israel comply with the Advisory Opinion and, among other things, that it "end without delay its unlawful presence" in the OPT within 12 months of the resolution's adoption. Israel voted against the resolution, has described it as "diplomatic terrorism",[4] and is highly unlikely to comply with it or the AdvOp itself.

The GA has other tools for discharging its obligations under the AdvOp, including unseating the Israeli government from the GA through the Assembly's authority to review the credentials of State delegations. A similar measure was taken against apartheid South Africa in 1974 and lasted until the end of apartheid in 1994.[5] This contribution canvases some of the most salient arguments raised against that and other efforts to use the credentialing process to substantively evaluate whether a State delegation should be seated or unseated from the GA – arguments that will certainly be leveled against any effort to unseat Israel's government. In addressing those concerns, this chapter also demonstrates how the AdvOp provides a particularly strong legal basis – grounded primarily in the right to self-determination – to unseat Israel's government from the General Assembly until it complies with the ICJ's Advisory Opinion.

Unseating governments from the UN General Assembly through the credentialing process

Under its Rules and Procedures, the GA is empowered to inspect the credentials of its State delegations. Pursuant to Rule 28, the Assembly's Credentials Committee, which consists of nine Member States, "shall examine the credentials of representatives and report without delay". Once it has decided whether to approve a delegation's credentials, the committee passes its recommendation onto the GA for a vote. Under Rule 29, members of the GA can also directly challenge the credentials of a delegation, a move that then obliges the Credentials Committee to issue a report on the matter to the GA. Once that report is issued, the GA formally votes on whether to seat the delegation, taking the report into consideration.[6]

Since the UN's earliest days, the GA has used the credentialing process to decide which of two or more rival governments should be treated as a State's legitimate representative in the Assembly.[7] In the case of South Africa, the GA used its credentialing power, for the first and so far last time, to conclude that a single government that had no rival should be unseated from the Assembly because it lacked legitimacy. In the case of South Africa, that illegitimacy was based on its apartheid system and failure to represent its indigenous Black population.[8]

Whether used to decide between competing governments or to evaluate one government, use of the credentialing process to evaluate a government's "legitimacy" and "representativeness" has long been controversial. This has been particularly true where the process has unseated a single, unrivaled government, as in the case of South Africa. While various arguments have been raised against

using the credentialing process to evaluate a government's legitimacy and representativeness – in the case of South Africa and more broadly – two arguments are particularly salient and likely to be raised against efforts to unseat the government of Israel.

The first argument is that unseating a government through the credentialing system – which is supposed to be a purely procedural process – effectively suspends or expels the State from the UN where there is no rival government to take its place. Such a move purportedly violates Articles 5 and 6 of the UN Charter, which allow for States to be suspended from participating in or expelled from the UN only through joint action by the Security Council and the GA.[9] Under Article 5, "[a] Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the GA upon the recommendation of the Security Council". Article 6 reflects a similar two-step process, allowing the GA to vote in favour of "expelling" a Member State from the UN "upon recommendation" by the Security Council where the Member State has persistently violated the Charter's principles.

While Israel's systematic and persistent non-compliance with Security Council and GA resolutions, as well as long-standing evisceration of core Charter principles – as reflected in the ICJ AdvOp itself – arguably qualify it for suspension or expulsion under Articles 5 and 6, the United States (and perhaps even the UK) would certainly exercise its Security Council veto to prevent either result from occurring. As a result, attempting to unseat the Israeli government through the credentialing process, where there is no rival government to take its place, would undoubtedly be framed as an end run around Articles 5 and 6 that conflicts with the requirements of those rules.

The second argument against using the credentialing process is that, without any meaningful guidelines, evaluating the legitimacy and representativeness of a government amounts to little more than a political exercise.[10] Though there are a hodge podge of opinions from UN officials, as well as a GA Resolution from 1950,[11] that propose guidelines for evaluating a government's legitimacy and representativeness,[12] the credentialing process remains haphazard and inconsistent. This has made it possible for powerful states, like the United States, to use their authority to exclude from the GA governments they do not favour.[13] While Israel need not worry about losing the political support of the global hegemon, the absence of strong legal guidelines for unseating a government will help ensure Israel cries wolf and blames political – and even antisemitic – bias for any such effort against it, as it typically does in response to unfavourable UN action.[14]

The AdvOp helps to ameliorate these concerns about conflicts with Articles 5 and 6 of the Charter, as well as the politicization of the credentialing process in the case of Israel. Before addressing those issues, however, the next section describes the framework provided by the AdvOp for evaluating the legitimacy and representativeness of Israel's government. That framework is based on violations of two inter-related international legal norms – the right of self-determination and the prohibition on acquiring territory by force – and provides a strong conceptual connection between the unseating of Israel's government today and the unseating of the South African government some fifty years ago.

The gist of the ICJ's Advisory Opinion

In the AdvOp, the ICJ held by 11 to 4 votes that Israel's presence in the entirety of the OPT is unlawful because it violates the prohibi-

tion on acquiring territory by force and the right to self-determination of the Palestinian people (para. 259-62). As articulated by the Court, there is a close link between the right to self-determination and the prohibition on the acquisition of territory both generally and in the case of Israel's occupation of the OPT (points variously made by some scholars as well[15]). As the Court observed, "territorial integrity is recognized under customary international law as a 'corollary of the right to self-determination'" (para. 237). Applying that rule to Israel's occupation, the Court concluded that "Israel's annexation of large parts of the Occupied Palestinian Territory [which violates the prohibition on the acquisition of territory by force] violates the integrity of the [OPT], as an essential element of the Palestinian people's right to self-determination" (para. 238).

The AdvOp – specifically its holding on the self-determination right – provides a strong conceptual basis for unseating Israel's government based on its illegitimacy and lack of representativeness. It does so in two ways. First, the Opinion demonstrates that, in denying the Palestinian people's right to self-determination, including through violating the prohibition against the acquisition of territory by force, Israel has prevented the Palestinians from achieving their own independent sovereign State and deprived them of a representative government of their own. Second, the Opinion suggests that, by claiming large swathes of the OPT for itself and engaging in systematic racial discrimination against the Palestinian people living in the OPT (para. 223-229), the Israeli government has both violated the Palestinian people's right to their own sovereign State and failed to provide them with any representation within the Israeli domestic system, where they have no electoral rights and, indeed, few rights of any kind. While allowing the Palestinian people to vote for or otherwise be represented within the Israeli government would not render Israel's presence in

the OPT lawful, it provides an additional basis for concluding that the Israeli government lacks legitimacy and representativeness because it exercises substantial control over a people without allowing them the right to "freely determine their political status and freely pursue their economic, social and cultural development" (para. 233).

This link – between representativeness and self-determination – was also made in relation to the unseating of South Africa's apartheid government. While that decision provides an important precedent, one could argue that representativeness functions differently in the situation of Israel and the OPT than in South Africa, where the indigenous Black population was ostensibly present within South Africa itself. In fact, however, one way the apartheid government denied the Black population its right to self-determination was by conceptually and materially placing it "outside" the territorial South African State. Indeed, the apartheid government created "Bantu Homelands", so-called independent territories with their own governments, in order to segregate the Black population and remove it from White South African society.[16] This technique parallels similar tactics undertaken by the Israeli government in the OPT, where it has created "bantustans"[17] for Palestinians that segregate them both from one another and from the Israeli settlers living illegally in their homeland, as rightly pointed out in the AdvOp (para. 227).

Even if one rejects this perspective on the similarities between the Israeli and South African cases, unseating the Israeli government arguably stands on even firmer legal ground than unseating South Africa's government did. This is largely thanks to the AdvOp's important holding on the nature of the self-determination right and the obligations arising from it. That holding also helps address concerns about the so-called politicization of the creden-

tialing process and potential conflicts between that process and Articles 5 and 6 of the Charter. These issues are discussed in the next section.

Self-determination and unseating the Israeli government

Even though the prohibition on apartheid was central to the GA's decision to unseat the government of South Africa, commentators also framed the government's removal as grounded in the right to self-determination, which was denied to South Africa's Black population by the very nature of apartheid.[18] While apartheid undoubtedly was and remains an affront to the purposes of the UN – and while it is also implicated in the ICJ's recent Advisory Opinion (para. 223-229; see Victor Kattan's contribution in this book) – the right of self-determination has a particular centrality to the UN system that makes its violation especially relevant to determining whether a State delegation is legitimate and representative.

Indeed, the UN Charter emphasizes the importance of the right to self-determination by describing, as one of the UN's purposes, the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Self-determination is also considered the foundational right upon which other human rights important to the mission of the UN depend.

The AdvOp adds to self-determination's existing importance at the UN by clearly establishing the right's peremptory status and binding nature on all States, as well as on the UN itself. By and large, the right to self-determination is understood to have attained *jus cogens* status during the early post-World War II period, particularly during the mass global decolonization movements of the 1950s, 60s, and 70s. Through multiple resolutions passed in the

1960s and 70s, the GA played a particularly crucial role in elevating self-determination to the status of a peremptory norm, which applies to all peoples and places and is fundamentally incompatible with situations of colonization and foreign occupation.[19]

All that being said, until the July 2024 AdvOp, the ICJ had never explicitly held that the right to self-determination enjoys *jus cogens* status. Now, it has done so, affirming that, "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (para. 233). The AdvOp also reiterates previous ICJ decisions concluding that the right to self-determination is *erga omnes*, meaning it is a right that States owe to all other States and that "all States have a legal interest in protecting…" (para. 232). While *jus cogens* rights are, in effect, rights *erga omnes*, the opposite is not necessarily true.[20] In sum, the ICJ's unambiguous holding on the right to self-determination makes clear that all States, as well as the UN, have a duty to protect and ensure that the right is realized in the particular situation facing the Palestinians of the OPT.

These holdings are meaningful ones. While ICJ Advisory Opinions are technically "non-binding", they nevertheless "entail […] an authoritative statement of international law on the question […] with which [they] deal […]" and "carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law". In this case, mechanisms like the credentialing process are one way for third States and the UN to effectuate those responsibilities that have been "authoritatively" articulated by this AdvOp.

By providing a legal framework for evaluating the legitimacy and representativeness of a State's government, grounded in the *jus cogens* right of self-determination, the ICJ opinion also over-

comes claims about the "politicization" of inquiries into the legitimacy and representativeness of State delegations to the GA. Since the Israeli government has clearly and credibly violated the Palestinian people's right to self-determination – a *jus cogens* right that is central both to the issue of representativeness and the UN system itself – there is a convincing legal reason for denying it a seat at the GA through the credentialing process.

Further, the AdvOp provides an even stronger basis for rejecting claims about so-called conflicts between the credentialing process and Articles 5 and 6 of the Charter. As others have argued, these two processes do not conflict with one another, on their face. This is due to the distinction between suspending or expelling a State, as an enforcement measure or for failure to adhere to the principles of the Charter, and refusing to seat its government, because it is illegitimate and unrepresentative. A GA decision to prevent a State's government from participating in the Assembly does not violate Articles 5 and 6 because it does not suspend or remove the state itself from the UN or represent an enforcement action or punishment for violating Charter principles.[21] Instead, it is fundamentally concerned with the issue of representation – namely with whether the government actually represents the people over which it has control.

The AdvOp provides another basis for rejecting arguments about Article 5 and 6's primacy. Specifically, the Opinion demands that the UN Charter be interpreted and implemented in ways that conform with the Palestinian people's right to self-determination, since, as the Court has held, that is a right both *jus cogens* and *erga omnes*. This means that Articles 5 and 6 – which are treaty rules subsidiary to *jus cogens* norms – should be interpreted and implemented in the service of the right to self-determination, rather than in the course of its subordination. It also suggests that Art-

icles 5 and 6 should not stand in the way of realizing the right to self-determination through other established processes and procedures in the UN. Even if there is a conflict between the right to self-determination and the language or implementation of a non-*jus cogens* Charter rule – like Articles 5 and 6 – the UN must adhere to the right of self-determination over and above the conflicting Charter rule.[22]

Conclusion

In the wake of Russia's invasion of Ukraine, there has been much discussion – often creative – among legal scholars about removing Russia from the Security Council as well as the GA.[23] While politicians and others have also called for Israel to be ejected from the UN over the last year, and even though there have been multiple efforts in past decades to unseat Israel's government from the GA through the credentialing process,[24] there has been noticeably little public debate and discussion of this issue amongst legal advocates and academics recently. That inconsistency is one of many that have been on display within scholarly circles since Israel's genocide against the Palestinians began last fall – at least in Western countries.[25]

Despite this scholarly reticence, the ICJ AdvOp – alongside Security Council and GA resolutions recognizing the Palestinian people's right to self-determination,[26] as well as the illegality of Israel's annexation of parts of the OPT,[27] and calling for an end to Israel's occupation[28] – provides a clear legal imperative for the GA to use its credentialing process to unseat the Israeli government for lack of legitimacy and representativeness directly connected to its occupation of the OPT and denial of the Palestinian people's right of self-determination. As the Security Council continues to

shirk its duties, the GA can and should assert itself by using its credentialing process to uphold its legal obligations and ensure that Israel's pathological denial of the Palestinian people's right to determine their own political, social, and economic future is finally and "rapidly" brought to an end.

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Matthias Goldmann

Non-Recognition and Non-Assistance

Consequences of the Palestine Advisory Opinion for Third States

The Advisory Opinion of 19 July 2024[1] on Israel's occupation of Palestine must have had international law experts advising foreign ministries around the world working extra hours. The International Court of Justice (ICJ) not only made it crystal clear that Israeli occupation is illegal in every respect – by itself a challenge for Western foreign offices as they face reproaches for double standards.[2] The Court also added a number of paragraphs detailing the legal consequences of the Advisory Opinion for UN Member States (paras. 273-279). A common element in Advisory Opinions, this section appears at first sight to contain a rather detailed list of "dos" and "don'ts". However, on a second reading, the passages harbour a host of unresolved legal questions. They range from deep theory issues implicating the legal basis of third States' obligations, to more practical ones concerning the limits of non-assistance and non-recognition, particularly with respect to military cooperation, and the possibility of sanctions.

Legal basis: erga omnes or ius cogens?

Having found Israel in violation of the right to self-determination, the rules relating to the use of force, human rights law, and international humanitarian law, the ICJ recalls in the initial lines of the section on States' obligations that these rules have an *erga omnes* character.

This statement is perplexing, as others have noted before (see e.g. Al Tamimi[3] and Carli[4]). To qualify an obligation as having *erga omnes* character is generally understood to refer to the question of standing: States other than the injured State may file a suit against the State allegedly violating the obligation in question, since the obligation is the concern of "the international community as a whole", to quote the ICJ's famous *Barcelona Traction* judgment[5] of

1970. The genocide cases against Myanmar and Israel, initiated by the Gambia and South Africa respectively, provide recent, much-discussed examples.[6]

By contrast, it is a widespread conviction that obligations for third States derive only from violations of *ius cogens*. In this sense, Judge Tladi, truly an expert on issues of peremptory international law, argues in his Declaration that the Court – which is on the record for its long-standing reticence in recognizing *ius cogens* – should have referred to the peremptory character of the rules violated by Israel (para. 28-30).[7] In his view, *erga omnes* addresses standing, while the peremptory character defines the scope of an obligation. In support of this position, Judge Tladi invokes Article 41 of the ILC's Articles on State Responsibility, which obliges States to refrain from recognizing a situation arising from a violation of peremptory international law. Moreover, his declaration echoes Judge Higgins's Separate Opinion in the 2004 *Wall* Advisory Opinion (para. 38-9).[8] In Judge Tladi's view, it is all the more surprising that the Court relied on *erga omnes* as it recognized the peremptory character of the right to self-determination in the very same Advisory Opinion (para. 233).

However, in support of the judgment, Judge Cleveland in her Separate Opinion points to the Court's previous case law, which uniformly based third States' obligations arising from violations of international law on the *erga omnes* character of the violated rules.[9] Of importance in this regard is the *Chagos* case[10] (para. 180), where the Court recognized the customary character of the right to self-determination, but refrained from attributing peremptory character to it, basing its findings on third States' obligations instead on the *erga omnes* nature of the right to self-determination. In the 2004 *Palestine Wall* Opinion, the Court even provided a detailed analysis of the *erga omnes* character of self-determination

and international humanitarian law (para. 154). The case law, it seems, is strikingly consistent, although at odds with the view of Judge Tladi and many voices in the literature.[11]

Who is right? Perhaps the question requires no further resolution. In fact, it seems entirely consistent with the rationale behind *erga omnes* duties to base third States' obligations on them. Their very purpose is not just to serve as a cause of action, but also to define the scope of an obligation. In *Barcelona Traction*, the Court brought up the concept of *erga omnes* obligations for the first time to distinguish obligations incumbent upon the international community as a whole from bilateral obligations. The Court recognized *erga omnes* obligations as a new category of international obligations because of their substance, their fundamental, quasi-constitutional significance for the international legal order. The implications for standing are only derivative of that character.

The essence of this is that *erga omnes* and *ius cogens* are two sides of the same coin, actually two overlapping concepts with only marginal, terminological differences between them. In this sense, it is telling that the ICL 2022 draft conclusion on peremptory norms recognizes that all peremptory norms have *erga omnes* character (for evidence, see the 2004 *Wall* Opinion[12], para. 157),[13] while avoiding the often-heard opposite conclusion that not all *erga omnes* rules had peremptory character. I doubt one will find an *erga omnes* rule without peremptory character. In fact, this would hardly make sense. For it is the multilateral, quasi-constitutional character of peremptory rules which makes it impossible for States to derogate them without the consent of the international community as a whole; and it is that very same character which grants standing to third States.

This prompts the question why the ICJ is much more reluctant to recognize the peremptory character of rules than their *erga*

omnes effect. One can only speculate. One possibility is that the Court simply started with *erga omnes* in 1970 and saw it unnecessary to add to this case law another, overlapping yet controversial category that would contribute little substance. Another possibility is that the Court's reasoning corroborating the *erga omnes* character has mostly been deductive, deriving their character from their substance rather than from the consent of member States. Peremptory international law is at least in theory as much based on consent as on the fundamental significance of the rules in question – as the 2022 ILC draft demonstrates in conclusions 1 and 2. Consent, however, is much more difficult to establish in a judgment. The ICJ is notorious for sloppy reasoning concerning practice and *opinio iuris* corroborating "simple" customary rules. This gets all the more problematic for peremptory international law as the line dividing it from "mere" custom is hard to pin down in practice. Therefore, the Court may have made a wise choice to stick to *erga omnes* as far as possible and to avoid the trouble of tracking State consent.

The limits of non-recognition and non-assistance

As ambiguous as the legal basis of duties of non-recognition and non-assistance is their precise scope. At first sight, the Court seems to carve out third States' duties in this respect with some level of detail. At closer inspection, however, it remains utterly unclear where to draw the line. On the one hand, it is evident that any act containing a recognition of Israel's occupation as legal is ruled out. This comprises recognition of occupied Jerusalem as Israel's capital. Moreover, direct forms of assistance to occupation, such as deliveries of military equipment specifically destined to control the Occupied Palestinian Territory (OPT), or economic cooperation

with Israeli actors, private or public ones, on the OPT, would be prohibited. On the other hand, the Court certainly did not have a BDS-style full boycott of Israel on its mind as it emphasizes the need to distinguish between Israel and the OPT. Also, non-recognition and non-assistance must not harm Palestinians (cf. *Namibia* Advisory Opinion[14], para. 125).

In between these poles, there is much uncertainty. Many forms of assistance to Israel, such as technological cooperation, may at least remotely benefit its capacity to control the OPT. As a general rule, I believe that good faith, proportionality as a general principle of law, and the duty to cooperate encased in Article 2(5) of the UN Charter require States to weight risks as they review their cooperation with Israel. The more serious the risk that some form of cooperation will contribute to illegal occupation, and the more direct the relation between the cooperation in question and illegal occupation, the more are States are bound to discontinue existing projects and refrain from starting new ones.

The future of military cooperation

An example for a high-risk field would be military cooperation. In this respect, joint ventures in the production of weapon systems should be a matter of utmost concern as it seems impossible to exclude with certainty that such weapons, or the knowledge acquired through cooperation, will be used to uphold illegal occupation. The German arms industry has a lot of joint ventures with Israeli producers – and the German government would do well to use all legal means available, including arms control and foreign trade control legislation, to disentangle, minimize, or freeze such relationships as long as occupation is ongoing.[15]

Moreover, any arms deliveries require full guarantees that the equipment will not be used to uphold occupation, as well as effective mechanisms to control respect for these guarantees. Particularly problematic in this respect are weapon deliveries destined for Israel's war effort in Gaza. The Court's Opinion does not cover the period after 7 October 2023. However, even if one assumes that Israel has been exercising legitimate self-defence after 7 October, such self-defence might slowly morph into a new state of occupation that becomes indistinguishable from occupation prior to 7 October – and might therefore be subject to the same legal challenges upheld by the Court. From this point of view, only punctual forms of assistance might remain legal where the impact on occupation can be minimized. Examples might include forms of cooperation targeted specifically at Hamas personnel and equipment associated with the massacre of 7 October 2023.

By contrast, member States are held to cooperate with the UN General Assembly (UNGA) and the Security Council in carving out a peaceful solution. Part of this solution includes protecting the civilian population. The UNGA has established UNRWA for this purpose.[16] Defunding this organization any further would violate the letter of the Court's opinion – and the spirit of international law.

Sanctions

The obligations breached by Israel's illegal occupation are owed to the international community as a whole. For that reason, third States may only claim cessation of the violation and reparations for Palestine as per Article 48(2) of the Articles on State Responsibility (ASR). This recalls debates on the sanctions imposed by third States on Russia after its invasion into Ukraine, particularly the

freezing and subsequent sequestration of Russian central banks assets.[17] As it has been argued in this context, third States enforcing peremptory (or *erga omnes*) obligations may only resort to legal means, also called retorsions. No reprisals may take place, unless the Security Council specifically authorizes member States to do so.

A different situation emerges where specific treaty provisions may be invoked to justify reprisals including the suspension of treaty privileges. Al Tamimi has made the case for the EU to activate the human rights clauses of the EU-Israel Association Agreement.[18] Moreover, one might rely on Article XXI(c) of the GATT to justify trade measures. While taking such measures to force Israel's compliance with the ICJ Opinion is not a binding legal obligation under the UN Charter, one might give the security exception of the GATT a wider reading to comprise measures aiming at the maintenance of international peace and security in alignment with UN policies and efforts. With the Security Council having fallen back into hibernation, rendering ICJ decisions effective may be one of the last straws to rely on for those interested in maintaining a universal order of peace.

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International Criminal Law

Mohamed M. El Zeidy

The Oslo Accords and the Amici Curiae Proceedings before the ICC

The Findings of the ICJ Advisory Opinion

This note draws on the Advisory Opinion[1] rendered by the International Court of Justice (ICJ) on 19 July 2024, in particular the legal findings on the Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accord) and the Interim Agreement on the West Bank and the Gaza Strip (Oslo II Accord) signed in 1993 and 1995, respectively (Oslo Accords). The note suggests that these findings could be of potential relevance to the current discussion on the jurisdiction of the International Criminal Court (ICC/Court) with respect to the situation in Palestine. The jurisdictional question concerning the Oslo Accords was initially submitted by the United Kingdom (UK) to the ICC through the avenue of an *amicus curiae*. Thus, taking heed of said recent developments before the ICJ and the ICC, this contribution contemplates and focuses only on the principled questions of whether *amicus curiae* observations under Rule 103 of the ICC's Rules of Procedure and Evidence (RPE/Rules) concerning jurisdiction or a challenge to the jurisdiction of the Court should be permitted at the warrant of arrest stage under Article 58 of the Rome Statute (Statute/RS); as well as what, if any, are the alternative avenues thereto.

ICJ legal findings concerning the Oslo Accords and their potential relevance to ICC roceedings

In its Advisory Opinion the ICJ referred to different paragraphs of the Oslo Accords (Advisory Opinion, paras. 38, 65-66, 78, 102, 133, 140, and 263), addressing the two legal questions put forward by the General Assembly (Advisory Opinion, paras. 1, 27) by way of (i) setting out the general context regarding the request (Advisory Opinion, paras. 65-66) and (ii) whether the Court, on the basis of its discretionary powers, should decline to give an advisory opinion on

these questions (Advisory Opinion, paras. 30). In fact, the Court not only made references to the Oslo Accords, but also drew a number of significant legal findings particularly on the basis of the Oslo II Accord, namely that this agreement should not be invoked in a manner that conflicts with Israel's other obligations arising from the relevant rules of international law applicable in the Occupied Palestinian Territory (OPT), including international humanitarian and human rights law.

In particular, the ICJ referred to Article XVII of the Oslo II Accord (which regulates the jurisdiction of the Palestinian Council), but it did so only in respect to paragraph 4(b) in discussing the powers conferred on Israel under the law of occupation. In this context, the ICJ concluded that "Israel may not rely on the Oslo Accords to exercise its jurisdiction in the Occupied Palestinian Territory in a manner that is at variance with its obligations under the law of occupation" (Advisory Opinion, para. 140). The Court's reliance on the two Oslo Accords in reaching a number of legal findings throughout the Advisory Opinion (paras. 78, 102, 133, and 263) suggests their continuous relevance and legal validity, which in turn, sets aside contrary scholarly opinions (see Ambos[2]).

This could be relevant for the current discussion before the ICC regarding the question of jurisdiction initially presented by the UK in the course of *amici curiae* proceedings under Rule 103 RPE, which is also premised on Article XVII of the Oslo II Accord. In the context of the ICC, the relevant part of Article XVII of the Oslo II Accord is paragraph (2)(c), which stipulates that "[t]he territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this agreement".[3] Although the ICJ referred to paragraph 4(b) of Article XVII of the Oslo II Accord as opposed to paragraph 2(c), the ICJ's findings in general could be relevant to the ICC if the respective Chamber re-

visits its validity, relevance, legal effects, and, where applicable, its compatibility with the rules of international law applicable in the OPT. This, in turn, begs the question whether the approach, espoused by the UK by way of *amicus curiae* observations under Rule 103 RPE, requesting the ICC to consider if it "can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to [Article XVII (2)(c) of] the Oslo Accords" (see the ICC's Order of 27 June 2024[4], para. 1), is legally and procedurally correct.

Article 58 of the RS and Rule 103 RPE: Implications for admitting amici curiae submissions at the warrant of arrest stage

According to Rule 103(1) RPE, "[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization, or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate". The plain reading of the phrase "[a]t any stage of the proceedings" indicates that the Court may grant leave to a State or any other entity referred to in this rule to submit observations even at the stage of considering the issuance of a warrant of arrest or a summons to appear under Article 58 of the RS. This conclusion finds support in the recent order of Pre-Trial Chamber (PTC) I "authorizing the [UK] to file written observations" and setting a deadline "for any other requests for leave to make observations" under that rule (paras. 3, 8).

Although the UK subsequently withdrew its request, the latter triggered more than 70 *amici curiae* observations, including submissions from States' representatives at the Article 58 RS stage – a stage, where the Chamber is in the process of deciding on the Pro-

secutor's applications for the issuance of warrants of arrest against Hamas leaders and Israeli officials. Arguably, PTC I's approach to permit the submission of *amici curiae* observations at this stage of the proceedings may be considered as interfering with the procedural regime envisaged by the drafters of the Statute. Article 58 (1) RS reads:

> *"At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest appears necessary […]."*

Reading the phrase the "Pre-Trial Chamber *shall* […] issue a warrant of arrest" (emphasis added) followed by "if, having examined the application and the evidence or other information submitted by the Prosecutor", makes it clear that the PTC decision is solely premised on the application and information provided by the Prosecutor. The usage of the mandatory language "shall" suggests that if the Chamber is satisfied that the requirements set forth in Article 58(1) and (2) RS have been met on the basis of the material submitted solely by the Prosecutor, the Chamber is duty-bound to issue a warrant of arrest (see Judgment of 12 July 2006[5])[6] without the need for any further submissions from any other party, participant or intervener in the proceedings. Thus, Article 58 RS is *lex specialis* with respect to the procedure governing the issuance of an arrest warrant or summons to appear. From this perspective, one may argue that any submission through the avenue of an *amicus curiae* has no

place at this specific phase of the judicial process. In other words, Article 58 RS proceedings are *ex parte*, Prosecutor only, and there is no procedural standing or *locus standi* for any other party, participant, or external intervener such as an *amicus curiae* (El Zeidy[7], p. 754).

It follows that, in principle, any intervener should neither know about the existence of an application filed by the Prosecutor nor about its content (see for example, the most recent decision of PTCI to unseal six warrants of arrest in the Libya situation after more than a year since their issuance *ex parte*, Prosecution only[8]). The handful of occasions where the Prosecutor revealed the existence of an application under Article 58 RS (as in the cases of Kenya, Ukraine, and Palestine) represent an exception, rather than the norm. Even in these exceptional circumstances, proceedings during the warrant of arrest stage should remain confined to the Chamber and the Prosecutor.

The *ex parte* nature of proceedings carried out under Article 58 RS also finds support in the early jurisprudence of the Court. In the *Situation in the Democratic Republic of the Congo (DRC)*, the Appeals Chamber stated, albeit in a slightly different context, that Article 58 RS "foresees that the Pre-Trial Chamber takes its decision on the application for a warrant of arrest *on the basis of the information and evidence provided by the Prosecutor*"[9] (emphasis added). Five years later, PTC II followed the same path, and adhered to this precedent.

In the *Situation in the Republic of Kenya*, Mr William Ruto's counsel submitted an application to PTC II under Rule 103 RPE to be granted leave to submit observations on the Prosecutor's application under Article 58 RS. In the relief sought, the applicant, *inter alia*, requested no summons to appear or warrant of arrest to be issued before being heard "on the issues raised in the Application"[10]

(para. 2). In responding to the several arguments put forward by the applicant, PTC II stated:

> *"[T]he proceedings triggered by the Prosecutor's application for a warrant of arrest or a summons to appear are to be conducted on an ex parte basis. The only communication envisaged at the article 58 this stage is conducted between the Pre-Trial Chamber and the Prosecutor."*
> (para. 10)

Three weeks later, the Chamber denied a request for leave to appeal that decision and made clear that "until [it] has ruled on the Prosecutor's applications for summons to appear, none of the persons under the Court's investigation is allowed to participate even by way of submitting observations on the said applications"[11] (see also the ICC's decision of 11 February 2011[12], para. 5). On the same date, the Chamber responded to a similar application submitted on behalf of Mr Mohammed Hussein Ali. Having recalled its previous ruling, PTC II further stated that "contrary to the Applicant's argument, neither victims nor *amici curiae have ever been allowed by any Pre-Trial Chamber to participate in the proceedings under article 58 of the Statute*"[13] (paras. 6, 9; emphasis added).

It follows from the above that Rule 103(1) RPE is not meant to apply during proceedings conducted under Article 58 RS. Rather, this rule should be read and applied through the provisions of the Statute, which regulate the different stages of proceedings depending on their scope and nature. To do otherwise would result in a conflict between the Statute and the Rules, which should be resolved in favour of the former in accordance with Article 51(5) RS.[14]

Alternative avenue: jurisdictional challenge

The above does not suggest that the jurisdictional question, initially put forward by the UK, which triggered the subsequent lengthy process of *amici curiae* submissions, is not important to be considered. To the contrary, the Oslo II Accord is of particular relevance for the question whether Article XVII(2)(c) and Article I(1)(a) of Annex IV appended thereto could constitute a bar to the ICC's exercise of jurisdiction over the situation of Palestine. This is particularly the case, given that PTC I in its earlier 2021 jurisdictional decision[15] (for an analysis of this decision, see Ambos[16]) under Article 19(3) RS seems to have left the door open when it found that

> *"[t]he arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine."*
> (para. 129)

The Chamber considered that issues underlying the Oslo II Accord

> *"may be raised by interested States based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under articles 13(a) and 14 of the Statute."*
> (para. 129)

The Chamber concluded that

> *"[w]hen the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time."*
> (para. 131)

Arguably, these quotes reveal that the Chamber decided not to take a final position on the relevance and effect of applying the jurisdictional clauses set out in the Oslo II Accord on the ICC's jurisdiction. However, elsewhere in the decision, the PTC still considered the two main lines of argument concerning this question. The first concerns the delegation theory premised on the *maxim nemo dat quod non habet*, while the second disregarded the legal effect of the Oslo II Accord on the ICC's jurisdiction (for an early discussion on the delegation theory and whether the Oslo II Accord can restrict the jurisdiction of the ICC, see Ambos[17] and Stahn[18], at 450). According to the latter, this agreement could at best pose future problems of cooperation.

Quoting a judgment issued by the Appeals Chamber in the *Situation in the Islamic Republic of Afghanistan*[19], the PTC considered that "pre-existing treaty obligations" such as the Oslo II Accord, should be resolved at that stage through provisions related to cooperation under Articles 97 and 98 RS (paras. 126-129). The Chamber's approach suggests that it has implicitly rejected the delegation theory, which has been previously advocated by some of the parties, participants and certain *amici curiae* and recently reintroduced by the UK. This conclusion finds further support in the

Chamber's pronouncement that the inclusion of Articles 97 and 98 in the Statute "appear[s] to indicate that the drafters expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute" (para. 127).

Be that as it may, as suggested above, the PTC left the door open for relitigating the question of jurisdiction arising from the Oslo II Accord. While the Chamber should have decided this question once and for all in its above mentioned 2021 ruling, the current PTC should address its merits. The PTC should *proprio motu* satisfy itself whether it has jurisdiction at the current stage pursuant to Article 19(1) together with Article 58(1)(a) RS.

Notably, the last sentence of Article 58(1)(a) RS speaks of the Chamber being satisfied that there are reasonable grounds to believe that a person has committed "a crime within the *jurisdiction* of the Court" (emphasis added). In order to determine whether a crime falls within the jurisdiction of the Court, the Chamber should examine all facets of jurisdiction (see the ICC's judgment of 14 December 2006[20], para. 21) and should not be confined to an assessment of jurisdiction *ratione materiae*. Consequently, the Chamber will also be obliged to satisfy itself of the fulfillment of all requirements relating to its jurisdiction or competence before ruling on the applications submitted by the Prosecutor under Article 58 RS, on the basis of the information provided by him or his office. The question posed by the UK representative is a jurisdictional question arising from the Oslo II Accord that could fall under the Chamber's *proprio motu* review of its own competence.

This begs the question as to whether PTC I is entitled to invite *amici curiae* submissions in the course of its *proprio motu* assessment if it found this desirable for the proper determination of the case or more particularly the Prosecutor's application under Article

58 RS. While it is inherent to its judicial function that any Chamber may request further information that it deems necessary or determinative for its case, regardless of the existence of Rule 103 RPE, PTC I should have respected the limited nature of Article 58 RS proceedings as envisaged by the drafters. In the event of missing information, the relevant Chamber may request it from the Prosecutor who is the *dominus litis* or triggering force in these proceedings and the only party entitled to take part in these proceedings by virtue of Article 58 RS. The Prosecutor is also best placed to furnish the relevant Chamber with the necessary information in support of the applications for a warrant of arrest.[21]

Aside from the *proprio motu* assessment, jurisdictional questions may also be addressed in the form of a challenge to the jurisdiction of the Court pursuant to Article 19(2)(a) RS, by an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58 RS, by a State which has jurisdiction over a case as specified in Article 19(2)(b) RS or by a State from which acceptance of jurisdiction is required under Articles 12(3) in conjunction with Article 19(2)(c) RS, after the decision of the PTC has been issued.

In this respect, on 4 October 2024, PTC I reclassified from secret to public an Israeli challenge to the jurisdiction of the Court under Article 19(2)(c) RS, which had been submitted to the Court on 23 September 2024.[22] In the opening paragraph of its submission, Israel lodges this challenge "in the *pending application* concerning Benjamin Netanyahu and Yoav Gallant, or in any other investigative action on the same jurisdictional basis" (emphasis added). The formulation "in the pending application" suggests that the purpose of the challenge, *inter alia*, is that PTC I address it on the merits before making a ruling on the outstanding arrest warrant applications. This approach remains to be inconsistent with

the RS procedural design due to the restrictive nature of Article 58 RS proceedings as explained above.

Moreover, this approach is also incompatible with the provisions governing jurisdictional challenges under the RS and the RPE. The conclusion that challenging the jurisdiction of the Court after a decision on a warrant of arrest or a summons has been issued is the legally and procedurally correct avenue to be pursued, is confirmed by a textual and contextual interpretation of Article 19(2)(a) and (9) RS/Rule 58 RPE, when read through the scope of Article 58 RS, and by the practice of the Court.

Article 19(2)(a) RS entitles "an accused or a person for whom *a warrant of arrest or a summons to appear has been issued under article 58*" (emphasis added) to challenge both jurisdiction and admissibility of the case (for a critical analysis of the German complementarity submission in that regard see Ambos[23]). Paragraph 9 of Article 19 RS comes into play to emphasise that "[t]he making of a challenge [to the jurisdiction or admissibility] shall not affect the validity of [...] any order or warrant issued by the Court prior to the making of the challenge". This language also suggests that a challenge to the jurisdiction of the Court and any related submissions by the challenging State is envisaged to take place after a warrant of arrest has been issued by the Court and not during the Article 58 RS stage.[24]

It follows that PTC I should dismiss *in limine* this challenge or any similar challenge at this stage. However, Israel or any other State meeting the requirements of Article 19(2) RS may still challenge the jurisdiction of the Court after a ruling under Article 58 RS has been made.

This is actually the conclusion the Court has reached subsequently in its decision of 21 November 2024 rejecting the Israeli jurisdictional challenge "as premature". (At the time this note first

appeared in the form of a blog in October 2024, the Israeli challenge was still under consideration[25]). In this decision, the Court still "reassur[ed] Israel that it will not be estopped on the basis of Article 19(5) of the Statute from bringing a jurisdictional challenge[…]". By doing so, PTC I not only assured Israel that any subsequent challenge to be lodged would still fit within the parameters of Article 19(5) of the Statute ("A State […] shall make a challenge at the earliest opportunity"), but it also seems to have guaranteed Israel that the granting of leave by the Chamber to submit a second jurisdictional challenge as required by Article 19(4) of the Statute appears guaranteed if Israel has decided to follow this path.

Conclusion

In conclusion, the initiative undertaken by the UK on 10 June 2024, although subsequently withdrawn, provoked a number of *amici curiae* submissions on issues that go beyond the Oslo II Accord. When PTC I allowed other States, organizations, and persons to submit observations under Rule 103 RPE during the Article 58 RS stage, it added an additional procedural layer which is not envisaged by the Court's founders. It also led to a considerable delay in the proceedings concerning the decision whether or not to issue warrants of arrest. The same holds true with respect to the implications for permitting a challenge to the jurisdiction of the Court by Israel under Article 19(2)(c) RS during the Article 58 RS phase. If one compares the time it took the Court to decide on an application for a warrant of arrest emanating from previous situations such as Libya (Saif Al-Islam Gaddafi and Abdullah Al-Senussi: 41 days), Ukraine (Mr Vladimir Putin and Ms Maria Lvova-Belova: 23 days), Mali (Mr Al Hassan: one week), Central African Republic I (Mr Jean Pierre Bemba: two weeks), and Central African Republic II

(Mr Alfred Yekatom: 18 days) with the situation in Palestine, it becomes clear that there is a large discrepancy and a considerable delay to decide on the Prosecutor's applications. The situation in Darfur where the Chamber took more than seven months to issue the first warrant of arrest against Mr Omar Al-Bashir on 4 March 2009 represents a notable exception here. PTC I only decided on the Prosecutor's applications on 21 November 2024, that is six months after the Prosecutor submitted his request to the Chamber on 20 May 2024. Still, this constitutes a considerable delay.

Permitting *amici curiae* submissions and jurisdictional challenges at the Article 58 RS stage could also be considered problematic not only because it deviates from the procedural regime of the Statute and causes a considerable delay of the proceedings *sub judice*, but more importantly because it opens the door for potential abuse of the judicial process.

If one looks closely at the subject matter of the initial UK request to file observations under Rule 103 RPE, it becomes clear that it is effectively a challenge to the jurisdiction of the Court as provided under Article 19(2) RS through the avenue of an *amicus curiae* submission. Such a course of action should not be permitted by the PTC. The Court's legal framework provides an avenue for the Chamber to check the jurisdiction *proprio motu* at any stage of the proceedings, including Article 58 RS, and it also regulates challenges to the jurisdiction of the Court at the appropriate phases. The jurisdictional challenge subsequently lodged by Israel under Article 19(2)(c) RS equally does not fall within the appropriate phase of the proceedings, as argued in this note. Accordingly, it should be procedurally dismissed *in limine*. Notably, PTC I correctly rejected this challenge in its jurisdictional decision of 21 November 2024. However, said challenge may be resubmitted to the Chamber only after it has decided on the arrest warrant applications.

The particular, *ex parte*, nature of proceedings under Article 58 RS has been demonstrated by the jurisprudence referred to above. Both the PTC and the Appeals Chamber understood the limited scope of Article 58 RS proceedings, and as such, PTC II rejected any attempt to allow any party, participant, or an *amicus* intervener to interfere during this stage of the proceedings. But the current PTC decided differently. Despite the fact that under Article 21(2) RS Chambers are not obliged to follow "principles and rules of law as interpreted in its previous decisions", it would have been preferrable if PTC I had followed the ICC's precedents. As De Guzman eloquently put it, adhering to judicial precedents "contributes to the development of a consistent and predictable body of international criminal law" (see also Gbagbo and Blé Goudé[26]).[27] By permitting the submission of observations under Rule 103 RPE and a jurisdictional challenge by Israel during the Article 58 RS stage, PTC I not only disregarded the Rome Statute's procedural framework, but it departed with this practice from the settled PTC jurisprudence that has been in place for over a decade.

Since PTC I has already permitted and received many *amici curiae* observations that went beyond the question of the Oslo II Accord, the Chamber should only consider those submissions, which would be directly related to and determinative for deciding on the Prosecutor's applications under Article 58 RS, including the question of jurisdiction. The German *amicus curiae* submission for instance, while raising relevant complementarity questions, has been rightly considered as an attempt to challenge admissibility through the scope of Rule 103 RPE (Ambos[28]). Considered from this perspective, one should note that admissibility considerations are very limited in the Article 58 RS proceedings. At this stage, the assessment is confined to a *proprio motu* review by the relevant Chamber and under strict conditions only "when it is appropriate

in the circumstances of the case, bearing in mind the interests of the suspect" (see the ICC's Judgment of 13 July 2006[29], para. 52).

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3. See also, Article I(1)(a) of Annex IV to Oslo II Accord ("[t]he criminal jurisdiction of the [Palestinian Interim Self-Government Authority] covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this article"). Arguably, the latter sub-paragraph was not addressed by the ICJ being non determinative to the legal questions *sub judice*.
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Florian Jeßberger, Kalika Mehta

The Inadvertent Protagonist

Possible Implications of the ICJ Advisory Opinion for the Prosecution of International Crimes in Palestine

The International Court of Justice (ICJ), a UN body essentially responsible for resolving inter-state disputes, has been increasingly asked to consider matters with implications for individual criminal responsibility – a predominant concern of international criminal law. In some cases, the link is direct; for instance, in the last years, the Genocide Convention has been invoked on behalf of Ukraine, Palestine, and Rohingyas in Myanmar. Although for the ICJ, its application is a question of State responsibility, it will give rise to questions of individual responsibility in other international and domestic fora. In other cases, the connection is not as direct, like in the Advisory Opinion[1] of 19 July 2024. Here we see potential consequences for the prosecution of international crimes arising even if the legal questions before the ICJ were not explicitly framed in terms of international crimes. Thus, in this chapter, we reflect on the "dialogue"[2] between public international law and international criminal law through its judicial institutions, i.e. the ICJ, the International Criminal Court (ICC) and domestic criminal courts.

It is not the first time that the jurisprudence of the ICJ and international criminal tribunals "intersect". A *locus classicus* is the ICJ Genocide judgment (*Bosnia v. Serbia*[3]) with parallel proceedings before the International Criminal Tribunal for the former Yugoslavia (ICTY). In this judgment, the ICJ discussed, *inter alia*, the elements and structure of the crime of genocide and largely adopted the ICTY's position (as posited in *Krstic*) on genocide in Srebrenica.[4] It will also not be the *last* time that we see an overlap, consider the recent initiative by Germany and other countries against the Taliban for systematic violations of women's human rights in Afghanistan under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or the not unlikely case of the ICJ being requested to clarify the legal status of functional immunity exception for international crimes.[5]

In the past, as pointed out by Claus Kreß, the ICJ broadly followed a "division of labour" approach between itself and the international criminal tribunals.[6] Arguably, in the Israel/Palestine Advisory Opinion, the ICJ follows the same approach as it restrains itself from discussing elements of crimes under international law or issues of attributing individual liability. However, there are some findings of the Court, in particular concerning the facts of the case and their legal assessment, which may indeed have indirect implications from an international criminal law perspective. We focus on two points that may give rise to a "dialogue" between the ICJ and the ICC, or, more broadly, between two distinct branches of international law: Israel's discriminatory legislation and measures against the Palestinian population, and its settlement policy in the Occupied Palestinian Territory (OPT).

Apartheid

In the questions posed to the ICJ by the UN General Assembly in January 2023, the Court was, *inter alia*, requested to consider the legal consequences of the discriminatory nature of legislations and measures adopted by Israel in the OPT.[7] Taking into account Israel's residence permit policy, restrictions on the movement of Palestinians in the OPT, and the demolition of Palestinian property, the Court found that these measures constituted systemic discrimination against Palestinians on the basis of, *inter alia* race, religion, or ethnic origin. The ICJ observed:

> *"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. For this reason, the Court considers that Israel's legislation and measures consti-*

tute a breach of Article 3 of CERD [1965 International Convention on the Elimination of All Forms of Racial Discrimination].” (para. 229)

Article 3 of CERD speaks of two particularly severe forms of racial discrimination: racial segregation and apartheid. The Court did not delve into the definition of apartheid and racial segregation, nor did it explicitly specify whether it considered Israel’s policy to be apartheid or racial segregation or both – presumably an outcome of the collective nature of the decision-making process of the Court.

This non-binding finding only deals with the framework of international human rights law and State responsibility and not with international criminal law (as emphasized by Judge Iwasawa in her Separate pinion[8], paras. 12-13). It was beyond the scope of this Advisory Opinion for the Court to give any findings on “apartheid as an international crime”,[9] which would be governed either by the 1974 International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) before the ICJ, or otherwise by the 1998 Rome Statute of the International Criminal Court (ICC Statute) before the ICC (with Israel not being a State party to both treaties). It is noteworthy, however, that Judge Brant in his Declaration[10] presents a definition of apartheid for the purposes of CERD which he takes from the Rome Statute and the Apartheid Convention, as indicative of State practice, engaging in a judicial dialogue across legal frameworks (paras. 6-10).
He notes:

“[A]s 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."
(para. 9)

While the Advisory Opinion itself is silent on whether discriminatory policies satisfy the constitutive elements of apartheid, individual judges of the Court addressed this question in their separate opinions and arrived at contrasting conclusions. On the one hand, Judge Nolte expresses that the Court did not have sufficient information to establish the subjective element (the specific intent to establish and maintain an institutionalised regime of domination and oppression by one racial group over the other) on the part of Israel.[11] In his view, the purpose of domination should be the "only reasonable inference" from the conduct of Israel to satisfy the specific intent to constitute apartheid. In this case, he noted that Israel may also be motivated by security considerations and/or driven by the aim of asserting sovereignty over the West Bank (para. 13).[12]

On the other hand, the President of the Court, Judge Salam, based on the evidence adduced before the Court, was convinced that Israel's actions and declarations demonstrate that it fully intends to continue the established regime of domination of the Palestinians (para. 28-29).[13] Also Judge Tladi, drawing parallels to apartheid policies in southern Africa and referring to ICTY case law, specifically deals with the question of intent raised by Judge Nolte in his Declaration.[14] He explains:

"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' [Prosecutor v.

> *Jelisić, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, para. 47]. 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, do not reveal the purpose of dominating the Palestinians."*
> (para. 40)[15]

Even if the Court did not explicitly qualify the discriminatory measures as apartheid, the fact that multiple judges alluded to such qualification may trigger and inform potential investigations pursuing individual criminal responsibility. In the ongoing case before the ICC apartheid (as a crime against humanity under Article 7 ICC Statute) is not one of the charges in the arrest warrant applications filed by the Office of the Prosecutor in May 2024.[16] However, in the *amicus curiae* submissions filed before the Pre-Trial Chamber, some experts requested the Chamber to include additional charges, *inter alia* the crime against humanity of apartheid.[17]

Settlement policy and forcible transfer

The ICJ was also called upon to examine the consequences arising from Israel's settlement policy, i.e. the residential communities established or supported by Israel in the OPT. The Court relies on extensive evidence of Israel's policy of providing incentives for the relocation of Israeli individuals and businesses into the West Bank, as well as for its industrial and agricultural development by settlers, and the integration of these settlemens into the territory of Israel. The Advisory Opinion makes a determination based on international humanitarian law and finds the transfer of settlers and

Israel's maintenance of their presence to be contrary to the sixth paragraph of Article 49 of the Fourth Geneva Convention (para. 118). Furthermore, the Court considered that forcible evictions, extensive house demolitions and restrictions on residence and movement that leave little choice to the Palestinian population in OPT are contrary to the prohibition of forcible transfer of the protected population as per the first paragraph of Article 49 of the Fourth Geneva Convention (para. 147). In this context, the Court explicitly refers to ICTY case law on the definition of "forcible transfer":

> *"[T]transfer may be 'forcible' – and thus prohibited under the first paragraph of Article 49 – not only when it is achieved through the use of physical force, but also when the people concerned have no choice but to leave (see International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Appeals Chamber, Judgment of 22 March 2006, para. 279). Therefore, the absence of physical force does not exclude the possibility that the transfer in question is forcible."*
> (para. 145)

The findings on settlement policy and forcible transfer did not come as a surprise given that the ICJ had already declared the settlement policy of Israel overall to be in violation of international law in its 2004 *Wall* Advisory Opinion[18]. Now, however, these findings, combined with the large-scale violence, including sexual and gender-based violence, against the Palestinian population (paras. 148-154), may form the foundation for potential prosecutions based on war crimes and crimes against humanity committed by Israeli authorities.

As in the case of apartheid, there is no explicit characterisation in the international crimes framework in the Advisory Opinion. But

again, President Salam, in his Separate Declaration, frames these violations as crimes under international law. He points out several facts which indicate that the State of Israel and its high ranking officers have been in full knowledge of the illegality of their actions and continued to act in clear violation of international law (para. 11). He explicitly recalls the obligation of all the State parties to the Geneva Conventions to punish and track down those responsible for ordering and committing such offences (para. 12).

Implications for individual criminal responsibility

The Advisory Opinion was sought by the General Assembly in January 2023 on the "ongoing" or "continuing" policies and practices and therefore was not connected to Israel's conduct in the Gaza Strip in response to the attack carried out against it in October 2023 – making it significant for its long-term implications even outside of the current context. Even though the ICJ held back on framing these violations as "international crimes" as such, its findings (both on settlement policy and apartheid) at least provide a reasonable basis to believe that crimes against humanity and war crimes have been perpetrated by the State of Israel in the OPT against the Palestinian population. As a result, there are several direct and indirect consequences with respect to individual criminal responsibility.

In terms of direct consequences, it is clear that States are now not only expected to but also obligated to move beyond the diplomatic condemnation of such violence.[19] As individual Judges have made explicit, third States have an obligation to prosecute and punish those responsible for serious violations of international law. While opening structural investigations to prosecute Israeli officials for these violations under universal jurisdiction is one side

of the coin,[20] the other side carries the responsibility to not become complicit in war crimes and crimes against humanity themselves. With the findings of the ICJ, third States and other private entities have been made aware of the illegality of the conduct of Israel in the OPT in no uncertain terms, therefore opening up the possibility for both civil and criminal liability claims in many parts of the world. Translated to the area of criminal law and subject to further requirements specific to this area, individuals, be it State officials or corporate executives, can be held accountable for knowingly aiding or abetting or otherwise providing direct and substantial assistance to the crimes in question. Such complicity may take the form of transferring weapons, other essential material support to Israel, contributing to war crimes and crimes against humanity including deportation, forcible transfer of population and possibly apartheid.

As an indirect consequence, the Advisory Opinion has laid the groundwork for broadening the scope of prosecutions at the ICC. Although the violations before October 2023 were not a part of the arrest warrant applications filed by the ICC Prosecutor in May 2024 which led to arrest warrants being issued against Prime Minister of Israel Benjamin Netanyahu, former Defence Minister Yoav Gallant, and Commander-in-chief of Hamas's military wing, Diab Ibrahim al-Masri (Deif) in November 2024. However, the ICC has jurisdiction and has long been requested to investigate these violations in the occupied territory since 2015 (when Palestine ratified the ICC Statute). While the findings in the Advisory Opinion do not meet the evidentiary threshold required for a trial, they do lend weight to pre-trial considerations.

Even in the ongoing proceedings which are concerned with events since October 2023, several issues were raised by *amicus curiae* briefs before the ICC that the ICJ indirectly addressed in its

Advisory Opinion. Consider the issue of complementarity, for example. Germany's arguments before the Pre-Trial Chamber for not issuing arrest warrants against Israeli officials rest on the claim that Israel has a functioning and independent judicial system which should be allowed more time in the face of an ongoing armed attack, and be given a genuine opportunity to present its domestic investigation and legal review mechanisms before the ICC intervenes.[21] The ICJ's findings on Israel's continued violations despite knowing the illegality of its conduct and its failure to punish these violations especially since the *Wall* Advisory Opinion (para. 154) arguably provide a compelling record to challenge this claim regarding the willingness of Israel to prosecute these violations.

Conclusion

It is clear that the 2024 Advisory Opinion will strengthen (or undermine) the claims of interested parties before the ICC, given the overlapping subject matter. Unlike the Genocide judgment mentioned above, the findings will likely impact the establishment and assessment of facts more than the legal questions of international criminal law proper. With the arrest warrants decisions of the Pre-Trial Chamber I still not public, what remains to be seen is how much weight the ICC Judges will attach to these findings in the current proceedings. A first indication gives the ICC Prosecutor's consolidated response to the *amicus curiae* observations of 23 August 2024[22], which not only referred multiple times to the Advisory Opinion (e.g. para. 2)[23] but also, indirectly, explicated the division of labour between the ICJ and the ICC and the somewhat complementary function of the two institutions:

> *"The ICJ has already addressed the situation in the oPt on four separate occasions during 2024, and it is now for the Court [the ICC] to ensure that there is no delay in the pursuit of criminal accountability in the* ***Situation in the State of Palestine****."*
> (para. 11; emphasis in the original)

Even more than at the ICC, the ICJ's determinations are likely to increase pressure on national prosecutors to initiate prosecutions for the commission of international crimes on the basis of the principle of universal jurisdiction. With findings on genocide (from Serbia/Bosnia to Myanmar, Ukraine and Gaza) and now indirectly on crimes against humanity such as apartheid or forcible transfer, the ICJ is on the verge of becoming, reluctantly perhaps, a protagonist of international criminal justice.

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We acknowledge that this contribution is situated in the context of the broader critique of the international legal discourse in Germany regarding the situation in Palestine, in particular the impact of silencing and censorship on voices of Palestinian origin.[24] We believe that it is crucial for platforms, especially German platforms, to provide space for discussions in all their political and legal complexity and to actively address the perception of bias by including more diverse voices and perspectives. We see our own contribution as an imperfect step towards this effort.

References

1. ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.
2. The idea of "judicial dialogue" entered into scholarly discussion in the 1990s (following the paper by Slaughter, 1994). It is used to describe different phenomena at the transnational or at the domestic level. The "dialogue" between judicial actors can be vertical or horizontal and includes exchanges within a single legal regime (such as international criminal law) or different legal regimes (such as criminal and administrative law). Such a "dialogue" can refer to factual (e.g. the establishment of certain facts and the factual assessment of a certain situation) or legal issues (e.g. the elements of a certain offense).
3. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996.
4. The ICJ agreed with the ICTY Appeals Chamber in *Krstic* "that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide" (para. 293).
5. German Federal Foreign Office, 'Launch of an Initiative on Accountability for Afghanistan's Violations of CEDAW Declaration' (2024); Aziz Epik, 'No Functional Immunity for Crimes under International Law before Foreign Domestic Courts' (2022) 19:5 *Journal of International Criminal Justice*.
6. Claus Kress, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18:4 *European Journal of International Law*.
7. UN, 'Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem' (A/RES/77/247), 30 December 2022.
8. ICJ, Separate Opinion of Judge Iwasawa *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
9. For an analysis from an international criminal law perspective, see Kai Ambos, 'Apartheid in the Occupied Palestinian Territory?' (2024) *Verfassungsblog*; Kai Ambos, 'Criminal "Apartheid" in the Occupied Palestinian Territory?: A Call for a More Nuanced Approach from the Perspective of International Criminal Law' (2024) 47:4 *Fordham International Law Journal*.
10. ICJ, Declaration of Judge Brant *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
11. ICJ, Separate Opinion of Judge Nolte *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.

12. There are good reasons to believe that this reading of specific intent sets an unreasonably high threshold; we tend to concur with Miles Jackson who argues that racial domination does not have to be an end in itself and that even if the measures relate to the end of security, it will still be apartheid where the State is choosing a regime of racial domination in order to ensure its security, see Miles Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination' (2022) 71:4 *International and Comparative Law Quarterly*. See also Jinan Bastaki, 'Whose Reasonable Inference? The ICJ's Advisory Opinion and the Threshold for Apartheid's Mens Rea' (2024) *EJIL:Talk!*.
13. ICJ, Declaration of President Salam *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
14. ICJ, Declaration of Judge Tladi *(Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem)*, 19 July 2024.
15. Jinan Bastaki, 'Whose Reasonable Inference? The ICJ's Advisory Opinion and the Threshold for Apartheid's Mens Rea' (2024) *EJIL:Talk!*.
16. ICC Prosecutor Karim A.A. Khan KC, 'Applications for Arrest Warrants in the Situation in the State of Palestine' (19 April 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.
17. See e.g. the *amicus curiae* observations by Prof. William Schabas (30 July 2024) and by Prof. Michael Lynk and Prof. Richard Falk (06 August 2024).
18. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 09 July 2004.
19. Matthias Goldmann, 'Die Zeitenwende beginnt im Nahen Osten' (2024) *Verfassungsblog*.
20. The term refers to a specific investigative practice (typically used by public prosecutors) that is not directed against an individual suspect, but involves the collection and examination of larger sets of facts, other information and evidence about a given situation involving crimes under international law for potential use in future trials before national, foreign or international courts, see, e.g., Florian Jeßberger, 'A Short History of Prosecuting Crimes under International Law in Germany' (2023) 21:4 *Journal of International Criminal Justice*.
21. ICC, Situation in Palestine (ICC-01/18), 'Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence by the Federal Republic of Germany', 6 August 2024. For a critical analysis see Kai Ambos, 'Complementarity and the German *Amicus Curiae* Submission in the ICC Palestine Arrest Warrant Proceedings' (2024) *EJIL:Talk!*.
22. ICC, 'Prosecution's Consolidated Response to Observations by Interveners Pursuant to Article 68(3) of the Rome Statute and Rule 103 of the Rules of Procedure and Evidence' (ICC-01/18-346), 23 August 2024.

23. Para. 2 reads: "As the International Court of Justice (ICJ) held in its *Advisory Opinion* of 19 July 2024, Israel's continued presence in the Occupied Palestinian Territory (oPt) is unlawful. The territory occupied includes Gaza, over which Israel exercises a range of forms of control. It has done so both before and after its unilateral disengagement in 2005, and before and after its military operations in response to the attacks of 7 October 2023. It includes the West Bank and East Jerusalem, where Israel has established, maintained, and expanded settlements in violation of international law. Israel has also engaged in policies and practices in violation of international law that have resulted in the annexation of large parts of the oPt, that entail systematic discrimination, and that impede the right of the Palestinian people to self-determination."
24. Sué González Hauck and Isabel Lischewski, 'Closing Channels: The Precarious State of International Law Academia in Germany' (2024) *Völkerrechtsblog*.

Other Perspectives

Victor Kattan

Apartheid or Systemic Discrimination?

A Connotative Reading of the ICJ's Advisory Opinion

Apartheid is defined as a crime against humanity associated with a structure of government in which a "superior" racial group establishes a system that oppresses and dominates an "inferior" one (see Article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention") and Article 7.2(h) of the 1998 Rome Statute of the International Criminal Court ("Rome Statute")). To ensure the maintenance of this oppressive system, multiple "inhuman acts" are perpetrated. However, unlike the crime of apartheid, the *prohibition* of apartheid in international human rights law is not defined in Article 3 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This is why scholars like Miles Jackson have argued that the definition of apartheid in Article II of the Apartheid Convention provides the definition of the wrong that binds all States in customary international law, as well as the definition of apartheid in CERD.[1] As we shall see, this was an argument that was also raised by States in the Advisory Opinion proceedings and by judges in their Separate Opinions.

Despite the submission of these arguments in the written and oral pleadings, the International Court of Justice (ICJ) avoided an analysis that engaged with the definition of apartheid in customary international law in its 19 July 2024 Advisory Opinion. The Court merely observed that Israel's legislation and measures that segregate the settler and Palestinian communities in East Jerusalem and the West Bank constitute a breach of Article 3 of CERD, which prohibits all practices of "racial segregation and apartheid". As the ICJ did not define apartheid when it referenced Article 3 of CERD or clarify whether it had made a finding of segregation or apartheid, the reference to Article 3 led to differences of views on the bench. ICJ President Salam[2] and Judge Tladi[3] thought that the reference to

Article 3 of CERD amounted to an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid (see Salam, paras. 15-17; Tladi, para. 41), whereas Judge Iwasawa[4] was of the view that the Court did not qualify Israel's policies as apartheid (para. 13). Judge Nolte[5] was of the view that the Court left the matter open (para. 8).

A lack of consensus on the Court could explain the failure to provide a definition of apartheid under customary international law. Judge Nolte expressed his concern that should the ICJ have provided a definition, it would have been expected to apply it (Separate Opinion of Judge Nolte, para. 8). Reading between the lines, however, it could be argued that the expression "*systemic* discrimination", which the Court referred to in paragraph 223 of the Advisory Opinion, was used as a synonym for "apartheid", even though it did not link this description to a breach of Article 3 of CERD – for there does not appear to be any substantial difference between apartheid and systemic discrimination. This is because the word "systemic" is associated with crimes against humanity, which, as explained below, is how apartheid is defined as a crime in international law. As ICJ President Salam noted, the magnitude and consistency of Israel's multiple violations of Palestinian human rights over many decades, "are part of an institutionalized regime of systematic oppression" (Declaration of President Salam, para. 24).

This contribution explores the significance of the ICJ's reference to "systemic discrimination", which appears to have been used as an alternative description for apartheid, a word laden with multiple meanings. It is noteworthy that the ICJ devoted more space in its opinion to Israel's discriminatory legislation and measures than to any other issue.

The failure to define apartheid

The definition of apartheid as a crime against humanity appears in two widely ratified treaties. The Apartheid Convention has 110 States parties, mostly Global South States. The Rome Statute has 124 States parties, including many States that had not ratified or acceded to the Apartheid Convention. Notably, 167 States have ratified at least one of these treaties.

However, rather than engaging with the definition of apartheid in customary international law, the ICJ decided to exclusively focus on CERD (see Section IV on "Applicable Law", at para. 101). By only focusing on CERD, the Court was able to avoid a finding that addressed the definition of apartheid in Article 3, which would have entailed addressing Article II of the Apartheid Convention, which provides a definition.

Although the Apartheid Convention was not expressly mentioned in the request for the Advisory Opinion,[6] the Convention was raised in argument by two dozen States before the Court (including implicitly by some Western States such as Spain that referenced "a structure of institutionalised discrimination" in its oral pleading at para. 17[7]).[8]

Judge Iwasawa expressed the view that the request for the Advisory Opinion was limited to human rights law, and not international criminal law (para. 13). This might explain why the ICJ did not review the Apartheid Convention. Yet, as Gerhard Kemp and I noted elsewhere[9], the Apartheid Convention is a hybrid treaty that combines elements of a human rights treaty with those of a penal treaty.[10] In addition to declaring apartheid a crime against humanity, defining the crime, and providing for individual criminal responsibility in broad terms, the Apartheid Convention estab-

lished a mechanism for monitoring and reporting on human rights violations.[11]

Notably, the Apartheid Convention is listed a human rights treaty in the UN's treaty collection under Chapter IV, and not as a penal treaty in Chapter XVIII. The Apartheid Convention was drafted in the UN's Third Committee that deals, *inter alia*, with human rights, the elimination of racism and racial discrimination, and the promotion of the right to self- determination.

The reference to systemic discrimination and apartheid in the Advisory Opinion

In paragraph 223 of the Advisory Opinion, the ICJ expressed its view, "that the régime of comprehensive restrictions imposed by Israel on Palestinians in the Occupied Palestinian Territory constitutes systemic discrimination based on, *inter alia*, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD. 224". Notably not one of these provisions refers to *systemic* discrimination.

In paragraphs 224-229, the ICJ addressed Article 3 of CERD, which "refers to two particularly severe forms of racial discrimination: racial segregation and apartheid" (para. 225). The Court explained that "[a]s a result of discriminatory policies and practices such as the imposition of a residence permit system and the use of distinct road networks … Palestinian communities remain physically isolated from each other and separated from the communities of settlers" (para. 227). The Court went into some detail to explain how the separation between the settler and Palestinian communities is also juridical due to the partial extension of Israeli law to the

West Bank and East Jerusalem creating "distinct legal systems in the Occupied Palestinian Territory" (para. 228). The ICJ observed that for decades Israel's legislation and measures have treated Palestinians "differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem" (para. 228).

Accordingly, the Court concluded 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. For this reason, the Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD" (para. 229). Although the ICJ did not define apartheid, the policies and practices described by the ICJ are considered constitutive of apartheid systems. As Kai Ambos has argued, "apartheid essentially describes a specific wrong that encompasses systemic and structural forms of discrimination destroying equality and freedom, within the framework of an institutionalized system of oppression".[12]

Apartheid as a crime against humanity

Given that the ICJ did not provide a definition of apartheid, understanding what it intended to convey in paragraph 229 is open to conflicting interpretations – as reflected in the diversity of views on the bench.

As is well known, apartheid is a word from the Afrikaans language, which means "to be apart". According to the Oxford Reference definition of apartheid there would not be much difference between apartheid and segregation, since both require separating communities from each other. It would be tautological for Article 3 to refer to the same thing twice. Perhaps for this reason, David

Keane suggests that apartheid is a "particularly egregious form of racial segregation".[13] In other words, segregation and apartheid are similar, just that the latter is a more severe form of segregation.

Given the close association between apartheid and segregation in Article 3 of CERD and the lack of a definition of apartheid in that treaty, many States made the argument in their written statements that the ICJ had to look beyond CERD for a legal definition of apartheid that went beyond segregation. They pointed out that apartheid is defined as a crime against humanity in the Apartheid Convention and the Rome Statute whose definitions focus on the systematicity of the crime as an oppressive system in which multiple human rights violations and other crimes against humanity occur. These States, which notably included South Africa[14] and Namibia[15], argued that the definition of apartheid as a crime against humanity should 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. Ultimately, the ICJ avoided this argument, but as Judge Nolte observed, addressing both definitions could have helped "to identify the meaning of apartheid under Article 3 of CERD in customary international law" (para. 10).

Significantly, there is no other definition of apartheid in international law other than its definition as a crime against humanity. Notably, when CERD was adopted in 1965, with its reference to apartheid in Article 3, apartheid had *already* been condemned as a crime against humanity – see UN General Assembly Resolution 2074(XX) Question of South West Africa, 17 December 1965, para. 4 – but it had not yet been defined. This would come later, in Article II of the 1973 Apartheid Convention.

The definition of apartheid as a crime against humanity in both the Apartheid Convention and the Rome Statute is *broader* than its

popular meaning, going beyond policies of separation and segregation to include domination and oppression. This was because at the time of the drafting of the Apartheid Convention, in the early 1970s, the apartheid State under the Vorster administration (1966-78) was at its most repressive. You could say the same thing about the current Netanyahu government, the most repressive and violent in Israel's history – to the extent that the UK Home Office recently granted asylum to a Palestinian citizen of Israel on account of increased persecution, apartheid, and systematic discrimination facing Palestinians *inside Israel* since October 2023.[16]

Despite the differences between the definitions of the crime of apartheid in the Apartheid Convention and the Rome Statute (see Ambos[17]), they both comprise three core elements: (i) an institutionalised regime of systematic oppression and domination by one racial group over another racial group or groups; (ii) the commission of several inhumane acts; and (iii) an intention to maintain that regime. These three constituent elements were identified by four of the judges in their Separate Opinions and Declarations: (see Salam, para. 20; Nolte, para. 11; Brant, para. 10; and Tladi, para. 38). As Judge Brant noted, the Court could have interpreted Article 3 CERD based on the three elements mentioned above that are common to both Conventions.[18] Judge Brant further noted that these elements also appear in the definition of the crime of apartheid in the International Law Commission's Draft Articles on the Prevention and Punishment of Crimes against Humanity, which Israel has not objected to.

The word "systemic" is particularly associated with crimes against humanity (though the word "systematically" makes a brief appearance in Article 40(2) of the International Law Commission's Articles on State Responsibility to describe what are considered serious breaches of peremptory norms of general international

law).[19] The word "systematically" appears in the definition of apartheid in the *chapeau* to Article II of the Apartheid Convention and the word "systematic" in the *chapeau* to the definition of crimes against humanity in Article 7 of the Rome Statute and in the definition of apartheid (in Article 7.2(h)). In both cases, "systematically" and "systematic" precede the word "oppression" in their respective definitions of the crime of apartheid. As Ambos has argued, the qualifier "systematic" that appears in the Rome Statute confirms that "some kind of organisation and ultimately a policy is required".[20] Indeed, the furtherance of a State or organizational policy is expressly mentioned in Article 7.2 (a) of the Rome Statute. In the case law of the International Criminal Tribunal for the former Yugoslavia, the reference to "systematic" was interpreted by the Trial Chamber in the *Kunarac*[21] case, as referring to "the organised nature of the acts of violence and the improbability of their random occurrence". This was impliedly noted by President Salam, when he observed that: "It is evident from the magnitude and consistency of [Israel's] 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" (para. 24).

To say that Israel *imposes* a "régime of comprehensive restrictions" that leads to "systemic discrimination" (para. 223) comes very close to saying that it is committing the first constituent element of the definition of the crime against humanity of apartheid identified by four of the ICJ judges: that of an institutionalised regime of systematic oppression and domination. It is almost as though the ICJ opted to describe an apartheid system without qualifying it expressly as such.

Apartheid implies a denial of self-determination

A foundational feature of apartheid in South Africa and South West Africa (Namibia) was the denial of self-determination to the non-white majority. Yet, the ICJ, by considering Israel's discriminatory legislation and measures (Section D, paras. 180-229) separately from the section on self-determination (which appears in Section E of the Advisory Opinion at paras. 230-243), failed to acknowledge that a central feature of apartheid systems, is the denial of self-determination (through *inter alia*, oppression, colonial domination, and territorial fragmentation). As Judge Brant noted, "*un régime de ségrégation raciale ou d'apartheid rend impossible la réalisation du droit du peuple palestinien à l'autodétermination*" (Déclaration de M. le Juge Brant[22]), para. 12). In this regard, regimes of domination are striking in their similarity to those associated with alien rule and colonization. As Judge Xue observed, after quoting the late Archbishop Desmond Tutu (1931-2021), the veteran anti-apartheid campaigner, the effects of Israel's occupation "have little difference from those under colonial rule, which has been firmly condemned under international law"[23] (para. 4).

It is also difficult to conceive of an apartheid system without a policy of enforced demographic change involving policies of demographic engineering, described by Andrea Maria Pelliconi as "a strategy of systematic, authority-sponsored demographic changes aimed at … permanently altering the demographic composition"[24] of a particular area with a view to extending its own sovereignty there. Demographic engineering was a hallmark of the National Party's apartheid policies in South Africa which it applied with brutal effect pursuant to the Group Areas Act.[25] To secure Jewish domination over the Occupied Palestinian Territory (OPT) and the concomitant denial of Palestinian self-determination,

well-documented policies altering its demographic composition have been instituted by successive Israeli governments of various ideological persuasions since 1948. These include strict controls – imposed in a discriminatory manner – on, *inter alia*, Palestinian residency and construction, access to water and natural resources, restrictions on freedom of movement, employment and occupation. Some of these restrictions were described at length in the Advisory Opinion as they pertain to the post-1967 occupied territories: restrictions on the exploitation of natural resources by Palestinian enterprises in Areas C (para. 131); discriminatory legislation (para. 136); discriminatory ID card and permit system (paras. 165, 193, 195); territorial fragmentation (paras. 167, 238); restrictions on freedom of movement (paras. 199, 200, 205, 239), and colonial-era legislation justifying the demolition of Palestinian property (para. 210).

There is a striking congruence between the ICJ's description of Israel's policies and practices in the paragraphs cited above and the non-exhaustive list of "inhuman acts" in Article II of the Apartheid Convention. The ICJ even referred to the use of disproportionate force against peaceful Palestinian protests in its Advisory Opinion (para. 152), as happened in apartheid South Africa (recall Sharpeville and Soweto), and "the maintenance of a coercive environment against Palestinians" (para. 154). In making these findings, the ICJ provided an authoritative factual description of the commission of several inhumane acts thereby satisfying the second element of the definition of the crime against humanity of apartheid. In doing this, the ICJ's findings could have a bearing on the assessment of facts crucial to international criminal investigations whether before domestic courts or the International Criminal Court.[26]

In the words of Judge Tladi, "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" (para. 37). And as a Black South African, who grew up in a Bantustan, which he expressly mentions in his opinion, he would know.

Maintaining an apartheid regime

If apartheid simply refers to an egregious form of racial segregation, involving legislative measures that separate Israeli settlers from Palestinian communities in East Jerusalem and the West Bank, as the ICJ reasoned in paragraph 229 of its Advisory Opinion, then it is clear the prohibition of apartheid in Article 3 of CERD is engaged (which notably, the ad hoc Conciliation Commission under CERD in *Palestine v Israel* failed to find, which Keane described as a "missed opportunity"[27]). But even if we take the view that apartheid is more than an aggravated form of segregation, and involves policies and practices of domination, oppression, and the denial of self-determination, it is equally apparent that the ICJ made an *implicit* apartheid finding going beyond segregation. And it has done so by providing an authoritative and comprehensive factual description of an institutionalised regime of systematic oppression and domination, as well as a series of multiple inhuman acts, thus fulfilling two of the constituent elements of the definition of the crime against humanity of apartheid.

As regarding the third element, that is, evidence of an intention to maintain an apartheid regime, differences of views were expressed on the bench, as noted by Jinan Bistaki.[28] It seems to me that a State that has constitutionally enshrined the right to self-determination *exclusively* to only one community (the "Jewish

people") and denied that right to the indigenous Arab majority, is expressing a clear intention to maintain that discriminatory regime. In 2018, the same year the Knesset adopted the Nation State Law, the Israeli army admitted that more Palestinians than Jews lived between the Jordan River and the Mediterranean Sea.[29] Writing in 2018, Tamar Hostovsky Brandes observed that the Nation State Law – a Basic Law – grants the Jewish people "the exclusive right of self-determination", which "will serve as ground for future laws that will allow preferential treatment of Jews".[30] Subsequent events, including the establishment of a new Settlement Administration,[31] a new (civilian) government institution, with powers to run the civilian operations of the Coordinator of Government Activities in the Territories (COGAT) and the Civil Administration, including the power to make new regulations to further discrimination between Israeli settlers and Palestinians,[32] have only affirmed this prognosis.[33]

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Tamar Hostovsky Brandes

The ICJ Advisory Opinion and Israeli Law

The ICJ Advisory Opinion and the Duty to Distinguish Between Israel and the Occupied Territories

On July 19, 2024, the International Court of Justice (ICJ) delivered its Advisory Opinion regarding the "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem"[1]. The Court determined that Israel violated international law in various ways, including by using the Occupied Palestinian Territories for the benefit of its own citizens and by annexing part of the Territories. The Court further concluded that Israel's control of the Territories is illegal under international law.

The Opinion raises many questions regarding the legal consequences for Israel. However, in this chapter, I will focus on the legal consequences of the Opinion for other States, and on the relationship between the Court's conclusions in this regard and Israel's internal law. The Court requires States to distinguish in their interactions with Israel between Israel and the Occupied Palestinian Territories, and to ensure that their interactions with Israel do not support Israel's control of the Territories and specifically the settlement project. However, calling for such a distinction or committing to it amount to a civil law tort in Israel, and the law determines that those who call for the distinction will not be permitted to enter Israel.

The legal consequences of the Opinion for other States are discussed in para. 273-279 of the Advisory Opinion. The Court observed that the obligations violated by Israel include certain obligations that are *erga omnes*. "Such obligations", the Court explains, are by their very nature "the concern of all States" and "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection". The Court noted the obligation of States to cooperate with the relevant UN bodies to ensure the right of Palestinians to self-determination, and the obligation not to recognize any change of status of the Territories (on the

non-recognition obligation see also the chapter by Yaël Ronen in this book). The obligation with perhaps the most practical implications, however, is the obligation to distinguish between Israel and the Territories. With respect to this obligation, the Court referred to GA 74/11 (2019), which called upon states "Not to render aid or assistance to illegal settlement activities, including not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories"[2] (para. 227) and specified that in its own opinion, the duty to distinguish included

> *"the obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory; to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory; to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory; and to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory."*
> (para. 278)

These exact requirements, however, bear repercussions under Israeli law.

The erosion of the distinction between Israel and the Occupied Territories in Israeli Law

The Boycott Law

In 2011, the Israeli Knesset passed the Law for Preventing Harm to the State of Israel by means of Boycott. Article 2(a) of the Law determines that:

> *"He who knowingly publishes a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is reasonable probability that the call will lead to a boycott, and he who published the call was aware of this possibility, will be considered to have committed a civil wrong to which the Civil Tort Law [new version] is applicable".*

Article 3 of the Law allows limiting the participation in a public tender of "he who knowingly published a public call for a boycott against the State of Israel, or who committed to take part in a boycott, including a commitment not purchase goods and/or services produced and/or provided in Israel, by one of its institutions, or in an area under its control". While the Law formally addresses the problem of boycotts against Israel, the key for understanding its purpose and motivation lies in the definitions clause. Article 1 defines a boycott against the State of Israel as:

> *"deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control,*

in such a way that may cause economic, cultural or academic damage."

The term "an area under its control" refers, of course, to the Occupied Territories. The law thus renders calls for boycott of the settlements or their products as a tort subject to liability in Israel, framing calls for boycotts of settlement products as "harm to the state of Israel", and delegitimizing calls to distinguish between the Territories and Israel proper.

The legal debate around the Law revolved, for the most part, on its implications for Freedom of Expression. In the 2015 case of *Avneri*[3], the High Court of Justice invalidated section 2(c) of the Law, which authorized courts to impose punitive damages, but upheld the rest of the Law. Justice Melcer, who wrote the main majority opinion, explained that while the Law indeed violated freedom of expression, it was justified under a doctrine of "defensive democracy". Melcer did not distinguish, in this regard, between calls for boycott on Israel and call for boycotts on an area "under Israel's control".

Several of the Judges did, indeed, suggest making such distinction. Justice Danziger, for example, suggested that the Law should be interpreted to apply only to calls for a boycott of the State of Israel in its entirety, but not to calls to boycott "areas under its control" alone. A similar position was expressed by Justice Jubran. Justice Vogelman went further, arguing that the term "an area under its control" should be stricken from Article 1 of the Law altogether. This approach, however, was not adopted by the majority. The doctrine of "defensive democracy" was thus applied to justify limiting calls for boycott of Israel and of the Territories alike.

The Entry into Israel Law

In 2017, the main elements of the Boycott Law were incorporated into the Entry into Israel Law. Section 2(d)-(e) of the Entry Law determines that no grants of residence or permits of entry will be given:

> *"to any person who is not an Israeli citizen or alternatively does not hold a license for permanent residence in Israel if he or she, or the organization or the body for which he or she operates, has knowingly published a public call to engage in a boycott against the State of Israel or has made a commitment to participate in such a boycott."*

"Boycott" is defined under the Entry Law "in accordance with the Law for Prevention of Harm to the State of Israel by Boycott".

The Scope of Section 2(d) was examined by the High Court of Justice in the case of *Human Rights Watch v. Minister of Interior Affairs*[4], in 2019, which concerned the decision of the Minister of Interior Affairs to deny a permit to stay and deport from Israel Omar Shakir, an employee of Human Rights Watch (HRW), for actively encouraging and taking part in a "boycott against Israel" under the Entry Law. The Court reinforced the position that the terms "Boycott against Israel" included acts directed against institutions and bodies in the Occupied Territories, and specifically against the settlements. The acts attesting to Shakir's culpability included, for example, efforts to remove the endorsement of FIFA from soccer games being held in settlements, the fact that he congratulated Airbnb on his Twitter (now X) account for removing properties in the Occupied Territories from their listings and the fact that he reported on the same account on HRW's attempt to create a "list of businesses operating in settlements, who contributes to serious ab-

uses". The Court clarified that a person who denies "the legitimacy of Israel's control" in the Occupied Territories, and tries to undermine it through a boycott is included within the definitions of the Boycott Law, "even if he disguises his position in a rhetoric of human rights or international law".

The discrepancies - immediate and general implications

The discrepancies between international law, as is reflected in the ICJ Opinion, and Israeli law, have both immediate and general implications. From the immediate perspective, States, entities and individuals who call for compliance with the ICJ Opinion or declare that they are committed to complying with it may find themselves subject to the repercussions enumerated in the Boycott and the Entry into Israel Laws.

For example, a company that states that it will not conduct business in the Occupied Territories can find itself barred from taking part in public tender in Israel. A person or entity who call to avoid investing in the settlements or to mark differently products originated within Israel or in the Territories can be subject to tort liability (although perhaps only if the call is made in Israel, as the question of whether the Boycott Law applies extraterritorially has not been determined). This means that NGOs and entities who call for implementation of the Advisory Opinion can thus be sued: from domestic NGOs such as the Association for Civil Rights in Israel to international bodies operating in Israel such as the Konrad Adenauer Foundation. Perhaps most significant are the implications under the Entry to Israel Law: an individual calling for compliance with the duty to distinguish, or who has committed, for example, not to engage in commercial, academic or other engagement with bodies or individuals in the settlements, will not be granted permit

to enter Israel. The Entry Law does contain an exception, allowing the Minister of Interior Affairs to grant a permit "for special reasons that will be noted", but this is an individual exception – the Law does not exempt public officials of other States or of international institutions as such. Thus, any official calling for compliance with the duty to distinguish should in theory be barred entry to Israel.

From the more general perspective, the Advisory Opinion is yet another example of the growing gap between the international discourse regarding the Israeli occupation and the internal Israeli discourse. The Opinion requires States to actively uphold the distinction between Israel and the Occupied Territories OPT. However, this distinction has long been eroded in Israel. The Boycott Law and the Entry to Israel law, as well as the case law that discusses them define boycott of settlements as boycott of Israel and perceive challenging the illegitimacy of Israel's control of the Territories as an illegitimate act. The opposition to Israel's control of the Territories is thus framed as an attack on Israel itself.

The fact that calls for compliance with the duty to distinguish bear consequences under Israeli law will lead to a situation in which most Israelis will not be exposed to voices supporting this duty (and the Opinion in general), as these voices will not voice their support within Israel or will not enter Israel altogether. The gap between the Israeli internal discourse and the international discourse will thus only grow. This gap is detrimental to any attempts to garner support from within Israel for a political process that may bring an end to the occupation, and compliance with the Advisory Opinion.

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