

Advisory Proceedings on the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem

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Summary of hearings

From 19 to 26 February 2024, public hearings were held in the advisory proceedings concerning the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.¹ 50 States, amongst them the State of Palestine, and three international organisations participated; Israel did not.²

The proceedings were triggered on 30 December 2022, when the United Nations (UN) General Assembly requested the ICJ to provide an advisory opinion on the following questions:³

- (a) *What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?*
- (b) *How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?*

The following provides a snapshot of the major themes that emerged from the hearings as well as a selection of arguments proffered. An overview of the positions articulated by all participating States and organisations is provided in the separate table. Points raised in the written submissions will be addressed in a subsequent update.

Framing

As regards the overall framing and context, many participating States and organisations took note of the longstanding nature of the issues raised in the questions put to the Court. The State of Palestine observed at the outset that '[s]uccessive Israeli governments have given the Palestinian people only three options: displacement, subjugation or death; these are the choices, ethnic cleansing, apartheid[,] or genocide'.⁴ South Africa pointed to 'a continuum of

¹ 'Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem' (*International Court of Justice (ICJ)*) <<https://icj-cij.org/case/186>> accessed 18 April 2024.

² 'Conclusion of the Public Hearings Held from 19 to 26 February 2024' (*ICJ*, 26 February 2024) <<https://icj-cij.org/sites/default/files/case-related/186/186-20240226-pre-01-00-en.pdf>> accessed 18 April 2024.

³ UNGA Res 77/247 (30 December 2022) UN Doc A/RES/77/247.

⁴ 'Public Sitting Held on Monday 19 February 2024, at 10 a.m., at the Peace Palace. Verbatim Record' (*ICJ*, 19 February 2024) p 54 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240219-ora-01-00-bi.pdf>> accessed 18 April 2024.

illegal acts perpetrated by [Israel] against the Palestinian people since the 1948 Nakba, and since the 1967 occupation'.⁵

In addition, the events unfolding since 7 October 2023 featured prominently in the remarks of participating States and organisations. By way of example, Ireland noted that '[t]he attacks launched by Hamas against Israel on 7 October were reprehensible and we have condemned them unequivocally'.⁶ Ireland also expressed the view that the 'limits [on the use of force in self-defence] have been exceeded by Israel in its military response to the Hamas attack',⁷ which can be deduced 'from the spiralling death toll, the extensive destruction of property, including homes, throughout Gaza, the displacement of up to 2 million people and the ensuing ... humanitarian catastrophe'.⁸ Belize spoke about 'Israel's deliberate use of starvation to destroy the civilian population of Gaza',⁹ while Colombia¹⁰ and Qatar¹¹ further referred to the contentious proceedings instituted by South Africa against Israel at the end of December 2023 concerning alleged violations of the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in the Gaza Strip.¹² As an exception, Hungary noted in this regard 'that both the present proceedings, as well as the proceedings against the State of Israel in *Application of the Convention on the Prevention and Punishment of the Crime of*

⁵ 'Public Sitting Held on Tuesday 20 February 2024, at 10 a.m., at the Peace Palace. Verbatim Record' (*ICJ*, 20 February 2024) p 11 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240220-ora-01-00-bi.pdf>> accessed 18 April 2024.

⁶ 'Public Sitting Held on Thursday 22 February 2024, at 10 a.m., at the Peace Palace. Verbatim Record' (*ICJ*, 22 February 2024) p 34 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240222-ora-01-00-bi.pdf>> accessed 18 April 2024.

⁷ *Ibid.*

⁸ *Ibid* pp 34-35.

⁹ 'Public Sitting Held on Tuesday 20 February 2024, at 3 p.m., at the Peace Palace. Verbatim Record' (*ICJ*, 20 February 2024) p 10 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240220-ora-02-00-bi.pdf>> accessed 18 April 2024.

¹⁰ 'Public Sitting Held on Wednesday 21 February 2024, at 10 a.m., at the Peace Palace. Verbatim Record' (*ICJ*, 21 February 2024) p 14 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240221-ora-01-0-bi.pdf>> accessed 18 April 2024.

¹¹ 'Public Sitting Held on Friday 23 February 2024, at 10 a.m., at the Peace Palace. Verbatim Record' (*ICJ*, 23 February 2024) p 57 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240223-ora-01-00-bi.pdf>> accessed 18 April 2024.

¹² 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)' (*ICJ*) <<https://icj-cij.org/case/192>> accessed 18 April 2024. For a compilation of the IHL Centre's publications on the contentious case, see 'Contentious Case Before the ICJ: South Africa v. Israel' (*Diakonia IHL Centre*) <<https://www.diakonia.se/ihl/jerusalem/proceedings-before-international-courts-relating-to-israel-and-the-opt/contentious-case-before-the-icj-south-africa-v-israel/>> accessed 18 April 2024.

Genocide in the Gaza Strip, may be considered as provocations in the ongoing conflict, not contributing to the de-escalation and an eventual settlement of the conflict'.¹³

Jurisdiction

An overwhelming majority of participating States and organisations affirmed that the Court has jurisdiction to render an advisory opinion.¹⁴ Some did not specifically address the question of jurisdiction, thus arguably accepting it as a given; none contended explicitly that the Court does *not* have jurisdiction.¹⁵ A number of those who did address the question argued that the two necessary conditions set out in Article 65(1) of the ICJ Statute have been met:¹⁶ First, according to Article 96 of the UN Charter, '[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question';¹⁷ the request for an advisory opinion in this case was made by the General Assembly. Second, the questions put to the Court are legal in nature; as the Court affirmed in its previous jurisprudence, the fact that there is also a political dimension to them is beside the point.¹⁸

Judicial propriety

A second theme concerned propriety, i.e., the question whether the Court, even if it has jurisdiction, should exercise its discretion and decline to render an advisory opinion. A majority of participating States and organisations was of the view that there are no 'compelling

¹³ 'Public Sitting Held on Wednesday 21 February 2024, at 3 p.m., at the Peace Palace. Verbatim Record' (*ICJ*, 21 February 2024) p 46 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240221-ora-02-00-bi.pdf>> accessed 18 April 2024.

¹⁴ See, e.g., the interventions of Libya ('Public Sitting Held on Thursday 22 February 2024, at 3 p.m., at the Peace Palace. Verbatim Record' (*ICJ*, 22 February 2024) p 31 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240222-ora-02-00-bi.pdf>> accessed 18 April 2024); Malaysia (*ibid*, pp 51-52); Hungary (Verbatim Record Wednesday Afternoon (n 13) pp 46-47); Colombia (Verbatim Record Wednesday Morning (n 10) pp 11-12); Brazil (Verbatim Record Tuesday Afternoon (n 9) pp 34-35); Saudi Arabia (Verbatim Record Tuesday Morning (n 5) p 31); and the State of Palestine (Verbatim Record Monday 19 February (n 4) p 58).

¹⁵ See the table of State positions for a comprehensive overview.

¹⁶ Article 65(1) of the ICJ Statute provides as follows: 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'. 'Statute of the International Court of Justice' (*ICJ*) <<https://www.icj-cij.org/statute>> accessed 18 April 2024.

¹⁷ 'United Nations Charter, Chapter XIV: The International Court of Justice' (*UN*) art 96(1) <<https://www.un.org/en/about-us/un-charter/chapter-14>> accessed 18 April 2024.

¹⁸ See, e.g., the intervention of Bolivia (Verbatim Record Tuesday Afternoon (n 9) p 25): '[S]uffice it to recall that the Court confirmed in 2004 that, "[w]hatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law"' (footnote omitted).

reasons¹⁹ for the Court to decline to exercise its jurisdiction. They pointed to the fact that the proceedings fall into “a much broader frame of reference than a bilateral dispute”²⁰ (in relation to the principle first established in the *Status of Eastern Carelia* case²¹ that the Court should not render an opinion if doing so would be akin to settling a bilateral dispute between States without their consent), and cited the plethora of documentation by the UN system²² (in response to arguments that accurate factual determinations by the Court would be difficult to entertain). Many also affirmed that an advisory opinion by the Court only stands to enhance the prospect of good-faith negotiations and a peaceful settlement of the conflict.²³ Amongst them was Mauritius, which recalled that the Court’s 2019 Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos Advisory Opinion) – in which the ICJ stated ‘that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible’²⁴ – paved the way for the commencement of negotiations between Mauritius and the UK.²⁵ Sudan pointed to the Court’s 1971 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council

¹⁹ See, e.g., the intervention of Chile (Verbatim Record Tuesday Afternoon (n 9) p 40).

²⁰ See, e.g., the intervention of the Netherlands (Verbatim Record Tuesday Morning (n 5) p 41), citing the advisory opinion rendered by the Court in July 2004 concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion). ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (ICJ, 9 July 2004) <<https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 18 April 2024.

²¹ The 1923 *Status of Eastern Carelia* request for an advisory opinion before the Permanent Court of International Justice (PCIJ), the predecessor institution of the ICJ, concerned the Treaty of Tartu between Finland and Russia as well as Russia’s promise of autonomy for the Eastern Carelia region under its control. The Court declined to render an advisory opinion on the grounds that (1) doing so would be akin to settling a bilateral dispute without State consent (the Soviet Union not having given such consent and not being a member of the League of Nations at the time); and that (2) it would be difficult for the Court to obtain an accurate picture of the facts underlying the request because of the Soviet Union’s refusal to cooperate with the proceedings. ‘Advisory Opinion of 23 July 1923 (Including the Text of the Joint Declaration by Judge Weiss, Judge Nyholm, Judge de Bustamante and Judge Altamira)’ (ICJ, 23 July 1923) <<https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie B/B 05/Statut de la Carelie orientale Avis consultatif.pdf>> accessed 18 April 2024.

²² See, e.g., the intervention of Sudan (‘Public Sitting Held on Friday 23 February 2024, at 3 p.m., at the Peace Palace. Verbatim Record’ (ICJ) p 43 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240223-ora-02-00-bi.pdf>> accessed 18 April 2024.

²³ See, e.g., the interventions of Mauritius (Verbatim Record Thursday Afternoon (n 14) p 63); Saudi Arabia (Verbatim Record Tuesday Morning (n 5) p 35); and the UAE (Verbatim Record Wednesday Morning (n 10) p 40).

²⁴ ‘Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965’ (ICJ, 25 February 2019) p 49 <<https://www.icj-cij.org/sites/default/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>> accessed 18 April 2024.

²⁵ Verbatim Record Thursday Afternoon (n 14) p 63.

Resolution 276 (1970),²⁶ observing that '[t]he successful resolution of the protracted dispute surrounding Namibia can be largely attributed to the Court's judicial task'.²⁷ Colombia emphasised that the Court should consider in its decision-making with regards to propriety the fact 'that the situation in the Palestinian occupied territory has changed drastically since the request was transmitted to the Court in January 2023'.²⁸

A handful of States differed with respect to propriety and the exercise of the Court's discretion; Zambia, for example, encouraged the Court to employ 'Solomonic wisdom'²⁹ so as not to render an advisory opinion 'that may exacerbate rather than resolve the complex and nuanced situation which both Palestine and Israel find themselves in'.³⁰ Similarly, Hungary did not address the substance of the questions before the Court, limiting its intervention to urging the Court to decline to render an advisory opinion.³¹ The United Kingdom (UK) argued, *inter alia*, that the Security Council has determined a specific framework – set out in resolutions 242 of 1967 and 338 of 1973,³² which mandate negotiations about Israel's withdrawal from occupied territory in exchange for security – that should take precedence over the General Assembly's general competence in respect of the Question of Palestine.³³ In the alternative, the UK suggested that the Court reformulate the request so that its response 'focus[es] on endorsing the continued application of the agreed framework, with a view to ensuring its urgent implementation'.³⁴ Chile retorted that '[i]t is difficult to understand how a legal opinion rendered by this Court, the purpose of which is precisely to determine the legal consequences of Israel's behaviour in the Occupied Palestinian Territory, might be an obstacle for a prospective negotiated solution'.³⁵

²⁶ 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)' (*ICJ*, 21 June 1971) <<https://www.icj-cij.org/sites/default/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>> accessed 18 April 2024.

²⁷ Verbatim Record Friday Afternoon (n 22) p 44.

²⁸ Verbatim Record Wednesday Morning (n 10) p 13.

²⁹ 'Public Sitting Held on Monday 26 February 2024, at 10 a.m., at the Peace Palace. Verbatim Record' (*ICJ*, 26 February 2024) p 20 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240226-ora-wri-01-00-bi.pdf>> accessed 18 April 2024.

³⁰ *Ibid.*

³¹ Verbatim Record Wednesday Afternoon (n 13) p 50.

³² Resolution 242 was adopted in November 1967, five months after the 1967 War between Israel, Egypt (then known as the United Arab Republic), Jordan, and Syria, in which Israel took control of the West Bank, including East Jerusalem, from Jordan, and of the Gaza Strip from Egypt. Resolution 338 was adopted towards the end of the 1973 War between Israel, Syria, and Egypt.

³³ Verbatim Record Friday Afternoon (n 22) pp 18-20.

³⁴ *Ibid* p 22.

³⁵ Verbatim Record Tuesday Afternoon (n 9) p 41.

Applicable law

Turning to the law governing Israel's conduct in and occupation of the occupied Palestinian territory (oPt) as articulated in the questions before the Court, participating States and organisations pointed to a range of norms and frameworks, including:

- International humanitarian law (IHL) or *jus in bello*, in particular the rules comprising the law of occupation;
- International human rights law (IHRL), including civil and political rights as well as economic, social, and cultural rights;
- The principle of self-determination;
- The prohibition of annexation and the acquisition of territory by force;
- The law on the use of force between States or *jus ad bellum* more generally;
- The prohibition of apartheid;
- The prohibition of genocide;
- The prohibition of crimes against humanity;
- The UN Charter;
- Resolutions by the UN General Assembly and the Security Council; and
- The bilateral agreements between the State of Israel and the Palestine Liberation Organization (PLO) concluded between 1993 and 1995, known as the Oslo Accords.³⁶

As an exception, Zambia made a 'firm submission that the Oslo Accords remain the only valid, agreed legal source of authority for the division of control, powers[,] and responsibilities between Palestine and Israel over the various parts of the territories'.³⁷ In Zambia's view, '[n]o other legal or normative framework, whether through international conventions, declarations or United Nations resolutions[,] has substituted the agreed-upon, still-valid legal framework of the Oslo Accords, unless and until the same are amended'.³⁸

Unlawful practices in the oPt and the legal status of the occupation

The vast majority of participating States and organisations was of the view that Israel's occupation of the oPt involves unlawful policies and practices, and a majority also took the position that the occupation as a whole is illegal. Different legal grounds were raised in support of these propositions, which are outlined below.

³⁶ The Oslo Accords notably comprise the Declaration of Principles on Interim Self-Government of 13 September 1993 ('Oslo I'), the Agreement on the Gaza Strip and the Jericho Area of 4 May 1994 ('Gaza-Jericho Agreement'), and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 ('Oslo II').

³⁷ Verbatim Record Monday 26 February Morning (n 29) p 22.

³⁸ Ibid.

The right to self-determination

First, participating States and organisations agreed that the Palestinian people have an inalienable right to self-determination. This stems from the right to self-determination as it emerged after the Second World War – in the words of South Africa, ‘the Magna Carta of decolonization’³⁹ – which was enshrined in the UN Charter⁴⁰ and the two human rights Covenants of 1966,⁴¹ and whose applicability to the Palestinian people has been affirmed by the international community time and again.⁴²

The League of Arab States further argued that Article 22 of the Covenant of the League of Nations, adopted in 1919, provides an additional, and even earlier, legal basis for the Palestinian people’s right to self-determination, in that it provisionally recognised as independent nations communities formerly under the control of the Ottoman Empire, including Palestine.⁴³ Therefore, the subsequent incorporation of the terms of the Balfour Declaration into the 1922 Mandate for Palestine by the Council of the League of Nations was *ultra vires* and without legal effect.⁴⁴ Furthermore, General Assembly resolution 181 of 29 November 1947 (which recommended the partition of Mandatory Palestine into a ‘Jewish State’ and an ‘Arab State’) constituted a violation of the Palestinian people’s right to self-determination as recognised in the Covenant and, after World War II, in general international law.⁴⁵ Algeria noted that the creation of territorial *faits accomplis* by Israel commenced already with the war of 1948 and Israel’s taking control of West Jerusalem, in contravention of resolution 181.⁴⁶

Returning to the present, a majority of participating States and organisations expressed the position that Israel’s occupation of the oPt violates Palestinians’ right to self-determination. In particular, they pointed to:

³⁹ Verbatim Record Tuesday Morning (n 5) p 15.

⁴⁰ Article 1(2) of the UN Charter provides: ‘The Purposes of the United Nations are: ... To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’. ‘United Nations Charter, Chapter I: Purposes and Principles’ (UN) <<https://www.un.org/en/about-us/un-charter/chapter-1>> accessed 18 April 2024.

⁴¹ Common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. ‘International Covenant on Civil and Political Rights’ (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> accessed 18 April 2024.

⁴² See, e.g., the interventions of Bangladesh (Verbatim Record Tuesday Morning (n 5) p 59); Brazil (Verbatim Record Tuesday Afternoon (n 9) p 35); and the Russian Federation (Verbatim Record Wednesday Afternoon (n 14) p 11).

⁴³ Verbatim Record Monday 26 February Morning (n 29) pp 26-27.

⁴⁴ Ibid.

⁴⁵ Ibid p 27.

⁴⁶ Verbatim Record Tuesday Morning (n 5) p 25.

1. A denial of territorial integrity by means of *de facto* and *de jure* annexation of the West Bank, including East Jerusalem, the settlement enterprise, and the 16-year closure of the Gaza Strip⁴⁷ (in the words of the League of Arab States, '[t]his constitutes a complete repudiation of Palestinian self-determination as a legal right, since it empties the right entirely of any territorial content';⁴⁸ Qatar⁴⁹ and Namibia⁵⁰ spoke of 'strategic fragmentation');
2. The hindrance of joint political, economic, and social projects,⁵¹ including by means of repressing civil society and cultural activities⁵² (Belize further pointed to 'action taken by Israel to deny Palestinian political participation by criminalizing political speech and membership of, or connection with, Palestinian political parties'⁵³);
3. Israel's continued and prejudicial control over natural resources in the oPt, such as water;⁵⁴
4. Forced demographic manipulations by Israel vis-à-vis Palestinian residents of the oPt in favour of Israeli settlers;⁵⁵ and
5. The prolonged nature of the occupation, which amounts to an 'indefinite violation'⁵⁶ or 'nullification and denial'⁵⁷ of Palestinians' right to self-determination.

The Netherlands, which altogether limited itself to abstract expositions of the right to self-determination, *jus ad bellum*, *jus in bello*, and IHRL, observed that the right to self-determination is also applicable in the context of occupation;⁵⁸ an occupying power must 'refrain from measures that impede the exercise of the right of self-determination of the people concerned during the occupation, and ... take measures aimed at creating the conditions under which the people concerned is able to freely and genuinely express its will in regard of its future

⁴⁷ See, e.g., the interventions of the State of Palestine (Verbatim Record Monday 19 February (n 4) pp 89-90); South Africa (Verbatim Record Tuesday Morning (n 5) p 17); Belize (Verbatim Record Tuesday Afternoon (n 9) p 9); Jordan (Verbatim Record Thursday Morning (n 6) p 61); and Malaysia (Verbatim Record Thursday Afternoon (n 14) pp 55-56. Norway cited the Court's pronouncement in the Chagos Advisory Opinion that the right to territorial integrity is a corollary of the right to self-determination (Verbatim Record Friday Morning (n 11) pp 23-24).

⁴⁸ Verbatim Record Monday 26 February Morning (n 29) p 29.

⁴⁹ Verbatim Record Friday Morning (n 11) p 58.

⁵⁰ Ibid p 17.

⁵¹ See, e.g., the intervention of Malaysia (Verbatim Record Thursday Afternoon (n 14) pp 55-57).

⁵² See, e.g., the intervention of the State of Palestine (Verbatim Record Monday 19 February (n 4) p 92).

⁵³ Verbatim Record Tuesday Afternoon (n 9) p 12.

⁵⁴ See, e.g., the intervention of the Maldives ('Public Sitting Held on Monday 26 February 2024, at 3 p.m., at the Peace Palace. Verbatim Record' (ICJ, 26 February 2024) pp 26-29 <<https://icj-cij.org/sites/default/files/case-related/186/186-20240226-ora-02-00-bi.pdf>> accessed 18 April 2024).

⁵⁵ See, e.g., the interventions of the State of Palestine (Verbatim Record Monday 19 February (n 4) p 88) and Cuba (Verbatim Record Wednesday Morning (n 10) pp 20-21).

⁵⁶ Intervention of Kuwait (Verbatim Record Thursday Afternoon (n 14) p 17.

⁵⁷ Intervention of Egypt (Verbatim Record Wednesday Morning (n 10) p 34).

⁵⁸ Verbatim Record Tuesday Morning (n 5) pp 42-44.

political status'.⁵⁹ In this context, the Netherlands also referred to General Assembly resolution 45/130, which recognises “the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle”,⁶⁰ noting that any armed force resorted to under such circumstances ‘must be in accordance with international law’.⁶¹ Similarly, China asserted that ‘[i]n pursuit of the right to self-determination, the Palestinian people’s use of force to resist foreign oppression and to complete the establishment of an independent State is an inalienable right well founded in international law’.⁶² Libya also expressed the position that ‘the Palestinian people has the right to resist the occupation by all means[,] and it is a moral and legal obligation upon all States to assist and support the Palestinians in their legitimate struggle for liberty and independence’.⁶³

Norway notably recalled the process of Israel joining the UN and in particular the commitments made in this context, *inter alia* that Israel “unreservedly accept[ed] the obligations of the United Nations Charter and [undertook] to honour them from the day when it [became] a Member of the United Nations”.⁶⁴ Noting that the State of Israel’s own existence (and concomitant realisation of self-determination) is indebted to the UN and General Assembly resolution 181,⁶⁵ which is specifically referenced in Israel’s Declaration of Independence, Norway argued that Israel has a similar obligation to ‘fully contribut[e] to the realization of a viable State of Palestine’⁶⁶ as envisaged in the same resolution.

Fiji, as an outlier, claimed that ‘the right to self-determination is a relative right ... [which] should not involve changes to existing frontiers’.⁶⁷ Fiji further argued that in the present case, ‘the Court would need to ascertain whether the Palestinians’ exercise of their right to self-determination has infringed the territorial integrity, political inviolability or legitimate security needs of the State of Israel’.⁶⁸

The prohibition of annexation and the acquisition of territory by force

Many participating States and organisations pointed to *de jure* and *de facto* annexation as an unlawful practice and invoked the prohibition of annexation and the acquisition of territory by

⁵⁹ Ibid p 43.

⁶⁰ Ibid pp 43-44.

⁶¹ Ibid p 44.

⁶² Verbatim Record Thursday Morning (n 6) p 13.

⁶³ Verbatim Record Thursday Afternoon (n 14) p 35.

⁶⁴ Verbatim Record Friday Morning (n 11) p 29.

⁶⁵ Ibid pp 28-31.

⁶⁶ Ibid p 31.

⁶⁷ Verbatim Record Monday 26 February Afternoon (n 54) p 24.

⁶⁸ Ibid.

force as a second ground for the illegality of Israel’s occupation of the oPt. They emphasised that it does not matter how Israel classifies its actions. Norway noted ‘that annexation under any form — whether *de jure* or *de facto* — is illegal under international law. The formal characterization is immaterial’.⁶⁹ Namibia called Israel’s prolonged occupation ‘a *de facto* annexation in all but name’;⁷⁰ citing the Wall Advisory Opinion, Pakistan said that ‘the occupation is today, “notwithstanding the formal characterization . . . tantamount to *de facto* annexation”’.⁷¹

Ireland argued that ‘Israel is already engaged in the process of annexing Palestinian territory’⁷² by means of ‘its policy of encouraging demographic change in that territory by population transfer and by the continuous development and maintenance of permanent settlements and infrastructure’⁷³ as well as ‘increasingly extending the application of domestic Israeli law and civilian administration to the settlements ... thereby integrating them into its own territory and erasing the differences in law between Israel and the settlements’.⁷⁴ In Ireland’s view, any contention that this process does not contravene the prohibition of the acquisition of territory by force ‘simply because Israel has not formally declared annexation would render the prohibition devoid of all meaning’.⁷⁵ The Gambia similarly suggested that otherwise ‘[a]ny State that wanted to *de facto* annex a territory could do so by indefinitely occupying that territory but not formally incorporating it within its borders’.⁷⁶ Egypt noted that ‘[i]n addition to the policy of *de facto* annexation, Israel [has] purported to annex East Jerusalem *de jure* through the Basic Law adopted by the Israeli Knesset in 1980, stipulating “Jerusalem, complete and united, is the capital of Israel”’.⁷⁷

Several other States offered expositions as to how intent to unlawfully annex or acquire territory can be inferred. Belize suggested that ‘[t]he requisite intention can be evidenced by a formal declaration of annexation, but it can also exist implicitly if the State has “clearly manifested its intention to hold the . . . territory permanently under its dominion”’.⁷⁸ Japan pointed to:

⁶⁹ Verbatim Record Friday Morning (n 11) p 24.

⁷⁰ Ibid p 13.

⁷¹ Ibid p 37.

⁷² Verbatim Record Thursday Morning (n 6) p 39.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Verbatim Record Wednesday Afternoon (n 14) p 29.

⁷⁷ Verbatim Record Wednesday Morning (n 10) p 29.

⁷⁸ Verbatim Record Tuesday Afternoon (n 9) p 21.

1. '[L]arge-scale alteration of the demographic composition of the territory, backed by military and other physical power, including through expropriation of land and eviction of the population';⁷⁹
2. '[T]he construction and continued maintenance by an occupying [p]ower of a network of physical infrastructure ... deemed to be intended to subsist over a significant period of time',⁸⁰ such as 'roads, communication systems, healthcare facilities or large-scale military or law enforcement facilities';⁸¹ and
3. '[T]he continuous forcible seizure and exploitation of the natural resources, including water'.⁸²

Norway invited the Court to consider similar criteria *in concreto* when determining whether Israel's occupation of the oPt amounts to unlawful *de facto* annexation, namely:

1. Israel's establishment of settlements and decades-long transfer of its own nationals into the oPt;
2. The prolonged nature of the occupation;
3. Plans to further expand the settlement enterprise;
4. Israel's seizure of natural resources as well as construction of and control over infrastructure in the oPt; and
5. Statements by Israeli political leaders attesting to the goal of *de facto* annexation of the West Bank.⁸³

Jus ad bellum

Participating States and organisations also referenced *jus ad bellum* – and in particular the right to use force in self-defence – in relation to the prohibition of annexation and the acquisition of territory by force, as well as more generally. Japan noted in this regard that 'the principle prohibiting acquisition of territory by force precludes *any* acquisition of territorial title through force, regardless of whether that force is unlawful or permitted as an exercise of self-defence'.⁸⁴ South Africa similarly observed that 'the acquisition of territory by the threat or use of force is illegal, irrespective of whether the territory was acquired through a war of self-defence or of an act of aggression'.⁸⁵

⁷⁹ Verbatim Record Thursday Morning (n 6) p 50.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Verbatim Record Friday Morning (n 11) pp 25-26.

⁸⁴ Verbatim Record Thursday Morning (n 6) p 51.

⁸⁵ Verbatim Record Tuesday Morning (n 5) p 16.

Japan further noted that any use of force in self-defence must fulfil the requirements of necessity and proportionality;⁸⁶ therefore, ‘and in any event, uses of force resulting in the annexation of territory will never be lawful as exercises of self-defence since permanent annexation can never be a proportionate response to an armed attack’.⁸⁷ Applying similar considerations to Israel’s occupation of the oPt – namely, that States can only use force for a lawful purpose (i.e., in self-defence), and to the extent that the force used is strictly necessary and proportionate – the League of Arab States contended that ‘Israel’s 1967 war was illegal in the *jus ad bellum* [sense] – even assuming, *arguendo*, its claim of a feared attack, States cannot lawfully use force in non-immediately imminent anticipatory self-defence’.⁸⁸ Furthermore, and in any event, the League of Arab States submitted that ‘the *jus ad bellum* requirements continued to apply to the occupation [itself as] a continuing use of force ... not only in the immediate aftermath, but for more than half a century’,⁸⁹ concluding that ‘[m]anifestly, this legal test has not been met’.⁹⁰ The Gambia argued that ‘the manner in which the occupation has been conducted – including the establishment of an apartheid régime – renders the occupation disproportionate [in the *jus ad bellum* sense] as well’.⁹¹ Lebanon submitted explicitly that the occupation and Israel’s blockade of the Gaza Strip amount to an act of aggression,⁹² whose prolonged and annexationist nature constitutes an aggravating factor.⁹³

The United States (US) offered a diverging assessment, claiming that ‘international law does not provide for an occupation itself to be rendered unlawful or void based either on its duration or on any violations of occupation law’.⁹⁴ The US relied on Article 42 of the Hague Regulations – which provides simply that ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army’ – to contend that occupation is a question of fact.⁹⁵ Belize specifically criticised the US position, pointing in particular to pronouncements in its written submission to the effect ‘that the *jus ad bellum* determines the lawfulness of territory becoming occupied, but not of its remaining occupied’,⁹⁶ which ‘would of course mean that an occupation could lawfully become indefinite, and that must be incorrect’.⁹⁷ In Belize’s view, ‘[t]he correct position is that whether the existence of an occupation is lawful, either at the time of its

⁸⁶ Verbatim Record Thursday Morning (n 6) p 53.

⁸⁷ Ibid p 51.

⁸⁸ Verbatim Record Monday 26 February Morning (n 29) p 31.

⁸⁹ Ibid p 32.

⁹⁰ Ibid.

⁹¹ Verbatim Record Wednesday Afternoon (n 14) p 34.

⁹² Verbatim Record Thursday Afternoon (n 14) p 24.

⁹³ Ibid p 23.

⁹⁴ Verbatim Record Wednesday Morning (n 10) p 55.

⁹⁵ Ibid.

⁹⁶ Verbatim Record Tuesday Afternoon (n 9) p 18.

⁹⁷ Ibid p 19.

commencement or as it continues, is determined by the *jus ad bellum*'.⁹⁸ Switzerland similarly emphasised that a distinction needs to be drawn between the provisions of *jus in bello* forming the law of occupation – which regulate the *conduct* of an occupying power in occupied territory – and *jus ad bellum* (including relevant provisions of the UN Charter) – which regulates the legality of the occupation *as a whole*.⁹⁹ The Gambia notably said regarding the relationship between *jus in bello*, *jus ad bellum*, and other peremptory norms of international law that an 'occupying [p]ower's ongoing obligations under international humanitarian law do not, and cannot, preclude the wrongfulness of *jus cogens* violations inherent in the occupation itself'.¹⁰⁰

Apartheid

Many States and organisations took the view that Israel's practices in the oPt amount to apartheid, and that the occupation is consequently unlawful.¹⁰¹ Amongst them were notably South Africa and Namibia – the two countries that from 1948 until 1994 and 1990, respectively were subjected to *apartheid* as the system of governance, forming the historical precedent for the prohibition of apartheid in international law. Namibia submitted that the prohibition of apartheid comprises three elements:

1. The commission of one or more inhumane acts (usually, systematic violations of human rights);
2. These inhumane acts are targeted towards a distinct racial group; and
3. The purpose of these inhumane acts is to establish or maintain domination over and systematic oppression of the targeted racial group.¹⁰²

In Namibia's view, Israel has been committing several inhumane acts within the meaning of this prohibition, such as the imposition of discriminatory laws, excessive use of force, mass detention, 'and, crucially, the denial of a Palestinian identity ... as a people with a right to determine their own political destiny and to pursue social, economic and cultural development'.¹⁰³ As regards the purpose element, Namibia observed that Israel's 'openly articulated aim is to ensure Jewish Israeli control of all facets of Palestinian life, as evidenced by

⁹⁸ Ibid.

⁹⁹ Verbatim Record Friday Afternoon (n 22) p 45.

¹⁰⁰ Verbatim Record Wednesday Afternoon (n 14) p 29.

¹⁰¹ See, e.g., the interventions of Saudi Arabia (Verbatim Record Tuesday Morning (n 5) p 38); Pakistan (Verbatim Record Friday Morning (n 11) p 38); Bangladesh (Verbatim Record Tuesday Morning (n 5) p 55); Bolivia (Verbatim Record Tuesday Afternoon (n 9) p 25); Colombia (Verbatim Record Wednesday Morning (n 10) p 16); the Gambia (Verbatim Record Wednesday Afternoon (n 14) pp 31-32); Kuwait (Verbatim Record Thursday Afternoon (n 14) p 18); Libya (ibid p 34); and Qatar (Verbatim Record Friday Morning (n 11) p 53).

¹⁰² Verbatim Record Friday Morning (n 11) p 15. Namibia derived these elements from the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).

¹⁰³ Ibid p 16.

legislation affirming Israel as the nation State of the Jewish people, with unique self-determination rights reserved for Jewish individuals only'.¹⁰⁴

South Africa similarly argued that 'Israel's illegal occupation is ... being administered in breach of the prohibition of the crime of apartheid ... [and] indistinguishable from settler-colonialism, which has no place in the twenty-first century'.¹⁰⁵ As examples, South Africa cited *inter alia*:

1. The construction of the 'separation wall' despite the Court's ruling as to its unlawfulness in the Wall Advisory Opinion twenty years ago;¹⁰⁶
2. '[D]iscriminatory land zoning and planning policies; punitive and administrative house demolitions; and violent Israeli army incursions into [Palestinian] villages, towns, cities[,] and refugee camps';¹⁰⁷
3. The existence of two separate legal systems in the West Bank – one for Palestinians, who must stand trial before military courts, where they are denied basic due process rights, and one for Israeli settlers, who are tried before Israeli domestic courts with the full set of protections afforded by the Israeli legal system;¹⁰⁸
4. Gaza's reduction to 'a sealed-off enclave, fragmented and segregated from the West Bank, and subjected by Israel to regression, sustained closure[,] and siege';¹⁰⁹ as well as
5. The denial of the right of return for Palestinian refugees in the diaspora.¹¹⁰

Namibia¹¹¹ and Belize¹¹² linked apartheid to the denial of Palestinians' right to self-determination. The latter contended specifically that '[i]t is impossible to realize a people's right to self-determination within an "institutionalised regime of systematic racial oppression and discrimination"'.¹¹³ As regards the geographical scope of apartheid, the League of Arab States notably submitted that 'the régime of racial domination — apartheid — and denying return ... has been extended throughout [historical Palestine]',¹¹⁴ with Palestinians in the oPt 'subject[ed] to an even more extreme form of racist domination, as they are not even citizens of the State exercising authority over them'.¹¹⁵ Qatar emphasised that it, alongside 'many other States[,]

¹⁰⁴ Ibid.

¹⁰⁵ Verbatim Record Tuesday Morning (n 5) p 13.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid p 14.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Verbatim Record Friday Morning (n 11) pp 16-17.

¹¹² Verbatim Record Tuesday Afternoon (n 9) p 13.

¹¹³ Ibid.

¹¹⁴ Verbatim Record Monday 26 February Morning (n 29) p 28.

¹¹⁵ Ibid p 29.

attach[es] particular importance to a finding [by the Court] that Israel's occupation, by its nature, amounts to a régime of apartheid'.¹¹⁶

Jus in bello

A large number of participating States and organisations contended that Israel's control over the oPt involves systematic violations of the law of occupation, such as the settlement enterprise.¹¹⁷ In a few instances, States and international organisations cited the rules of IHL comprising the law of occupation as an additional ground for the illegality of the occupation. Bolivia, for example, contended that 'Israel's occupation ... must be considered illegal under both *jus in bello* and *jus ad bellum*'¹¹⁸ – that is 'because there is a violation of the normative order and the legal régime of the occupation such as the principles of temporality, the prohibition of annexation by force, serious violations of human rights and the right to self-determination, inalienability of sovereignty and the prohibition of racial discrimination, apartheid and, more recently, genocide'.¹¹⁹

The African Union referred to continuing and composite violations of the law of occupation, such as the settlement enterprise and the construction of the 'separation barrier', affirming that 'the cumulative effect of Israeli policies and practices that are associated with the occupation provides an additional basis on which to conclude that the occupation is – *as a whole* – unlawful'.¹²⁰

Chile similarly observed that 'systematic breaches'¹²¹ by Israel 'of self-determination, humanitarian law, human rights law[,] and international criminal law'¹²² in the oPt constitute another 'basis to declare that the occupation is illegal'.¹²³ It referenced in this regard the test articulated by the former Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, pursuant to which 'the legality of an occupation requires the occupier to act in the best interests of the people under occupation and to administer the occupied territory in good faith, including acting in full compliance with the duties and obligations under international law'.¹²⁴ Chile stressed that an occupying power's breach of a particular provision of the law of occupation will not automatically render an occupation illegal as a whole, especially where the authorities see to it that individual

¹¹⁶ Verbatim Record Friday Morning (n 11) p 64.

¹¹⁷ See, e.g., the intervention of Belgium (Verbatim Record Tuesday Morning (n 5) pp 64-67).

¹¹⁸ Verbatim Record Tuesday Afternoon (n 9) p 28.

¹¹⁹ Ibid.

¹²⁰ Verbatim Record Monday 26 February Morning (n 29) p 51.

¹²¹ Verbatim Record Tuesday Afternoon (n 9) p 48.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

perpetrators are duly punished for such acts; that being said, as far as Israel's occupation of the oPt is concerned, in Chile's view 'the systematic violation of international law is part of a State policy',¹²⁵ and therefore 'the occupation has become illegal'.¹²⁶ Bangladesh too referred to the test proposed by Michael Lynk as a relevant framework for determining the illegality of the occupation.¹²⁷

Switzerland did not take a clear position on the legal status of the occupation, but offered a detailed treatment of the interplay between IHL and IHRL in situations of prolonged occupation. Observing that prolonged occupations give rise to tensions between the fundamental principles underlying the law of occupation – such as the occupying power's obligation to maintain, as far as possible, the status quo *ante* while at the same time ensuring the well-being of the population in the occupied territory¹²⁸ – Switzerland suggested that the actions of an occupying power be evaluated against the following benchmarks:

1. Measures that change the status quo in favour of the occupying power are lawful only if taken due to imperative security needs and as long as the interests of the occupied population are not disproportionately affected, also in the long term;
2. Measures that change the status quo are lawful if they are taken in the interest of the occupied population, are compatible with human dignity, and take due consideration of the wishes of said population, including the societal and cultural context; and
3. Measures that change the status quo are mandatory where there is a corresponding duty under IHL and IHRL.¹²⁹

UN Security Council and General Assembly resolutions

Namibia argued that 'successive resolutions of the Security Council and the General Assembly have declared Israel's occupation to be illegal and called on Israel to end it *immediately*',¹³⁰ which 'provide an independent source of authority for the illegality of the occupation'.¹³¹ The resolutions cited by Namibia in this regard include Security Council resolution 242 of 1967, which the UK had contended forms part of 'the agreed framework for a permanent settlement of the parties' disputes',¹³² and which, in its view, 'does not determine that the occupation is unlawful'.¹³³

¹²⁵ Ibid p 49.

¹²⁶ Ibid.

¹²⁷ Verbatim Record Tuesday Morning (n 5) p 57.

¹²⁸ Verbatim Record Friday Afternoon (n 22) p 47.

¹²⁹ Ibid pp 47-48.

¹³⁰ Verbatim Record Friday Morning (n 11) p 13.

¹³¹ Ibid.

¹³² Verbatim Record Friday Afternoon (n 22) p 18.

¹³³ Ibid.

Genocide

Some States alleged that the occupation involves the commission of genocide. Cuba suggested that 'rather than an obvious apartheid régime situation, prosecuted as a crime against humanity, this is indeed an act of low-intensity genocide that is perpetrated with systematic and effective cruelty'.¹³⁴ Bolivia noted 'that the Israeli colonialist occupations [sic] are clearly illegal'¹³⁵ on a variety of grounds, including 'more recently, genocide'.¹³⁶ Tunisia similarly contended that Israel is committing genocide against the Palestinian people 'for purposes of acquiring their territory [translated from French]',¹³⁷ which is relevant for determining that the occupation is unlawful.

Legal consequences for Israel

There was widespread consensus regarding the legal basis and core elements of the consequences that follow for Israel should the Court determine that it has indeed committed violations of international law. In this context, participating States and organisations referred to Chapters I and II of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which reflect customary international law.¹³⁸ Many agreed that the legal responsibility for the State that is the author of the breach – Israel in this case – would entail:

1. An obligation of continued performance (the State is not relieved of its duty to comply with the obligation that has been violated);¹³⁹
2. A duty to cease the internationally wrongful act and, where appropriate, offer assurances and guarantees of non-repetition;¹⁴⁰ and
3. An obligation to make full reparation for injury, which may consist of restitution, compensation, or satisfaction.¹⁴¹

¹³⁴ Verbatim Record Wednesday Morning (n 10) p 22.

¹³⁵ Verbatim Record Tuesday Afternoon (n 9) p 28.

¹³⁶ Ibid.

¹³⁷ Verbatim Record Friday Afternoon (n 22) p 69.

¹³⁸ 'Responsibility of States for Internationally Wrongful Acts' (UN, 2001)

https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf accessed 18 April 2024.

¹³⁹ See, e.g., the intervention of Spain (Verbatim Record Monday 26 February Afternoon (n 54) p 13).

¹⁴⁰ See, e.g., the interventions of Bangladesh (Verbatim Record Tuesday Morning (n 5) p 58); Malaysia (Verbatim Record Thursday Afternoon (n 14) p 59); and Indonesia (Verbatim Record Friday Morning (n 11) p 51).

¹⁴¹ See, e.g., the interventions of the Maldives (Verbatim Record Monday 26 February Afternoon (n 54) p 36) and Colombia (Verbatim Record Wednesday Morning (n 10) pp 16-17).

In concreto, many States took the position that since the occupation as a whole is unlawful, Israel is under an obligation to end it immediately and unconditionally.¹⁴² In the view of the League of Arab States, this entails that ‘Israel must renounce all sovereignty claims[,] and all settlements must be removed’.¹⁴³ The African Union submitted that ‘[t]o condition the end of occupation on a negotiated settlement is to make the occupation permanent, given that the occupying [p]ower – Israel – refuses to negotiate on the basis of the two-State solution[,] and it has declared its will that it will never accept the establishment of a Palestinian State’.¹⁴⁴

Depending on the different unlawful practices and grounds for illegality invoked, there may be other obligations: Belize, for example, contended that ‘Israel must dismantle the physical, legal[,] and policy régime of discrimination and oppression, including freeing political prisoners; evacuate Israeli settlers from Palestinian territories; permit Palestinians to return to their country and property; and lift the siege and blockade of Gaza’.¹⁴⁵ The Maldives similarly argued that Israel has a duty to ‘dismantle the discriminatory régime concerning water resources ... in precisely the same way as the Court previously stated that Israel must dismantle both the wall and the associated legislative and regulatory régime which entrenched discrimination’.¹⁴⁶ Chile stressed the systematicity of violations of international law which, in its view, form an independent ground for the illegality of the occupation, and which ‘also [require] the end of the occupation as the measure needed to effectively protect the rights of the Palestinians’.¹⁴⁷ Namibia urged that the Court impose a deadline ‘within which Israel must be asked by the General Assembly to bring the occupation to an end, without conditions’,¹⁴⁸ arguing that a ‘[f]ailure to set a strict time-limit has the perverse effect of being treated as acquiescence in the present occupation, and permission for it to continue indefinitely’.¹⁴⁹ Bolivia contended that Israel must also ‘stop [the] development of the atrocities of genocide committed more recently in Gaza and ... comply with the provisional measures set forth in the Order of this Court on 26 January 2024’.¹⁵⁰

A notable detractor from the near-consensus was the US, which claimed that ‘the Court should not find that Israel is legally obligated to immediately and unconditionally withdraw from

¹⁴² See, e.g., the interventions of Namibia (Verbatim Record Friday Morning (n 11) p 19); Belize (Verbatim Record Tuesday Afternoon (n 9) p 12); Guyana (Verbatim Record Wednesday Afternoon (n 14) p 43); and the Gambia (ibid p 28).

¹⁴³ Verbatim Record Monday 26 February Morning (n 29) p 30.

¹⁴⁴ Ibid p 54.

¹⁴⁵ Verbatim Record Tuesday Afternoon (n 9) p 17.

¹⁴⁶ Verbatim Record Monday 26 February Afternoon (n 54) p 35.

¹⁴⁷ Verbatim Record Tuesday Afternoon (n 9) p 46.

¹⁴⁸ Verbatim Record Friday Morning (n 11) p 19.

¹⁴⁹ Ibid.

¹⁵⁰ Verbatim Record Tuesday Afternoon (n 9) p 30.

occupied territory'.¹⁵¹ Rather, the ICJ 'can address the questions before it within the established framework based on the "land for peace" principle, and within the parameters of established principles of occupation law'.¹⁵² The Russian Federation recognised that Israel has an 'obligation to respect the right of the Palestinian people to self-determination and to stop all settlement activities in the occupied territory',¹⁵³ but at the same time urged the Court 'not to engage in a detailed discussion on a precise scope and forms of implementation of Israel's responsibility'.¹⁵⁴ In its view, this is better left to 'direct negotiations between Israel and Palestine'¹⁵⁵ so that they may 'reach an agreement on the basis of their free will'.¹⁵⁶

The UAE asserted that 'a negotiating process that results in the contravention of peremptory norms of general international law would be void'.¹⁵⁷ The League of Arab States rebutted the argument regarding negotiations as follows: 'Israel cannot lawfully demand concessions on Palestinian rights as the price for ending its impediment to Palestinian freedom. ...The Palestinian people are legally entitled to reject a further loss of land over which they have an exclusive, legal, peremptory right. Any such rejection makes no difference to Israel's immediate legal obligation to end the occupation'.¹⁵⁸ The League of Arab States further notably contended that 'in the absence of the occupation ending, necessarily, everything Israel does in the Palestinian territory lacks a valid international legal basis and is, therefore ... invalid, not only those things violating the law regulating the conduct of the occupation',¹⁵⁹ such as, for example, the construction of settlements in violation of Article 49(6) of the Fourth Geneva Convention.

France noted that a finding as to the illegality of the occupation on the grounds of its prolonged nature bears the risk of a simultaneous inference that the law governing belligerent occupation is no longer applicable, which would leave the civilian population devoid of protection.¹⁶⁰ Jordan countered that 'Israel's obligations under [IHL and IHRL] continue to apply even though the occupation as such is unlawful'.¹⁶¹

¹⁵¹ Verbatim Record Wednesday Morning (n 10) p 56.

¹⁵² Ibid. As regards the principle of 'land for peace', in the view of the US, this entails negotiations about Israel's withdrawal from the occupied territory in exchange for security guarantees and full normalisation of relations.

¹⁵³ Verbatim Record Wednesday Afternoon (n 14) p 13.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid p 14.

¹⁵⁶ Ibid.

¹⁵⁷ Verbatim Record Wednesday Morning (n 10) p 40.

¹⁵⁸ Verbatim Record Monday 26 February Morning (n 29) p 31.

¹⁵⁹ Ibid p 34.

¹⁶⁰ Verbatim Record Wednesday Afternoon (n 14) p 20.

¹⁶¹ Verbatim Record Thursday Morning (n 6) p 65.

Legal consequences for third States

Again, there was widespread consensus that the grounds for the illegality of the occupation and different unlawful practices of Israel in the oPt involve serious breaches of peremptory norms of general international law,¹⁶² which entail legal consequences not just for the author of the breach – Israel – but also for third States.¹⁶³ Malaysia emphasised this point, observing that ‘for other States – indeed, for all other States – ... special legal consequences arise’.¹⁶⁴ Therefore, ‘Malaysia felt it was under a duty to participate in these advisory proceedings’.¹⁶⁵

Referring again to the ARSIWA, many participating States and organisations agreed that the legal consequences for third States comprise:

1. A duty not to recognise as lawful a situation resulting from serious breaches of peremptory norms;¹⁶⁶
2. A duty not to render any aid or assistance in the maintenance of the unlawful situation;¹⁶⁷ and
3. An obligation to cooperate to bring the serious breaches to an end by lawful means.¹⁶⁸

¹⁶² The International Law Commission (ILC) has recognised the following as peremptory norms of general international law:

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

‘Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*)’ (UN, 2022) p 6 <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf> accessed 18 April 2024.

¹⁶³ See, e.g., the interventions of Algeria (Verbatim Record Tuesday Morning (n 5) p 29) and Kuwait (Verbatim Record Thursday Afternoon (n 14) pp 19-20).

¹⁶⁴ Verbatim Record Thursday Afternoon (n 14) p 59.

¹⁶⁵ Ibid.

¹⁶⁶ See, e.g., the interventions of Brazil (Verbatim Record Tuesday Afternoon (n 9) p 37) and Colombia (Verbatim Record Wednesday Morning (n 10) p 17).

¹⁶⁷ See, e.g., the interventions of Kuwait (Verbatim Record Thursday Afternoon (n 14) p 19) and Algeria (Verbatim Record Tuesday Morning (n 5) p 29).

¹⁶⁸ See, e.g., the interventions of Saudi Arabia (Verbatim Record Tuesday Morning (n 5) p 40) and Ireland (Verbatim Record Thursday Morning (n 6) p 43).

On non-recognition, Namibia added that further to a negative obligation, third States have a ‘parallel and positive duty of *recognition* — of the Palestinian people’s right to self-determination realized through a viable and independent State of Palestine’.¹⁶⁹

The State of Palestine memorably summarised the duty not to render any aid or assistance as follows: ‘No aid. No assistance. No complicity. No contribution to forcible actions. No money, no arms, no trade, no nothing’.¹⁷⁰ Belize suggested that in addition to adjusting their own conduct accordingly, third States must also ‘regulate private actors to ensure that their conduct does not support Israel’s illegal practices’.¹⁷¹ Cuba urged the Court to ‘emphasize the scope of Article 2.5 of the United Nations Charter, which states that all Members “shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action”’.¹⁷²

Regarding the duty to cooperate, the Netherlands stressed that while such cooperation will usually take place under UN auspices, in case the UN is unable to act, third States ‘are obliged to seek co-operation through regional or bilateral fora’.¹⁷³ Chile noted that it ‘is precisely co-operating to bring [the] situation to an end by participating in these advisory proceedings, and by its joint submission with Mexico of a referral to the International Criminal Court on the situation in Palestine’.¹⁷⁴

Citing Israel’s track record of non-compliance with UN decisions, Namibia said that ‘it is precisely for this kind of egregious violations of peremptory norms that a régime of countermeasures was contemplated’.¹⁷⁵ The Netherlands too suggested, albeit in the abstract, that in case of serious breaches of peremptory norms (all of which, in its view, are also *erga omnes* obligations owed to the international community as a whole), third States are entitled to take countermeasures against the State that is the author of the breach.¹⁷⁶ Slovenia similarly contended that the policies and practices of Israel in the oPt involve violations of *erga omnes* obligations, meaning that any State is entitled to invoke Israel’s international responsibility for these breaches, and to call for their cessation as well as full reparation to the State of Palestine and the Palestinian people.¹⁷⁷

¹⁶⁹ Verbatim Record Friday Morning (n 11) p 18.

¹⁷⁰ Verbatim Record Monday 19 February (n 4) p 96.

¹⁷¹ Verbatim Record Tuesday Afternoon (n 9) p 24.

¹⁷² Verbatim Record Wednesday Morning (n 10) p 24.

¹⁷³ Verbatim Record Tuesday Morning (n 5) p 51.

¹⁷⁴ Verbatim Record Tuesday Afternoon (n 9) p 46.

¹⁷⁵ Verbatim Record Friday Morning (n 11) p 19.

¹⁷⁶ Verbatim Record Tuesday Morning (n 5) p 52.

¹⁷⁷ Verbatim Record Friday Afternoon (n 22) p 33.

In addition to these general legal consequences emanating from the law of State responsibility, States and organisations also took note of other duties that may arise from specific legal regimes. Spain, for instance, referred in this regard to Security Council resolution 2334 of 2016, which requires States ‘to distinguish in their relevant dealings between the territory of the State of Israel and the territories occupied since 1967’.¹⁷⁸ Belgium also pointed to resolution 2334 as well as third States’ obligation to ensure respect for IHL,¹⁷⁹ as did Luxembourg.¹⁸⁰ Spain further invited the Court to determine whether members of the Security Council have a specific obligation ‘to not prevent, hinder or delay collective action in favour of the peaceful resolution of the conflict’.¹⁸¹ Kuwait emphasised that ‘[t]hird States shall also contribute to safeguarding the Palestinian population against war crimes, genocide[,] and crimes against humanity, and ensure that those responsible for crimes committed within the framework of illegal occupation are held accountable’.¹⁸² Bolivia suggested that ‘[a]ll States have common but differentiated responsibilities and the obligations to provide solidarity and assistance to the Palestinian people’.¹⁸³

Legal consequences for the UN

Many participating States and organisations emphasised that the UN is well-placed to bring about a peaceful settlement of the dispute. The State of Palestine, citing the Wall Advisory Opinion, contended that ‘there exists “a permanent responsibility [of the United Nations] towards the question of Palestine ...”’.¹⁸⁴ Malaysia echoed these remarks, urging the UN ‘to pursue with vigour its permanent responsibility towards the question of Palestine, including its responsibility to ensure UNRWA’s continued effective functioning’.¹⁸⁵ South Africa said that ‘the Security Council and General Assembly ... must in all their engagements and actions on the issue of Palestine be guided by the imperative of the implementation of the sacrosanct Palestinian right to self-determination’,¹⁸⁶ and for this purpose ‘use all measures within their powers to bring an immediate end to the unlawful Israeli occupation of the Palestinian Territory, including East Jerusalem’.¹⁸⁷

¹⁷⁸ Verbatim Record Monday 26 February Afternoon (n 54) p 15.

¹⁷⁹ Verbatim Record Tuesday Morning (n 5) pp 69-70.

¹⁸⁰ Verbatim Record Thursday Afternoon (n 14) p 49.

¹⁸¹ Verbatim Record Monday 26 February Afternoon (n 54) p 14.

¹⁸² Verbatim Record Thursday Afternoon (n 14) pp 19-20.

¹⁸³ Verbatim Record Tuesday Afternoon (n 9) p 32.

¹⁸⁴ Verbatim Record Monday 19 February (n 4) p 59.

¹⁸⁵ Verbatim Record Thursday Afternoon (n 14) p 60.

¹⁸⁶ Verbatim Record Tuesday Morning (n 5) p 20.

¹⁸⁷ Ibid.

Kuwait suggested that the UN, like third States, has an obligation to ‘refrain from acknowledging the legality of the situation resulting from the illegal occupation and associated actions’¹⁸⁸ and to ‘refrain from offering support or assistance to prolong the situation[,] and should instead cooperate to bring an end to this illegal occupation’.¹⁸⁹ In this regard, the Organisation of Islamic Cooperation (OIC) urged the UN and its member States to adopt sanctions against Israel,¹⁹⁰ while South Africa called upon the UN to re-establish the Special Committee on Apartheid.¹⁹¹

¹⁸⁸ Verbatim Record Thursday Afternoon (n 14) p 20.

¹⁸⁹ Ibid.

¹⁹⁰ Verbatim Record Monday 26 February Morning (n 29) p 44.

¹⁹¹ Verbatim Record Tuesday Morning (n 5) p 20.