

SUMMARY OF THE INTERNATIONAL COURT OF JUSTICE’S ADVISORY OPINION OF 19 JULY 2024 ON THE LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM

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Introduction

On 30 December 2022, the United Nations (UN) General Assembly adopted a resolution in which it decided to submit the following questions to the International Court of Justice (ICJ):

- (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 [...] (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?*

These questions were officially communicated to the ICJ by the UN Secretary General on 19 January 2023. Exactly a year and a half later, on 19 July 2024, the ICJ rendered an Advisory Opinion answering the questions that the General Assembly had posed with the following momentous conclusions:¹

- Israel's continued presence in the occupied Palestinian territory (oPt) is unlawful.
- Israel is under an obligation to bring to an end its unlawful presence in the oPt as rapidly as possible.
- Israel is under an obligation to cease immediately all new settlement activities, and to evacuate all settlers from the oPt.
- Israel has an obligation to make reparation for the damage caused to all natural or legal persons concerned in the oPt.
- All States are under an obligation not to recognise as legal the situation arising from Israel's unlawful presence in the oPt and not to render aid or assistance in maintaining the situation created by Israel's continued presence in the oPt, while cooperating to bring an end to the violations identified.
- International organisations, including the UN, are under an obligation not to recognise as legal the situation arising from the unlawful presence of the State of Israel in the oPt.
- The UN, and especially the General Assembly, which requested the opinion, and the Security Council, should consider the precise modalities and further action required to bring to an end as rapidly as possible the unlawful presence of Israel in the oPt.

This note aims to provide a summary of the Advisory Opinion with a view to explaining the reasoning that led the Court to formulate these conclusions. The note also examines some of the

¹ *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) 2024 <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>> accessed 29 July 2024.

points raised in seven declarations made by judges on the panel, as well as in two joint opinions and five separate opinions they provided.

Largely mirroring the structure of the Advisory Opinion, the note contains the following parts:

Part 1 reviews the Court’s decision regarding its jurisdiction and discretion to answer the request.

Part 2 goes on to discuss the Court’s analysis of the scope and meaning of the questions posed by the General Assembly.

Part 3 addresses the Court’s findings regarding the applicable legal framework.

Part 4 examines the Court’s assessment of the conformity of Israel’s policies and practices in the oPt with its obligations under international law. This part consists of five subsections each addressing the Court’s findings about a different aspect of Israel’s policies and practices in the oPt:

- **Part 4.1** concerns the prolonged duration of Israel’s occupation.
- **Part 4.2** concerns Israel’s settlement policy, and related transfer of Israeli civilians into the oPt, confiscation and requisition of land, exploitation of natural resources, extension of Israeli law to the oPt, forced displacement of Palestinians, and violence against Palestinians.
- **Part 4.3** concerns the finding that Israel has annexed large parts of the oPt.
- **Part 4.4** addresses the finding that Israel subjects Palestinians to systematic discrimination and violates the obligation to prevent, prohibit, and eradicate all practices of racial segregation and apartheid.
- **Part 4.5** addresses the finding that Israel has violated its obligation to respect the right of the Palestinian people to self-determination.

Part 5 examines the Court’s assessment of the effects of Israel’s policies and practices on the legality of Israel’s continued presence in the oPt as an occupying power.

Part 6 examines the Court’s assessment of the legal consequences – for Israel, for other States, and for the UN – arising from Israel’s policies and practices and from the illegality of Israel’s continued presence in the oPt.

This is followed by a **conclusion**.

1. Jurisdiction and discretion

The Court **unanimously** found that it has jurisdiction to give the requested opinion (Advisory Opinion (AO) para 285(1)). The ICJ’s jurisdiction to give an advisory opinion is based on Article 65(1) of its Statute, which provides that ‘[t]he 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’.² The UN General Assembly, which submitted the

² ‘Statute of the International Court of Justice’ (ICJ) art 65(1) <<https://www.icj-cij.org/statute>> accessed 29 July 2024.

request, is authorised to do so pursuant to Article 96(1) of the UN Charter.³ The Court affirmed that the questions posed to it are ‘legal questions’ in accordance with Article 65(1) and that it consequently has jurisdiction to give the opinion requested (AO paras 27 and 28).

Article 65(1) of the ICJ Statute specifies that the Court ‘may’ render an advisory opinion if the jurisdictional criteria are met. It follows that the Court has discretion to decline to give an opinion. The Court observed that only ‘compelling reasons’ may lead it to refuse to give an opinion, given the critical function of the Court as the principal judicial organ of the UN (AO paras 30 and 31). It noted that some participants in the advisory proceedings had argued that there were compelling reasons to refuse to give the requested opinion, notably: (1) the request relates to a bilateral dispute between parties, one of which has not consented to the jurisdiction of the Court (i.e., Israel); (2) the opinion would not assist the General Assembly and (3) would further be detrimental to the work of the Security Council; (4) the Court does not have enough information to give the requested opinion; and (5) the questions submitted by the General Assembly are formulated in a biased manner (AO para 32). Vice-President Sebutinde echoed these arguments in her dissenting opinion (Dissenting Opinion of Vice-President Sebutinde paras 1, 42, 43, 46, 47).⁴

Having considered these arguments in turn, the Court concluded by fourteen votes to one (Vice-President Sebutinde voting against) that it would comply with the request to give an opinion (AO para 285(2)). In brief, the Court found that:

- The subject-matter of the General Assembly’s request is not only a bilateral matter between Israel and Palestine but constitutes ‘a matter of particular interest and concern to the United Nations’ (AO para 35).
- It is not for the Court to decide whether the organ requesting the opinion has a need for it to perform its functions (AO para 37).
- Whether the Court’s opinion would have an adverse effect on peace negotiations is a matter of speculation and the ‘Court cannot speculate about the effects of its opinion’ (AO para 40).
- While the Security Council has ‘primary responsibility’ for the maintenance of international peace and security, the General Assembly also has competence to address matters concerning international peace and security (AO paras 42 and 43).
- The Court has sufficient information to give an opinion on the questions submitted to it, including from the submissions of over 50 States and international organisations and dossiers submitted by the Secretary-General of the UN (AO para 47).

³ ‘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 29 July 2024. UNGA Res 77/247 (30 December 2022) UN Doc A/RES/77/247.

⁴ Dissenting Opinion of Vice-President Sebutinde <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-en.pdf>> accessed 29 July 2024.

- As to whether the questions put to the Court are biased or imbalanced, the Court has the power to interpret and, where necessary, reformulate the questions and determine their scope (AO para 49).

2. Scope and meaning of questions

As the Court observed, it has the power to determine for itself the scope and meaning of the questions put to it (AO para 49). The Court interpreted the material scope of the questions (set out in the Introduction) as requiring an investigation into the legality of (a) certain ‘policies and practices’ adopted by Israel in the oPt and of (b) Israel’s continued presence as an occupying power in the oPt in view of these policies and practices, as well as the legal consequences that follow for Israel, other States, and the UN.

With respect to the ‘policies and practices’ listed in question (a), the Court observed that their formulation seems to assume that they are contrary to international law.⁵ In that regard, the Court emphasised that it ‘must itself determine the lawfulness of the policies and practices identified by the General Assembly’ (AO para 74). The Court further specified that it had not been asked to provide a detailed factual determination of Israel’s policies and practices; rather, the ‘Court need only establish the main features of Israel’s policies and practices and, on that basis, assess the conformity of these policies and practices with international law’ (AO para 77).

In terms of the territorial scope of the requested opinion, the Court confirmed that it encompasses the whole of the oPt, including the West Bank, East Jerusalem, and the Gaza Strip. Importantly, the Court stressed 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’ (AO para 78).

As for the temporal scope, the Court noted that it had been requested to consider policies and practices adopted by Israel since the start of its occupation in 1967. While the Court stressed that it was not precluded from also having regard to facts predating the occupation (AO para 80), the Court did not address the initial legality of Israel’s presence in and occupation of the oPt.⁶ Moreover, the Court noted that the General Assembly had adopted the request for an advisory opinion on 30 December 2022, and that the request therefore did not include conduct by Israel in Gaza following the Hamas attacks on 7 October 2023 (AO para 81).

⁵ The wording of the question suggests that Israel had already been found to be committing an ‘ongoing violation ... of the right of the Palestinian people to self-determination’, that it was maintaining a ‘prolonged occupation, settlement and annexation of the Palestinian territory’, and that it had adopted ‘measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem’, and was guilty of discrimination through ‘its adoption of related discriminatory legislation and measures’.

⁶ According to Judges Tomka, Abraham and Aurescu, the Court ‘did not receive sufficient information to rule, on an objective basis, on the respective responsibilities of the various parties involved in the armed conflict of 1967’. Joint Opinion of Judges Tomka, Abraham and Aurescu <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-04-en.pdf>> accessed 29 July 2024, [33].

3. Applicable legal framework

To respond to the questions before it, the Court first had to determine the applicable legal frameworks under international law. The Court noted that the applicability of certain rules of international humanitarian law (IHL) depends on whether territory is ‘occupied’ in the sense defined in international law. Referencing its 2004 Wall Advisory Opinion, in which it had already observed that Israel occupied the West Bank and East Jerusalem, the Court affirmed that these territories remained occupied by Israel during the relevant time period (AO para 87).⁷

Turning to the status of the Gaza Strip (which the Court had not addressed in its 2004 Wall Advisory Opinion), the Court restated the customary international law definition of occupation as set out in Article 42 of the Hague Regulations of 1907, according to which a territory is occupied when it is actually placed under the authority of the hostile army, which entails the exercise of effective control over the territory.⁸ The Court went on to observe that where a State has placed territory under its effective control, ‘it might maintain that control and continue exercising its authority despite the absence of a military presence on the ground’ (AO para 91). Accordingly, ‘[p]hysical 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’ (AO para 91).

The Court considered that, although Israel had withdrawn its army from the Gaza Strip in 2005 pursuant to its so-called ‘Disengagement Plan’, ‘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’, noting that this ‘is even more so since 7 October 2023’ (AO para 93). Without explicitly stating that Gaza remains occupied territory, the Court proceeded to endorse a version of the so-called ‘functional’ approach to occupation, stating that ‘Israel’s obligations [under the law of occupation] [are] commensurate with the degree of its effective control over the Gaza Strip’ (AO para 94; see Separate Opinion of Judge Iwasawa para 8).⁹ Thus, the Court concluded that ‘Israel’s withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation’ (para 94).

One possible reading of this part of the Opinion is that Israel retains obligations under the law of occupation even if it no longer occupies the territory (see Separate Opinion of Judge Iwasawa, para 8). Alternatively, the Court could be read as saying that Israel remains an occupying power in Gaza, but that the extent of its obligations under the law of occupation are commensurate with the nature and level of its control. That is typically how the ‘functional approach’ to occupation has been understood.

⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136 (Wall Advisory Opinion).

⁸ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Regulations) art 42.

⁹ Separate Opinion of Judge Iwasawa <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-07-en.pdf>> accessed 29 July 2024.

The Court did not specify *which* obligations under the law of occupation remain binding on Israel with respect to the Gaza Strip. Based on the functional approach ostensibly endorsed, the answer to that question requires a factual assessment of the nature and level of control exercised by Israel over Gaza. According to Judge Cleveland, given the control that Israel exercised over Gaza prior to 7 October 2023, this would, inter alia, include ‘aspects of the duty to ensure the food and medical supplies of the population under Article 55 of the Fourth Geneva Convention and the duty to facilitate humanitarian relief under Article 59 of that Convention’.¹⁰

In addition to obligations under the law of occupation as set forth in the Fourth Geneva Convention (GC IV) and customary international law, the Court affirmed that Israel is also bound by human rights treaties to which it is a party in respect of its conduct in the oPt. In particular, the Court confirmed the applicability of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (CERD), the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (ICESCR), and the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR) (AO paras 97, 100, and 101). Referring to its earlier jurisprudence, the Court recalled that ‘international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories’ (AO para 99).

With respect to the Oslo Accords, the Court noted that participants of the advisory proceedings had expressed diverging views as to their relevance (AO para 102). The Court affirmed that ‘the Oslo Accords cannot be understood to detract from Israel’s obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory’, noting that it would take the Accords into account ‘as appropriate’ (AO para 102).

4. Israeli policies and practices in the oPt

Having determined what international legal norms apply, and pursuant to its interpretation of the questions posed by the General Assembly, the Court turned to assess whether certain Israeli policies and practices in the oPt that had been identified in the first part of the General Assembly’s request for an advisory opinion conform with Israel’s obligations under international law.

4.1 Prolonged occupation

The Court began its survey of the legality of Israel’s policies and practices in the oPt by assessing the legal consequences arising from the prolonged duration of Israel’s occupation of the oPt. Its main findings in this regard were as follows:

Occupation is temporary and does not transfer sovereignty (AO para 106): The Court noted that the nature and scope of the set of powers and duties that a State assumes with respect to territory it occupies are premised on the assumption that an occupation (a) is a temporary situation to

¹⁰ Separate Opinion of Judge Cleveland <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-13-en.pdf>> accessed 29 July 2024, [24].

respond to military necessity,¹¹ and (b) cannot transfer sovereign title to the occupying power (AO para 105). The Court observed that this assumption underlies several provisions of the law of occupation, which illustrate that occupation is conceived of as a temporary state of affairs, during which a State's exercise of authority over the foreign territory it occupies is tolerated for the benefit of the local population.¹²

The legality of prolonged occupation must be assessed on the basis of the law on the use of force (jus ad bellum) and the right to self-determination, not IHL (AO para 109): The Court went on to observe that, even while premised on the temporary character of the occupation, the law of occupation does not set temporal limits that would, as such, alter the legal status of the occupation. Accordingly, the fact that an occupation is prolonged does not in itself change its legal status under IHL. The legality of the occupying power's ongoing presence in the occupied territory must instead be assessed in light of other rules of international law. More specifically, since occupation entails the exercise of effective control over foreign territory, it must at all times be consistent with: (a) the rules concerning the prohibition of the threat or use of force, including the prohibition of territorial acquisition resulting from the threat or use of force (i.e., with rules that form a key part of the jus ad bellum), and (b) the right to self-determination. The fact that an occupation is prolonged may render it inconsistent with these rules of international law, thereby rendering the occupying power's continued presence in the occupied territory unlawful.

Prolonged occupation does not reduce the occupant's obligations or increase its powers (AO paras 107-108): During the course of its analysis of the question of prolonged occupation, the Court offered insight on the correct interpretation of Article 6(3) of GC IV, which sets a temporal limit to the obligations of a State in its capacity as an occupying power. The Court observed that this provision is not aimed at releasing States from their obligations under GC IV in situations of prolonged occupation. Instead, the limit it sets is based on the understanding that, within a year after the end of military operations, the local authorities in the occupied territory would have resumed exercising governmental functions, and it would therefore be unnecessary for the occupying power to perform these functions. The Court went on to clarify that in circumstances in which the local authorities in the occupied territory have not in fact resumed exercising

¹¹ The IHL rules forming the law of occupation do not specify that the presumed purpose of the temporary situation of occupation is 'to respond to military necessity'. Indeed, the Court itself observes, at [105], that 'there is nothing in GC IV or in customary international law to suggest that the nature and the scope of the powers and duties of the occupying Power are contingent on the circumstances by which the occupation was brought about'. This implies that the occupant would have those powers and duties even if the occupation was brought about by unlawful use of force on its part, including force that did not serve a military necessity. It seems therefore that the Court's reference to a presumed military necessity is drawn not from IHL but from the other rules of international law that it subsequently turns to when assessing the legality of Israel's prolonged occupation.

¹² In this regard, the Court pointed to the following provisions: GC IV Art 64 and Hague Regulations Art 43, which oblige the occupying power to respect the laws that were in force in the occupied territory prior to the occupation; GC IV Art 50(5), providing that the occupying power may not hinder the application of certain preferential measures adopted prior to the occupation; GC IV Art 54, instructing that the occupying power may not alter the status of public officials or judges in the occupied territory; and Hague Regulations Art 55, which confers on the occupying power only the status of administrator and usufructuary of public buildings, real estate, forests, and agricultural estates in the occupied territory.

governmental functions a year after the close of military operations, the obligations of the occupying power under GC IV remain in force, notwithstanding Article 6(3). In support of this assertion, the Court noted that to conclude otherwise would be contrary to the object and purpose of GC IV and would deprive the population subject to an ongoing occupation of the protection that it enjoys under IHL. It further observed that the prolonged duration of the occupation cannot result in the transfer of title and cannot therefore release the occupying power from the obligations that it bears, including the obligation to refrain from exercising acts of sovereignty, nor does it expand the powers that IHL vests in the occupying power.

4.2 Settlement policy

In this part of its analysis, the Court reaffirmed the conclusion that it had reached in its 2004 Wall Advisory Opinion¹³ that Israeli settlements in the West Bank and East Jerusalem, and the regime associated with them, have been established and are being maintained in violation of international law (AO para 155). The Court also expressed grave concern about reports that Israel's settlement policy has been expanding in the years since it rendered its Wall Advisory Opinion (AO para 156).

The Court clarified that this finding applies with respect to all communities in the West Bank and East Jerusalem that were established or maintained with Israel's support, whether they are referred to as 'settlements' or 'outposts' (AO para 112). It also observed that Israel's settlement policy carried out in the Gaza Strip until 2005 was not substantially different from the policy that continues in the West Bank and East Jerusalem today (AO para 114).¹⁴

In its analysis, the Court identified six different types of violations of international law associated with Israel's settlement policy, which it examined in turn.

4.2.1 Transfer of civilian population

The Court found that the transfer by Israel of settlers to the West Bank and East Jerusalem, as well as Israel's maintenance of their presence, is contrary to Article 49(6) of GC IV, which provides that '[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies' (AO para 119).

In support of this conclusion, the Court reiterated the well-established view, which it had already expressed in the Wall Advisory Opinion, that the prohibition set out in Art 49(6) of GC IV prohibits not only forcible transfer of parts of the occupying power's civilian population into the occupied territory, but also any measures taken by an occupying power in order to organise or encourage transfers of parts of its own population into the occupied territory (AO para 115).¹⁵ The Court

¹³ Wall Advisory Opinion [120].

¹⁴ In this regard, Judge Cleveland observed in a separate opinion that any future attempt to resurrect the settlement policy with respect to the Gaza Strip would constitute a 'flagrant violation' of the prohibition on the transfer of the population of an occupying power into occupied territory set out in GC IV Art 49(6). See Separate Opinion of Judge Cleveland (n 10) [23].

¹⁵ Ibid; Yutuka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill 2009) 347-50; Eliav Liebllich and Eyal Benvenisti, *Occupation in International Law* (OUP 2022) 132.

added that Article 49(6) of GC IV prohibits the transfer of members of the civilian population of the occupying power into the occupied territory regardless of whether this results in the displacement of the local population; it also noted that in any event the transfer of Israel's civilian population into the West Bank and East Jerusalem has resulted in the displacement of Palestinians residing there (AO para 118).

The Court then went on to observe that there is extensive evidence that Israel pursues policies and practices that are in contravention to the prohibition thus understood. These include:

- A 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 (AO para 115);
- Regularly “legalising” outposts that have been established in contravention of domestic Israeli legislation (AO para 116); and
- Building infrastructure and facilities to encourage the expansion of settlements, including road, water, and sewage systems, communications and power systems, security systems, and educational and healthcare facilities (AO para 117).

4.2.2 Confiscation or requisitioning of land

The Court noted that the expansion of Israel's settlements in the West Bank and East Jerusalem is based on the confiscation or requisitioning of large areas of land, including both public and private property (AO para 120).¹⁶

With respect to private property, the Court took the view that Israel's land policies are in breach of Articles 46 and 52 of the Hague Regulations (AO para 122). The former establishes an unqualified prohibition of confiscation of private property that does not allow for any exceptions. The latter stipulates that requisitions in kind shall not be demanded from inhabitants of the occupied territory except for the needs of the army of occupation (requisitions for the purpose of settlement expansion clearly fall outside this exception).¹⁷

With respect to public property, the Court observed that Israel's land policies do not conform with Article 55 of the Hague Regulations (AO para 122). This provision requires the occupying power to administer public property in the occupied territory in accordance with the rules of usufruct, which is understood to mean that such property must be administered for the benefit of the local population or, exceptionally, to meet the needs of the army of occupation. Contra to this rule, the

¹⁶ Citing a report by an independent international commission of inquiry, the Court observed that expropriated land in the West Bank includes considerable areas of land that would be characterised as private property but have been declared by Israel as State land — and thus intended for public use — in reliance on a selective interpretation of the law in force at the time of Israel's occupation. See UNGA 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel' (14 September 2022) UN Doc A/77/328 para 33.

¹⁷ By referring to Article 52 of the Hague Regulations in relation to the requisition of land, the Court appears to hold the view that this provision also applies to immovable property. This position has been contested by some commentators who maintain that the Article should be understood to apply only to movable property. See Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd ed, CUP 2019) 246-7.

confiscation or requisition of public property for the development of Israeli settlements benefits Israeli settlers, to the detriment of the local Palestinian population.

4.2.3 Exploitation of natural resources

Referring once again to Article 55 of the Hague Regulations, the Court recalled that under this provision, the occupying power is regarded only as administrator and usufructuary of natural resources in the occupied territory and must safeguard the capital of these resources. The Court observed that this requires the occupying power to refrain from any use of the natural resources of the occupied territory that exceeds what is necessary ‘for the purposes of the occupation’.¹⁸ Accordingly, the Court observed that the occupying power has a continuing duty to ensure that the local population has an adequate supply of foodstuffs, including water, and that use of natural resources in the occupied territory is sustainable and does not cause environmental harm (para 124).

On the basis of the evidence before it, the Court opined that Israel has acted in contravention of these obligations by (a) diverting a large share of the natural resources in the oPt to its own population, including settlers;¹⁹ and (b) severely restricting the Palestinian population’s access to water in the oPt, in contrast to its obligation to ensure the availability of water in sufficient quantity and quality (AO paras 126-133).

The Court further observed that by pursuing a policy of exploitation of natural resources in the occupied territory contrary to the law of occupation, Israel is acting in a manner inconsistent with its obligation to respect the Palestinian people’s right to permanent sovereignty over natural resources in the oPt (AO para 125, 133).

4.2.4 Extension of Israeli law to the oPt

The Court opined that Israel has exercised its regulatory authority as an occupying power in a manner inconsistent with the provisions of Article 43 of the Hague Regulations and Article 64 of GC IV, pursuant to which the occupying power is obliged to respect the law that existed in the occupied territory prior to the occupation and may exercise regulatory powers (such as the introduction of new laws and regulations) only on an exceptional basis on specific grounds enumerated in Article 64(2) of GC IV (AO paras 134, 141).²⁰

The Court observed that Israel has made extensive use of its regulatory powers to alter the law enforced in the West Bank and East Jerusalem (AO para 135). This includes:

¹⁸ With the expression ‘necessary for the purposes of the occupation’, the Court seems to be referring to use of natural resources that is necessary to finance the occupying power’s administration of the occupied territory.

¹⁹ Recalling that the transfer by Israel of its own population into the oPt is unlawful per Article 49(6) of GC IV, the Court contended that the use of natural resources in the occupied territory cannot be justified with reference to the needs of that population (AO para 133).

²⁰ Article 64(2) of GC IV provides that the occupying power may subject the population of the occupied territory to provisions which are essential either (a) to enable the occupying power to fulfil its obligations under GC IV; (b) to maintain the orderly government of the territory; or (c) to ensure the security of the occupying power.

- (a) The introduction of a comprehensive body of military laws applied to Palestinians in the West Bank which has to a large degree substituted the local law that was in force prior to the occupation (AO para 136).
- (b) The application of Israeli domestic law to Israelis and to non-Israeli Jews in the West Bank (AO para 136). Relatedly, the Court observed that regional and local councils of settlers have assumed de facto jurisdiction over the settlements in the West Bank, and that since late 2022, Israel has transferred decision-making power over civil affairs in Area C of the West Bank from the military to a civilian minister in the Israeli Ministry of Defence (AO para 137).
- (c) The application of Israel domestic law in full in East Jerusalem to the exclusion of any other domestic legal system (AO para 138).

The Court indicated that this extension of Israeli law to the West Bank and East Jerusalem is not justified under any of the grounds laid down in Article 64(2) of GC IV. In this regard, it observed that the illegal transfer of parts of Israel's civilian population to the West Bank and East Jerusalem cannot be invoked as a ground for regulation in these areas, or for the application of Israeli law within them (AO para 139). The Court added that the Oslo Accords did not grant Israel authority to exercise regulatory powers in the oPt in a manner that is at variance with its obligations under the law of occupation (AO para 140).

4.2.5 Forced displacement of Palestinians

The Court observed that various policies and practices pursued by Israel have compelled Palestinians to leave parts of the oPt against their will. These include large-scale confiscations of land and the deprivation of access to natural resources that divest the local population of their basic means of subsistence, thus inducing their departure; as well as a series of other measures such as forcible evictions, extensive house demolitions, and restrictions on residence and movement (AO para 143).

The Court took the view that these policies and practices are contrary to the prohibition of forcible transfer of the protected population established in Article 49(1) of GC IV (AO paras 144, 147). In this regard, the Court clarified that a transfer is considered 'forcible' not only when it is achieved through the use of physical force, but also when the people concerned have no choice but to leave (AO para 145).

The Court noted further that evacuations are permissible only when they are undertaken as a temporary measure, to be reversed as soon as the imperative military reasons that rendered them necessary have subsided. By contrast, evacuations of a permanent or indefinite character breach the prohibition of forcible transfer (AO paras 144, 146). In this regard, the Court observed that Israel's conduct, including the fact that it frequently confiscates land following the demolition of Palestinian property for reallocation to Israeli settlements, indicates that its measures are not temporary in character and therefore cannot be considered as permissible evacuations under GC IV (AO para 147).

4.2.6 Violence against Palestinians

The Court noted that Israel's settlement policy has given rise to violence by settlers and security forces against Palestinians.

Having examined the evidence before it in light of the relevant provisions of international law, the Court concluded that the violence by settlers against Palestinians, Israel's systematic failure to prevent or to punish it effectively, and its excessive use of force against Palestinians contribute to the creation and maintenance of a coercive environment against Palestinians and are inconsistent with its obligations (AO para 154).

The provisions of international law that Israel was thus deemed to have violated include Article 46 of the Hague Regulations, which imposes a duty on the occupying power to respect the lives of persons in occupied territory, and Article 27(1) of GC IV, which provides that protected persons must be humanely treated and protected against all threats or acts of violence. They also include the right to life and to protection against violence guaranteed by Articles 6(1) and 7 of the ICCPR (AO para 149).

4.3 *The annexation of the oPt*

In order to address the General Assembly's question about the legal consequences arising from Israel's annexation of the oPt, the Court first needed to assess whether Israel has in fact annexed the oPt or parts thereof. The Court began that inquiry by clarifying that it understands the term 'annexation' to refer to the forcible acquisition of the occupied territory by the occupying power, such that the occupied territory is integrated into the territory of the occupying power (AO para 158). Annexation thus defined presupposes an intent by the occupying power to exercise permanent control over the occupied territory. In this regard, the Court recalled that, under the law of occupation, the occupying power's control of the occupied territory must be temporary in character. The Court consequently observed that conduct by the occupying power that displays an intent to exercise permanent control over the occupied territory may be indicative of annexation (AO para 159).

The Court noted that the occupying power's assertion of permanent control over the occupied territory can manifest in a variety of ways. Thus, in some cases it may involve a formal declaration by the occupying power of sovereignty over the occupied territory in what is sometimes referred to as *de jure* annexation, while in other cases it may entail so-called *de facto* annexation, which comprises acts short of a formal declaration that create facts on the ground and consolidate the occupying power's permanent control over the occupied territory. Both constitute annexation (AO para 160).

The Court went on to examine Israel's documented policies and practices in relation to East Jerusalem and the West Bank with a view to determining whether they amount to annexation (AO paras 162-172). The Court noted that Israel's maintenance and expansion of settlements, construction of associated infrastructure and the wall, exploitation of natural resources, proclamation of Jerusalem as Israel's capital, and its comprehensive application of Israeli domestic law in East Jerusalem as well as its extensive application in the West Bank all serve to entrench Israel's control of the oPt, notably of East Jerusalem and of Area C of the West Bank.

Observing also that these policies and practices are designed to remain in place indefinitely and to create irreversible effects on the ground, the Court opined that they amount to annexation of large parts of the oPt (AO para 173).

The Court further observed that efforts to acquire sovereignty over occupied territory, such as those undertaken by Israel through the policies and practices it adopted in East Jerusalem and the West Bank, are contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force.²¹ As the Court went on to elaborate, this has implications for the legal status of the occupation, and thus for the legality of Israel's continued presence in the oPt (AO paras 174-179, 261, 267).²²

4.4. Discriminatory policies and practices

The Court began by noting that certain forms of discrimination are prohibited under IHL, including the prohibition in Article 27(3) of GC IV of adverse distinction in the treatment of protected persons 'based, in particular, on race, religion or political opinion' (AO para 186). However, the Court primarily relied on human rights instruments to assess the legality of Israeli policies and practices in view of the prohibition of non-discrimination, which the Court found to be part of customary international law (AO para 189).

Systemic discrimination based on, inter alia, race, religion, or ethnic origin (para 223): The Court found that 'a broad array of legislation adopted and measures taken by Israel in its capacity as an occupying Power' subject Palestinians to differential treatment that 'cannot be justified with reference to reasonable and objective criteria nor to a legitimate public aim'. Thus, the Court considered that the 'regime of comprehensive restrictions imposed by Israel on Palestinians in the [oPt] constitutes systemic discrimination based on, inter alia, race, religion or ethnic origin' in violation of Articles 2(1) and 26 of the ICCPR, Article 2(2) of the ICESCR, and Article 2 of CERD (AO para 223).

Notably, the Court found that the following policies and practices amount to prohibited discrimination:

- Israel's residence permit policy, at least as applied to East Jerusalem;
- Israel's practice of restricting the movement of Palestinians in the oPt;
- Punitive demolitions of Palestinian property; and Israel's planning policy in relation to the issuance of building permits;

²¹ See also, Joint Declaration of Judges Nolte and Cleveland <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-09-en.pdf>> accessed 29 July 2024 [12], observing that through the settlement policy, severe restrictions on movement within and between parts of the oPt, and other policies and practices, Israel has demonstrated that it seeks to permanently obstruct the exercise of the right of the Palestinian people to self-determination, particularly its right to territorial integrity and political independence, including the right to an independent and sovereign State.

²² As elaborated in part 5 below, while sharing the view that the annexation policy pursued by Israel is illegal, judges Tomka, Abraham and Aurescu did not agree with the majority's ensuing conclusion that the occupation itself is illegal. See Joint Opinion of Judges Tomka, Abraham and Aurescu (n 6) [22].

- Israel's practice of demolishing property for lack of building permits (AO paras 194-197, 205-206, 210-213, 221-222).

Judge Charlesworth furthermore emphasised the intersectionality of Israel's discriminatory policies and practices and how certain groups of Palestinians, including women and children, are particularly affected by them (Declaration of Judge Charlesworth paras 4-10).

Apartheid or racial segregation (paras 224-229): The Court observed that a number of participants in the advisory proceedings had argued that Israel's policies and practices in the oPt amount to racial segregation or apartheid in breach of Article 3 of CERD, which provides: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction' (AO paras 224 and 225).

The Court found that 'Israel's policies and practices in the West Bank and East Jerusalem implement a separation between the Palestinian population and the settlers transferred by Israel to the territory' (AO para 226). This separation is both physical and juridical (AO paras 227 and 228). Against this background, the Court considered that Israel's legislation and measures, which 'impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities', constitute a breach of Article 3 of CERD (AO para 229).

Judge Tladi interpreted this finding 'to be an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid' (Declaration of Judge Tladi para 36). Yet, the Court did not explicitly state whether Israel's policies and practices amount to 'racial segregation' and/or 'apartheid', both of which are condemned pursuant to Article 3 of CERD.

Judge Brant regretted that the Court had not seized the opportunity to spell out the constituent elements of the prohibition of apartheid under customary international law (Declaration of Judge Brant para 7). According to President Salam, that exercise would not have been 'appropriate for the Court [...] in this Advisory Opinion' (Declaration of President Salam para 20). Still, President Salam went on to set out the following elements as constitutive of the crime of apartheid: 'the existence of two or more distinct racial groups; the commission of inhumane acts against one or more groups; an institutionalised regime of systematic oppression and domination by one racial group over one or more other racial groups and an intention to maintain this régime' (para 20). President Salam found these elements to be present, concluding that 'Israel's commission of inhumane acts against the Palestinians as part of an institutionalised regime of systematic oppression and domination, and its intention to maintain that regime, are undeniably the expression of a policy that is tantamount to apartheid' (para 29).

Meanwhile, Judge Nolte was 'not convinced that the Court has sufficient information before it to conclude that Israel's policies and practices amount either to apartheid or to racial segregation' (Separate Opinion of Judge Nolte para 8).²³ Judge Nolte expressed doubt that 'the only reasonable

²³ Separate Opinion of Judge Nolte <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-08-en.pdf>> accessed 29 July 2024.

inference which can be drawn from Israel's policies and practices in the [oPt] is that of an intention to maintain an institutionalised regime to systematically oppress and dominate the Palestinians relative to Israeli Jews' (para 13). However, Judge Tladi stressed in his Declaration that it is not necessary to establish that domination is 'the sole, or even dominant reason, for the discriminatory measures' to constitute apartheid (Declaration of Judge Tladi para 40). In Judge Tladi's opinion, it is '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).

4.5. The right of the Palestinian people to self-determination

The Court began by observing that it had already affirmed the existence of the right of the Palestinian people to self-determination in its Wall Advisory Opinion, noting that the centrality of this right in international law was reflected in its inclusion in Article 1(1) of both the ICESCR and the ICCPR (AO paras 230 and 233). The Court recalled that the obligation to respect the right to self-determination is owed erga omnes, and that 'all States have a legal interest in protecting that right' (AO para 232). Furthermore, 'in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law' (AO para 233).

In her Declaration, Judge Xue found it unfortunate that the Court had qualified its statement on the peremptory character of the right to self-determination by the phrase 'in cases of foreign occupation such as the present case', stressing that the principle of self-determination applies to all peoples under colonialism, alien subjugation, foreign domination and exploitation and enjoys a peremptory status in all those contexts (Declaration of Judge Xue para 3). Judge Cleveland, on the other hand, suggested that the phrase 'in cases of foreign occupation such as the present case' was merely intended to analogise the situation of Israel's prolonged occupation 'to a situation of alien subjugation and foreign domination, which implicate the right to self-determination as a peremptory norm' (Separate Opinion of Judge Cleveland para 33).

Elaborating on the meaning and implications of the right to self-determination, the Court, firstly, underscored that Israel, as the occupying power, has the obligation 'not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory' (AO para 237). According to the Court, Israel's settlement policy and annexation of large parts of the oPt 'violates the integrity of the Occupied Palestinian Territory, as an essential element of the Palestinian people's right to self-determination' (AO para 238). Judges Nolte and Cleveland stressed that the principle of territorial integrity 'applies not only to States; it may also apply to territorial units within which a people exercises its right of self-determination' (Joint Declaration of Judges Nolte and Cleveland para 13). Yet, Judge Gómez Robledo regretted that the Court had not been explicit on the character of Palestine as a State, which, in his view, 'is beyond doubt' (Separate Opinion of Judge

Gómez Robledo, para 3).²⁴ He argued that the ‘invisibilization of Palestine, which goes as far as denial, constitutes [...] another obstacle to the right of the Palestinian people to self-determination’ (para 6).

Second, in addition to territorial integrity, the Court observed that the right to self-determination protects a people against ‘acts aimed at dispersing the population and undermining its integrity as a people’ (AO para 239). In the view of the Court, Israel’s settlement policy, its annexation of territory and related discriminatory legislation and measures ‘undermine the integrity of the Palestinian people in the [oPt], significantly impeding the exercise of its right to self-determination’ (AO para 239).

Third, the Court considered that the right to self-determination entails the right to ‘exercise permanent sovereignty over natural resources’ and that, ‘[i]n depriving the Palestinian people of its enjoyment of the natural resources in the [oPt] for decades, Israel has impeded the exercise of its right to self-determination’ (AO para 240).

Fourth, the Court found that ‘Israel’s policies and practices obstruct the right of the Palestinian people freely to determine its political status and to pursue its economic, social and cultural development’, which it identified as ‘a key element of the right to self-determination’ (AO paras 241 and 242).

For these reasons, the Court considered that Israel’s ‘unlawful policies and practices are in breach of Israel’s obligation to respect the right of the Palestinian people to self-determination’ (AO para 243).²⁵ The Court observed that this breach was aggravated by the ‘prolonged character of Israel’s unlawful policies and practices’ (AO para 243).

5. Effects of Israel’s policies and practices on the legal status of the occupation

The General Assembly had also requested the Court to advise on the legality of Israel’s continued presence as occupying power in the oPt in light of the policies and practices adopted by Israel since 1967 (see Part 4 above). The Court was not asked to assess the legality of Israel’s initial presence in and occupation of the oPt, nor did it do so.²⁶

In addressing the question of the lawfulness of Israel’s continued presence in the oPt, the Court distinguished between, on the one hand, rules of international law regulating the legality of the use of force in foreign territory (*jus ad bellum*) and, on the other hand, rules of international law

²⁴ Separate Opinion of Judge Gómez Robledo <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-12-en.pdf>> accessed 29 July 2024.

²⁵ Judges Tomka, Abraham and Aurescu, who disagreed with the majority on the effect of Israel’s unlawful policies and practices on the legality of its continued presence in the oPt (see Part 5 below), were in full agreement with the Court that Israel had violated the right of the Palestinian people to self-determination. See Joint Opinion of Judges Tomka, Abraham and Aurescu (n 6) [2].

²⁶ In his Declaration, President Salam opined that, given the formulation of the questions submitted to it, it was not for the Court to pronounce on the legality *ab initio* of the occupation. Declaration of President Salam <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-01-en.pdf>> accessed 29 July 2024 [35]. That being said, the Court *could* have interpreted the nature and scope of the questions posed to it in such a way as to require an assessment of whether the occupation was ever lawful.

regulating the conduct of an occupying power under IHL (*jus in bello*) and human rights law. The Court noted that the former set of rules determines the legality of the continued presence of an occupying power in occupied territory, while the latter continues to apply to the occupying power regardless of the legality of its presence (AO para 251).

By eleven votes to four, the Court considered that **Israel's continued presence in the oPt is unlawful** (AO para 285(3), Vice-President Sebutinde, Judges Tomka, Abraham and Aurescu voting against). The Court reached that conclusion, firstly, on the basis that the policies and practices of Israel (see Part 4 above) have brought about changes to the oPt that 'manifest an intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian Territory', in violation of the prohibition under international law of the acquisition of territory by force (AO paras 252 and 253). The Court stressed that this prohibition is non-derogable, and that Israel's security concerns cannot override it (AO para 254).

Secondly, the Court emphasised the link between the prohibition of the acquisition of territory by force and the inalienable right to self-determination, observing that the purported extension of Israeli sovereignty to parts of the occupied territory, particularly the West Bank and East Jerusalem, has obstructed the exercise of the right to self-determination of the Palestinian people (AO paras 252, 256, and 260). Bringing these two elements together, the Court found that '[t]he sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the [oPt] 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 [oPt] unlawful' (AO para 261).

Illegality extends to the whole of the oPt (para 262): Significantly, the Court found that the illegality of Israel's presence in the oPt 'relates to the entirety of the Palestinian territory occupied by Israel in 1967'; that is, the West Bank, East Jerusalem, and the Gaza Strip. Thus, even though most of the policies and practices reviewed by the Court relate to the West Bank, including East Jerusalem, the Court underscored the unity and integrity of the Palestinian territory, the entirety of which is encompassed by the Palestinian people's right to self-determination (AO para 262).

In their joint declaration, Judges Nolte and Cleveland emphasised that it would 'undermine the principle of territorial integrity if the occupying Power could use force to fragment the occupied territory' (Joint Declaration of Judges Nolte and Cleveland para 13). On the other hand, Judge Cleveland stressed in her separate opinion that '[n]one of the circumstances that led the Court to conclude that Israel's presence violates the rules regarding the use of force apply to the Gaza Strip', and although the right of the Palestinian people to self-determination applies to the 'entirety' of the oPt, the Court had failed to 'explain how a violation of the right to self-determination – in the absence of a violation of the prohibition of acquiring territory by force – renders an occupying Power's presence unlawful' (Separate Opinion of Judge Cleveland paras 15 and 17). Judges Tomka, Abraham and Aurescu were of the view that the Court should have confined its Opinion and findings to the West Bank, including East Jerusalem (Joint Opinion of Judges Tomka, Abraham and Aurescu, paras 13 and 29).

Judges Tomka, Abraham and Aurescu, who, along with Vice-President Sebutinde, disagreed with the majority's conclusion that Israel's continued presence in the oPt is unlawful, considered that

the prohibition of annexation stems from the law of occupation, the *jus in bello*, which does not regulate the legality of an occupation (Joint Opinion of Judges Tomka, Abraham and Aurescu para 24).²⁷ Accordingly, they could ‘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’ (para 22).²⁸

However, as Judge Tladi emphasised in his Declaration, ‘while the mere fact of violation of certain rules of international law would not always lead to the unlawfulness of the presence itself’, the Court had found that ‘the seriousness and magnitude of Israel’s violations, as well as the nature of the rules breached, are such as to remove any pretences concerning the purpose of Israel’s presence, transforming what may have been lawful presence based on occupation, to unlawful presence because such presence clearly amounts to a manifest violation of fundamental rules of international law prohibiting the acquisition of territory by force and the denial of the right of self-determination’ (Declaration of Judge Tladi para 2).²⁹

Duration of the occupation: The Court was of the view 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 part of their territory into the occupying Power’s own territory’ (AO para 257). It was thus not the passage of time alone that the Court criticised, but rather its effect on the right to self-determination and measures aimed at rendering that presence permanent in breach of the prohibition of acquisition of territory by force. In their individual opinions, the judges expressed diverging views on the relevance of the length of Israel’s occupation for the legality of its continued presence in the oPt. According to Judge Yusuf, the Court should have reached the conclusion that Israel’s continued presence in the oPt is unlawful ‘by dint of its prolonged character in disregard of the law of belligerent occupation’, which has ‘decouple[d] it from its normative framework’ (Separate Opinion of Judge Yusuf paras 1 and 12).³⁰ Meanwhile, Vice-President Sebutinde and Judges Tomka, Abraham and Aurescu found it necessary to stress that mere passage of time cannot render an occupation unlawful (Dissenting Opinion of Vice-President Sebutinde para 88, and Joint Opinion of Judges Tomka, Abraham and Aurescu para 35). Judge Tladi appeared to treat the relevance of the prolonged nature of Israel’s occupation as an indicator that Israel had sought to unlawfully acquire the territory, as opposed to temporarily occupy it, noting that ‘there is nothing

²⁷ Judges Tomka, Abraham and Aurescu’s assertion that the prohibition on annexation derives from the law of occupation is open to challenge, given that the law of occupation does not expressly prohibit annexation but instead provides that an act of annexation is devoid of legal consequence and does not relieve the occupying power of its obligations under the law of occupation. See GC IV art 47; Dinstein (n 11) 50.

²⁸ See also, Declaration of Judge Tomka <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-03-en.pdf>> accessed 29 July 2024 [7].

²⁹ Declaration of Judge Tladi <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-14-en.pdf>> accessed 29 July 2024. See also, Separate Opinion of Judge Yusuf <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-05-en.pdf>> accessed 29 July 2024 [17].

about the enterprise in question that justifies it as a temporary occupation’ (Declaration of Judge Tladi para 3).

Self-defence under the jus ad bellum: The Court did not pronounce itself on whether Israel’s continued presence in the oPt could also be considered unlawful on the basis that it cannot be justified as a legitimate exercise of self-defence in accordance with Article 51 of the UN Charter and customary international law. In her Declaration, Judge Charlesworth stressed that occupation consists of ‘authority backed by armed force – whether actual or threatened force’ and thus ‘the occupation must at all times be based on a ground for the use of force that is accepted under the *jus ad bellum*’ (Declaration of Judge Charlesworth para 15).³¹ Judge Charlesworth further observed that in the absence of consent or authorisation by the UN Security Council, self-defence is the sole justification available to Israel to justify its continued military occupation (para 20). Judge Charlesworth argued that Israel’s policies and practices, including steps to permanently annex parts of the Palestinian territory, ‘illustrate that the maintenance by Israel of its occupation does not qualify as an act of self-defence’ (para 25). Thus, Judge Charlesworth concluded that ‘Israel’s continued effective control of the [oPt] lacks a valid legal basis’ (para 28).

By affirming that Israel’s ‘security concerns’ cannot override the prohibition of the acquisition of territory by force (AO para 254), the Advisory Opinion could be read as stating that Israel’s continued presence in the oPt does not meet the criteria for the lawful exercise of the right to self-defence, or possibly that self-defence, which is an exception to the prohibition on the use of force in Article 2(4) of the UN Charter, is not an exception to the more specific prohibition of acquisition of territory by force. It might be inferred from the Court’s Opinion that, if a violation of the prohibition of acquisition of territory by force is established, it becomes impossible to satisfy the necessity and proportionality criteria of self-defence.

Indeed, in their Joint Declaration, Judges Nolte and Cleveland expressed the view that ‘when the presence of occupying forces becomes a vehicle for achieving annexation, the occupying Power violates the prohibition of the acquisition of territory by force under the jus ad bellum and thereby loses any possible justification for the presence of its forces, including on the basis of the right of self-defence’ (Joint Declaration of Judges Nolte and Cleveland para 8). Similarly, Judge Yusuf argued that Israel’s maintenance of its prolonged occupation of the oPt had failed to satisfy the criteria of necessity and proportionality for self-defence (Separate Opinion of Judge Yusuf paras 13 and 14).

Finally, the Court reiterated that the illegality of Israel’s continued presence in the oPt in no way detracts from Israel’s continued obligations under the law of occupation and human rights law based on its factual control of territory and persons in the Palestinian territory (AO para 264).

³¹ Declaration of Judge Charlesworth <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-10-en.pdf>> accessed 29 July 2024.

6. Legal consequences

6.1 Legal consequences for Israel

Pursuant to the Court's conclusion that Israel's continued presence in the oPt is illegal, the Court found by eleven votes to four that **'Israel has an obligation to bring an end to its presence in the Occupied Palestinian Territory as rapidly as possible'** (AO para 285(4), Vice-President Sebutinde, Judges Tomka, Abraham and Aurescu voting against).

It is logical that the four judges who did not agree with the majority's finding that Israel's continued presence in the oPt is unlawful also disagreed with the legal consequence that Israel must bring that presence to an end. The dissenting judges also questioned the *feasibility* of a duty on Israel to withdraw from the oPt. Vice-President Sebutinde argued that such a duty was simply 'impracticable' given Israel's real security concerns, disagreement over the borders of the two States, and the 'de facto reality on the ground' (Dissenting Opinion of Vice-President Sebutinde para 54). Judges Tomka, Abraham and Aurescu were similarly sceptical that Israel could completely withdraw from the oPt 'without exposing its security to substantial threats' (Joint Opinion of Judges Tomka, Abraham and Aurescu para 36).

The Opinion does not, however, lay down a strict timeframe for the withdrawal. As Judges Nolte and Cleveland underlined, the 'Court's wording recognizes that there are significant practical issues that would make an "immediate" withdrawal and cessation of some aspects of Israel's presence not possible' (Joint Declaration of Judges Nolte and Cleveland para 16; see also Separate Opinion of Judge Iwasawa para 20). Moreover, while the legal obligation on Israel to bring an end to its presence in the oPt as rapidly as possible is not conditioned on any negotiations between Israeli and Palestinian authorities, President Salam noted in his Declaration that negotiations, 'which remain necessary', would 'focus mainly on the modalities of implementation' of Israel's obligation to withdraw (Declaration of President Salam para 58).

Although perhaps implicit in the obligation to end its presence in the oPt, the Court also concluded, by fourteen votes to one, that 'Israel must immediately cease all new settlement activity', 'repeal all legislation and measures creating or maintaining the unlawful situation, including those which discriminate against the Palestinian people in the [oPt], as well as all measures aimed at modifying the demographic composition of any parts of the territory' (AO para 285(5), Vice-President Sebutinde voting against).

By fourteen votes to one, the Court considered that Israel has the obligation to 'provide full reparation for the damage caused by its internationally wrongful acts to all natural or legal persons concerned' (AO para 285(6)). The Court reiterated the principle that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed' (para 269).³²

³² The principle was established in *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 47. Vice-President Sebutinde objected to the application of that principle as '[t]his is clearly a situation where there is enough blame to go round'. Dissenting Opinion of Vice-President Sebutinde (n 4) [61].

The Court observed that reparation includes restitution, compensation and/or satisfaction. With respect to restitution, Israel is under a duty to ‘return the land and other immovable property, as well as all assets seized from any natural or legal person since its occupation started in 1967, and all cultural property and assets taken from Palestinians and Palestinian institutions’ (AO para 270). According to the Court, restitution further ‘requires the evacuation of all settlers from existing settlements and dismantling of the parts of the wall constructed by Israel’ in the oPt, ‘as well as allowing all Palestinians displaced during the occupation to return to their original place of residence’ (AO para 270). In case restitution would be materially impossible, the Court affirmed Israel’s obligation to compensate all natural and legal persons who have suffered any form of material damage as a result of Israel’s wrongful acts under the occupation (AO para 271).

Finally, the Court stressed that Israel remains bound by the duty to perform the obligations which it has violated, including the duty to respect the right of the Palestinian people to self-determination and its obligations under IHL and IHRL (AO para 272).

It is worth noting, as Judge Nolte did in his Separate Opinion, that the Court was not asked to consider the full extent of Israel’s legal responsibilities for all its conduct in the oPt. Thus, ‘Israel’s responsibility for specific conduct or situations would need to be established in other proceedings’ (Separate Opinion of Judge Nolte para 6). In addition, as President Salam emphasised, several of the acts found unlawful by the Court could also entail individual criminal responsibility for crimes against humanity and war crimes. President Salam thus urged States to ‘draw all the legal conclusions from the Court’s findings in this Advisory Opinion to prevent and punish the perpetrators of these acts’ (Declaration of President Salam para 13).

6.2 Legal consequences for other States

By twelve votes to three, the Court found that Israel’s violation of the obligations identified in the Advisory Opinion impose the threefold obligations of non-recognition, non-assistance, and cooperation on all States (AO para 285(7), Vice President Sebutinde, Judges Abraham and Aurescu voting against).

(1) Firstly, all States are under an obligation **not to recognise as legal** the situation arising from the unlawful presence of Israel in the oPt, including any changes in the physical character or demographic composition, institutional structure, or status of the territory occupied by Israel, except as agreed by the parties through negotiations (AO paras 278 and 279).³³ This further requires States to distinguish in their dealings with Israel between the territory of Israel and the oPt (AO para 278). To that effect, States must (inter alia):

- Abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the oPt or a part thereof on matters concerning the oPt or a part thereof;

³³ This suggests that – even while the Court opined that Israel’s obligation to withdraw is not conditional on negotiations – third States would need to take account of an agreement between the parties that changes the physical character or demographic composition, institutional structure, or status of the territory.

- Abstain from entering into economic or trade dealings with Israel concerning the oPt or parts thereof which may entrench its unlawful presence in the territory;
- Abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the oPt; and
- Take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the oPt.³⁴

(2) Secondly, States are under an obligation **not to render aid or assistance** in maintaining the situation created by Israel's illegal presence in the oPt (AO para 279).

(3) Thirdly, 'all States must **co-operate** with the United Nations' to implement whatever modalities the General Assembly and Security Council consider necessary to ensure an end to Israel's illegal presence in the oPt and the full realisation of the right of the Palestinian people to self-determination (AO para 275).

In addition, the Court stressed that '[i]t is for all States, while respecting the Charter of the [UN] and international law, to ensure that any impediment resulting from the illegal presence of Israel in the [oPt] to the exercise of the Palestinian people of its right to self-determination is brought to an end', and States also have the duty to 'ensure compliance by Israel' with its obligations under GC IV (AO para 279).

In setting out these legal consequences, the Court echoed the substance of Article 41 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).³⁵ Based on a straightforward textual construction, Article 41 is triggered by a serious breach of an obligation arising under a peremptory norm of international law. Yet, when discussing third State obligations, the Court highlighted the erga omnes character of the obligations violated by Israel (i.e., obligations owed to all States), rather than their status as peremptory or jus cogens norms (i.e., norms that are so fundamental or important that no derogation is permitted) (AO para 274). In his declaration, President Salam also seemed to infer from the erga omnes nature of the obligations that 'special legal obligations' follow for other States under customary international law, a view shared by Judge Cleveland (Declaration of President Salam para 44 and Separate Opinion of Judge Cleveland para 34). However, as Judge Tladi (correctly) emphasised, it is the peremptory character of the norms breached, not their erga omnes nature, that gives rise to the legal consequences for third States specified in Article 41 of the ARSIWA (Declaration of Judge Tladi para 31; see also Separate Opinion of Judge Gómez Robledo para 22).

³⁴ While Judge Tomka disagreed with the Court's view that Israel's continued presence in the oPt is unlawful, he agreed that all States are under an obligation not to recognise the situation arising from its presence in that territory and to refrain from rendering aid or assistance to Israel in maintaining that situation because 'States should not assist Israel in its aim to annex a major part of the [oPt] and to treat it as its own territory'. Declaration of Judge Tomka [8].

³⁵ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) 2 Yearbook Intl L Com (ARSIWA) art 41.

6.3 Legal consequences for the UN

By twelve votes to three, the Court found that the duty **not to recognise** as legal the situation arising from the unlawful presence of Israel in the oPt and to distinguish in dealings with Israel between the territory of Israel and the oPt also applies to international organisations, including the UN (AO para 285(8), Vice-President Sebutinde, Judges Abraham and Aurescu voting against).

Again, by twelve votes to three, the Court found that the UN, especially the General Assembly and the Security Council, **should consider the precise modalities and what further action is required** to bring to an end as rapidly as possible the unlawful presence of Israel in the oPt (AO para 285(9), Vice-President Sebutinde, Judges Abraham and Aurescu dissenting). According to Judge Tladi, despite the Court's use of the word 'should', this is a reference to a legally binding obligation on the UN to 'consider' what further action is required, particularly if Israel does not comply with the legal consequences identified in the Opinion (Declaration of Judge Tladi para 57).

Judge Tladi further suggested that '[i]n view of the nature and scale of the violations of international law identified by the Court, and the potentially large pool of claimants resulting therefrom, the United Nations might want to consider the establishment of an international mechanism' for reparations of the damage, loss and injury caused by the internationally wrongful acts identified in the Opinion (Declaration of Judge Tladi para 60).

Finally, the Court reiterated the call it had made 20 years ago in its Wall Advisory Opinion, namely 'the urgent necessity for the [UN] as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region' (AO para 282).

Conclusion

The ICJ's Advisory Opinion of 19 July 2024 is highly consequential. The hope expressed by Judge Nolte is that the Court's conclusions will be 'the beginning of a process that seeks to establish and maintain peace through law' (Separate Opinion of Judge Nolte para 4). After 57 years of military occupation of the Palestinian territory, the Court found that Israel's continued presence in the oPt is unlawful because it violates the right of the Palestinian people to self-determination and the prohibition under international law of the acquisition of territory by force. Accordingly, the Court maintained that Israel is under the obligation to withdraw from the oPt as rapidly as possible, to return all property and land taken from Palestinians, and to compensate all natural and legal persons for damage incurred as a result of its illegal policies and practices. Until such time that Israel withdraws from the oPt, the Court emphasised that Israel remains bound by the law of occupation and relevant human rights law in respect of its conduct in the oPt.

The Court also identified significant obligations for third States not to recognise the unlawful situation created by Israel nor render aid or assistance in maintaining that situation, as well as to cooperate with the UN in bringing an end to Israel's unlawful presence in the oPt and realising the right of the Palestinian people to self-determination. The Court stressed that the duty not to recognise the situation created by Israel's unlawful presence in the oPt equally applies to international organisations, including the UN, which should furthermore consider the modalities

and further action required to bring an end to Israel's continued presence in the oPt as quickly as possible.

While Advisory Opinions are not legally binding in themselves, they constitute an authoritative statement of international law. Failure to comply with the Court's conclusions by Israel, or by other States or international organisations, could result in international responsibility for breach of any of the obligations identified by the Court.