

ICJ: LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, ADVISORY OPINION: The Prolonged Occupation and Annexation of Palestine, and Racial Discrimination of Palestinians / Lukáš Mareček

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Abstract: *The International Court of Justice advisory opinion addresses several complex legal questions. The Court examined whether these policies violate international law, particularly erga omnes obligations. Israel's actions were found to violate international law through the annexation of large parts of Palestinian territories. The Court explored the relationship between occupation and annexation, clarifying that while occupation is lawful if temporary and necessary, Israel's extended presence goes beyond this and amounts to annexation. The advisory opinion further addressed claims of racial segregation or apartheid, concluding that Israeli policies toward Palestinians demonstrate systematic discrimination and a policy of separation. This potentially may meet the legal definition of apartheid. The Court emphasized that all states and the UN have a duty not to recognise annexation and other violations for jus cogens. This opinion reaffirms the rights of the Palestinian people to self-determination and criticises the prolonged occupation for undermining those rights.*

Key words: *International Court of Justice; Occupation; Annexation; Self-determination; Apartheid; Racial segregation; Palestine; Israel*

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1. INTRODUCTION

This paper aims to analyse the advisory opinion of the International Court of Justice (hereinafter "**the Court**" or "**ICJ**") regarding the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East

Jerusalem.¹ The core objectives of this commentary are to evaluate the ICJ's findings on the legality of Israel's prolonged occupation, its settlement activities, and the potential annexation of Palestinian territories. Additionally, the commentary explores the broader implications of these actions under international law, including the violations of *erga omnes* obligations and the Palestinian people's right of the to self-determination.

A critical focus of the analysis is whether Israel's actions amount to apartheid as understood under international law, and the corresponding legal consequences for Israel, the United Nations, and other states. The commentary also examines the jurisdictional challenges presented to the ICJ and the broader question of whether this is a bilateral dispute or a matter of global concern. The case contributes to the understanding of international law in relation to prolonged occupations, annexation, self-determination, and human rights violations by racial discrimination, and offers legal clarity on the responsibilities of states and international bodies in addressing such issues.

2. JURISDICTION AND POSED QUESTIONS

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.² One such authorised body is the UN General Assembly.³ It is important to highlight that the Court may decide only on questions of law. In reality, questions often have mixed character. That does not prevent the Court from ruling on their legal aspects, leaving the other unanswered.⁴

Only "compelling reasons"⁵ may lead the Court to refuse to exercise its judicial function. There were several arguments against the Court's jurisdiction. According to the author, the strongest argument among them⁶ was that this question actually relates to a dispute between two states – Israel and Palestine.⁷ It should therefore be a subject of a contentious proceedings.

Neither Israel nor Palestine accepted the jurisdiction of the ICJ under Article 36 of the ICJ Statute, nor under a special agreement. Their mutual agreements name international negotiations as a modality for dispute settlement. Giving advisory opinion was thus viewed as circumvention of consensual basis of contentious jurisdiction of the ICJ, that, in addition, may jeopardise the solution of dispute, as argued by judge Sebutinde – the main opponent to the conclusions of the Court among the judicial plenum.

¹ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, not published in ICJ Reports yet. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf> (accessed on 10.12.2024).

² Art. 65 (1), Statute of the ICJ (1945).

³ Art. 96 (1), UN Charter (1945).

⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, para. 27.

⁵ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 31.

⁶ Other being the opinion would not assist the General Assembly; the opinion may undermine the Israeli-Palestinian negotiation process; an advisory opinion would be detrimental to the work of the Security Council; the Court does not have sufficient information to enable it to give an advisory opinion; and the questions are formulated in a biased manner. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, para. 32.

⁷ Palestine is having a status as a non-member observer state at the UN General Assembly, from 2012 using name "State of Palestine" and replacing the Palestine Liberation Organization. A/RES/67/19. For its position see also A/RES/73/5 and A/RES-10/23. The Slovak Republic, forming majority with other states, recognised Palestine as an independent and sovereign state. The Palestine is understood as a state in this paper.

It is hard to see how a measure of pacific solution could jeopardise a solution, as negotiations can continue even when the Court has laid down the law. It would only clarify the negotiations on legal matters. Notwithstanding the fact that negotiations have been unable to find an ultimate solution for decades, is there actually anything to jeopardise?

As to the principle of consent, Judge Sebutinde referred to Eastern Carelia and Western Sahara.⁸ However, the Eastern Carelia case concerned a bilateral dispute between Finland and Russia (USSR) regarding their mutual borders, not the aspect of the use of force, occupation, or widespread and systematic racial discrimination, which are now understood as *erga omnes* obligations. Thus, it was a different situation, notwithstanding the fact that the concept of *jus cogens* was not recognised in 1923.

As to the Western Sahara, the ICJ issued an advisory opinion, so it is not a case of refusal to exercise its jurisdiction, even though it could also be viewed as a dispute between Morocco and Western Sahara. Relevant to our case the ICJ in 2004 answered questions *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁹ where the ICJ did not answer only questions regarding the applicable international law *in abstracto* but went to the legal consequences for Israel *in concreto* as well.¹⁰

The Court decided that the issue is not just a concern of bilateral relations between Israel and Palestine, but a matter of interest and concern to the United Nations and to the international community as a whole. This is because the question relates to a wider issue of international peace and security and international legal norms in questions are having *erga omnes* character so their violations have legal consequences for the other members of the international community and the UN.¹¹ The fact that two states are particularly involved in a question does not mean that the question is of no matter or interest to international community. A different situation would be, for example, if the advisory opinion would be misused to settle the territorial dispute between the two states.¹²

The General Assembly posed two questions:

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

⁸ Dissenting opinion of Vice-President Sebutinde, para. 43 ff. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf> (accessed on 10.12.2024).

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136.

¹⁰ By vote fourteen to one the ICJ in its advisory opinion ruled, that "*construction of the wall being built by Israel is contrary to international law; Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall... to dismantle forthwith the structure...*". *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 201, operative part.

¹¹ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 33.

¹² Compare e.g. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 117, para. 86.

Israel raised objection about assumptions made in the resolution.¹³ The Court said that it does not feel bound by the assumption of the UN General Assembly about illegality of the Israel's conduct, and that it is up to the Court to determine lawfulness of its policies and practices.¹⁴ It is only regrettable that, aside from the written statement of five pages plus annexes, Israel ignored the proceedings.

The Court clarified that it understands Palestinian territory as a single territorial unit, generally speaking, encompassing the West Bank, East Jerusalem, and the Gaza Strip, divided by the so-called Green Line to the west and by the former British Mandate to the east. It is true that in deciding on the status question of occupied territories of Palestine, would logically follow to first determine, what are actual borders of the Palestine, and this is still not settled. By this, the advisory opinion concludes that a territory is occupied (or annexed) without first ascertaining which territory and on what basis does not belong to Israel.

From one point of view, based on the principle *uti possidetis juris*, all the territory of British mandate might belong to Israel. Borders from 1949-1967 are a result of aggression against Israel. On the other hand, it was planned from the beginning, that State of Palestine would be created as well. Hence, some part of the former British mandate should be part of the Palestine. Using principle *uti possidetis juris* therefore does not lead to any meaningful solution of Israel-Palestine question. It may be used only towards "external actors" – in relation to frontiers with Egypt, Jordan, Syria and Lebanon. What constitutes the actual territory of Palestine, however, is an issue that should be addressed before considering the consequences of Israel's presence on it.¹⁵

In this regard, the Court examined the settlement policy, in particular the transfer of (its own) civilian population to occupied territory,¹⁶ confiscation or requisitioning of large areas of land,¹⁷ exploitation of natural resources,¹⁸ extension of Israeli law to occupied Palestinian territories,¹⁹ forced displacement of Palestinian population,²⁰ and violence against Palestinians.²¹

¹³ Written statement of the State of Israel, 24 July 2023.

¹⁴ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 49, 74.

¹⁵ Conf. Dissenting opinion of Vice-President Sebutinde, paras. 67-82. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf> (accessed on 10.12.2024). Or at least to pronounce, that the Palestine is a state under international law, even if its precise borders are not settled yet, as this is also still a disputed question by many states. See Separate opinion of Judge Gómez Robledo, para. 4 ff. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-12-encs.pdf> (accessed on 10.12.2024).

¹⁶ "...transfer by Israel of settlers to the West Bank and East Jerusalem, as well as Israel's maintenance of their presence, is contrary to the sixth paragraph of Article 49 of the Fourth Geneva Convention." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 115-119.

¹⁷ "...land policies are not in conformity with Articles 46, 52 and 55 of the Hague Regulations." *Ibid.*, paras. 120-123.

¹⁸ "...exploitation of natural resources in the Occupied Palestinian Territory is inconsistent with its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources" *Ibid.*, paras. 124-133.

¹⁹ "...Israel has exercised its regulatory authority as an occupying Power in a manner that is inconsistent with the rule reflected in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention." *Ibid.*, paras. 134-141.

²⁰ "...Israel's policies and practices are contrary to the prohibition of forcible transfer of the protected population under the first paragraph of Article 49 of the Fourth Geneva Convention." *Ibid.*, paras. 142-147.

²¹ "...Israel's systematic failure to prevent or to punish attacks by settlers against the life or bodily integrity of Palestinians, as well as Israel's excessive use of force against Palestinians, is inconsistent with the obligations..." *Ibid.*, paras. 148-154.

In all these points the Court found that there was enough evidence to establish these facts and that they constituted violation of international law. In summary the Court found that Israeli settlements in the West Bank and East Jerusalem, and the *régime* associated with them, had been established and were being maintained in violation of international law.²² This itself is not a new observation, as this was already stated by the Court in previous advisory opinion,²³ and the Court observed "with grave concern"²⁴ that the violations were still ongoing and even expanding. We will not go into further details regarding these in this commentary, rather we will focus on aspects that we find new.

3. OCCUPATION FOR ANNEXATION: NEW SPECIES OR INAPPROPRIATE MIXING?

Occupation is generally considered a *de facto* situation of control over territory, which is regulated by international humanitarian law (*jus in bello*) and not by *jus ad bellum*, which deals with matters of the use of force against another state. Due to this distinction, it was generally understood, that for legal character of occupation is not affected by whether *jus ad bellum* was violated or not. Occupation as such is understood as a temporary situation reflected by the law and distinguished from unlawful annexation contrary to *jus ad bellum*. The advisory opinion, however, brings a new idea according to which the occupation and *jus ad bellum* are not completely independent categories living in their own worlds.

In its previous advisory opinion, the Court set out the circumstances under which a state of occupation is established: "*Under customary international law as reflected... in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907..., territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.*"²⁵

It was also established that the West Bank and Eastern Jerusalem were occupied. As the Court was dealing with the question of the construction of the wall, it did not deal with the issue of Gaza strip. In current advisory opinion it said, that despite the fact that Israeli military forces withdrew from Gaza in 2005 the Israel still maintains control over Gaza, so this territory is also under occupation.

From temporal side, the Court did not take into account the response to the Hamas terrorist attack from September 2023.²⁶ So, Gaza was understood as occupied even without physical military presence of Israel. Physical military presence is only one of the aspects that may establish effective control. Israel was maintaining effective control even without such presence, "*as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable*

²² *Ibid.*, paras. 155-156.

²³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, pp. 183-184, para. 120.

²⁴ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 156.

²⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 229, para. 172.

²⁶ The court took account on events from 1967 to 30 December 2022, when the question was posed by the UN General Assembly. For more detailed analysis of situation of Gaza see Separate opinion of Judge Cleveland, paras. 7-27. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-13-en.pdf> (accessed on 10.12.2024).

time.²⁷ Israel was controlling borders, movement of persons and goods, import and export taxes and so on, even after military withdrawal in 2005. And as an occupying power, Israel was under obligation to administer the territory for the benefit of the local population.

Occupation is understood as *de facto* consequence of a necessary military action, either by the aggressor or by the defending state, that *per definitione* is temporary. Such situations in the interstate practice are not rare. What is not typical, however, is that Israel's occupation lasts now almost sixty years. Military operations were generally closed, however, the Palestine authorities did not regain the control over its territory. This, therefore, remains qualified as occupied and under the responsibility of Israel.²⁸

One of the obligations of the occupying power is to refrain from exercising acts of sovereignty. Occupation is understood as a necessary *de facto* situation, which has to be regulated, but it cannot lead to the acquisition of a title for gaining sovereignty over such territory, no matter how long the occupation lasts.

*"In order to be permissible, therefore, such exercise of effective control must at all times be consistent with 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, as well as with the right to self-determination. Therefore, the fact that an occupation is prolonged may have a bearing on the justification under international law of the occupying Power's continued presence in the occupied territory."*²⁹

The term "annexation," distinct to occupation, the Court defined as *"the forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power. Annexation, then, presupposes the intent of the occupying Power to exercise permanent control over the occupied territory."* Annexation can be *de jure* when the occupying power formally declares sovereignty over and integrates the territory into its own. *De facto* annexation is a situation lacking a formal declaration, but the occupying state consolidates its power over the territory in a manner and extent that is not necessary for maintaining the responsibility of the occupying power to take care of the local population or its own security needs. Occupying power should preserve *status quo ante* in the occupied territory to the extent possible. On the contrary, occupying power should not take measures with the intent to exercise permanent control. Both forms of annexation are impermissible under international law.³⁰

The Court found that the actions of Israel amounted to the annexation of "large parts" of occupied Palestinian territories, but it did not declare what form of annexation it was. From the evidence the Court cites, it may be concluded that it is generally *de facto*

²⁷ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 91 ff. Compare also ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34-T, Trial Chamber, Judgement, 31 March 2003, para. 217.

²⁸ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 107.

²⁹ *Ibid.*, para. 109. *"...an occupation must be temporary. Each framework [jus ad bellum and IHL]... attaches different value to the question of duration. International humanitarian law does not set an end date on belligerent occupation. It is rather concerned with ensuring that the protections it affords, which aim to safeguard the rights and well-being of the local population, remain applicable until the Occupying Power stops exercising effective control over the occupied territory. On the other hand, the law on the use of force, also referred to as jus ad bellum, requires an occupation to end as soon as the circumstances justifying its establishment cease to exist... the infringement of the principle of temporariness makes an occupation illegal under both bodies of law."* (Todeschini, 2022, pp. 31-32).

³⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 158-161, 175.

annexation, and at least regarding East Jerusalem, even *de jure* annexation, as Jerusalem as a whole was proclaimed the capital of the state of Israel.³¹

Israel³² referred to historical titles of sovereignty over the territory. The Court noted that this title was not substantiated by evidence, and more importantly, the acquisition of territory by force is not a means for resolving claims of sovereignty.³³

However, here we come to the question of against whom Article 2(4) was violated. Should this be interpreted as implicit statement of the Court that Palestine is already an independent state? It is understood that this article can be violated only *vis-à-vis* another state. Or is the prohibition of force actually more extensive and does it also protect entities other than states, such as nations pursuing self-determination?³⁴ The status of Palestine under international law is another question that should be answered before analysing whether *jus ad bellum* was violated by Israel.

It has already been affirmed that Palestinian people have the right to self-determination,³⁵ and now even that it is a peremptory norm.³⁶ Self-determination is thus a principle having a peremptory character with *erga omnes* effects,³⁷ which consists namely, but not only, of the right to freely determine its political status and to pursue its economic, social and cultural development.³⁸ This right was found to be violated by the policies and practices of Israel.³⁹

Moreover, Israel violated the right to preserve the territorial unity and integrity,⁴⁰ the integrity of the people⁴¹ and sovereignty over natural resources.⁴² This severely impeded the exercise by the Palestinian people of its right to self-determination, which is

³¹ Compare e.g., "*Jerusalem is not, in any part, 'occupied territory'; it is the sovereign capital of the State of Israel*" Israel's report to the UN SC, S/21919.

³² "*Israel's deep historical ties and own valid claims to the territory in question...*" Written statement of the State of Israel, 24 July 2023, p. 3.

³³ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 178.

³⁴ "...*threat or use of force against the territorial integrity or political independence of any state...*" Art. 2 (4) UN Charter (1945). See also Milanovic (2024).

³⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 183, para. 118.

³⁶ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 233.

³⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 199, para. 155; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), p. 139, para. 180; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29.

³⁸ Comp. "*By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*" Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV).

³⁹ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 241.

⁴⁰ The right to territorial integrity is recognized under customary international law as a corollary of the right to self-determination. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), p. 134, para. 160.

⁴¹ People is protected against acts aimed at dispersing the population and undermining its integrity as a people. Comp. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 184, para. 122.

⁴² "... *element of the right to self-determination is the right to exercise permanent sovereignty over natural resources, which is a principle of customary international law.*" Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 251, para. 244.

only aggravating by the continuing maintenance of such a situation.⁴³ The Court thus considers that Israel's policies and practices obstruct the rights of the Palestinian people.

In summary, the Court distinguished between rules and principles of *jus ad bellum*, by which the presence of foreign troops on a territory should be assessed and found to be violated, and norms of *jus in bello*, which apply and regulate the situation regardless of the legality or illegality of the occupying power's presence on a territory.⁴⁴

The fact that the occupation is prolonged itself does not change its legal character in the sense of *ius in bello*. Author believes this is a misunderstanding of the advisory opinion.⁴⁵ However, the prolonged presence of Israel in Palestinian territories is relevant in determining legality in light of *jus ad bellum* and self-determination.

*"The fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law... the fact that an occupation is prolonged may have a bearing on the justification under international law of the occupying Power's continued presence in the occupied territory."*⁴⁶

The rules of *ius ad bellum* prohibit the acquisition of territory by force, and the right of self-determination prohibits taking forcible actions which deprive peoples of this right. Self-determination was defined as a "fundamental and inalienable right"⁴⁷ of Palestinian people, and occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination while integrating parts of their territory into the occupying Power's own territory.

The Oslo Accords from 1993, which allows the presence of Israeli forces in Palestine for security needs, is not changing the evaluation of the situation by the Court, as neither they are allowing annexation of these territories.⁴⁸

In other words, as international law does not regulate the time limit of occupation, it cannot be ruled that occupation is illegal just because it lasts almost sixty years. This indeed can be justified because of security needs, and we agree with Judge Sebutine, that this should be voiced more in the advisory opinion, not just to highlight the need to end it "as rapidly as possible."⁴⁹

To say that there is a need to rapidly end the occupation is true, but it should be said also, that "as possible" part of the sentence is related to Israel's legitimate security concerns and need for effective security guarantees under right to self-defence.

However, this prolonged occupation can be understood as one of the factors, together with others, like the policies and practices of the state on occupied territory, that leads to the conclusion, that the situation is not just occupation, but it amounts (also) to annexation. And occupation with intention of annexation, indeed, has to stop "as rapidly as possible."⁵⁰ If the advisory opinion is to be read, that the occupation in the part, that is

⁴³ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 237 ff.

⁴⁴ *Ibid.*, para. 264.

⁴⁵ Comp. Dissenting opinion of Vice-President Sebutinde, para. 88. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf> (accessed on 10.12.2024).

⁴⁶ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 109.

⁴⁷ *Ibid.*, para. 257.

⁴⁸ *Ibid.*, para. 263.

⁴⁹ Dissenting opinion of Vice-President Sebutinde, para 54 ff. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf> (accessed on 10.12.2024).

⁵⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 267.

justified by military necessity and security reasons following from self-defence is illegal as well, then it is possible to agree with dissenting judges.⁵¹

It seems, that the term occupation if used in different ways, depending on intention that lies behind it. If the Court is using this term, it should be more careful, otherwise it might raise more questions than answers by delivering its opinions. Without specifying that is has in mind specific type of occupation (i.e., occupation for annexation) it might lead to conclusion that any military presence (and so on) whatsoever is prohibited. The operative part, indeed, might sound like this.

Plausibly, the Court interchanged the wrongful act (annexation) with the underlying conduct (occupation, continued presence, which is the factual side of the situation). And this occupation, in the view of the court, no longer serves the purposes of the belligerent occupation only, but due to its prolonged character (in connection to other actions) changed its character. And it is hard to imagine, what security needs justify almost sixty years of occupation.⁵² Milanovic thinks that the Court used the abuse of rights doctrine, which is well known in the law.⁵³

When speaking of Israel's security needs, it is a term that is often used, but the actual legal basis for the ongoing occupation must be interpreted through the lens of *jus ad bellum*. Thus, the security needs must be translated into necessary and proportional measures taken within the context of self-defence. And this requires that the security needs for military presence (or other control, thus for occupation as a matter of fact) are raised because of an armed attack that occurred and for necessary period to stabilise the situation after it. Any presence beyond that is unlawful. Security itself, whatsoever real, is broader concept than self-defence and not a recognised legal title for military actions against territory of another. Many of these security threats are raised because of the resistance against the occupation. This way of reasoning thus leads us in the circle.⁵⁴

⁵¹ Namely Joint opinion of Judges Tomka, Abraham and Aurescu, para. 18 ff. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-04-en.pdf> (accessed on 10.12.2024). Also Declaration of Judge Tomka, para. 9. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-03-en.pdf> (accessed on 10.12.2024).

⁵² See e.g., "Israel's policies and practices, as they have presented themselves, are not justified by its security concerns... Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people." Declaration of Judge Xue, para 9. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-06-en.pdf> (accessed on 10.12.2024); "...if occupation were to be allowed to continue indefinitely, thus gradually transforming itself into conquest or colonization, the legal tenets underlying the régime governing belligerent occupation, such as the protection of the interest of the occupied people and the return of sovereignty, would be rendered meaningless... indefinite alien subjugation and domination which is contrary to all rules and tenets of the law governing belligerent occupation. This is reflected in the realities on the ground... Any military occupation of foreign territory that changes the characteristics of belligerent occupation under international humanitarian law and decouples it from its normative framework must be considered unlawful." Separate opinion of Judge Yusuf, paras. 8, 10, 12. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-05-en.pdf> (accessed on 10.12.2024). "The prolonged nature of an occupation has no legal consequences as such under IHL. Rather, the prolonged nature of the occupation may be relevant for assessing the occupying power's compliance with other rules of international law" (Milanovic, 2024).

⁵³ *Ibid.*

⁵⁴ "Israel has legitimate security concerns. Nevertheless, the presence of occupying forces can only be justified by a credible link to a defensive and temporary purpose; in our view, therefore, any possible justification is necessarily lost if such a presence is abused for the purpose of annexation and suppression of the right to self-determination." Joint declaration of Judges Nolte and Cleveland, para. 8. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-09-en.pdf> (accessed on 10.12.2024). Also Declaration of Judge Charlesworth, para. 11 ff. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-10-en.pdf> (accessed on 10.12.2024).

As judge Iwasawa said “*Since Israel’s continued presence in the Occupied Palestinian Territory is an internationally wrongful act of a continuing character, Israel is under an obligation to cease that act... Israel has an obligation to bring to an end its continued presence in the Occupied Palestinian Territory “as rapidly as possible” ... Given its legitimate security concerns, Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally, particularly from the Gaza Strip in view of the ongoing hostilities since 7 October 2023.*”⁵⁵ Judges Nolte and Cleveland noted that “*the Court did not adopt the formulation urged by some participants that Israel must end the occupation “immediately, totally and unconditionally”*⁵⁶ but adopted formulation „as rapidly as possible” which recognises security needs of Israel, if they met the conditions and threshold of proportional self-defence.”⁵⁷

4. APARTHEID AGAINST PALESTINIANS?

In occupied territory, international humanitarian law is applied with complementary application of international human rights law.⁵⁸ Various international human rights legal instruments are thus applicable as well. Israel was found by the Court to be responsible for discriminatory legislation and measures against Palestinians based on “*systemic discrimination based on, inter alia, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD.*”⁵⁹

To constitute discrimination, the Court had to find:

- 1) Existence of different treatment,
- 2) That was not justified – which means that different treatment is reasonable and objective and serves a legitimate public aim.⁶⁰

The Court went as far as to conclude that this situation amounted to “*racial segregation and apartheid*” under art. 3 of CERD, without explicitly stating whether if it was “*mere*” segregation or apartheid. The Court used the “*neutral*” term “*separation*” answering the question of what form the separation takes.⁶¹ Some of the judges in their declarations or separate opinions were even more explicit in this sense.⁶²

⁵⁵ Separate opinion of Judge Iwasawa, paras. 19-20. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-07-enc.pdf> (accessed on 10.12.2024).

⁵⁶ Joint declaration of Judges Nolte and Cleveland, para. 16. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-09-en.pdf> (accessed on 10.12.2024).

⁵⁷ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, pp. 223-224, para. 148.

⁵⁸ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 98.

⁵⁹ *Ibid.*, para. 223.

⁶⁰ *Ibid.*, para. 191.

⁶¹ Separate opinion of Judge Iwasawa, para. 13. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-07-enc.pdf> (accessed on 10.12.2024).

⁶² Declaration of President Salam, para. 29. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-01-en.pdf> (accessed on 10.12.2024); Declaration of Judge Tladi, para 5. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-14-en.pdf> (accessed on 10.12.2024); Separate opinion of Judge Nolte, para. 15. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-08-en.pdf> (accessed on 10.12.2024). Or at least calling for more explicit approach, to define if it is segregation or apartheid, and viewed it missed opportunity to interpret the term, see Declaration of Judge Brant. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-11-en.pdf> (accessed on 10.12.2024). “As

The separation of Palestinians was both physical as well as legal:

- Physical separation, e.g.,: *"...Israel's settlement policy furthers the fragmentation of the West Bank and East Jerusalem, and the encirclement of Palestinian communities into enclaves. As a result of discriminatory policies and practices such as the imposition of a residence permit system and the use of distinct road networks, which the Court has discussed above, Palestinian communities remain physically isolated from each other and separated from the communities of settlers."*⁶³
- Legal separation, e.g.,: *"...as a result of the partial extension of Israeli law to the West Bank and East Jerusalem, settlers and Palestinians are subject to distinct legal systems in the Occupied Palestinian Territory... To the extent that Israeli law applies to Palestinians, it imposes on them restrictions, such as the requirement for a permit to reside in East Jerusalem, from which settlers are exempt. In addition, Israel's legislation and measures that have been applicable for decades treat Palestinians differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem..."*⁶⁴

Israel is not a party to the International Convention on the Suppression and Punishment of the Crime of Apartheid from 1973 (the Apartheid Convention), and violation of this convention were not analysed by the Court. Nevertheless, we will try to find out if, based on the Court advisory opinion, it would be possible to assume, that not only racial segregation but even apartheid was committed against Palestinians as defined by the Apartheid Convention. The definition in this convention can be understood to be principally the same as corresponding international custom.⁶⁵

Apartheid is widely recognised as customary norm having peremptory (cogent) character. ICJ said, that apartheid measures are, e.g., those that *"establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory."*⁶⁶

The issue of the apartheid definition in the Rome Statute of the International Criminal Court (1998) can be set aside for this purpose, as this definition is set for purposes of individual criminal responsibility. This can differ from the definition for the purposes of the state's obligations and responsibilities. The definition under the Rome Statute differs is stricter for its purposes. Apartheid Convention (1973) requires that the acts were committed for the purpose domination of one racial group – so it is wrong even if the domination was not accomplished yet – whereas the Rome Statute (1998) requires, that the act was already part of the context of institutionalised regime of systematic oppression and domination.⁶⁷ The fact that states later negotiated a different definition for a particular purpose does not imply, that they intended to change the definition, which

always, there was a price for obtaining that consensus: ambiguities and silences in the Court's analysis on some important points (for example, on whether Israel's practices in the OPT amount to apartheid, or whether Palestine has already achieved statehood)." (Milanovic, 2024).

⁶³ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 227.

⁶⁴ *Ibid.*, para. 228.

⁶⁵ See e.g. Jackson (2022, pp. 831-855).

⁶⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 57, para. 130.

⁶⁷ For more on apartheid as a crime in the Israel-Palestine context see e.g. Kai (2024, pp. 485-546).

was negotiated before for another purpose. The content of custom regulating state responsibility is thus intact with the custom regulating criminal responsibility of an individual.

In comparison to the CERD, or the Rome Statute, the Apartheid Convention provides the most detailed definition of apartheid in international law, and that is one of the reasons why we are focusing on this definition.

The Apartheid Convention in introductory part of art. 2 enumerates acts which might be committed with purpose to establish and maintain domination by one racial group of persons over any other racial group of persons and systematically oppress them.

One may say that Palestinian people are not being “other racial group”, as both Israelis and Palestinians are Semites. However, according to the CERD, the term race is actually an umbrella term that encompasses “race, colour, descent, or national or ethnic origin.”⁶⁸ The Apartheid Convention explicitly references the CERD in the preamble, so this definition should have relevance for the interpretation of terms in the Apartheid Convention, that were not defined differently. Under this definition, the Palestinians would be understood as “other racial group” compared to Israelis. The distinctiveness of Palestinians as a group compared to Israelis was already confirmed by the ICJ in another case.⁶⁹

Apartheid Convention names acts that may constitute apartheid. The Court was able to find, that Israel was discriminatory through:

- a) residence permit policy⁷⁰ - Palestinians, for example can reside in Eastern Jerusalem only with valid permission, which is not required for Jews (even non-Israeli Jews), and the conditions for this permission are relatively strict. This can be seen as suppressing the right to freedom of movement and residence, which is defined as one of acts of apartheid,⁷¹ potentially seen as a measure, designed to divide the population along racial lines.⁷²
- b) restriction on movement⁷³ – almost the entire Area C is accessible to all settlers and holders of an entry permit to Israel, including non-Israeli Jews, Palestinians in the Occupied Palestinian Territory require a special permit to access them. There is extensive road network that connects the Israeli settlements with one another and with the territory of Israel. Although they often passes near Palestinian villages, access by Palestinians to much of it is impeded, restricted or entirely prohibited. This can be seen as well as suppressing the right to freedom of movement and residence, which is defined as one of acts of apartheid,⁷⁴ potentially seen as a measure, designed to divide the population along racial lines.⁷⁵

⁶⁸ Art. 1 (1), International Convention on the Elimination of All Forms of Racial Discrimination (1965).

⁶⁹ “...*Palestinians appear to constitute a distinct national, ethnical, racial or religious group...*” Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, para. 45.

⁷⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 192 ff.

⁷¹ Art. 2 (c), Apartheid Convention (1973).

⁷² Art. 2 (d), Apartheid Convention (1973).

⁷³ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 198 ff.

⁷⁴ Art. 2 (c), Apartheid Convention (1973).

⁷⁵ Art. 2 (d), Apartheid Convention (1973).

- c) demolition of property⁷⁶ – According to the United Nations Office for the Coordination of Humanitarian Affairs, which has been compiling data on the practice of property demolition in the West Bank and East Jerusalem since 2009, almost 11,000 Palestinian structures have been demolished since then. Israel's practice of house demolitions takes two main forms: demolition of property as a punitive sanction for a criminal offence; and demolition of property for lack of a building permit.
- a. The measure of punitive demolition appears never to have been used against properties connected to Israeli civilians having committed similar offences. Notwithstanding the fact, that this criminal sanction affects also other persons living in the household, that are not responsible for criminal offence.
 - b. As to the demolitions due to lack of building permit, according to the 2013 report of the Independent International Fact-Finding Mission, in the 20 years prior to the report, 94% of Palestinian permit applications had been denied. In July 2023, the more than 90% of Palestinian requests for permits were rejected, while approximately 60-70% of Israeli requests were discussed and approved. This reality forced Palestinian to build without building permission. Five times more demolition orders were issued for Palestinian structures than Israeli ones.
 - c. This policy may potentially amount to fulfilment of several acts of apartheid such as „creation of separate reserves and ghettos,“ if the buildings were demolished in areas where the Palestinians were „unwelcomed.“ Then it may fulfil act of measures calculated to prevent a racial group or groups from participating in the political, social, economic, and cultural life of the country by social marginalisation tactic, as housing is foundational to economic stability and social integration. Or it may full fill the act of „denial to a member or members of a racial group or groups of the right to life and liberty of person.“ By rendering people homeless, this act places them in a precarious state, denying them the fundamental right to shelter, which is linked to the right to life and security. Finally, it is possible to think about “deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part” as an act of apartheid. Discriminatory housing destruction could fall under this provision if it is done with the intent to weaken or harm the affected racial group, for example, by pushing them into poverty, insecurity, or unsafe living conditions.⁷⁷

Judge Charlesworth in its declaration elaborated an interesting aspect of multiple and intersectional discrimination, and how the of Israel's measures have special effect on women and on children, which was not addressed by the Court, which focused on the group as a whole, without noting that these are affected even more.⁷⁸

⁷⁶ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 207 ff.

⁷⁷ Art. 2 (a), (c), (d), Apartheid Convention (1973).

⁷⁸ Declaration of Judge Charlesworth, paras. 2-10. Available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-10-en.pdf> (accessed on 10.12.2024).

D'Evereux recently published an article in which she is advocating against qualification of the Israel practices as an apartheid (D'Evereux, 2024). However, she is not addressing the fact, that the Israel has different treatment on persons not only on the own territory of Israel, but also on the territory of Palestine that compasses Gaza, West Bank as well as Eastern Jerusalem. As an instance she wrote that state has full right to decide who will be granted a permission to reside, from what follows factual possibility to enter the territory. However, this policy of Israel relates also to the Eastern Jerusalem, which is not part of Israel, but occupied territory under its control and Israel, as an occupying power, has to administer it to the benefit of local population. From that follows, on a non-discriminatory matter, especially towards the local population. The reality is, actually, contrary, and the local population – Palestinians – are actually discriminated on their own land, which is controlled by another state.

5. CONCLUSION

The Court firstly rejected the objection, that the question at hand relates only to a dispute that is bilateral between Israel and Palestine, and, thus, can be adjudicated in contentious proceedings rather than in an advisory. According to the Court, the issues involved have broader international implications related to *erga omnes* obligations, namely peremptory norms and principles of *jus ad bellum*, self-determination, and the prohibition of racial segregation and apartheid.

In its advisory opinion, the Court concluded that although occupation is not prohibited *in abstracto*, in the context of Palestine, it evolved into annexation, which violates *jus ad bellum* principles. Occupation, as a factual situation, must be evaluated through the prism of *jus in bello* – which mainly regulates how the occupying power should behave, disregarding the legal basis for occupation – and through the prism of *jus ad bellum*, which allows occupation within the limits of self-defence. Israel's prolonged presence is beyond what is justified under international law. The violation of cogent principles of *jus ad bellum* is a matter of whole international community.

Further, it reaffirmed the Palestinian people's right to self-determination, and said that this fundamental right has peremptory (cogent) character. This was severely undermined by Israel's policies.

Regarding the apartheid allegations, the Court did not go as far as to explicitly say whether Israel's conduct amounts to apartheid. It just said that separation violated CERD, thus either constituted racial segregation or apartheid. Both of them severe violations of international human rights law. In this commentary it was argued that the discussion on apartheid against Palestinians is far from being off the table.

As Israel's acts constituted violation of international law, international responsibility arises, the content of which lies namely in continuing duty of performance and accessory obligations to cease the violation (*cessation*), and offering appropriate assurances and guarantees of non-repetition, if circumstances so require (*non-repetition*). If injury was caused, then also provide full reparation. Reparation may have form of restitution, compensation and satisfaction, and these forms can be combined as suitable (e.g., Mareček and Golovko, 2022, pp. 133-134).⁷⁹

⁷⁹ „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.“ Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.

As was confirmed also in previous advisory opinion,⁸⁰ the injury may relate not only to the State of Palestine or Palestinian people as such, but to all individuals (natural and juridical persons) that were injured by acts of Israel.

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⁸⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 198, para. 152; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 269.

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