

## INTERNATIONAL DECISIONS

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*Annexation—Israel—jus ad bellum—law of occupation—Palestine—self-determination of peoples*

LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM. Advisory Opinion. At [www.icj-cij.org/case/186](http://www.icj-cij.org/case/186).

International Court of Justice, July 19, 2024.

In the advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Opinion) rendered on July 19, 2024, the International Court of Justice (ICJ), almost unanimously, determined that certain policies and practices undertaken by Israel in the Gaza Strip, West Bank, and East Jerusalem, the Occupied Palestinian Territory (OPT) and occupation thereof, are unlawful, and that they entail consequences for Israel, third states, and the United Nations (UN).

The Opinion focuses on several international legal issues, particularly relating to international humanitarian law (IHL), *jus ad bellum* (JAB), and the principle of self-determination of peoples. This note explores the main findings, focusing particularly on certain points pertaining to the sources of illegality of the occupation that deserve more analytical clarity.

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The Opinion answers the request issued by the UN General Assembly (UNGA) with Resolution 77/247 adopted on December 30, 2022, wherein the Court was asked:

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 [OPT] 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?

How do the policies and practices of Israel referred [above] affect the legal status of the occupation, and what are the legal consequences that arise for all States and the [UN] from this status? (Para. 1.)

At the beginning of the Opinion, the ICJ disposes of questions relating to its jurisdiction, determining that the questions presented are legal in kind (para. 28) and are sufficiently clear to allow the Court to render its opinion (para. 29). The Court considers that there is no ground to exercise its discretion not to render an advisory opinion for several reasons,

including that, although the questions relate to the relationship between Israel and Palestine, the longstanding involvement of the UN in the Israeli-Palestinian conflict makes the Palestinian question a matter of particular interest for the UNGA, thus dispelling the risk that advisory proceedings may circumvent the principle of consent to judicial settlement (para. 35). However, recognizing that the questions were posed by the UNGA in a biased way that presupposes the illegality of Israeli practices and policies, the ICJ declares that it will proceed to ascertain the legality of the relevant practices and policies for itself (para. 29). Judge Sebutinde opposed the majority decision to render the Opinion, arguing that the Court should have declined to exercise its jurisdiction, principally because the Israeli occupation of the OPT should be solved in the framework of bilateral negotiations, considering relevant UN Security Council (UNSC) resolutions and the Oslo Accords<sup>1</sup> (diss. op., Sebutinde, J., paras. 40–48, 90–91). This view conflicts with the fact that the Oslo Accords are not *lex specialis* as Judge Sebutinde suggests (*id.*, para. 91), but rather, under Article 47 of the 1949 Fourth Geneva Convention (GCIV), agreements between the occupying power and the local population cannot derogate IHL. Although negotiations may be the most appropriate way to solve the Israeli-Palestinian conflict, an ICJ advisory opinion that clarifies some legal aspects in the interest of the UNGA would not disrupt negotiations: rather, the Opinion could be the legal bedrock of successful negotiations, and could stimulate the resumption of a (so-far) ineffective peace process by delineating the legal consequences of a lack of solution to the conflict and the occupation.

After a concise recounting of the relevant background and context (paras. 51–71), the ICJ delineates the boundaries of the questions posed by the UNGA: policies and practices concerning the exercise of the principle of self-determination of peoples; the prolonged character of the occupation; and discriminatory measures (para. 74). The temporal scope of the Opinion spans from 1967 to December 30, 2022, thus excluding recent events triggered by the Hamas attack on October 7, 2023 (para. 81).

Regarding the applicable legal framework, after reiterating the findings of the 2004 *Wall* Opinion<sup>2</sup> that the West Bank is occupied (paras. 86–87), the Court adds that Israel still bears responsibility under the law of occupation in the Gaza Strip as well, notwithstanding its 2005 redeployment of troops outside the Strip (paras. 88–94). The Court emphasizes that the law of occupation thus applies to the entire OPT (para. 96), along with the international human rights law conventions binding upon Israel (paras. 97–101). As mentioned, the so-called Oslo Accords are applicable as long as they do not reduce the protection offered by the law of occupation (para. 102). Other rules of international law such as the prohibition of acquisition of territory by threat or use of force and the right of peoples to self-determination are also applicable (para. 95).

The Court moves on to offer a granular analysis of Israel's settlement policy under international law. The main points can be summarized as follows. First, the Court views the transfer of Israeli population into the OPT as a violation of Article 49 of the GCIV, both in relation to settlements created in line with Israeli law and so-called "outposts" created in violation of Israeli law (paras. 115–19). Second, the Court concludes that the confiscation and requisition

<sup>1</sup> The main agreements in the Oslo Accords are: Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O. (Sept. 13, 1993), 32 ILM 1525 (1993); Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O. (Sept. 28, 1995), 36 ILM 551 (1997).

<sup>2</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136 (July 9).

of land to build settlements and roads are violations of the law of occupation (paras. 120–23). Third, the associated exploitation of natural resources in the interests of the settlers and the occupying power violates the rules of the law of occupation pertaining to the protection of public property and the principle of permanent sovereignty over natural resources (paras. 124–33). Fourth, in the ICJ's view, the extension of Israeli law to the OPT is unlawful because it violates the duty of the occupying power to maintain, as far as possible, the law in force in the occupied territory (paras. 134–41). Fifth, the Court affirms that the forced displacement of the Palestinian population as a direct consequence of settlement policies violates Article 49 of the GCIV. Finally, the Court argues that violence against Palestinians in the framework of settlement policy—both by settlers themselves and by security forces who protect them—violates international law rules on the right to life (paras. 148–54).

After having recalled that the occupation is a temporary situation that does not confer any legal title over territory (para. 159) and that there is no practical difference in international law between *de facto* annexation and *de jure* annexation as a matter of their legal consequences (para. 160), the ICJ concludes that, taken together, Israeli policies such as the settlements and their integration into Israeli territory, the displacement of Palestinians, the extension of Israeli law to East Jerusalem and to the settlements, amount to unlawful annexation because they demonstrate the intent to acquire the occupied territory permanently (paras. 162–73). In support, the Court recalls the prohibition of the acquisition of territory by force embodied in numerous resolutions of the UNSC and the UNGA about the OPT (paras. 176–77). The Court concludes that it is not called to assess any historical claim of Jewish people over the Palestinian territory, an issue that could not be solved through armed force anyway (para. 178).

The Court considers that Israeli policies and practices pertaining to resident permits, measures restricting the movement of Palestinians, and demolition of property, unlawfully discriminate between Palestinians and Israelis (paras. 192–222). The Court stresses that the strict physical and juridical separation between Palestinians and Israelis in the OPT (paras. 227–28) violates Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, which bans racial segregation and apartheid (para. 229).

The Court finds that Israeli settlements and annexation policies violate four aspects of the right to self-determination: (1) territorial integrity, because while Israel has a duty not to impede Palestinian self-determination, also in the form of an independent and sovereign state (para. 237), Israeli settlements and annexation fragment the territorial integrity of the Palestinian self-determination unit (para. 238); (2) protection against dispersion of population and demographic alteration, because settlements and annexation policies contribute to the dispersion of the Palestinian people and the alteration of the demographic composition of the OPT (para. 239); (3) permanent sovereignty over natural resources, because Israel has been exploiting the OPT's natural resources for its own benefit and for the benefit of settlements (para. 240); and (4) freedom of determining political status and to pursue economic, social, and cultural development, because settlements and annexation policies impede the Palestinian economic, social, and cultural life, which depends on Israel for basic needs (paras. 241–42).

Taking into consideration “rules and principles of general international law” (para. 250), and JAB specifically (para. 251), the ICJ determines how these policies and practices affect the legality of the entire Israeli occupation. In line with the IHL consideration that an occupation

is an ongoing portion of an armed conflict<sup>3</sup> and the JAB view of an occupation as an act of aggression that lasts until the occupation lasts,<sup>4</sup> the Court considers that an occupation is a continuous use of armed force (para. 253). The Court concludes that Israeli annexation through such use of armed force is unlawful under the JAB prohibition of the acquisition of territory by force (para. 254) and under the Palestinian right to self-determination (para. 257). These violations have a direct impact on the legality of the entire occupation, which is illegal (paras. 261–62).

The ICJ notes that such an unlawful act of continuous character results in Israeli state responsibility (para. 265), including obligations of cessation and reparation (paras. 267–71). Since some of the obligations at hand create obligations *erga omnes* (para. 274), the UNSC and the UNGA have “to pronounce on the modalities required to ensure an end to Israel’s illegal presence in the [OPT] and the full realization of the right of the Palestinian people to self-determination” (para. 275). All states must cooperate to put UN determinations into effect (*id.*) and must not recognize the legality of the Israeli occupation by: distinguishing between Israeli and Palestinian territories; not negotiating with Israel on behalf of the Palestinians; not trading with Israel in relation to Palestinian territory; not recognizing any legality of the Israeli occupation through the establishment of diplomatic missions; taking steps to prevent trades and investments that might support the maintenance of the occupation (para. 278). The duty of non-recognition applies to the UN, too (para. 280). It is up to the UNSC and the UNGA to establish the practical modalities of ending the occupation (para. 281) to guarantee the “realization of the right of the Palestinian people to self-determination, including its right to an independent and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States, as envisaged in resolutions of the [UNSC] and [UNGA],” which “would contribute to regional stability and the security of all States in the Middle East” (para. 283).

On September 19, 2024, the UNGA adopted a resolution in relation to the implementation of the Opinion detailing the modalities of the end of the occupation.<sup>5</sup> Although UNGA members states adopted the resolution with an overwhelming majority (124 in favor, fourteen against, forty-three abstentions), so far, Israel has not implemented the UNGA’s recommendations.

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The Opinion touches upon important legal issues and its conclusions, along with the elaboration offered by judges in their individual opinions, will generate significant interests among international lawyers. Although much of the Opinion is persuasive and reflects decades of scholarship on the law of occupation and the OPT, this note will focus on one particularly important issue where the Court’s reasoning somewhat lacks analytical clarity: the argumentation put forward to conclude that the entire occupation is unlawful. While this conclusion appears to be sound, some passages of the Court’s argumentation are unpersuasive.

<sup>3</sup> MARCO LONGOBARDO, *THE USE OF ARMED FORCE IN OCCUPIED TERRITORY* 130–32 (2018).

<sup>4</sup> GA Res. 3314 (XXIX), Definition of Aggression, para. 3(a) (Dec. 14, 1974).

<sup>5</sup> GA Res. ES-10/24, Advisory Opinion of the ICJ on the Legal Consequences Arising from Israel’s Policies and Practices in the OPT, Including East Jerusalem, and from the Illegality of Israel’s Continued Presence in the OPT (Sept. 19, 2024).

The Opinion affirms that the Israeli occupation is unlawful in its entirety—a topic frequently discussed in legal scholarship.<sup>6</sup> The Court identifies as relevant sources of the illegality of the Israeli occupation both JAB and the right to self-determination of peoples (para. 251). The Court makes a distinction between JAB as the branch of international law determining—along with the right to self-determination—“the legality of the continued presence of the occupying Power in the occupied territory” (*id.*) and IHL, as the source of obligations for Israel as an occupying power that apply “regardless of the legality or illegality of its presence” (*id.*). In doing so, the Court differentiates between the occupation in its entirety—which falls within the scope of application of JAB to assess whether it constitutes an unlawful territorial situation or not—and the specific actions of the occupying power within the occupation, which pertains to IHL.<sup>7</sup> Contrary to Judge Sebutinde’s allusions (diss op., Sebutinde, J., para. 88), this conclusion is in line with the 2004 *Wall* Opinion, wherein the Court had claimed that JAB was inapplicable to specific military operations by Israel as a matter of self-defense,<sup>8</sup> but nevertheless concluded that JAB was part of the applicable legal framework as a matter of “illegality of territorial acquisition resulting from the threat or use of force.”<sup>9</sup> Two different JAB rules were at stake in 2004: self-defense (in relation to specific acts within the occupation); and the ban on territorial acquisition resulting from the threat or use of force (in relation to the entirety of the occupation).<sup>10</sup> If in 2004 the ICJ did not pronounce on the illegality of the entire occupation, it is not because—as claimed by the dissenting opinion of Vice-President Sebutinde (*id.*)—the Court did not believe that an occupation can become illegal because of the passage of time or because of violations of the law of occupation; simply, the UNGA had not asked the Court to examine the legality of the entire occupation.

However, the 2024 ICJ’s reasoning on why the Israeli occupation is illegal under JAB is not straightforward. As mentioned, the Court, correctly, considers that the rules on JAB enshrined in the UN Charter apply to assess the legality of the entire occupation, while specific conduct within the occupied territory is governed by IHL (para. 251). However, the Court does not follow this reasoning to its logical consequence: in order to assess whether the occupation is lawful under JAB, one should assess *first* the legality of the events that led to that occupation, particularly whether the Israeli use of armed force in 1967 was justifiable as an act of self-defense,<sup>11</sup> and whether, if so, in light the security risks emanating from the OPT, the continuing occupation complies with the customary law requirements of necessity and proportionality (mentioned by sep. op., Yusuf, J., para. 14; joint dec., Nolte and Cleveland, JJ., para. 6). Such an analysis would have led the ICJ to address the controversial

<sup>6</sup> E.g., Orna Ben-Naftali, Aeyal M. Gross & Keren J. Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERK. J. INT’L L. 551 (2005); Ardi Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020*, 31 EUR. J. INT’L L. 1055 (2020); Ata R. Hindi, *Unlawful Occupations? Assessing the Legality of Occupations, Including for Serious Breaches of Peremptory Norms*, 4 TWAIL REV. 1 (2023).

<sup>7</sup> See the early intuitions by ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW 7–8 (2006).

<sup>8</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 2, para. 139. See LONGOBARDO, *supra* note 3, at 99–118, 126–33.

<sup>9</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 2, para. 87.

<sup>10</sup> LONGOBARDO, *supra* note 3, at 133.

<sup>11</sup> On Israeli arguments, see John B. Quigley, *The Six Day War—1967*, in THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018).

topic of the legal basis of the Six-Day War, as well as the threats that each side in this conflict at times pose to the other—issues that the Court clearly did not want to address (dec., Tomka, J., para. 7; joint op., Tomka, Abraham, and Aurescu, JJ., para. 33; dec., Charlesworth, J., para. 17). To avoid this analysis, the Court neglects the question on the legality of the beginning of the occupation, concluding that *the features of the occupation*, particularly, its permanent character, make it unlawful (para. 172).

While it is correct to determine that, from a JAB perspective, regardless of how an occupation started, its permanent character renders it illegal under the JAB ban on territorial acquisition resulting from the threat or use of force—a corollary supported by numerous UNSC and UNGA resolutions—the ICJ should have reached this conclusion only after examining the JAB legality of the Six-Day War. Different scenarios were available: (1) Israel complied with JAB in beginning the Six-Day War allegedly in self-defense (as argued by diss. op., Sebutinde, J., para. 87) and the occupation never became unlawful under JAB because it is temporary; (2) Israel complied with JAB in the Six-Day War as a matter of self-defense but the occupation became unlawful under JAB because of its permanent character; (3) the Israeli occupation is unlawful under JAB because the Six-Day War was not a legitimate exercise of self-defense in 1967 even if the occupation in itself does not violate JAB as a matter of permanent character; and (4) the Israeli occupation is unlawful under JAB because the Six-Day War was not a legitimate exercise of self-defense in 1967 and it is unlawful because it resulted in a permanent acquisition of territory through the use or threat of force prohibited by JAB. To avoid addressing the legality of the Six-Day War, the Court erased the distinction between these scenarios.

Accordingly, although the conclusion that the Israeli occupation is unlawful under JAB pursuant to the ban on territorial acquisition resulting from the threat or use of force is correct as demonstrated by UN practice, the Court should have assessed the legality of the Six-Day War from the perspective of the right to self-defense before reaching this conclusion. It is unclear how it is possible to assert that the key issue is whether Israel can invoke self-defense to maintain the occupation (dec., Charlesworth, J., paras. 20–28) while holding that a JAB analysis of the Six-Day War is unnecessary (*id.*, para. 17). Considering the Court's holding that the occupation is “an unlawful act of a continuing character” (paras. 265, 267), the JAB analysis should have included also an assessment of the legality of the beginning of that act.

Additionally, the analysis of the permanent character of the occupation as a violation of the JAB ban on territorial acquisition resulting from the threat or use of force relies heavily on IHL considerations. Putting aside the scholarly debate on whether forcible acquisition of territory is prohibited by JAB or by an autonomous rule of international law,<sup>12</sup> the Court emphasizes the Israeli intent to control the OPT indefinitely. From a JAB perspective that focuses on self-defense, if State A uses armed force against State B and occupies a portion of State B's territory for one day only, absent a JAB justification such as self-defense, that short-lived occupation would be unlawful, and probably would amount to an act of aggression,<sup>13</sup> irrespective of the intention of State A to control State B's territory indefinitely. On the contrary, demonstrating that the occupation is unlawful under JAB because it violates the

<sup>12</sup> Ingrid Brunk & Monica Hakimi, *The Prohibition of Annexations and the Foundations of Modern International Law*, 118 AJIL 417 (2024).

<sup>13</sup> GA Res. 3314 (XXIX), *supra* note 4, para. 3(a).

ban on territorial acquisition resulting from the threat or use of force requires an analysis of the intention of Israel to acquire permanent control over the OPT.<sup>14</sup> If this is an easy task in relation to those portions of the OPT that Israel has annexed by law (e.g., East Jerusalem), for other areas the Court has to look at the facts on the ground to infer the relevant intention. In doing so, the ICJ employs the violation of fundamental rules of the law of occupation—which are premised on a temporary character—as evidence of the permanent character of the Israeli control of the OPT, the only one violating JAB. Although this argument may be seen as the vanishing point of the fundamental distinction between JAB and IHL,<sup>15</sup> interpreting JAB and IHL in a coherent and harmonious way on this specific issue is correct<sup>16</sup> insofar as this interpretation is performed to provide evidence of the permanent character of the Israeli control rather than to apply the law of occupation to JAB issues. However, the Court could have reduced these conceptual hurdles by offering a JAB analysis of the Six-Day War first.

Furthermore, avoiding a JAB analysis from 1967 causes one to wonder when the occupation became illegal. The Court states that the occupation is (became?) illegal because of the intent to control the territory indefinitely (para. 261 employs the verb “renders”). However, when discussing reparations, the ICJ says that restitution should cover actions from the beginning of the occupation in 1967 (para. 270) and, more generally, the Court stresses on multiple occasions that the illegal occupation is “an unlawful act of a continuing character” that began in 1967 (paras. 265, 267). The fact that the occupation is unlawful *ab initio*, when the practices and policies confirming the intent to control the OPT indefinitely were not entirely in place yet, can only be determined through analyzing whether the beginning of occupation was unlawful under JAB already in 1967.

The same perplexities exist in relation to the illegality of the occupation under the right to self-determination of the Palestinian people, a peremptory norm of international law (para. 233) in the ICJ’s quite unique explicit endorsement of *jus cogens* (dec., Tladi, J., paras. 14–17). The Court stresses that “occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination” (para. 257). However, the Court does not clarify whether *all* occupations are inherently illegal because they violate the peremptory right to self-determination, as suggested recently by the African Court of Human and Peoples’ Rights<sup>17</sup> and as unconvincingly opposed by one judge (sep. op., Iwasawa, J., para. 16), or at least the moment from which the right to self-determination renders the occupation of the OPT unlawful.

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The ICJ answered the question posed by the UNGA in its request and, in doing so, it exercised its advisory function under Article 96 of the UN Charter. The Court offered a highly

<sup>14</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 425 (9th ed. 2021).

<sup>15</sup> Ardi Imseis, *Prolonged Occupation: At the Vanishing Point of the Jus ad Bellum/Jus in Bello Distinction*, 58 TEX. INT’L L.J. 33, 42 (2023).

<sup>16</sup> On the impact of IHL in shaping JAB in this regard, see SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 109–11 (1996).

<sup>17</sup> *Bernard Anbataayela Mornah v. Rep. of Benin and Ors.*, App. No. 028/2018, Judgment, paras. 301–03 (Af. Ct. Hum. Peoples’ Rts. Sept. 22, 2022).



authoritative—albeit, formally speaking, not binding—explanation of the legal framework applicable to the Israeli occupation of the OPT and of the consequences of relevant violations. As demonstrated by individual opinions, unpersuasive points are likely due to the need to reach a majority in a bench where judges had diverging views on some relevant issues. Although the findings of the Court will likely influence the way in which the Israeli occupation is addressed in diplomatic circles, it is not for the ICJ to solve all the complex legal and non-legal problems pertaining to the Israeli-Palestinian conflict. Correctly, the Court indicates that political organs of the UN have the responsibility to ensure the end of the Israeli occupation and the realization of Palestinian self-determination, as well as to guarantee a peaceful and stable coexistence between Israel and Palestine. These are extremely difficult goals to achieve. However, any failure in this regard should not be attributed to the ICJ: the Opinion, on its own, is not an instrument to solve the Israeli-Palestinian conflict or part of it, but rather, it is an important parcel of a more complex and composite process involving multiple states and international organizations, largely governed by political actors rather than by international judges.

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WESTMORELAND MINING HOLDINGS LLC v. GOVERNMENT OF CANADA, Case No. UNCT/20/3. Final Award. At <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/20/3>.

International Centre for the Settlement of Investment Disputes, Jan. 31, 2022.

The arbitral tribunal in *Westmoreland v. Canada* (*Westmoreland*), constituted under the North American Free Trade Agreement (NAFTA),<sup>1</sup> addressed the novel question of “whether the investor at the time the challenged measures are adopted or maintained must be the same entity as the investor at the time the arbitration is commenced” (para. 195). It answered the question in the affirmative and, consequently, decided that it lacked “jurisdiction *ratione temporis*” over the claimant’s claims. This decision is significant for international dispute resolution and, particularly, for investor-state dispute settlement, due to the novelty of the issues it addressed, its approach to arbitral jurisdiction in its temporal dimension and the influence its findings might have on future investor-state arbitrations.

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<sup>1</sup> North American Free Trade Agreement, Dec. 17, 1992, 32 ILM 289 (1993).