

BEFORE THE INTERNATIONAL COURT OF JUSTICE

**REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN
ADVISORY OPINION ON THE LEGAL CONSEQUENCES ARISING FROM THE
POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN
TERRITORY, INCLUDING EAST JERUSALEM**

**WRITTEN STATEMENT SUBMITTED BY
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA
25 JULY 2023**

CONTENTS

	Page
I. INTRODUCTION	3
II. FACTUAL BACKGROUND	4
III. JURISDICTION OF THE COURT	5
IV. STATEMENT OF LAW	19
V. CONCLUSION	57

I. INTRODUCTION

1. On 30 December 2022 at the 56th meeting of its seventy-seventh session, the General Assembly of the United Nations adopted resolution 77/247, by which it decided, pursuant to Article 65 of the Statute of the International Court of Justice (“the Court”), to request the Court to render an advisory opinion on the following questions, taking into consideration the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
 - (a) What are the legal consequences arising from the ongoing violation by Israel of the rights 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 the legal consequences are that arise for all States and the United Nations from this status?
2. The Secretary-General of the United Nations transmitted the resolution to the Court under cover of a letter dated 17 January 2023, which was received by the Court on 19 January 2023. Thereafter, the Registrar of the Court gave notice of the request to all States entitled to appear before the Court pursuant to Article 66, paragraph 1, of the Statute by letters dated 19 January 2023.
3. The Court, by order of 3 February 2023, decided that the United Nations and its Member States, as well as the observer State of Palestine, are considered likely to be able to furnish information on the questions submitted to the Court

for an advisory opinion, and may present written statements to the Court, in accordance with Article 66, paragraph 2, of the Statute, by 25 July 2023 and that States and organizations that have presented written statements may submit written comments on other written statements received by the Court, in accordance with Article 66, paragraph 4, of the Statute by 25 October 2023.

4. The core issue for the Court to determine in these proceedings is the legality of Israel's occupation of the Palestinian territory and the legal questions that arise therefrom, particularly with respect to the achievement of the Palestinian right to self-determination.

II. FACTUAL BACKGROUND

5. South Africa's Statement is based on facts that are contained in numerous official United Nations publications and official documents,¹ some of which the Court had before it in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,² hereinafter referred to as the "*Construction of a Wall Case*."
6. This Statement is made against the background of South Africa's foreign policy, which reflects its longstanding commitment to the development of a viable, sovereign Palestinian State, living in peace alongside the State of Israel. South Africa therefore supports international efforts aimed at the establishment of a viable Palestinian state, existing side by side, in peace, with Israel within internationally recognised borders, based on those existing on 4 June 1967, prior to the outbreak of the 1967 Arab-Israeli war, with East

¹ Notably the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese, in accordance with Human Rights Council resolution 5/1; 21 September 2022, A/77/3586; the Report of the Independent International Commission of Enquiry on the Occupied Palestinian Territory, including East Jerusalem and Israel (A/HR/53/22, 9 May 2023); Resolution 49/28 adopted by the Human Rights Council on 1 April 2022: Right of the Palestinian people to self-determination (A/HRC/RES/49/28).

² 2004 ICJ Reports 136.

Jerusalem as its capital, in line with all relevant United Nations resolutions, international law and internationally agreed parameters.

7. Similarly, South Africa's policy position on the Israeli-Palestine conflict is consistent with the Oslo Accords, the Roadmap and the Arab Plan 2002, all of which concluded that the only viable solution to the present conflict is the two-state option.
8. To this end, South Africa's foreign policy advocates for a viable and sustainable peace plan for the Middle East which must ensure that Palestine's sovereignty, territorial integrity, and economic viability is guaranteed, with sovereign equality between Palestine and Israel. The ongoing delay in achieving a settlement has resulted in an unending cycle of violence.
9. The right of the Palestinian people to self-determination in accordance with the provisions of the United Nations Charter, relevant United Nations resolutions and declarations, and the provisions of international covenants and instruments relating to the right to self-determination, as an international principle and as a right of all peoples in the world, and taking into account that self-determination is a *jus cogens* norm of international law, is a basic prerequisite for achieving a just, lasting and comprehensive peace in the Middle East.

III. JURISDICTION OF THE COURT

Requirements for the Court to exercise jurisdiction

10. The requirements for the Court to exercise jurisdiction are clear: the Court has jurisdiction to give the advisory opinion requested by the General Assembly. Article 36, paragraph 1, of the Statute of the International Court of Justice provides that the jurisdiction of the Court includes all matters specifically provided for in the Charter of the United Nations. Article 65, paragraph 1, of the Statute requires the Court to consider any legal question, and regulates

that the request must emanate from an organ or entity authorised to request an opinion under the Charter of the United Nations. Article 96, paragraph 1, of the United Nations Charter provides that the General Assembly may request the Court to give an advisory opinion on any legal question. Article 10 of the Charter conferred on the General Assembly a competence relating to “any questions of any matters” within the scope of the Charter, while Article 11, paragraph 2, specifically invests it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations.”

11. To meet these requirements, the organ must be authorised to request the advisory opinion, and the request must concern a legal, as opposed to a political, question.

Meeting the requirements for jurisdiction

12. The questions before the Court emanated from resolution 77/247, adopted on 30 December 2022 by the United Nations General Assembly at the 56th meeting of its seventy-seventh Session, by which it decided, pursuant to Article 65 of the Statute of the Court, to request the Court to render an advisory opinion on the present matter. Both questions, quoted above in paragraph 1 of this Statement, are legal questions. This Court is requested to render an advisory opinion on the right of a people to self-determination, the legality of the occupation of a territory by an occupying power and the practices implemented against the civilian population by the occupying power, and the resultant legal consequences of this situation for the occupying power, third States and the United Nations, that will have to be answered by reference to international law.
13. South Africa submits that the United Nations General Assembly is competent to request the advisory opinion from the Court in terms of the Charter of the United Nations on a matter that falls within its competence and responsibility and with which it has been seized since the inception of the United Nations;

the questions raised are legal questions; and the Court, as the principal legal organ of the United Nations, is competent to give an advisory opinion that will assist the United Nations General Assembly and third States to deal with this issue.

Possible challenges to the jurisdiction of the Court in this matter

14. In this regard it is possible that some States may argue that the present matter concerns a situation wherein the Court should exercise its discretion not to assume jurisdiction. States may challenge the jurisdiction of the Court on one or more of the following grounds:
 - (a) The issue in question is of a political nature and it is to be settled bilaterally between the States concerned, Israel and Palestine, and that there is an ongoing process in this regard.
 - (b) It is a domestic matter that falls outside the purview of the powers of the United Nations;
 - (c) It is a contentious matter (that may include an argument that the questions referred to the Court in the present matter relates to a legal question or bilateral dispute actually pending between two or more States, or that an affected State did not consent to the settlement of a dispute it has with another State) and the request for an advisory opinion attempts to circumvent the jurisdictional hurdles relating to contentious proceedings; or
 - (d) The General Assembly acted *ultra vires* under the Charter in view of the ongoing engagement of the Security Council with respect to the Peace Process in the Middle East, including the Palestinian question.

15. All these possible challenges to the Court's jurisdiction have been dealt with extensively in the jurisprudence of the Court. It is South Africa's submission, based on the reasons advanced below, that none of the grounds that may be raised to challenge the jurisdiction of the Court find application in the present matter before the Court.
16. In fact, the Court very rarely declined to exercise jurisdiction regarding requests for advisory opinions. The predecessor of the Court, namely the Permanent Court of International Justice, in an isolated event, opined that it must refuse to give an opinion if the answering of the question put to it would amount to deciding a dispute between States, as this would undermine the requirement of consent to adjudication of disputes between States.³ The Permanent Court of International Justice refused to give an advisory opinion in the *Eastern Carelia* Case because the question related to a dispute between Russia and Finland.⁴
17. The Court reiterated the view that a request for an advisory opinion should not, in principle, be refused,⁵ and previously considered issues that were potentially contentious, political or domestic-related on various occasions. The Court qualified the *Eastern Carelia* Case several times by distinguishing it from the other cases before the Court.⁶ For example, in the case of *Namibia (South West Africa)* involving South Africa, the Court noted that the State raising an objection to its competence was a member of the United Nations and participated in the proceedings of the United Nations (unlike Russia in the *Eastern Carelia* Case) and the purpose of the request was not to settle a dispute, but to assist the United Nations to make decisions on the legal issues

³ Dugard John Dugard's *International Law: A South African Perspective* 5th ed. 2018 p 468.

⁴ *Status of Eastern Carelia* PCIJ Reports Series B No. 5 (1923) p 7.

⁵ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* 1950 ICJ Reports 65 p 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 ICJ Reports p 19; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* 1962 ICJ Reports p 155.

⁶ *Peace Treaties Case op cit* p 71; *Western Sahara Case* 1975 ICJ Reports 12 p 23-9; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports par 46-50.

where the political organ requesting the opinion was concerned with its own function.⁷

18. Furthermore, in relation to the discretionary power of the Court to exercise its jurisdiction, the Court noted in the *Construction of a Wall Case* that it had been contended that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.⁸ The Court first recalled that Article 65, paragraph 1, of its Statute, which provides that "The Court may give an advisory opinion...", should be interpreted to mean that the Court retains a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. The Court was mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused". From this it followed that, given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter of the United Nations), the Court should in principle not decline to give an advisory opinion, and only "compelling reasons" should lead the Court to decline do so.⁹

Political nature

19. In its advisory opinion of 28 May 1948 in the matter concerning the *Conditions of Membership*,¹⁰ it was contended that the question before the Court was not legal, but political in nature. In that matter, the Court was unable to attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task¹¹ by entrusting it with the interpretation of a treaty provision. The Court indicated that it was not concerned with the

⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 1970 1971 ICJ Reports 16 par 23-24.*

⁸ *Ibid* p 156 to 164 par 43-65.

⁹ *Ibid* p 156 par 44.

¹⁰ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the United Nations Charter) ICJ Reports 1948 p 57.*

¹¹ *Ibid* p 61.

motives which may have inspired the request, nor has it to deal with the views expressed in the Security Council on the various cases with which the Council dealt.¹² Consequently, the Court held itself to be competent. The Court also relied on the fact that there was no provision forbidding it to exercise jurisdiction in regard to Article 4 of the Charter of the United Nations. The Court's function was held to be an interpretative function which falls within the normal exercise of its judicial powers.¹³

20. In the advisory opinion in the *Nuclear Weapons Case* of 8 July 1996,¹⁴ the Court observed that it had already had occasion to indicate that questions “framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law ... [and] appear ... to be questions of a legal character”.¹⁵ It found that the question put to the Court by the General Assembly was indeed a legal one, since the Court was asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court had to identify the existing principles and rules, interpret them, and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. The fact that this question also had political aspects – as is the case with so many questions that arise in international relations – did not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute”. Nor was the political nature of the motives that may have inspired the request, or the political implications that the opinion might have, of relevance in the establishment of the Court's jurisdiction to give such an opinion.¹⁶

21. In its advisory opinion in the *Construction of a Wall Case* on 9 July 2004,¹⁷ the Court found that it could not accept the view advanced that it has no

¹² *Ibid* p 61.

¹³ *Ibid* p 61.

¹⁴ *The Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996 p 226.

¹⁵ *Western Sahara Case op cit* p 233-37 par 13 to 15.

¹⁶ *Ibid* p 234 par 13.

¹⁷ *The Construction of a Wall Case op cit* p 136.

jurisdiction because of the political character of the question posed.¹⁸ As is clear from its long-standing jurisprudence on this point, the Court considered that the fact that a legal question also has political aspects, does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute, and “the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task”.¹⁹ The Court accordingly concluded that it had jurisdiction to give the advisory opinion requested by resolution of the General Assembly.

22. In the Court’s advisory opinion in the *Kosovo Case* of 22 July 2010,²⁰ the Court recalled that it had repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question.²¹ The Court added that, whatever its political aspects, it could not refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law. The Court made it clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it was not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have.²²
23. It may also be submitted that for a question to constitute a legal question it must be reasonably specific, otherwise it would not be amenable for a response by the Court. This matter was conclusively dealt with in the *Construction of a Wall Case*,²³ where the Court held that:

¹⁸ *Ibid* p 162 par 58.

¹⁹ *Ibid* p 155 par 41.

²⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ICJ Reports 2010 p 403.

²¹ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion ICJ Reports 1973 p 172 par 14.

²² *Conditions of Membership Case op cit* p 61; *Nuclear Weapons Case op cit* p 234 par 13.

²³ *Op cit* p 153-154 par 38.

lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretations have frequently been given by the Court.

24. It is submitted that the present question put to the Court for an advisory opinion is sufficiently clear for the Court as a question of international law, allowing the Court to provide an opinion, by doing what it has done in the past, namely:

identify the existing principles and rules and apply them ... thus offering a reply to the question posed based on law.²⁴

25. South Africa submits that the fact that there may indeed be political implications in the present matter between Israel and Palestine, or between the United Nations and Israel and Palestine or any other State, or political implications of any other nature, does not prevent the Court from exercising its jurisdiction.

Contentious matter

26. The grounds for objecting to the Court's jurisdiction on the fact that it is a contentious matter was dealt with in its advisory opinion of 30 March 1950 in the *Peace Treaties Case*.²⁵ The Court considered whether the fact that Bulgaria, Hungary and Romania had expressed their opposition to the advisory proceedings should not move it, by the application of the principles that govern the functioning of a judicial organ, to decline to give an answer. The Court pointed out that a contentious procedure resulting in a judgment and an advisory procedure were different. It considered that it had the power to examine whether the circumstances of each case were of such a character as should lead it to decline to answer the request. In that matter, the Court

²⁴ *Nuclear Weapons Case, op cit* p 234, par 13.

²⁵ *Ibid* p 65.

affirmed that States cannot prevent the giving of an advisory opinion which the United Nations consider desirable to obtain enlightenment as to the course of action it should take,²⁶ and the Court was not asked to pronounce on the merits of these disputes.

27. In the matter concerning *Namibia (South West Africa)*,²⁷ objections were raised against the jurisdiction of the Court. The Court indicated in its advisory opinion on 21 June 1971 that the Government of South Africa advanced a reason for the Court not to give the advisory opinion requested, namely that the question was contentious because it related to an existing dispute between South Africa and other States. The Court considered that it was asked to deal with a request put forward by a United Nations organ with a view to seeking legal advice on the consequences of its own decisions. The fact that, in order to give its answer, the Court might have to pronounce on legal questions upon which divergent views exist between South Africa and the United Nations does not convert the case into a dispute between States.²⁸ The Court saw no reason to decline to answer the request for an advisory opinion in that matter.
28. In its advisory opinion of 16 October 1975 in the *Western Sahara Case*, the Court considered its competence.²⁹ The Court relied on Article 65, paragraph 1, of the Statute to indicate that it may give an advisory opinion on any legal question at the request of any duly authorised body. The Court noted that the General Assembly of the United Nations is suitably authorised by Article 96, paragraph 1, of the United Nations Charter and that the two questions submitted are framed in terms of law and raise problems of international law. The questions were questions of principle and of a legal character, even if they also embody questions of fact, and even if they do not call upon the Court to pronounce on existing rights and obligations. The Court ruled that it was competent to entertain the request.

²⁶ *Ibid* p 71 and 77.

²⁷ *Namibia (South West Africa) Case op cit* p 16.

²⁸ *Ibid* p 24 par 34.

²⁹ *Western Sahara Case op cit* p 12, but also see par 14-22.

29. In the same matter, and on the propriety of giving an advisory opinion it was noted that Spain put forward objections which, in its view, render the giving of an opinion incompatible with the Court's judicial character.³⁰ Spain referred in the first place to the fact that it had not given its consent to the Court's adjudicating upon the questions submitted and maintained that the subject of the questions was substantially identical to that of a dispute concerning Western Sahara, which Morocco in September 1974 had invited it to submit jointly to the Court, a proposal which it had refused. Spain argued that the advisory jurisdiction was therefore being used to circumvent the principle that the Court has no jurisdiction to settle a dispute without the consent of the States. Spain also argued that the case involved a dispute concerning the attribution of territorial sovereignty over Western Sahara and that the consent of States was always necessary for the adjudication of such disputes.
30. In consideration, the Court indicated that the General Assembly, while noting that a legal controversy over the status of Western Sahara had arisen during its discussions, did not have the object of bringing before the Court a dispute or legal controversy with a view to its subsequent peaceful settlement, but sought an advisory opinion which would be of assistance in the exercise of its functions concerning the decolonisation of the territory,³¹ hence the legal position of Spain could not be compromised by the Court's answers to the questions submitted. The Court also held that those questions did not call upon the Court to adjudicate on existing territorial rights.
31. The Court also examined the resolutions adopted by the General Assembly on the subject, from resolution 1514 (XV) of 14 December 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, to the resolution embodying the request for an advisory opinion. It concluded that the decolonisation process envisaged by the General Assembly was one that would respect the right of the population of Western Sahara to determine their

³⁰ *Ibid* par 23-74.

³¹ *Ibid* p 21 par 23; p 26-27 par 38; and p 72 par 4.

future political status by their own freely expressed will. This right to self-determination, which is not affected by the request for an advisory opinion and constitutes a basic assumption of the questions put to the Court, leaves the General Assembly a measure of discretion with respect to the forms and procedures by which it is to be realised.³²

32. Consequently, the advisory opinion would thus furnish the General Assembly with elements of a legal character relevant to that further discussion of the problem to which the resolution requesting the advisory opinion alludes. Furthermore, the Court found no compelling reason for refusing to give a reply to the two questions submitted to it in the request for advisory opinion.

33. Returning to the advisory opinion of the Court on 9 July 2004 in the *Construction of a Wall Case*,³³ it was argued before the Court that it should not exercise its jurisdiction in that case because the request concerned a contentious matter between Israel and Palestine, in respect of which Israel had not consented to the exercise of that jurisdiction.

34. According to that argument, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. The Court observed that the lack of consent to the Court’s contentious jurisdiction by interested States had no bearing on the Court’s jurisdiction to give an advisory opinion,³⁴ but recalled its jurisprudence to the effect that the lack of consent of an interested State might render the giving of an advisory opinion incompatible with the Court’s judicial character, e.g. if to give a reply would have the effect of circumventing the principle that a State is not obliged to submit its disputes to judicial settlement without its consent.

³² *Ibid* p 36 par 71.

³³ The *Construction of a Wall Case op cit* p 136.

³⁴ *Ibid* p 158.

35. As regards the request for an advisory opinion before the Court in that matter, the Court acknowledged that Israel and Palestine had expressed radically divergent views on the legal consequences of Israel's conduct, on which the Court was asked to pronounce in the context of the opinion it would give. However, as the Court has itself noted before, "Differences of views ... on legal issues have existed in practically every advisory proceeding." Furthermore, the Court did not consider that the subject-matter of the General Assembly's request could be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it was the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations, in general, and the General Assembly, in particular. The responsibility of the United Nations in that matter also had its origin in the Mandate and the Partition Resolution concerning Palestine. This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy." The object of the request before the Court was to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion was requested on a question which is of particularly acute concern to the United Nations, and one which was located in a much broader frame of reference than a bilateral dispute.³⁵ In the circumstances, the Court did not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly could not, in the exercise of its discretion, decline to give an opinion on that ground.
36. The Court then turned to another argument raised in support of the view that it should decline to exercise its jurisdiction, namely that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it was contended that such an opinion

³⁵ *Ibid* p 158 par 50.

could undermine the scheme of the Roadmap, which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The Court observed that it was conscious that the Roadmap, which was endorsed by the Security Council, constituted a negotiating framework for the resolution of the Israeli-Palestinian conflict, but that it was not clear what influence its opinion might have on those negotiations. The Court found that it could not regard this factor as a compelling reason to decline to exercise its jurisdiction.

37. In the Court's advisory opinion of 22 July 2010 in the *Kosovo Case*,³⁶ the Court first addressed the question whether it possesses jurisdiction to give an advisory opinion as requested by the General Assembly. The Court referred to Article 65, paragraph 1, of its Statute and noted that the General Assembly is authorised to request an advisory opinion by Article 96 of the United Nations Charter. The Court also recalled Article 12, paragraph 1, of the United Nations Charter providing that, "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the ... Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests". The Court observed, as it has done on an earlier occasion, that "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'".³⁷ Accordingly, the Court pointed out that while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court's opinion, it does not in itself limit the authorisation to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. The Court noted that the question put by the General Assembly asked whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appeared to be a legal question.

³⁶ *Kosovo Case op cit* p 403 par 18-28.

³⁷ *Construction of a Wall Case op cit* p 148 par 25.

Consequently, the Court ruled that it had jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

38. South Africa submits that based on the Court's jurisprudence, the fact that there may be contentious issues (including that the matters concern a legal question actually pending between States, or that no consent has been given by an affected State) does not prevent the Court from exercising its jurisdiction in light of the above.

The General Assembly acted *ultra vires*

39. It has already been submitted that the subject of the present request falls within the competence of the General Assembly.³⁸ However, Article 12, paragraph 1, of the Charter is relevant in this regard, as it provides that:

While the Security Council is exercising in respect of any dispute the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

40. The Court has in the *Construction of a Wall Case*³⁹ dealt decisively with this line of argument, concluding that, while the Security Council has primary responsibility for the maintenance of international peace and security, this is not necessarily an exclusive competence. It found that while the General Assembly and the Security Council have initially interpreted Article 12 to mean that the General Assembly could not make a recommendation on a matter relating to the maintenance of international peace and security while the matter was on the agenda of the Security Council, this interpretation has subsequently evolved and there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter.

³⁸ Par 13 above.

³⁹ Par 24-28, p 148-149.

41. Consequently, it is submitted that the General Assembly has not exceeded its competence or acted *ultra vires* by submitting the request for an advisory opinion.

Conclusion on jurisdiction

42. South Africa's submission is that the Court is empowered to exercise jurisdiction over legal questions submitted to it by the United Nations General Assembly. For the reasons stated above, the fact that there may be political implications, domestic matters or contentious issues does not, in South Africa's submission, prevent the Court from exercising its jurisdiction.
43. In the event that the Court considers a contentious issue being present that may affect a State, it is for the Court to invoke Articles 65 and 68 of the Statute, and Article 102, paragraph 2, of the Rules of Court, and adapt the proceedings accordingly. Even if the Court were to find that an advisory opinion concerns a legal question actually pending between two or more States, it is simply for the Court to invoke the rights contained in Article 31 of its Statute regarding judges *ad hoc*, while the Court does not lose jurisdiction and is not faced with a bar to exercising jurisdiction.
44. For the reasons advanced above, South Africa submits that the Court should exercise its discretion in favour of providing an advisory opinion to the General Assembly.

IV. STATEMENT OF LAW

General

45. While the main thrust of the questions referred to the Court by the General Assembly relates to the legal consequences of the ongoing violation by Israel

of the right of the Palestinian people to self-determination and the legal status of the prolonged occupation by Israel of the Palestinian territory, the underlying legal principles are of a cross-cutting nature that involves a number of areas of international law. South Africa will in this Statement focus on the following legal issues:

- (a) With respect to Question 1: The legal position with respect to the right to self-determination of a people, the law with respect to occupation, and the other violations of international humanitarian law and discriminatory policies that violate international human rights law applicable in territories under occupation; and
- (b) With respect to Question 2: The legal status of the occupation and the legal consequences for Israel, the United Nations and third States resulting from the aforementioned legal position.

Question 1: Self-determination, occupation, international humanitarian law and international human rights law

The legal position with respect to the right to self-determination

46. The right to self-determination is a basic right in international law.⁴⁰ It is inextricably linked to the concepts of independence and sovereignty, and all these basic characteristics of a State can only be exercised on a territorial basis. Self-determination as a political concept appeared in the time after the First World War, in treaties for the protection of minorities, in the mandates system⁴¹ and in claims by nations for self-determination after the implosion of the Austro-Hungarian and Ottoman Empires.⁴²

⁴⁰ Albanese *op cit* par 15: “The right to self-determination constitutes the collective right par excellence: and the “platform right” necessary for the realization of many other rights. If a population grouping is not free to “determine their political status and ... pursue their economic, social and cultural development” as a people, other rights will certainly not be realized.”

⁴¹ Shaw MN *International Law* 7th ed. 2014 Cambridge University Press, p 183.

⁴² Pedersen S *The Guardians: The League of Nations and the Crisis of Empire* 2017 Oxford University Press, p 400.

47. The concept of self-determination was included in the Charter of the United Nations. Article 1, paragraph 2, provides that one of the organisation's purposes is the development of friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples, while Article 55 deals with the ways in which the organisation should create the conditions necessary for peaceful and friendly relations among states, based on the respect for the principle of equal rights and self-determination of peoples. The inclusion of the concept of self-determination in the Charter as a principle and not a legal right, however, marks the beginning of a process that led to the crystallisation of a legally enforceable right: "Despite the fact that self-determination in the Charter is referred to 'only' as a 'principle' and not as a legal right, its appearance in a conventional instrument establishing an international organisation which would be open to universal membership was a very important step in the evolution of self-determination into a positive right under international law".⁴³ Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights confirms the right of peoples to self-determination. The right to self-determination has both a political and an economic component: the capacity of a people to freely determine their political status, to choose its own government and govern itself without interference, and the collective right to freely pursue their economic, social and cultural development and enjoy their natural wealth and resources.⁴⁴

48. This position has been strengthened by Article 20(1) of the African Charter on Human and Peoples' Rights which provides that all peoples shall have "the unquestionable and inalienable right to self-determination". This right has furthermore been confirmed in numerous resolutions of the United Nations, most notably General Assembly resolution 1514 (XV) on the Declaration of Granting of Independence to Colonial Countries and Peoples and General Assembly resolution 2625 (XXV) on the Declaration on Principles of

⁴³ Raic D *Statehood and the Law of Self-Determination*, Doctoral Thesis, University of Leiden 2002, p 200.

⁴⁴ *International Covenant on Civil and Political Rights*, Article 1.

International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

49. Shaw confirms that while there may be some uncertainty as to whether self-determination was a legal right when it was included in the Charter, subsequent practice within the United Nations since 1945 have established “the legal standing of the right in international law”,⁴⁵ and that such a right existed by the time of the adoption of resolution 1514 (XV)⁴⁶ in 1960 and the International Covenants in 1966. Dugard⁴⁷ also confirms that the right of self-determination as a legal right under international law is no longer seriously challenged.
50. The right to self-determination is an inalienable right of the Palestinian people.⁴⁸ This position has also been affirmed by the Court in its advisory opinion on the *Construction of a Wall Case*.⁴⁹ The Court noted that the existence of the “Palestinian people” is no longer in issue and has been recognised by Israel, which has a duty to respect this right, but has taken measures that “severely impeded the exercise by the Palestinian people of its right to self-determination, and is therefore in breach of Israel’s obligation to respect that right”.
51. Indeed, the right to self-determination is a peremptory or *jus cogens* norm with an *erga omnes* character which is the concern of all States.⁵⁰ All States have a collective legal interest in the realisation of and protection of the right to self-

⁴⁵ Shaw *op cit* p 183 to 84.

⁴⁶ Called “the Magna Carta of decolonization”, Strydom H (ed.) *International Law* 2016 Oxford University Press p 51.

⁴⁷ Dugard *op cit* p 149.

⁴⁸ For a overview of the origins of this right for the Palestinians, see Albanese, *op cit* par 25-32.

⁴⁹ *Op cit* p 182 par 118-122. See also the *Western Sahara Advisory Opinion* 1975 ICJ Reports 12. 31-331.

⁵⁰ A “peremptory norm” is defined in Article 53 of the *Vienna Convention on the Law of Treaties*, 1969 as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

determination, and to respect this right.⁵¹ In the *Case Concerning East Timor*⁵² the Court held that “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice, has an *erga omnes* character, is irreproachable” and that “it is one of the essential principles of contemporary international law”. The Court concluded in the *Construction of a Wall Case*⁵³ that “The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law”. A number of resolutions of the United Nations Human Rights Council conclude that the right to self-determination of the Palestinian people is being violated by the “existence and ongoing expansion of settlements in the Occupied Palestinian Territory, including East Jerusalem”.⁵⁴

52. Israel has occupied the Palestinian territory (the West Bank, including East Jerusalem and Gaza) since the Six Day War in June 1967. Israel annexed East Jerusalem and parts of the West Bank in 1967 by a Cabinet decision and by means of the Basic Law on Jerusalem, declared Jerusalem the complete and united capital of Israel. Israel is further *de facto* annexing parts of the occupied West Bank.⁵⁵

53. However, the occupation of the Occupied Palestinian Territory and annexation of parts thereof, negatively affecting the full exercise of Palestinian authority and resulting in a diminishing of effective control over the territory, does not affect the Palestinian right to self-determination and the fact that Palestine is a State under the principles of public international law.⁵⁶

⁵¹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement* ICJ Reports 1970, par 33.

⁵² 1995 ICJ Reports 90, p 102.

⁵³ *Op cit* p 199, par 155.

⁵⁴ A/HRC/RES/49/28 *Right of the Palestinian people to self-determination*, 1 April 2022.

⁵⁵ *Report of the Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967*, A/72/556 23 October 2017, par 46.

⁵⁶ Heinsch R and Pinzauti G “To Be (a State) or Not to Be? The Relevance of the Law of Belligerent Occupation with regard to Palestine’s Statehood before the ICC” 18 (2020) *Journal of International Criminal Justice* p 945;

54. It is not disputed that in terms of international law, the conquest of territory by means of the use of force is illegal. The occupying power cannot annex any part of the occupied territory and there is an obligation on States not to recognise such illegal territorial acquisition.⁵⁷ With respect to the territory occupied by Israel in the 1967 Six Day War, the United Nations Security Council in Resolution 242 (1967) expressly emphasised the “inadmissibility of the acquisition of territory by war”⁵⁸ and that a just and lasting peace in the Middle East requires the withdrawal of Israeli armed forces from the territory occupied during the conflict. It is not disputed that annexation resulting from the use of force has taken place since 1967 and is in clear violation of the principles of international law.
55. The United Nations General Assembly has long recognised that the Palestinian people are entitled to the right to self-determination in accordance with the United Nations Charter, and has expressed its grave concerns that the Palestinian people have been prevented from enjoying their inalienable rights, in particular the right to self-determination.⁵⁹ In the *Construction of a Wall Case*, the Court also noted that the principle of self-determination of people has been enshrined in the United Nations Charter and reaffirmed by the General Assembly, citing resolution 2625 (XXV).⁶⁰
56. Accordingly, the Court found in the *Construction of a Wall Case* that the construction, along with measures taken previously, have severely deprived

Ronen Y “Palestine in the ICC: Statehood and the Right to Self-determination in the Absence of Effective Control” 18 (2020) *Journal of International Criminal Justice*, p 947.

⁵⁷ This obligation dates back to the time of the League of Nations. The idea was developed in 1934 by the International Law Association’s *Budapest Articles of Interpretation of the Kellogg-Briand Pact* and a number of other international instruments, the 1933 *Anti-War Treaty of Non-Aggression and Conciliation*, the 1933 *Convention on the Rights and Duties of States*, the 1948 *Charter of the Organization of American States* and the United Nations General Assembly’s *Friendly Relations Declaration* (1970) and its 1974 *Definition of Aggression* in resolution 29/3314, of which par 5(3) reads as follows: “No territorial acquisition or special advantage resulting from aggression shall be lawful.” See also Shaw *op cit* p 469.

⁵⁸ The General Assembly also denounced the annexation, see resolutions 2253 (ES-V) and 2254 (ES-V).

⁵⁹ United Nations General Assembly resolution 3236 (XXIX), adopted 22 November 1974.

⁶⁰ *Construction of a Wall Case*, par 88.

the exercise by the Palestinian people of its right to self-determination.⁶¹ Consequently, the Court held that Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligation under international humanitarian law and international human rights law.⁶²

57. The Court further held that Israeli practices with respect to the Occupied Palestinian Territory are illegal:

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.⁶³

58. The Court further finds with respect to the construction of the wall and its associated regime in the Occupied Palestinian Territory that it creates a *fait accompli* on the ground “that could well become permanent, which would be tantamount to *de facto* annexation”.⁶⁴
59. The Security Council, in resolution 2334 (2016) is unequivocal in its condemnation of Israeli settlement practices in the Occupied Palestinian Territory, including East Jerusalem, specifically the construction and expansion of settlements, the transfer of Israeli settlers, the confiscation of land, the demolition of homes and displacement of Palestinian civilians, reaffirming that the establishment of Israeli settlements has no legal validity and constitutes a flagrant violation of international law.
60. It is therefore clear that the annexation of, and incorporation into Israel, of East Jerusalem and parts of the West Bank, are in violation of international law. The principle of self-determination is inextricably linked to the principle of territorial integrity.

⁶¹ *Ibid* par 120.

⁶² *Ibid* par 149.

⁶³ *Ibid* par 120.

⁶⁴ *Ibid*.

61. In the *Western Sahara Case* the Court confirmed the principle contained in paragraph 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁶⁵ which prohibits the partial or total disruption of the national unity and the territorial integrity of a colonial territory as reflecting customary international law.⁶⁶ This then raises the question of the legal status of the remaining parts of the Occupied Palestinian Territory. It has been submitted that the long-term occupation by Israel of the Occupied Palestinian Territory is in fact a disguised form of conquest,⁶⁷ in other words, a permanent occupation of Palestinian territory going beyond a temporary occupation and therefore a *de facto* annexation and consequently the acquiring of the territory by means of force.
62. Previously, the Court confirmed the temporary nature of occupation when it held in the *South West Africa Case* that the end result of South Africa's action for its mandate must be self-determination and independence of the people of Namibia⁶⁸.
63. No legal justification for the continued occupation exists and the achievement of self-determination will require, as was the case in other cases of occupation, the withdrawal of the occupying force.⁶⁹

⁶⁵ Par 55.

⁶⁶ See Mosses M "Revisiting the Matthew and Hunter Islands Dispute in Light of the Recent Chagos Advisory Opinion and Some Other Relevant Cases: An Evaluation of Vanuatu's Claims relating to the Right to Self-Determination, Territorial Integrity, Unlawful Occupation and State Responsibility under International Law" 66, 475–506 (2019) *Netherlands International Law Review*, p 486.

⁶⁷ "Today States may avoid the issue of conquest by remaining in long-term occupation and create 'facts' on the ground through the establishment of settlements, re-routing transport links and mounting security barriers and walls. This is obviously the case with regard to the Israeli occupation of Palestinian territories", Clapham A *War 2022* Oxford University Press p 117.

⁶⁸ International Court of Justice Advisory Opinion on *the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970). Lynk, Michael, "Prolonged Occupation or Illegal Occupant?" Blog of the *European Journal of International Law*, 3 16 May 2018 accessed at <https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/>.

⁶⁹ The international community has called for self-determination to be achieved in five situations: Namibia, Cambodia, East Timor, Western Sahara and the Palestinian Occupied Territories: General Assembly resolution 2672 (XXV) of 8 December 1970 being the first of many calling for self-determination of the occupied Palestinian territories.

64. Israel's failure to recognise the Palestinians' right to self-determination, independence and sovereignty in the territory, is clear evidence of its underlying intention to pursue the permanent acquisition of Palestinian territory.⁷⁰

International humanitarian law applicable to occupation

65. The Israeli occupation of the Gaza Strip and the West Bank, as well as East Jerusalem, which form part of the Palestinian Territories, started 56 years ago and continues until this day, the longest occupation in modern history. The Special Rapporteur on the situation on human rights in the Palestinian territories since 1967 noted in his Report⁷¹ that the construction of new settlements continue unabated, that statements from political leaders, including the Israeli Prime Minister, call for continued expansion of settlements, while the transfer of Israeli nationals into the occupied territory continues unabated, in violation of the prohibition contained in Article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter "the Fourth Geneva Convention") and Article 85(4)(a) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.⁷²

66. In terms of international law, the legal status of a belligerent party derives its character from occupying and placing under the authority of its armed force in the territory of another State without the consent of the latter, "even when such occupation meets with no armed resistance".⁷³

⁷⁰ Azarova V *Israel's Unlawfully Prolonged Occupation: Consequences under an Integrated Legal Framework* available at https://ecfr.eu/publication/israels_unlawfully_prolonged_occupation_7294/.

⁷¹ A/72/556 of 23 October 2017, par 11.

⁷² Article 85(4)(a) provides that a grave breach of Protocol I and the Conventions shall include: "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies ... in violation of Article 49 of the Fourth Convention".

⁷³ Melzer N, coordinated by Kurster E, ICRC *International Humanitarian Law A Comprehensive Introduction*, August 2016, p 57.

67. Customary international humanitarian law, as well as 1907 Hague Regulations concerning the Laws and Customs of War on Land, are amongst the sources that regulate occupation.⁷⁴ It is also regulated by Section III of the Fourth Geneva Convention. Protocol I to the Geneva Conventions⁷⁵ also addresses protection of civilian victims in occupied territories.
68. Article 42 of the Hague Regulations provides that a “territory is considered occupied when it is actually placed under the authority of the hostile army”. The occupation extends only to the territory where such authority has been established and can be exercised.⁷⁶ In such a situation, the law of armed conflict must apply. Consequently, obligations are placed on the occupying power to ensure compliance with the law of armed conflict and of occupation.
69. The international humanitarian law that regulates international armed conflicts also applies to situations where the occupied territory does not belong to a High Contracting Party, but to people fighting against alien occupation in the exercise of its right to self-determination.⁷⁷ This notion is articulated in Article 1(4) of the Additional Protocol I.
70. Recognition that occupation is a temporary situation at the end of which control of the territory will return to the original sovereign is the most important principle in international humanitarian law relating to occupation.⁷⁸ The Court confirmed the temporary nature of occupation by highlighting that by issuing “settlement of titles”⁷⁹ Israel “...subverts the principle that occupation is

⁷⁴ *Ibid.*

⁷⁵ The Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁷⁶ Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force on 26 January 1910) (1907) 205 CTS.

⁷⁷ Melzer *op cit* p 60.

⁷⁸ International Military Tribunal at Nuremberg, Hostages trial, p 56. The Court highlighted that “while it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant”.

⁷⁹ *Construction of a Wall Case op cit* p 136.

inherently temporary”.⁸⁰ However, despite this basic principle, Israel has turned the temporary nature of its occupation in the Palestinian territories into a permanent situation. The total disdain and disrespect for international humanitarian law principles by Israel render its occupation in the Palestinian territories illegal.

71. It is recalled that the basic objective of the law of occupation is the protection of the population under occupation, including their public and private property.⁸¹ Recently the Special Coordinator for the Middle East Peace Process in his briefing to the Security Council on the situation in the Middle East expressed his concern “that civilians continue to bear the brunt of such hostilities.” He was particularly appalled that children, who must never be the target of violence, continue to be victims in Palestine.⁸²
72. A number of provisions aimed at providing rights to a civilian population in the context of armed conflict are contained, amongst others, in the Fourth Geneva Convention. Kolb argues that these rights “prevent abuse of the civilian population by the Occupying Power”.⁸³ He further argues that the Fourth Geneva Convention ensures the maintenance of the *status quo* in the territory with respect to its laws and institutions and the protection of the rights of the civilian population.⁸⁴ There have been a number of United Nations resolutions, amongst others, recognising Israel’s obligation in terms of the Fourth Geneva Convention to “ensure the safety, well-being and protection of the Palestinian civilian population under its occupation in the Occupied Palestinian Territory.”⁸⁵

⁸⁰ *Ibid.*

⁸¹ Clapham *op cit* p 415.

⁸² UNSC, S/PV.9328, statement by Mr Tor Wennesland, Special Coordinator for the Middle East Peace Process, the situation in the Middle East, including the Palestinian question, 24 May 2023 accessed at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2023.05.24%20S_PV.9328.pdf

⁸³ Kolb R and Hyde R *An Introduction to the International Law of Armed Conflicts* 2008 Hart Publishing p 258.

⁸⁴ *Op cit* p 235.

⁸⁵ UNHRC Human Rights Resolution, A/HRC/46/22, “Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem” 15 February 2021.

73. However, despite these calls, Israel as the occupying power fails to respect international law and comply with its obligations under the law of occupation. As a result, the violation of the international humanitarian law norms aimed at protecting the civilian population continues unabated in the Occupied Palestine Territory.
74. It is therefore submitted that Israel as the occupying power is not acting in the best interests of the population under occupation and is not administering the occupied territory in good faith in compliance with its obligations under international law and as a member of the United Nations.

Israeli settlements in the Occupied Palestinian Territory

75. There have been numerous pronouncements made by the international community, including civil society about Israel's actions in Palestine. Some, including United Nations resolutions, have labelled it a violation of international law⁸⁶. Others have called Israel's conduct illegal.⁸⁷ Strong criticism of the domestic policies that Israel has been adopting since it took occupation of Palestine has also been expressed. In total violation of international law, Israeli settlements were already established after the Six-Day War in 1967 when Israel captured some Palestinian territories. The Court concluded in the *Construction of a Wall Case* that "The Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."⁸⁸ A further policy on settlement has been adopted by Israel in 2016⁸⁹. The United Nations Security Council on 23 December 2016 condemned the conduct and demanded of Israel to immediately and completely cease all settlement activities in the Occupied Palestinian

⁸⁶ UN News, "Israeli occupation of Palestinian territory illegal: UN rights commission" 20 October 2022, accessed at <https://news.un.org/en/story/2022/10/1129722>.

⁸⁷ *Ibid.*

⁸⁸ Par 120.

⁸⁹ See UN News, "Israel's settlement 'legalization bill' would harm prospects for Arab-Israeli peace, UN envoy warns" 6 December 2016, accessed at <https://news.un.org/en/story/2016/12/547082>.

Territory.⁹⁰ In an extraordinary emergency meeting, the United Nations General Assembly⁹¹ also adopted a resolution that decried decisions and actions aimed at changing the “character, status or demographic composition of the Holy City of Jerusalem.”⁹² The General Assembly called on the States concerned to rescind such decisions as they have “no legal effect and are null and void.”⁹³ Most recently, Israel adopted a policy which extends the already illegal settlement in the East of Jerusalem.

76. Concerning are recent reports that Israel has adopted plans aimed at expanding the already illegal settlements in the Occupied Palestinian Territory.⁹⁴ The Israeli Cabinet had decreed a settlement expansion plan in the occupied Syrian Golan to build 7,300 residential units in existing settlements, for new Israeli settlers, within the next five years.⁹⁵ This is mindful of the fact that when Israel was taking occupation initially, it promised to allow the local laws that had been in place at the time to remain applicable in the Palestinian territories.⁹⁶ Successive Israeli governments have for a prolonged period of time established, maintained and expanded settlements and their concomitant infrastructure.⁹⁷ All these policies and practices have subsequently resulted in the extensive appropriation of Palestinian land and natural resources.⁹⁸

77. The establishment of Israeli settlements in the Israeli-occupied territories is considered as illegal by the international community as they are in violation of

⁹⁰ See United Nations Security Council resolution 2334 (2016), 23 December 2016, S/RES/2334 (2016).

⁹¹ UNGA Resolution, A/RES/ES-10/19, Status of Jerusalem, 21 December 2017, accessed at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/462/00/PDF/N1746200.pdf?OpenElement>.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Al-Jazeera News, “Israel approves plans for thousands of illegal settlement homes”, 26 June 2023, accessed at <https://www.aljazeera.com/news/2023/6/26/israel-approves-plans-for-thousands-of-illegal-settlement-homes>.

⁹⁵ United Nations Office of the High Commissioner on Human Rights, End-of-Mission Statement of the United Nations Special Committee to Investigate Israeli Practices, 15 July 2022, accessed at <https://www.ohchr.org/en/statements/2022/07/end-mission-statement-un-special-committee-investigate-israeli-practices>.

⁹⁶ Boutruche T. and M. Sassòli, *Expert Opinion on the Occupier’s Legislative Power over an Occupied Territory Under IHL in Light of Israel’s On-going Occupation* June 2017, p 23 accessed at <https://www.nrc.no/globalassets/pdf/legal-opinions/sassoli.pdf>.

⁹⁷ Azarova *op cit.*

⁹⁸ *Ibid.*

Article 49 of the Fourth Geneva Convention. Paragraph 6 of Article 49 of the Fourth Geneva Convention provides that “the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”.⁹⁹ Evidently, Israel is prohibited by international humanitarian law and international instruments to transfer its population into the Occupied Palestinian Territory. It therefore follows that any legislation authorising settlements or the extension of settlements “adopted by Israel to facilitate or set up settlements would be in violation of Article 43, in that this would not fall within any of the admissible purposes”.¹⁰⁰

78. Some scholars note with concern that Israeli legislation “has increasingly gone beyond the limitations and related justifications provided for under International Humanitarian Law”.¹⁰¹ They note, in this regard, the “trend of a growing legislative expansion, illustrated by the nature and scope of application of the Israeli legislation reviewed in those landmark developments that range from legislating for prohibited purposes (settlements) and in the interest of Israel and Israelis (including settlers)”.¹⁰²
79. Israel’s annexation of Palestinian territory has been viewed as an extension of its sovereignty, and an unlawful act in international law.¹⁰³ Israel further started adopting legislation which governs Palestinian territory as if it belongs to Israel. This act was regarded by Boutruche and Sassòli as an “aspect of *de jure* annexation”.¹⁰⁴ Of concern to the two scholars was the fact that “certain legislative changes adopted by an Occupying Power, may not only constitute violations of the law of belligerent occupation, but also amount to a certain

⁹⁹ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

¹⁰⁰ Boutruche and Sassòli *op cit* p 30.

¹⁰¹ *Ibid* p 3.

¹⁰² *Ibid*.

¹⁰³ See United Nations Office of the High Commissioner on Human Rights, statement by the Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967 dated 13 April 2023; United Nations General Assembly, *Report of the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory including East Jerusalem, and in Israel*, 14 September 2022.

¹⁰⁴ Boutruche and Sassòli *op cit* p 7.

form of annexation, prohibited by the *jus ad bellum*, the international law on the use of force”.

Discriminatory legislation and violations of international human rights law

80. Israel is a party to the so-called international bill of rights, which comprises the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights.
81. Israel is also a party to several other international human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child (including the Optional Protocol on the sale of children, child prostitution and child pornography); and the Convention on the Rights of Persons with Disabilities. Israel has thus accepted the legal obligations that arise from those international instruments. The focus of this Statement will be restricted to the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.
82. This Court has already addressed the application of human rights in the context of armed conflict.¹⁰⁵ The Court found that “the protection offered by human rights conventions does not cease in case of armed conflict”.¹⁰⁶
83. The Court also addressed the application of international human rights law beyond the territory of a State, but over which it still exercises jurisdiction. The Court found that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to

¹⁰⁵ *Nuclear Weapons Case*, Advisory Opinion, ICJ Reports 1996; *Construction of a Wall Case*.

¹⁰⁶ *Construction of a Wall Case*, par 106.

acts performed by a state in the exercise of its jurisdiction outside its own territory.¹⁰⁷

84. The Court's findings in the *Construction of a Wall Case* were reaffirmed in the *Case Concerning Armed Activities on the Territory of the Congo*.¹⁰⁸
85. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have both reached the same conclusions as the Court regarding the extraterritorial application of the aforementioned Covenants in relation to periodic reports submitted by Israel.¹⁰⁹ This interpretation is similarly applied by other international human rights treaty-based mechanisms. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have also expressed their concern that Israel maintains its position that the aforementioned Covenants do not apply with respect to individuals under its jurisdiction, but outside of its territory.¹¹⁰
86. The Human Rights Committee has also published General Comment No. 31, which interprets Article 2(1) of the International Covenant on Civil and Political Rights to mean "that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".¹¹¹ The Committee on Economic, Social and Cultural Rights in its General Comment No. 24 clarified that States' obligations "apply both with respect to situations on the state's national territory, and outside the national territory in situations over which States Parties may exercise control".¹¹²

¹⁰⁷ *Ibid*, par 111-113.

¹⁰⁸ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ, Judgement, 19 December 2005, par 215-221.

¹⁰⁹ Most recently, CCPR/C/ISR/CO/5; E/C.12/ISR/CO/4; CRC/C/ISR/CO/2-4.

¹¹⁰ *Ibid*.

¹¹¹ General Comment 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13.

¹¹² General comment No. 24 (2017), *State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24.

87. In light of these well-established interpretations, it is clear that Israel continues to violate its international human rights law obligations applicable in the Occupied Palestinian Territory.
88. The human rights situation in the Occupied Palestinian Territory is so dire that since 1993 there has been a United Nations Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967. However, little has changed and in 2021, the Human Rights Council established the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem and Israel.
89. While all of these bodies play an important and instrumental role in bringing to light human rights violations, it is disconcerting that little has changed in relation to the plight of civilians in the Occupied Palestinian Territory.
90. The extent of human rights violations by Israel is well documented and it would require far too voluminous a statement to detail all the violations that have occurred. In this regard, the Court is referred to the numerous reports prepared by the various treaty-based and charter-based mechanisms of the United Nations. Particular emphasis is placed on the violation of the right to self-determination, which is detailed elsewhere in this Submission (see paragraphs 46-64). The denial of the right to self-determination has a consequential effect on numerous other rights, including the right to freedom of movement; rights relating to natural resources; the right to enjoy one's culture; and the right to life.¹¹³ Other human rights violations are documented in several reports, most recently those of the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, as well as the United Nations High Commissioner for Human Rights.¹¹⁴

¹¹³ See *Report of Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/77/356, 21 September 2022.

¹¹⁴ A/HRC/53/22 (9 May 2023) and A/HRC/46/22 (15 February 2021), respectively.

91. The Palestinian reality evokes experiences of South Africa's own history of racial segregation and oppression. There exists in the Occupied Palestinian Territories an institutionalised and oppressive system of Israeli domination over Palestinians as a group. These policies have their genesis in the creation of the State of Israel in 1948 and have been extended to the Occupied Territories after the 1967 Six Day War.
92. We concur with the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, in her most recent report,¹¹⁵ that "the recognition of Israeli apartheid must address the experience of Palestinian people in its entirety and in their unity as a people, including those who were displaced, denationalised and dispossessed in 1947-1949 (many of whom live in the occupied in Palestinian territory)".
93. While the Palestinian experience is not entirely identical to the South African one, a number of apartheid-style atrocities are being reproduced in Palestine, such as the permit system which applies only to Palestinians travelling to and from the Gaza Strip, annexed East Jerusalem and the rest of the West Bank. This includes the creation of a dual legal system consisting of an intricate and obscure system of military orders and regulations, which "often racialised in implementation rather than on paper makes the depth of Israel's systematic discrimination less immediately conspicuous than its counterpart in South Africa".¹¹⁶
94. The Committee on the Elimination of Racial Discrimination concluded that there exists in the Occupied Palestinian Territory "two entirely separate legal systems and sets of institutions for Jewish communities in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand. The Committee is appalled at the hermetic character of the separation of the two groups, who live on the same territory

¹¹⁵ A/77/356 (21 September 2022), par 9 p 23.

¹¹⁶ Dugard J and Reynolds J "Apartheid, International Law, and the Occupied Palestinian Territory" 24 (2013) *European Journal of International Law*, p 867.

but do not enjoy either equal use of roads and infrastructure or equal access to basic services, land and water resources. Such separation is materialised by the implementation of a complex combination of movement restrictions consisting of the wall, the settlements, roadblocks, military checkpoints, the obligation to use separate roads and a permit regime that impact the Palestinian population negatively”.¹¹⁷

95. South Africa submits that Israeli apartheid must be viewed in the context of the inherent illegality of the occupation as a whole; it being an additional breach of peremptory norms under an illegal situation. The fragmentation of Palestinian territory, the subjugation of its people, restrictions on movement, racial discrimination and state-sanctioned extrajudicial killings are all calculated to impede the right of the Palestinians to self-determination.
96. For over seventy years, various United Nations resolutions, reports of Special Rapporteurs and human rights organisations have deplored the egregious discriminatory treatment of Palestinians in the Occupied Palestinian Territory, including in Gaza and East Jerusalem. These discriminatory laws and practices have only become more entrenched, systematic and deliberate as Israel’s illegal occupation continues.
97. While the law of occupation allows different treatment, it does not permit grave breaches of human rights of the protected populations, nor to maintain a system of racial oppression and domination which would violate a peremptory norm of international law. The State of Israel is obligated to comply with international law, which prohibits discrimination on the basis of race, ethnicity, or nationality.
98. Further, Article 85(4)(c) of the Protocol I to the Geneva Conventions lists “practices of apartheid and other inhuman and degrading practices involving

¹¹⁷ CERD, *Concluding Observations: Israel*, 27 January 2020, UN Doc. CERD/C/ISR/CO/17-19, par 21 and 22.

outrages upon personal dignity, based on racial discrimination” as grave breaches of the Geneva Conventions, when committed wilfully.¹¹⁸

99. The Court held in the *South West Africa Case* that to establish and enforce distinctions, exclusions, restrictions, and limitations exclusively based on the grounds of race, colour, descent or national or ethnic origin, constitute a denial of fundamental human rights and is a flagrant violation of the purposes and principles of the United Nations Charter.¹¹⁹ In 1980, the United Nations Security Council by means of S/RES/471 “expressed deep concern that Israel, as the occupying Power, has failed to provide adequate protection of the civilian population in the occupied territories in conformity with the provision of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.”
100. As recently as December 2022, the United Nations General Assembly adopted a resolution¹²⁰ which demands that Israel “cease all measures contrary to international law, as well as discriminatory legislation, policies and actions in the Occupied Palestinian Territory”. The United Nations Special Rapporteur on the right to adequate housing, in October 2022, referred to the “institutionalised regime of systematic racial oppression and discrimination” which continues to lead to the destruction of Palestinian homes, calling it “nothing short of apartheid as defined under article 7(2)(h) of the Rome Statute” and further referring to the forcible transfer of populations as satisfying the definition of persecution under Article 7(2)(g) of the Rome Statute.¹²¹
101. It is South Africa’s submission that not only does Israel continue to fail to provide adequate protection of a protected population with international status under international law, but that it in fact continues to impose an

¹¹⁸ International Law Commission *Peremptory Norms of General International Law (Jus Cogens)*, Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, 2019, UN Doc. A/CN.4/L.936, Draft Conclusion 2.

¹¹⁹ *Op cit* par 131.

¹²⁰ A/RES/77/247.

¹²¹ A/77/190.

institutionalised regime of systematic racial oppression and discrimination against the people of Palestine which satisfies the prevailing evidentiary standard of the international crime of apartheid.

102. As Dugard points out, apartheid has acquired a legal content that, while deriving from the South African experience, is at the same time independent from it, having permeated a number of branches of public international law.¹²² The International Law Commission in its draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), concluded that prohibition of racial discrimination and apartheid is a peremptory norm under international law.¹²³
103. Three international treaties prohibit and/or explicitly criminalise apartheid as a crime against humanity: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) and the Rome Statute of the International Criminal Court (Rome Statute).
104. The crime of apartheid is an international crime, not limited in territorial scope. While the Apartheid Convention refers to “southern Africa”, this reference is in relation to policies of racial segregation and discrimination similar to those practices in southern Africa indicating that its prohibition extends beyond the territorial scope of that region.
105. The States of Palestine and Israel are both parties to the ICERD, while Palestine acceded to the Apartheid Convention in 2014. In 2015, by way of declaration under Article 12(3) of the Rome Statute, Palestine accepted the International Criminal Court’s jurisdiction as of 13 June 2014. It is South Africa’s submission that apartheid as a crime against humanity is a norm of *jus*

¹²² Dugard and Reynolds *op cit* p 867.

¹²³ International Law Commission (2022) *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*.

cogens giving rise to obligations *erga omnes*. In the *Barcelona Traction Case*, the Court held that obligations *erga omnes* would arise in the case of the prohibition of racial discrimination as a norm of *jus cogens* and that these obligations would arise from “the principles and rules concerning the basic rights of the human person, including protection from slavery and from racial discrimination.”¹²⁴

106. Turning to the definition of apartheid under international law, it is submitted that the Court is required to apply the definition for the crime of apartheid under customary international law. While ICERD defines racial discrimination and prohibits the practice of apartheid, it does not define its practice. Article 3 of ICERD imposes an obligation for “States Parties [to] particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”

107. The Apartheid Convention affirms the categorization of apartheid as a crime against humanity. It designates a list of inhuman acts which amount to apartheid “committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”¹²⁵

108. It further enumerates the specific acts falling within the scope of apartheid, including murder, torture, inhuman treatment, and arbitrary arrest of individuals belonging to a particular racial group; deliberate imposition of living conditions upon a racial group with the intent to cause their physical destruction; legislative measures that discriminate in the realms of politics, society, economics and culture; actions that segregate the population along racial lines through the establishment of separate residential areas for racial groups;

¹²⁴ *Case concerning the Barcelona Traction, Light and Power Company (Belgium v Spain)* Final judgment (1970) ICJ Rep 3, at 32 paras 33-34.

¹²⁵ Article 1, ICERD: “In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

prohibition of interracial marriages; and persecution of individuals opposing apartheid.¹²⁶

109. In respect of the crime of apartheid, Article 7(2)(h) of the Rome Statute refers to “inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”
110. It is submitted that the Court should apply the list of practices as it appears in Article 2 of the Apartheid Convention, which, read with Article 7(2)(h) of the Rome Statute, may further amount to acts of apartheid when committed in a systematic manner by one racial group over any other racial group for the purpose of maintaining domination and oppression of that group.
111. It is our contention that apartheid can be distinguished from other forms of prohibited discrimination, in that it involves an institutionalised element of law, policy and institutions and is state-sanctioned for the purpose of domination by one racial group over another. Israeli discriminatory and inhuman treatment of Palestinians has reached the threshold of apartheid within the meaning ascribed to it in the Apartheid Convention.
112. This manifests in many ways, with evidence of differential and discriminatory treatment in land use, housing, access to natural resources, citizenship, residence, family reunification, freedom of movement, access to education and health, and freedom of association. The 2009 report of the United Nations Fact Finding Mission on the Gaza Conflict¹²⁷ concluded that:

The systematic discrimination, both in law and in practice, against Palestinians, in legislation (including the existence of an entirely separate legal and court system which offers systematically worse conditions

¹²⁶ ICERD Article 2.

¹²⁷ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (2009), par 1502.

compared with that applicable to Israelis), and practice during arrest, detention, trial and sentence compared with Israeli citizens is contrary to ICCPR article 2 and potentially in violation of the prohibition on persecution as a crime against humanity.

113. It is submitted for the purposes of the definition of apartheid under the Apartheid Convention, that Jewish Israelis and Palestinian Arabs are distinct groups. The Court has observed that “the definition of racial discrimination in the Convention includes ‘national or ethnic origin. These references to ‘origin’ denote, respectively, a person’s bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person’s lifetime ... The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of ICERD, namely race, colour and descent, are also characteristics that are inherent at birth”.¹²⁸
114. The inhuman acts specified in Article 2 of the Apartheid Convention are well documented by United Nations monitoring bodies and human rights organisations and it is not possible to enumerate them in this Statement. A number of reputable scholars and human rights organisations have concluded that the inhuman acts being perpetrated by Israel against Palestinians amount to apartheid under international law.¹²⁹
115. The available evidence indicates that Israel is responsible for inhuman acts which fall within the ambit of Article 2(a), (c), (d) and (f) of the Apartheid Convention. This includes the right to life and liberty (Article 2(a)), given Israel’s excessive and disproportionate use of force against militants and civilians in Palestine, including arbitrary arrest and administrative detention. Palestinians as a group are further discriminated against through control of border crossings and permit and identity card systems, through the wall and

¹²⁸ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE)*, Preliminary Objections, judgment, 4 February 2021.

¹²⁹ Amnesty International *Israel’s Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity* (2022) (available at <https://www.amnesty.org/en/documents/mde15/5141/2022/en/>); Human Rights Watch *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021).

checkpoints and separate roads within the West Bank (Article 2(c)). The fragmentation and expropriation of Palestinian land, the prevention of the return of Palestinian refugees have divided the Occupied Palestinian Territory into enclaves or Bantustans, similar to the then South African context (Article 2(d)). Israel's systematic targeting of organisations and persons who oppose Israel's domination and oppression of Palestinian people in the Occupied Palestinian Territory further meet the persecution element as contained in Article 2(f) of the Apartheid Convention.

116. As to the institutionalised and systematic nature of Israel's discrimination against and domination of the Palestinian group, it is South Africa's contention that similar to the South African experience, the crime of apartheid is being committed against one group (the Palestinians) by another (Jewish group) to create a superior, privileged group, whose position is elevated through two-tiered systems and benefits reserved for such group through the granting of superior rights and privileges. This system is not random or isolated but widespread and oppressive, in a manner that is institutional and systemic, albeit dispersed among the fragmented Occupied Palestinian Territory.
117. Israel's discriminatory treatment of Palestinians must be viewed in its totality: it has created and maintained an institutionalised regime of systematic oppression wherever it controls territory, fuelled by demographic considerations that continue to shape its policies towards Palestinians. These manifest in the different sets of discriminatory and exclusionary laws, policies, and practices which intentionally serve to oppress and dominate Palestinians, to maximise the benefit to Jewish Israelis and to create a Jewish majority which is privileged in every respect.
118. The only conclusion to draw is that these policies seek to advance the Jewish nation whose privilege can only be maintained through the dispossession and fragmentation of Palestinian land, the economic and political malignment of Palestinians, restrictions on their movement, the denial of their dignity and absence of legal protection through arbitrary laws and military orders. This

reality is reminiscent of apartheid South Africa and the way in which the white minority government implemented the crime against humanity of apartheid to advance the white population through the oppression of the majority black population in South Africa between 1948 and 1994.

Question 2: The legal status of the occupation and the legal consequences for Israel, the United Nations and third States resulting from the aforementioned legal position

The legal status of the occupation

119. It has already been illustrated how the belligerent occupation by Israel of the Palestinian Territory since 1967 is preventing the achievement of self-determination for the Palestinian people and is violating the rules of international humanitarian law and international human rights law. We now turn to the question of how the violation of these rights affects the legal status of Israel's prolonged occupation of the Palestinian territories.

120. At the outset, it is recalled that there have been numerous reports by the United Nations, articles and papers published by scholars, and reports by civil society organisations that characterise the occupation of the Palestinian territory by Israel as illegal. Other sources, such as video footage and photographs on social media reliably documented how Israel's occupation in the Palestinian territory has seriously violated international humanitarian law.

121. Recently, the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel issued its Report to the General Assembly, wherein it found that there are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law owing to its permanence and to actions undertaken by Israel to annex parts of the land *de facto* and *de jure*.¹³⁰

¹³⁰ Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel issued on 14 September 2022, p 24.

122. To assist in determining the legality of Israel's occupation of the Palestinian territory, this analysis shall focus on the indicators below:

The Prohibition of the annexation of an occupied territory

123. It is recalled that the annexation of occupied territory is illegal under international law. The illegal nature of Israel's adoption of annexation policies/legislation are also recognised in a number of United Nations reports and resolutions. The United Nations General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States provides that "the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal."¹³¹

124. On 20 August 1980, the United Nations Security Council in resolution 478 (1980) censured Israel's *de jure* annexation of the East Jerusalem and parts of the West Bank by a Cabinet decision in 1967 and by a Knesset vote in 1980. The Security Council affirmed that Israel's actions of enactment of the "basic law" constituted a violation of international law, and that all the legislative and administrative measures and actions taken by Israel, which have altered or purport to alter the character and status of Jerusalem are null and void and must be rescinded forthwith.¹³²

125. However, Israel argued that it has a superior title to East Jerusalem and the West Bank because they were acquired in a defensive war.¹³³ Resolution 478

¹³¹ UNGA, A_RES_2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, accessed at <https://digitallibrary.un.org/record/202170>.

¹³² United Nations Security Council resolution 478 (1980) of 20 August 1980.

¹³³ *Lynk op cit.*

(1980) reaffirmed the position that the acquisition of a territory by force is inadmissible under international law.¹³⁴ This position was also confirmed by the Court the *Construction of a Wall Case*:¹³⁵

The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

126. In terms of the above, it is clear that an act of acquisition of territory by threat or use of force makes no distinction as to whether the territory was occupied through a war of self-defense or an act of aggression; what is important is that annexation is prohibited in both circumstances.¹³⁶

127. In addition, Article 47 of the Fourth Geneva Convention addresses the protection of persons in occupied territories. It provides that “protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying power, nor by any annexation by the latter of the whole or part of the occupied territory”. While the Fourth Geneva Convention does not pronounce on the character and legality of occupation, customary international law on the other hand, in particular, the *jus ad bellum*, applies in an annexation situation. The *jus ad bellum* forbids “the acquisition of territory through the use of force against the territorial integrity and political independence of the occupied territory”¹³⁷.

¹³⁴ United Nations Security Council resolution 478 (1980) of 20 August 1980.

¹³⁵ *Construction of a Wall Case* par 87.

¹³⁶ Lynk, *op cit*.

¹³⁷ Boutruche and Sassòli *op cit* p 34.

128. Israel, however, has long disputed that the law of occupation applies to the Occupied Palestinian Territory, because there was no sovereign authority before 1967.¹³⁸ This was also highlighted in the *Construction of a Wall Case*, wherein the Court stated that:¹³⁹

In particular, in paragraph 3 of Annex 1 to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention.

129. However, the Court recalled that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention, and that Israel has not made any reservation that would be pertinent to the present proceedings.¹⁴⁰ After the occupation of the West Bank in 1967, Israel issued an order No. 3 which provided under its Article 35 that the Military Court must apply the provisions of the Fourth Geneva Convention and that in case of conflict between the order and the Fourth Geneva Convention, the Convention shall prevail.¹⁴¹

130. It is also recalled that South Africa’s annexation of Namibia was found to be illegal by the Court in the *South West Africa Case*.¹⁴² Importantly, the Court found that the mandatory power must act as a trustee for the benefit of the people of the territory, and that it must fulfil its obligations in good faith, and the end result of the mandate must be self-determination and independence.¹⁴³

¹³⁸ Azarova *op cit*.

¹³⁹ *Construction of a Wall Case* par 90.

¹⁴⁰ *Ibid* par 91.

¹⁴¹ *Ibid* par 93.

¹⁴² International Court of Justice Advisory Opinion on the *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

¹⁴³ Lynk *op cit*.

The prolonged nature of Israel's occupation of the Palestinian territories

131. As already indicated in this Statement, the Israeli occupation of the Palestinian territories is the longest in modern history. Israel has occupied the Palestinian territories for 56 years since 1967. As mentioned above, occupation of a territory by an occupying power is meant to be temporary but the Israeli occupation in Palestine has clearly become permanent. Lynk¹⁴⁴ argues that “occupation is by definition a temporary and exceptional situation where the occupying power assumes the role of a *de facto* administrator of the territory until conditions allow for the return of the territory to the sovereign”. Yet, in the Palestinian territories Israel is still occupying the area in total disregard of international humanitarian law with no intentions of ceasing the illegal act, any time soon. Boutruche and Sassòli also recognise that by “its prolonged character the Israeli occupation challenges the main assumption underlying the law of belligerent occupation according to which in nature the occupation is meant to be transitional and temporary”.¹⁴⁵

132. The prolonged occupation has led to the infringement of the fundamental principle of self-determination of the Palestinian peoples, thereby depriving the Palestinian peoples their right to decide their own political status, free of external interference. It is recalled that this right has been endorsed by legal instruments and many United Nations resolutions. The General Assembly in resolution 2625 for instance, states that “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.”¹⁴⁶

¹⁴⁴ *Ibid.*

¹⁴⁵ Boutruche and Sassòli *M op cit.*

¹⁴⁶ United Nations General Assembly resolution 2625 (XXV) of 24 October 1970.

133. In September 2022, the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory including East Jerusalem, and in Israel,¹⁴⁷ found that “there are reasonable grounds to conclude that the Israeli occupation of Palestinian territories is now unlawful under international law owing to its permanence and to actions undertaken by Israel to annex parts of the land de facto and de jure ... Israel treats the occupation as a permanent fixture and has – for all intents and purposes – annexed parts of the West Bank”.
134. The International Commission of Inquiry is an independent body, the primary role of which has been to serve as a truth finding mechanism. It has been entrusted by the United Nations to report on violations taking place in the Occupied Palestinian Territory and to advise the international community on actions to address such violations. Its reports are viewed as credible as they give a clear picture of the violations that are committed by Israel on the ground.
135. In addition, a number of United Nations Security Council resolutions have been adopted dating back as far as 1967 requesting Israel, as the occupying power, to abide by international law, in particular the Fourth Geneva Convention and to “desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem”.¹⁴⁸
136. It is therefore concerning that, despite these credible reports, the international community is still reluctant or unable to declare the permanent occupation illegal and hold Israel accountable. Boutruche and Sassòli note that “an

¹⁴⁷ United Nations General Assembly, *Report of the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory including East Jerusalem, and in Israel*, 14 September 2022, A/77/328, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/591/34/PDF/N2259134.pdf?OpenElement>.

¹⁴⁸ United Nations Security Council resolution 446 of 23 March 1979, par 3. Also Security Council resolutions 242 of 22 November 1967, resolution 465 of 1 March 1980, resolution 476 of 30 June 1980, resolution 478 of 20 August 1980, resolution 497 of 17 December 1981, resolution 904 of 18 March 1994, and resolution 2334 of 23 December 2016.

occupation continuing over a long period of time impacts on the way the duties and obligations of the occupying power under International Humanitarian Law are considered and interpreted”¹⁴⁹.

137. South Africa’s submissions are supported by the following conclusion by Farncesca Albanese, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.¹⁵⁰ She concludes that the Israeli occupation of the Palestinian Territory is inherently illegal:

The Israeli occupation is illegal because it has proven not to be temporary, is deliberately administered against the best interests of the occupied population and has resulted in the annexation of occupied territory, breaching most obligations imposed on the Occupying Power. Its illegality also stems from its systematic violation of at least three peremptory norms of international law: the prohibition on the acquisition of territory through the use of force; the prohibition of imposing regimes of alien subjugation, domination and exploitation, including racial discrimination and apartheid and the obligation of states to respect the rights of peoples to self-determination. By the same token, Israeli occupation constitutes an unjustified use of force and an act of aggression. Such an occupation is unequivocally prohibited under international law and contrary to the values, purposes and principles of the United Nations as enshrined in its Charter.

138. Michael Lynk, the Special Rapporteur on the situation of human rights in the Palestinian territories since 1967, in his report of 23 October 2017¹⁵¹ raises the question of whether an occupation, that was once regarded as legal, can cross a red line into illegality on the basis of flagrant violations of international law by the occupying power. He then designs a four-point test for lawful occupation. According to this test:

- a lawful occupier cannot annex any of the occupied territory;

¹⁴⁹ Boutruche and Sassòli *op cit* p 2.

¹⁵⁰ A/77/356 of 21 September 2022, par 10(b).

¹⁵¹ A/72/556.

- the occupation must be temporary and cannot be either permanent or indefinite; and the occupant must seek to end the occupation and return the territory to the sovereign as soon as reasonably possible;
- the occupier must during the occupation act in the best interests of the people under occupation; and
- must administer the occupied territory in good faith and act in full compliance with its duties and obligations under international law and as a member of the United Nations.

139. Applying this test to the factual situation, he comes to the following conclusion:

States who administer territory under international supervision – whether an occupier of a mandatory power – will cross the red line into illegality if they breach their fundamental obligations as alien rulers. The International Court of Justice in its advisory opinion on Namibia supports this conclusion. The Special Rapporteur submits that Israel’s role as an occupant has crossed this red line.¹⁵²

140. South Africa submits that the cumulative effect of the aforementioned factors must lead the Court to the conclusion that the occupation itself has become inherently and fundamentally illegal in terms of international law, as South Africa’s prolonged presence in Namibia was found to be illegal by the Court.

Legal consequences for Israel, the United Nations and third States

Israel

141. The illegality of the occupation by Israel of the Palestinian Territory, including East Jerusalem, *per se* as well as the aforementioned violation of peremptory norms of international law are breaches of international obligations constituting internationally wrongful acts attributable to Israel and which invoke the law of

¹⁵² *Op cit* par 65.

state responsibility.¹⁵³ Article 30 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 provides that a State responsible for an internationally wrongful act is under an obligation to cease the act, if it is continuing, and to offer appropriate assurances of non-repetition. The matter of cessation is usually closely connected to that of reparation. Article 31 of the Draft Articles provides that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Article 31 reflects a principle of international law, which was described by the Permanent Court of International Justice in the *Factory at Chorzow Case*:¹⁵⁴

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form ... The essential principle ... is 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, had existed if that act had not been committed.

142. Article 34 of the Draft Articles provides that reparation can take the form of restitution, compensation and satisfaction. Article 35 of the Draft Articles provide that in cases where restitution in kind, which aims at establishing the situation before the internationally wrongful act was committed, is not possible, a state responsible for an internationally wrongful act remains under an obligation to make restitution. This is conditional to the extent that it is materially possible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. The Court has held in the *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Case*¹⁵⁵ that it is a "well-established rule of international law that an injured State is entitled to obtain compensation from a State that has committed an internationally wrongful act for the damage caused by it."

¹⁵³ Article 3 of the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)*; Shaw *op cit* p 799.

¹⁵⁴ *Factory at Chorzow, Jurisdiction, Judgement No. 8, 1927 P.C.I.J., No. 9, p 21; p 47.*

¹⁵⁵ ICJ Reports 1997 p 7; 81.

143. In the present case, the aforementioned principles of international law mean that Israel must immediately cease its illegal settlement activities and all measures aimed at altering the character, status and demographic composition of the Occupied Palestinian Territories. It must terminate the illegal occupation of and withdraw its military forces from the Occupied Palestinian Territory, allowing for the right to self-determination of the Palestinian people to be realised. Israel as occupying power must forthwith cease all settlement activities and other measures aimed at altering the character, status and demographic composition of the Occupied Palestinian Territory, including East Jerusalem.
144. Israel must also cease forthwith all violations of international humanitarian law and international human rights law. It must specifically terminate all segregation measures and discriminatory legislation, policies and actions in the Occupied Palestinian Territory. Israel is a party to a plethora of international agreements on the protection of international humanitarian law and international human rights law. It must be emphasised that international law rests on the premise that states will adhere to the international obligations to which they have bound themselves. The decision to become a party to an international agreement is a choice that rests solely on a state; if it does not wish to adhere to a treaty, it need not ratify the treaty. However, by binding itself on the international plane, a state takes on international obligations and assumes the responsibility of adhering to those obligations. Where a State fails to observe its obligations in an international treaty to which it has bound itself, it has breached international law. This derives from the general principle of law known as *pacta sunt servanda* which requires that a state must comply with its obligations contained in a treaty once it has ratified or acceded to such a treaty.¹⁵⁶ To summarise: Israel must, in terms of its obligations under international law, specifically the Fourth Geneva Convention, administer the Occupied Palestinian Territory in good faith and in the best interests of the population under occupation.

¹⁵⁶ Preamble, Article 26, *Vienna Convention on the Law of Treaties*, 1969.

145. The Court has already, in the *Construction of a Wall Case*,¹⁵⁷ held that Israel has a compensation obligation with respect to the Palestinians affected by the construction of the wall:

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should materially be impossible, Israel has an obligation to compensate the persons in question for damage suffered.

146. It is submitted that the aforementioned position expressed by the Court could form the basis for an order relating to the whole of the Occupied Palestinian Territory in the present case. In this respect, it has been proposed that the illegality of the occupation *per se* (as opposed to an occupation that is legal in terms of the *jus in bello*) is a factor which may increase the financial compensation to legal and natural persons affected thereby.¹⁵⁸

The United Nations

147. The United Nations Security Council and the United Nations General Assembly must in all their engagements and actions on the issue of Palestine be guided by the imperative of the implementation of the sacrosanct Palestinian right to self-determination. This should also be the bedrock principle of any future negotiations on a final status for Palestine and the United Nations should ensure that no future negotiations on the status of Palestine will negate this *jus cogens* norm. The United Nations, as the representative of the international community, further has the obligation to work towards establishing an international presence to monitor the situation, contribute to ending the violence, protect the Palestinian civilian population and assist the parties to implement any agreements reached.

¹⁵⁷ *Wall Case*, par 153.

¹⁵⁸ Ronen Yael *Illegal Occupation and its Consequences* (41) 1&2 *Israeli Law Review* 2008 p 231.

148. These organs of the United Nations should also take continuous action to end the racial discrimination and apartheid practiced by Israel in the Occupied Palestinian Territory to ensure that the illegal situation is ended immediately and to ensure that their resolutions are implemented without delay. This may include the establishment of a committee, similar to the Special Committee on Apartheid, with respect to the Occupied Palestinian Territory.

Third States

149. Article 41(1) of the Draft Articles provides that States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. Article 40 defines a “serious breach” as a gross or systematic failure to fulfil an obligation arising under a peremptory norm of general international law. There is no doubt that the breaches of peremptory norms by Israel qualify as such serious breaches:

To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims.¹⁵⁹

150. Third States must therefore immediately act with a view to end, through lawful means, the annexation by Israel of parts of the Occupied Palestinian Territory and East Jerusalem which violates the prohibition on the acquisition of territory by means of force, the systematic racial discrimination and the suppression of human rights and the denial of self-determination, and refrain from rendering assistance or aid in any form to the maintenance of the situation.

¹⁵⁹ *Responsibility of States for Internationally Wrongful Acts, 2001* Text adopted by the International Law Commission at its fifty-third session, p 113, par 8.

151. Furthermore, it is the obligation of all States to take collective actions against Israel for disrespecting international humanitarian law and to ensure compliance with international humanitarian law. In summary: all States need to cooperate to end Israel's permanent occupation in the Palestinian territory.
152. Article 41(2) of the Draft Articles codifies the international principle of *ex injuria non jus oritur*, a principle that prevents a wrongdoer from benefitting from its wrongful acts. Consequently, no State shall recognise as lawful a situation created by a serious breach of international law, nor render aid or assistance in maintaining the situation. The United Nations has recognised the peremptory norms violated by Israel in the Occupied Palestinian Territory, namely the prohibition on the acquisition of territory by means of force, the prohibition of systematic racial discrimination and the suppression of human rights and the prohibition of the denial of self-determination, for the purposes of non-recognition.¹⁶⁰
153. All States are therefore under a positive obligation not to recognise Israel's continued occupation of and presence in the Occupied Palestinian Territory. This obligation includes the treaty law obligation contained in Article 34 of the Vienna Convention on the Law of Treaties, 1969 not to enter into agreements with Israel in relation to the Occupied Palestinian Territory, where the Government of Israel purports to act on behalf of or concerning the occupied people of Palestine, unless Palestine has consented thereto.¹⁶¹ Third States are also under an obligation to refrain from lending any support or any form of assistance to Israel to maintain its occupation of Palestinian territory.

¹⁶⁰ Dugard *op cit* p 147. Dugard also notes that non-recognition has seriously undermined Israel's territorial claims to the Golan Heights and East Jerusalem, and further refers to the non-recognition of the Bantustans created as part of the South African apartheid policy due to the policy being a violation of the right to self-determination.

¹⁶¹ This principle was applied by the European Court of Justice with respect to the Western Sahara in the case of *Council v. Front Polisario* C-104/16P, 21 December 2016.

154. For as long as the occupation continues, the people of Palestine must be allowed to continue to enjoy the rights under the local legislation, which were replaced or abolished by Israel.

155. The international community through the United Nations should enable the Palestinian people to exercise their right of self-determination by compelling Israel to engage and cooperate.

V. CONCLUSION

156. It is often said that the right to life is the font from which all other rights flow. The same can be said about the right to self-determination. In the absence of self-determination, it is not possible for a people to realise a plethora of other rights. The achievement of the right to self-determination for the Palestinian people is inextricably linked to the status of the Occupied Palestinian Territory. Occupation, under the *jus in bello* is, by its nature, temporary. The aim of the law of occupation is the protection of the civilian population of the occupied territory and precludes the occupying State to revise the systems of government or the international status of the territory.¹⁶² The reason why an occupation took place in the first place and whether it resulted from the legal or illegal use of force, are irrelevant factors: the underlying purpose of an occupation should be to obtain concrete, and hence temporary, military objectives.¹⁶³ It is illegal for an occupying power to acquire occupied territory or to transform the status of the territory by creating irreversible facts on the ground so that the people of the territory would be precluded from eventually freely exercising their right self-determination at the end of the occupation.

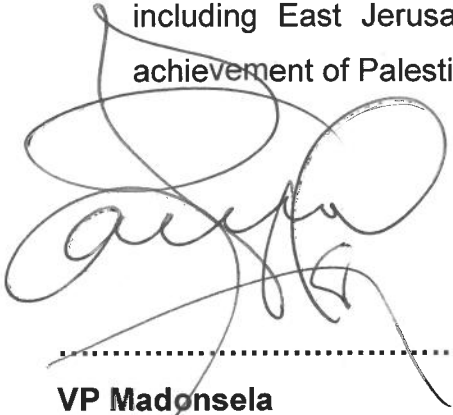
157. Sadly though, while many States agree that the situation in the Palestinian territories is untenable, it would appear that there is no political will to address the illegal acts that are currently committed by Israel in Palestine. Those

¹⁶² Azarova *op cit* p 5.

¹⁶³ *Ibid* p 6.

States that are unwilling to rebuke Israel's illegal actions in the Occupied Palestinian Territory are perceived to be encouraging and assisting Israel to continue to violate international humanitarian law, in violation of their own obligations under international law. On the other hand, States that oppose the violation, appear to be unable to take action to stop Israel's illegal occupation and persistent violation of international law in the Palestinian territories.

158. There is a mount of credible reports submitted to the United Nations proving the illegal status of Israel's permanent occupation in the Palestinian territories. Against this background it is submitted that the Court should find that the prolonged Israeli belligerent occupation of the Occupied Palestinian Territory, including East Jerusalem, is illegal and an insurmountable barrier to the achievement of Palestinian self-determination.



.....
VP Madonsela

Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands

**FOR AND ON BEHALF OF THE GOVERNMENT
OF THE REPUBLIC OF SOUTH AFRICA**

DATE: 25 July 2023