***Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem***
***(Request for Advisory Opinion)***

**International Court of Justice**

**Written comments on the written statements made by States and organizations**

**League of Arab States**

**25 October 2023**

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## 1. Introduction

1. This response addresses certain matters arising out of the written statements made by states and other organizations in relation to the case. It is partly linked to, and should be taken in conjunction with, the written statement to the Court by the League of Arab States, dated 20 July 2023 (referred to herein as 'the written statement').

2. The response begins in section 2 by summarizing, by way of a recap of what is set out in the written statement, the position on the illegality of the occupation, its consequences, and the prior legal determinations on general matters on which this position is partly based.

3. In section 3, it then addresses the suggestion made in a few of the written statements that the ordinary operation of the international legal framework, as outlined in section 2, has been/should be departed from.

    a. These written statements suggest that the commitment to a settlement process, including through the Oslo accords (Oslo), has somehow suspended the operation of the ordinary application of international law to the occupation, in that it has rendered certain key matters that would be determined by such application subject to determination only by what is agreed in a settlement process. On this basis, it is suggested that the question of the legality/illegality of the occupation is not something to be determined in the manner outlined in section 2, and that it would be inappropriate for the Court to engage in any determination of this question. More specifically, it is also suggested that the Oslo accords legalized the existence of certain elements of the occupation, and that this trumps the position on the question of the legality/illegality of the occupation that would be arrived at according to the approach outlined in section 2.

    b. It will be explained that both of these positions are incorrect, not least because they fail to account for the continued operation of international law during any process of dispute settlement and, indeed, how respect for that is embedded as a legal principle applicable to such a process as a matter of the UN Charter. The correct, and complete, international law framework applicable to determine the legality/illegality of the occupation is as summarized in section 2. More specifically, Oslo does not provide legal cover for the existence of the occupation. The existence of a commitment to a settlement process does not pose any legal impediment to the Court's exercise of its discretion to exercise jurisdiction over the case. Indeed, suggestions to the contrary risk compromising the Court's judicial function, potentially co-opting the Court in a political manoeuvre aimed at benefiting one side in a dispute—Israel—by enabling the meaning and application of the general international law framework to the occupation to be concealed in a manner that is to the advantage of Israel and to the detriment of the Palestinian people.

4. Section 4 addresses the suggestion made again by a few written statements that the situation before the Court is somehow exclusively or essentially a bilateral dispute, and that this has implications for whether the Court should exercise its discretion to answer the question put to it by the General Assembly. It will be explained how this is manifestly not the case, and to suggest otherwise is to downplay the centrality of the situation at issue to the global public interest, as reflected in the involvement of the United Nations across all

of its organs and agencies, including the present Court, since the creation of the organization. This is also reflected in how, as set out in the written statement, the areas of international law violated by Israel in both the existence and conduct of the occupation are all those that have *erga omnes* status and are thus by definition not only bilateral but also multilateral in nature.

5. Section 5 responds to the suggestion that the question requires the Court to address matters that are so complex, requiring so much information, and covering such a long period of time, that this is, essentially, too much for the Court to handle. In consequence, either jurisdiction should not be exercised at all, or the Court should make things more manageable by cherry-picking certain discrete matters covered by the question while leaving other matters covered by it unaddressed. This suggestion has no merit in the face of the Court's jurisprudence, and given the pressing need for the situation before it to be addressed in its entirety, so that the Court can assist the General Assembly to discharge its functions under the UN Charter to deal comprehensively with matters that directly implicate the purposes and principles of the UN Charter.

6. Section 6 responds to the suggestion in the written submission of Fiji that the legal effect of the League of Nations Mandate Agreement for Palestine is to provide an international legal entitlement on the part of Israel to the entire territory between the Jordan river and the Mediterranean Sea, in terms of both sovereignty and Jewish settlement. The effect of this argument is that there is no territorial basis for the Palestinian right of self-determination, and, in consequence, there is no legal bar to the occupation, annexation and Jewish settlement on all or part of the West Bank (including East Jerusalem) and Gaza. This constitutes the complete opposite of the correct position in international law, which is that the Palestinian people have what is in effect a right of external self-determination on the basis of Article 22 of the Covenant of the League of Nations (as well as, separately, on the basis of the right of self-determination that emerged in international law applicable to people in colonial territories generally in the middle of the twentieth century), and this right was not somehow legally replaced by a somewhat equivalent right vested in the Jewish people by the Palestine Mandate Agreement.

7. Section 7 addresses the applicability of the *jus ad bellum* to the occupation, and why it does not meet the test for legality, in response to the suggestion in the written submission of Fiji to the contrary.

## 2. Applying the international legal framework: recap of the position on illegality and its consequences, and the prior determinations on which this is based

### 2.a. Illegality and its consequences

8. As set out in the written statement, the occupation is existentially illegal as a matter of the international law on the use of force (and as such constitutes an aggression), and the law of self-determination. Therefore, it needs to be terminated immediately. Both areas of international law being breached by the continued existence of the occupation have *jus cogens* status in international law. One aspect of the existential illegality of the occupation is that those aspects of the occupation involving purported annexation, whether *de jure* or

*de facto*, are illegal; the existence of the occupation on the basis of such purported annexation is illegal; and the purported annexation is without legal effect. One consequence of the foregoing is that in the absence of a termination of the occupation, the Palestinian people have a legal right to resist its existence. The occupation is also illegal in the way it is conducted, notably in terms of the abusive and discriminatory treatment of the Palestinian people, the implanting of and support given to Jewish settlements, and the prevention of the right of Palestinian people to return. This illegality must also end immediately, for example by Israel ceasing all abusive and discriminatory treatment of the Palestinian people, removing all settlers and settlements, and allowing Palestinian people to return.

### 2.b. Prior legal determinations on which the determination of illegality is partly based

9. The foregoing position on illegality and its consequences is based on legal determinations of prior, more general matters. These include the following:

   a. The Palestinian people have a legal right of external self-determination.

   b. The West Bank (including East Jerusalem) and Gaza are part of the sovereign territory of the State of Palestine and the Palestinian people as a self-determination unit.

   c. The West Bank (including East Jerusalem) and Gaza are not part of the sovereign territory of Israel. Israel's exercise of control over this territory is therefore that of a non-sovereign over land that is the sovereign territory of another international legal person.

   d. In consequence, Israel is legally prohibited from annexing all or part of this land.

   e. Also in consequence, the legality of the existence of Israel's exercise of control over this territory falls to be determined according to the law of self-determination and (because the control is effected through the use of military force) the law on the use of force.

   f. Also in consequence, the applicable law governing the legality of the conduct of Israel's exercise of control over this territory is occupation law plus international human rights law (on the basis that the latter applies extraterritorially and the test for extraterritorial applicability is met).

   g. The Palestinian people have a legal right to return.

   h. The Palestinian people have a legal right to resist the existence of the occupation, given that the occupation constitutes a violation of their right to self-determination.

## 3. The argument that the ordinary operation of the international legal framework, as outlined above, has been/should be departed from, and this has implications for whether the Court can exercise jurisdiction, and whether the occupation is existentially illegal

### 3.a. The argument

10. A small number of written statements in the present proceedings seem to suggest that in consenting to, and continuing to affirm the operation of, the Oslo peace agreements, the PLO as the representative of the Palestinian people somehow consented to an alteration in the operation of the international legal framework as it applies to the determination of the legality/illegality of the occupation, and/or the prior determinations of general matters on which that determination of legality/illegality is partly based. Insofar as the Oslo process was and continues to be endorsed at the United Nations and by certain other States, it is also seemingly suggested that the UN and these States have endorsed the supposed alteration.

11. The supposed alteration has two elements, the first is relatively general, the second is relatively specific.

12. In the first place, a few of the written statements suggest that some of the prior determinations of general matters on which the determination of legality/illegality would be partially based, as outlined above, have been made subject to the outcome of peace negotiations. The statements argue that because the Oslo accords provide for these matters to be addressed in peace negotiations, it would not be appropriate for the Court to pronounce upon them. As a result, the Court cannot make a determination on the illegality of the existence and the conduct of the occupation, because to do this it would have to determine matters which, it is said, have been left to negotiation.

13. In the second place, more narrowly, a few of the written statements suggest that since the terms of the Oslo accords purport to provide for certain aspects of the Israeli presence in the Palestinian territory to operate for an interim period, this permits the existence of the relevant aspects of the presence as a matter of international law. Thus, the position on the existential illegality of the occupation is different from that arrived at from applying the general international law framework as indicated above. Oslo essentially derogates from that, rendering lawful what would otherwise be illegal.

### 3.b. The continued ordinary operation of international law during and in the settlement of international disputes

14. If the Palestinian people had no collective right to external self-determination in international law, it would indeed follow that the question of the existence of the occupation would not be a matter of such legal rights, and any legal arrangement on this question would only be rooted in something agreed to by Israel in negotiations.

15. However, as the present Court itself has affirmed in the *Wall* advisory opinion, it is universally accepted that the Palestinian people do indeed have a right of external self-determination, a legal position that no written statement in the present proceedings has challenged, and most have affirmed. This has implications for the status of the West Bank (including East Jerusalem) and Gaza, and thus the legality of Israel's occupation of that territory, in both its existence and conduct. These implications have been outlined above.

16. The question is whether the representatives of the Palestinian people somehow agreed to put the full scope of application of the right of self-determination aside by agreeing to and continuing to affirm the Oslo accords. And whether this therefore abrogates the effect of

the right of self-determination on the existential legality of the occupation, and the prior issues on which a determination of such legality is partly based (such as the question of the status of the West Bank (including East Jerusalem) and Gaza).

17. However, when States and peoples participate in processes of dispute settlement, including negotiation, which concern matters implicating their rights under international law, this does not mean that they have given up those rights. While a negotiation process might eventually lead to a party agreeing to modify the scope of and even give up certain rights, and while reaching this outcome might be understood by some to be the purpose of the negotiations (cf. 'land for peace'), this should not be confused with the idea that these rights do not exist in the first place, or that the party has somehow renounced them by entering into a negotiation about whether a concession might be made.

18. The Palestinian people have continued to be entitled to their right of external self-determination in international law, in its full, ordinary meaning and scope, and the implications of this for the other prior issues on which determinations of legality/illegality partly depend, such as the status of the West Bank, including East Jerusalem, and Gaza, have continued to operate, throughout the period when Palestinian representatives entered into agreements such as the Oslo accords, and participated in negotiations. It follows, then, that agreements and negotiations have left unchanged the general international law framework applicable to the legality of the existence and the conduct of the occupation, and the prior legal determinations on which a determination of such legality is partially based. For example, the fact that the question of whether the Palestinian people should give up sovereignty over parts of the West Bank, including East Jerusalem, in favour of Israel, in return for a permanent peace agreement ('land for peace'), has been and may be discussed in negotiations does not mean that the Palestinian people's sovereignty over all or parts of that land has thereby already been somehow terminated or suspended. Israel's presence on the land continues to be, as the Court held in the *Wall* Advisory Opinion (issued post-Oslo), that of a non-sovereign occupier. The existential legality of this occupation falls to be determined according to the standard international legal framework of the law on the use of force and the law of self-determination.

19. The continued operation of international law during any process of dispute settlement, including negotiation, is a necessary consequence of the rule of international law itself.[1] This is reflected in the international law of dispute settlement including within it a requirement that, in the words of the UN Charter, Art 2(3):

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, *and justice*, are not endangered (emphasis added).

It is also reflected in the fact that, under Article 1(1) of the UN Charter, one of the purposes of the United Nations is to bring about "the adjustment or settlement of international

[1] See, e.g., the written statements in the present case of Bangladesh ("International law must dictate the terms of any future solution to the plight of the Palestinian people. The Palestinian people must not be compelled to negotiate their freedom in the face of unlawful conduct") (para. 8), and Norway (expressing a "preference for a negotiated, peaceful two state solution within the framework of international law") (p. 2).

disputes or situations which might lead to a breach of the peace" in "conformity with the principles of justice and international law".

20. It follows that all States, as subjects of international law, and those States who are parties to the UN Charter, are legally committed to respecting the full, normal operation of international law during any process of dispute settlement. And insofar as the United Nations is involved in and/or takes a position on any such process, this must necessarily be on the basis that the process itself does not and cannot involve the suspension of the ordinary operation of international law to the matters it is concerned with. The powers of UN Organs are limited by the purposes and principles of the Organization, as set out in the UN Charter, including, therefore, the foregoing stipulation concerning dispute settlement having to be in conformity with the principles of justice and international law. Notably, when it comes to the Security Council in particular, there is a dedicated Charter provision linking its powers to the purposes and principles of the UN. Under Article 24(2), the Council "shall act in accordance with the Purposes and Principles of the United Nations."[2] The significance of dispute settlement processes being in conformity with international law for the UN in general, and as it relates to the very issue under present evaluation in particular, was underlined by the present Court, when in the *Wall* Advisory Opinion it drew the General Assembly's attention "to the need for…efforts to be encouraged with a view to achieving as soon as possible, *on the basis of international law*, a negotiated solution" (emphasis added) (p. 201, para. 99).

21. As usual, the present Court is being asked to address a question put to it by a fellow principal UN organ on the basis of this understanding of the operation of international law when a dispute settlement process (in addition to that operated by itself under its contentious jurisdiction) might also be in play, bearing in mind that its function is to apply international law, and that it exists and operates as a principal UN organ on the basis of powers given to it by the UN Charter.

### 3.c. Oslo does not legalize the existence of occupation

#### 3.c.i Oslo's provisions concerning the Israeli presence in the West Bank and the existence of certain Palestinian institutions of self-governance

22. At the time of the present written comments, the legal operability of the 1993/5 Oslo accords as a general matter continues to be affirmed by the representatives of the Palestinian people (as well as Israel).

23. The accords purport to provide for certain aspects of the Israeli presence in the Palestinian territory to continue for an interim period. They also provide for a degree of reduction by Israel of authority in certain areas, and, in consequence, enable certain self-governing

[2] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge ad hoc Lauterpacht, I.C.J. Reports 1993 p. 325 at p. 440, para. 101 and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports 1992, p. 3 at p. 61-5 (addressing the specific purpose and principle at issue, concerning international law and dispute settlement in Art. 1(1)).

Palestinian institutions to operate in these areas, even if still subject to the occupation as whole.

24. The Palestinian people and their representatives do not depend on Oslo for their legal entitlement to exercise such prerogatives and functions. They enjoy this entitlement, which, moreover, extends to the entirety of the Palestinian territory and not just those areas provided for under Oslo, as a matter of their right to self-determination in international law. Equally, Israel's legal obligation to permit these administrative prerogatives and functions does not depend exclusively on Oslo. In any case, it has an obligation under the law of self-determination to permit them and more broadly to permit Palestinian self-administration throughout the entirety of the West Bank (including East Jerusalem) and Gaza. Oslo amounts, then, to a treaty-based legal obligation on Israel to engage in a very partial reduction in its impediment to Palestinian self-determination, while at the same time also being obliged, as a matter of the international law of self-determination, to end the impediment completely by withdrawing entirely its control from all the Palestinian West Bank, including East Jerusalem, as well as Gaza.

25. Oslo does not legalize the existence of the occupation. The agreement of the representatives of the Palestinian people to Oslo was procured by Israel in the context of an illegal use of force, and the provisions in Oslo purporting to permit Israel to maintain its presence in the Palestinian territory are contrary to peremptory norms in international law. The consequence of these two factors, both individually and together, is that those provisions purporting to legalize the occupation in Oslo are void (even if the accords as a general matter remain in force).

### 3.c.ii Coerced consent through illegal use of force

26. The accords were agreed to by the PLO in the context of the already-existing occupation, being conducted by the other party to the accords, which, as indicated, was and is an unlawful use of force.

27. In a provision reflective of the position in customary international law, the Vienna Convention on the Law of Treaties (VCLT) stipulates in Article 52 that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations"[3]. This rule, which the VCLT (using its State-centric language, which can be applied here to a non-State self-determination unit) characterizes (in the same Article) as arising in the context of "coercion of a State by the threat or use of force", reflects the policy position that a State should not be able to use force illegally to gain advantages that would not be obtainable, or would be less easily obtainable, through peaceful means. The lack of such a rule would risk greater recourse to war internationally. The effort to limit war to narrow circumstances of self-defence, in order, in the opening words of the UN Charter, to "save succeeding generations from the scourge of war", presupposes and requires not only that such a doctrine of recourse to force as a means of self-help is itself illegal, but also, to bolster this, that provision is made to deny a State the advantages enabled by illegal war. This is the reason why the use of force to annex territory is not only a violation of the international law on

[3] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 119.

the use of force (hence Israel's acts of annexation are illegal as breaches of this area of law), but also, in terms of the law of title to territory, treated as a nullity (hence Israel is not sovereign over those areas it has purportedly annexed, like East Jerusalem).

28. As set out in the written statement, the existence of the occupation is not only a means, in certain areas, of Israel purporting to assert *de jure* annexation (and so for Israel this is not an occupation, but an ostensible assertion of sovereignty or at least control over territory in relation to which it claims it has a sovereign right). It is also more generally a means through which Israel establishes 'facts on the ground' to gain advantages when negotiating the terms of any agreement, including insofar as provision might be made for Israel to acquire territorial sovereignty over parts of the Palestinian territory. One such advantage is that the basic fact of this domination manifestly places the Palestinian people in an egregiously weak position when it comes to negotiations on any agreement, whether for an interim or final status. This is especially true when the agreement in question, as here, is about the very nature of that domination itself, i.e., re-configuring how the occupation will operate.

29. Representatives of a dominated people were negotiating and supposedly agreeing with the State exercising domination over them about the terms of domination, in the context where this particular form of domination was prohibited by international law as an illegal use of force, and, moreover, on the basis that the domination would not end, but be simply reconfigured, albeit ostensibly on an interim basis. Thus, there is an unbroken continuation and correspondence between the activity the accords provided for on the part of Israel, and Israel's already-existing illegal use of force. This is a perverse situation where a State is using force illegally to coerce the object of that force to agree to an arrangement that amounts to a continuation, in partly reconfigured form, of the illegal use of force. An immediate and automatic end to the illegal use of force—the occupation—which was not only what the Palestinian people wanted (and want), but also what international law required, was not an option.

30. It will be recalled that in the *Chagos* Advisory Opinion, the present Court noted that

> Heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony … it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter (p. 137, para. 172).

Oslo did not of course provide for part of the Palestinian territory to form part of Israeli sovereign territory. But it did purport to provide for a significant part of this territory to remain under Israeli control, a situation that can look and be experienced as if Israel does enjoy sovereignty in the sense of legal title (and, as addressed above and in the original written statement, can be a means through which Israel maintains 'facts on the ground' in order to bolster a sovereignty claim). The underlying logic behind the Court's caution that "heightened scrutiny should be given to the issue of consent" is applicable, given that the Palestinian territory "was under the authority" of Israel when the accords were adopted.

31. Given that much of international law operates on the basis of a fiction of sovereign equality despite *de facto* inequality, treaties between unequal parties are not necessarily invalid for

that reason. But one red line is when the powerful party, as here, is subjugating the other party in a particular manner—through an illegal use of force—in a way that has so compromised the freedom of action of that other party when it comes to their consent to the agreement, that the agreement can be understood to have been "procured" through that particular form of subjugation. The Oslo accords meet this test. Indeed, their procurement in the context of the occupation constitutes a manifest and egregious form of coercion. At stake here is the integrity of the global rules on the use of force, and the legal prohibition on using force on a broad self-help basis.

32. Does this mean that the entire accords are void, or only those provisions in them that are to the disadvantage of the Palestinian side whose consent was procured through the illegal use of force? This matter will be addressed below, alongside an equivalent matter arising out of the conflict between certain stipulations in Oslo and peremptory norms in international law.

### 3.c.iii Conflict with peremptory norms

33. The right of self-determination and the prohibition of aggression that are breached through the existence of the occupation are, as explained in the written statement, peremptory norms of international law. In the light of this, the provisions of the Oslo accords that purport to provide authority for Israel to maintain its presence in certain areas of the Palestinian territory conflict with peremptory norms in the following ways:

    a. In the first place, fundamentally, by purporting to legalize something which is prohibited by these peremptory norms.

    b. In the second place, by, enabling Israel to use its illegal occupation (via the coercive effect as outlined above) to gain the advantage of legal cover for maintaining the occupation which would have not been possible, or would have been more difficult, had the illegal occupation not been in existence at the time the accords were negotiated and agreed. Insofar as they place this advantage on an international legal footing, the accords conflict with the legal prohibition on the use of force preventing a State from using force other than in self-defence, i.e., the prohibition of its use by Israel to gain these advantages.

    c. In the third place, as indicated above, the relevant provisions enable Israel to obtain legal cover for its coercion, through the illegal use of force, of the representatives of the Palestinian people into 'accepting' the arrangements they contained. This is incompatible with the legal right of self-determination, since according to that right, such acceptance must be freely given. For this reason of bypassing meaningful consent alone, the provisions conflict with the right of self-determination. This is then aggravated by the fact that the arrangements the provisions are concerned with involve, in substance, a continued limitation of the Palestinian people to engage in self-administration. It is striking that this needs to be stated, but coercing a people with a right of external self-determination through an unlawful denial of this right of self-determination (the occupation) to accept a modified continued form of that denial is a violation of that right.

34. The Oslo accords do not have *jus cogens* status. They, therefore, must be interpreted in a manner that is compatible with the peremptory character of norms prohibiting the existence and conduct of the occupation by Israel, with any contradictions resolved in favour of the peremptory norms. The approach here is the same as that addressed earlier in terms of the coerced nature of the Palestinian acceptance of the accords: voiding. The VCLT takes the same approach here as it does, in Article 52, on the earlier matter. Article 53, also understood to reflect the position in customary international law, stipulates that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[4] The same question that presented itself on the earlier issue is therefore present here: does this mean the entire treaty is void, or only those provisions contrary to *jus cogens* norms? This question will now be addressed in relation to both issues.

3.c.iv Voiding: entire accords, or only certain provisions?

35. A common issue presents itself from the position that the conclusion of the Oslo accords was brought about through an illegal use of force, and that the provisions of the accords that permit Israel to maintain certain forms of authority over the Palestinian territory conflict with peremptory norms of international law: does this mean that the accords are void in their entirety, or only certain provisions in them?

36. The relevant provisions of the VCLT are, as indicated, Articles 52 (on coerced consent) and 53 (on conflict with peremptory norms). (Article 44 of the VCLT, concerned with particular circumstances where a party to a treaty might "denounce, withdraw from or suspend the operation of the treaty" stipulates that "in cases falling under articles…52 and 53, no separation of the provisions of the treaty is permitted." This is irrelevant to the present matter, which concerns the meaning and operation of the treaty irrespective of whether or not a party has purported to denounce/withdraw/suspend the operation of it.)

37. Articles 52 and 53 of the VCLT refer to the "treaty" being "void". Applying the principles of treaty interpretation, themselves set out in the VCLT (Article 31), to these provisions requires a term in a treaty to be given an "ordinary meaning" in its "context" and "in the light of" the "object and purpose" of the treaty, and, in addition to context, it is necessary to take "into account", *inter alia*, "relevant rules of international law applicable in the relations between the parties".

38. Rendering the accords void in and of themselves, and, necessarily, *ab initio*, would necessarily void the obligations that Israel has under them which, as indicated above, permit a degree of self-administration by the Palestinian people in certain areas. Although, as explained, the right of the Palestinian people to self-administration does not depend, legally, on Oslo (being derived from their self-determination right in international law, which would remain unchanged), nonetheless there is a benefit to them, in terms of the limited exercise of self-determination, insofar as Israel enables this limited exercise because it is stipulated in the accords rather than because it is obliged to do so in general international law. Voiding the accords as a whole, and therefore voiding these obligations on Israel, would risk loss of this this benefit, insofar as Israel's behaviour is linked to the presence or absence of these *lex specialis* obligations as distinct from its obligations under

[4] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 119.

international law to end the occupation. That said, if the accords are void in their entirety, this would take with it the provisions that purport to permit Israel to maintain the occupation in those areas where authority has not been transferred to the representatives of the Palestinian people.

39. As indicated, the "context" for the legal rule of treaty law on voiding when there is coercion through illegal force (reflected in Article 52 of the VCLT) is that one party is not to be permitted to obtain a benefit from the other party, and that other party is not to be subjected to a detriment by the first party (including in the benefit to the former, if relevant), through coercion by the former over the latter through the illegal use of force. The international law rules on the use of force are, of course, "relevant rules of international law applicable in the relations between the parties". Such a benefit/detriment matrix can operate consistently across and thus at the level of the treaty in its entirety, in which case the approach of voiding the treaty itself is warranted. But where, as here, a party is coerced through the illegal use of force to agree to a treaty, and is subject to provisions in that treaty partly to its detriment but also partly to its benefit, the automatic approach of drastic treaty-wide voiding only captures the (unfair, because of illegal coercion) detriment and does not also account for the benefit. A more sound approach is that the voiding occurs more specifically to those things in the treaty that are to the detriment of the coerced party, leaving intact those other things that are to its benefit. Thus, Oslo has to be interpreted in a manner that preserves Israel's obligations to enable certain elements of Palestinian self-administration, but voids those elements that permit Israel to maintain its own presence in the Palestinian territory.

40. The "context" for the legal rule of treaty law on voiding where there is a conflict with peremptory norms of international law (reflected in Article 53 of the VCLT) is, as stated by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Furundžija* case, that *jus cogens* norms possess

> a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.[5]

Such an approach is necessarily concerned with the rules that have a "higher rank" only. And it is only concerned with a situation where such rules, or their operation, would be derogated from. This has two consequences for the Oslo accords.

41. In the first place, it only requires that the provisions that purport to legalize the continuation of the occupation are invalidated.

42. In the second place, the concern it has for upholding and protecting the existence and operation of peremptory norms necessarily means that those other parts of Oslo that do involve a partial implementation of the right of self-determination of the Palestinian people must be upheld and cannot be invalidated. To be sure, as indicated above, if Oslo was void in its entirety, including these other key parts, the Palestinian people would still have their

[5] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1988, para. 153.

legal right to be free of the occupation, since this right does not depend on Oslo for its existence. Nonetheless, the partial supplementary normative weight of Oslo is significant for the reasons indicated above. Taking this away, then, would amount to the removal of an additional guarantee of compliance with a partial aspect of a right that has peremptory status. If the right itself is peremptory, then a guarantee of compliance has to enjoy the same status. Given this, the logic behind a rule such as that in VCLT Article 53 requires the rule to be applied in a way that does not have any knock-on negative consequences for the enjoyment of rights with peremptory status. This requires that only those provisions that violate peremptory norms are void, with the other provisions that provide for a partial realization of the rights that have peremptory status remaining in force.

43. The correct approach to these two areas of voidability, then, is the same for each: voiding those parts of Oslo that permit Israel to maintain its presence in the Palestinian territory in particular, rather than the accords as a whole.

44. It might be said that this approach would run counter to the principle of consent that is embedded in treaty law (and thus part of the "object and purpose" of the VCLT that needs to be accounted for when interpreting Articles 52 and 53), in that the state using illegal force to coerce another party to agree to things that are to its benefit, and which breach peremptory norms, necessarily gave its own agreement to the treaty on the basis of those benefits and breaches being in it. Thus, Israel cannot be considered to have consented to the Oslo accords if those benefits and breaches are void. The accords therefore have to be void in their entirety.

45. Such an approach is based on a particular logic concerning reciprocal, bilateral benefits and detriments in treaties that fails to account for the broader context in which some treaties, as here, are adopted, and the international law framework applicable in that broader context. When a treaty involves a deal between two parties enshrining reciprocal rights and obligations of those parties exclusively—i.e. rights and obligations operating mutually, being owed by one to the other, and vice versa—it is always a challenge to unpack the treaty and potentially void certain provisions of benefit to one party, bearing in mind how that party being given these benefits might be linked to its willingness to accept certain other parts of the treaty that are to its detriment. Any unpacking risks disrupting the cost/benefit balance that was the basis for that state agreeing to the treaty in the first place.

46. But treaties are rarely adopted in a legal vacuum whereby the matters they are concerned with are not already the subject of international legal rules. And the Oslo accords were certainly not adopted in such a vacuum. Indeed, as ostensibly part of a process of dispute settlement, they must, as explained above, conform with the applicable general international law framework. If the accords were void in their entirety, the position in international law would be (as it is) that the occupation is existentially illegal, meaning that Israel has no valid legal basis to exercise any authority anywhere in the Palestinian territory. And Israel would have a positive obligation to allow the Palestinian people to exercise full control over that territory. By contrast, if Oslo continues to operate with those provisions in it purporting to provide Israel legal cover to maintain certain forms of authority in the Palestinian territory being void, then from the standpoint of Israel, it would be in the same position as if the accords were void in their entirety. Thus, the two different

approaches—voiding the entire accords, or only those parts of them that purport to legalize Israel's authority over parts of the Palestinian territory—are identical in outcome when it comes to Israel's rights to exercise authority over Palestinian territory. Understanding Oslo as a reciprocal 'bargain' involving Israel giving up some of its own rights in order to gain certain things that are the rights of the Palestinian people, and vice versa, is fundamentally at odds with the position the two parties were and are in when it comes to international law. Israel had no right to that which it agreed it would enable the Palestinian people to partly exercise. Whereas the Palestinian people already had the legal right to do that which Israel purported to partly grant them the ability to do. Voiding those parts of Oslo that purport to permit Israel to continue the occupation does not, therefore, invalidate Oslo in terms of the principle of consent. It would not unfairly deprive Israel of something it was given in exchange for something it gave up, because the thing it 'gave up' was something it had no right to in the first place, which it would be required to give up regardless of any obligation to do so under Oslo, and which *was already the rightful entitlement of the other party*.

3.c.v Oslo does not legalize the existence of the occupation

47. To sum up the foregoing analysis: the Oslo accords do not alter the meaning and application of the general international law framework on the question of the existential illegality of the occupation, since they do not provide a valid treaty-based entitlement on the part of Israel to exercise any authority over the Palestinian territory, nor a reciprocal acceptance by the Palestinian people to such exercise of authority.

### 3.d. The relationship between the Court's advisory jurisdiction and peace negotiations

48. For the Court to clarify the position regarding the legality of the existence and conduct of the occupation, and to make any determinations of prior legal issues necessary to provide such clarification, is not to prejudice or substitute its own determination for the outcome of negotiations, since it is addressing matters which are *already the position in international law, regardless of whether negotiations end up addressing them and what the outcome of these negotiations might be*. Indeed, as indicated in the written statement, the illegality of the existence and conduct of the occupation is a matter that has presented itself since 1967.

49. Moreover, the present Court has already made, in the *Wall* Advisory Opinion, legal determinations on some of the key background legal questions as outlined above (the right of self-determination of the Palestinian people; Israel's non-sovereign relationship to the West Bank including East Jerusalem; the consequent application of occupation law and the extraterritorial application of human rights law; the consequent prohibition on annexation and settlements) and also some elements of the question of legality/illegality. The Court was well aware of, and, indeed, made reference to, the negotiations framework and process, and the emphasis placed on this by the representatives of the Palestinian people, and Israel, and by the UN. Clearly, the Court did not take the view that the existence of the foregoing prevented it from making these determinations.

50. Indeed, the Court took this approach when the negotiations process period was, roughly speaking, ten years into what was conceived to be a temporary, interim phase post-Oslo. It is now two decades after that, three decades in total. If the continued existence of a commitment to a process was not even regarded as a bar to making legal determinations, then it surely cannot operate in this way now, a further twenty years on.

51. To be sure, the question before the Court now is wider than in the earlier case. In consequence, the range of legal determinations necessary is broader. But this is simply a difference of degree. In substance, the Court is being asked to do now what it was able to do then. And, actually, as indicated, what it did then was to make clear legal determinations on some of the background general matters, and areas of substantive illegality, that it is being asked to address now.

52. It is also important to emphasize that the Court is being asked to make a determination on what the already-existing international legal position is when it comes to the legality/illegality of the existence and conduct of the occupation, and any prior general matters that are necessary to make the determination on legality/illegality. The Court is not being asked to determine matters *ex aequo et bono*. Nothing the Court will say in its answer, then, will encroach on anything that is not already determined by international law: the Court will simply clarify what that determination is. When the Court determined in the *Wall* Advisory Opinion that, for example, the Palestinian people had a right to self-determination in international law, Israel did not enjoy sovereignty over the Palestinian territory occupied since 1967, and Israel's implanting of settlements in the West Bank was illegal, the Court did not somehow bring these legal positions into existence as a matter of international law. The Palestinian people did not, for example, suddenly acquire the legal right of external self-determination, nor did Israel suddenly find itself to be lacking legal title over the West Bank, nor did the Israeli settlements in the West Bank suddenly become illegal, through judicial *fiat* on 9 July 2004. It was *already the case*. Similarly, in the present proceedings, the Court is not being asked to render the Israeli occupation illegal in its existence and conduct. It is being asked to determine whether international law does this. If the Court determines that, as is submitted, the occupation is illegal, this determination will not somehow render the occupation suddenly illegal on the date the Court's judgment is issued. Rather, it will amount to an authoritative confirmation of a pre-existing situation which has already been in operation, including throughout the post-Oslo period. In consequence, any determination by the present Court of the question before it cannot be understood as an interference in the diplomatic process. It is simply clarifying what the international legal context is within which that process has been and (insofar as it can be understood to continue to exist) is taking place.

53. Indeed, given the centrality of international law to the settlement of disputes, as indicated above, the Court providing such clarification has to be viewed, necessarily, as a positive contribution to the prospects of and process for a settlement, and, more specifically, as helpful guidance, by the principal judicial organ, to the political organ requesting its advice, and also to other non-judicial UN bodies, notably the Security Council.[6] Given

[6] See e.g. the written statements in the present case of Norway ("… an advisory opinion of the ICJ will provide important guidance to the General Assembly and the Security Council in furthering the process of reaching a negotiated two-state solution based on internationally agreed parameters and public international law") (p. 2) and China (the Court should "…provide legal guidance to the UN in handling the question of Palestine and contribute to an appropriate solution to the question") (para. 15).

this, it is strange to see those few written statements by States, including Israel, who raise objections to the present case by invoking the settlement process. On what valid basis might (an admittedly very small number of) States view the Court providing clarity on the international legal framework relevant to a dispute as being harmful to the process of resolving that dispute?

54. It might be speculated that this reflects a position that the negotiation process should be conducted on some other basis than, and lead to an outcome and agreement that departs from the operation of, international law. Such an approach would greatly advantage Israel, and correspondingly be to the serious detriment of the Palestinian people, given that Israel's claims and aspirations to territorial sovereignty beyond its 1948 borders are entirely coextensive with territory—all or parts of the West Bank (including East Jerusalem)—that forms part of the territorial sovereignty of the State of Palestine and the Palestinian people as a self-determination unit (and thus to which Israel has no legally valid sovereign entitlement). However, such a position is not within the legally-permissible parameters of the law of international dispute settlement. It cannot, then, be accepted as a legally valid basis for objecting to the Court clarifying the legal position. This would be tantamount to seeking to co-opt the Court (by successfully persuading it to exercise its discretion not to exercise jurisdiction) into the political process of downplaying and obscuring the meaning and significance of international law in a dispute, in order to give an advantage to one side in their effort to have the dispute resolved in a manner contrary to international law. This would involve the Court in supporting a political position—an abuse of its judicial function—and, moreover, a political position that constitutes a breach of the UN Charter.

55. Alternatively, these objections may reflect a cynical invocation of a process that is not actually viewed/being pursued as a viable means of producing a final settlement at all. Rather, its existence serves as a means of avoiding having to address the fundamental question of the legality of Israel's exercise of control over the West Bank (including East Jerusalem) and Gaza which has continued for over half a century. But if this were the case, then not only is the process a sham in the view of such States, but also its invocation by them before the present Court is being made in bad faith. And the Court would again be co-opted into a political position. In this case, it would be aimed at removing attention from a fundamental matter of illegality in order to benefit the state, Israel, responsible for that illegality. The benefit would be in the advantages Israel obtains from maintaining the illegal situation, and being able to avoid the scrutiny and criticism that would arise out of the recognition that the occupation is existentially illegal, and that the illegality of its conduct is widespread, systematic and egregious. Equally, the Court would also be co-opted into providing cognate advantages to those States who have supported Israel in its operation of the occupation, or who have at least been unwilling to fully challenge it in this regard, and whose own responsibilities and reputations are thereby at stake, being bound up in Israel's behaviour and reputation.

## 4. Situation before the Court is multilateral in character

56. A few of the written statements have suggested that the situation before the Court is exclusively or essentially a bilateral dispute, and that this has implications for whether the

Court should exercise its discretion to answer the question put to it by the General Assembly.

57. The situation before the Court is one that has long been and continues to be central to the global public interest, and is manifestly multilateral in character.[7] This is partly because of the historical, religious and cultural significance of the land and its people between the Jordan river and the Mediterranean sea to many people in the world, for example, in religious terms, given the centrality of this land and particular sites on it, notably Al-Quds/Jerusalem, to the three major Abrahamic religions. It is also because it concerns matters—colonization, decolonization, and self-determination; the use of military force, including military occupation, and the pursuit of peace; the prohibition of racial discrimination; other core human rights protections—that are understood to be of common global concern.

58. This is reflected in the following:

    a. The position of Palestine as a Mandate under the League of Nations, subject to the special international "sacred trust of civilization" obligations of the League Covenant (Article 22) (part of the multilateral Treaty of Versailles) and the supervision of the League, the League being the pre-eminent multilateral organization of its time.

    b. The subsequent and consequent involvement of the United Nations, the pre-eminent multilateral organization since 1945, across all of its organs and agencies, including the present Court (in two previous cases and two current cases including the present advisory opinion case), from its creation, in the situation in the entire land between the river and the sea and the people on that land in general and, specifically, in the situation in the Palestinian territory occupied by Israel since 1967.[8] Reflecting this, the General Assembly reaffirmed in 2002 that "the United Nations has 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".[9]

    c. The way in which, as set out in the written statement, the areas of international law violated by Israel in both the existence and conduct of the occupation—the law of self-determination, the prohibition of aggression, the prohibition of racial discrimination generally and apartheid in particular, the core norms of IHL notably the implantation of settlements in occupied territory, the prohibition on torture, inhuman and degrading treatment—are all those that have *erga omnes* status and are thus by international legal definition not only bilateral but also multilateral in nature.[10]

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[7] See also the following written statements in the present case: of Jordan, para. 2.15; Palestine, para. 1.57, Liechtenstein, para. 1.56; Egypt, para. 44; Saudi Arabia, paras. 17–18; Qatar, paras. 6.100–6.101; Switzerland, para. 16; Russia, para. 21; Yemen, para. 9; Pakistan, para. 13; South Africa, para. 35; China, para. 14; Ireland, para. 9; Malaysia, para. 18; Indonesia, para. 20.

[8] Note the present Court's invocation of these matters, in the *Wall* Advisory Opinion, as the basis for concluding that "the construction of the wall must be deemed to be directly of concern to the United Nations" and that the question before was "of particularly acute concern to the United Nations and one which is located in a much broader frame of reference than a bilateral dispute" as a rebuttal to the assertion that the subject-matter of the General Assembly's request to it was "only a bilateral matter between Israel and Palestine" *Wall* Advisory Opinion, paras. 49 and 50. Since the matters are not specific to the construction of the wall, but concern, at the very least, entire situation in the occupied Palestinian territory now before the Court, the logic of the Court's finding in relation to the construction of the wall in particular is transferrable to the situation now before the Court.

[9] GA Res 57/107, 3 December 2002, preamble.

[10] See also the written statements in the present case by Luxembourg, para. 22; Brazil, para. 12; Switzerland, para. 16.

d. The fact that 57 States and international organizations, the highest ever number in the 77 years of the Court's operation at the time of writing, the States of which representing more than a quarter of the entire membership of the United Nations, have chosen to participate in the present proceedings, in the vast majority of cases to affirm the Court's exercise of jurisdiction, and to make submissions relating to the substance of the question before the Court.

59. Indeed, the foregoing significance of States participating in the present proceedings includes those few States, other than Israel, who have suggested that the subject of the present proceedings is somehow exclusively or essentially bilateral. It is one thing for Israel to make this point. But it is strange to see other States, who, according to their own position, seemingly have no legitimate stake in the matter before the Court, intervening in the proceedings to make the same point. They deny that a general interest exists or, at least, is of much significance, when it comes the nature of the question put before the Court, but invoke a clear general interest (as the necessary basis for their intervention) when it comes to whether the Court should answer the question. But they cannot have it both ways. The very act of intervening undermines the point being made in the intervention.

60. (In fact, in some cases they seem to want to have it every which way. The UK, for example, simultaneously insists that the situation is essentially bilateral and therefore should not be determined by the Court, and also, *in the same written statement*, advances positions of its own that presuppose determinations of some of the general matters it says the Court should not pronounce upon. For the UK, the injunction to stay out of an essentially bilateral matter or, alternatively, the characterization of the situation as essentially bilateral, seems to apply selectively, only when the International Court of Justice and, by association, the General Assembly (as the UN organ for whom the opinion will be rendered) is concerned, and not also in the case of itself.)

61. Equally, their invocation of the significance of UN Security Council determinations on the subject of the peace process, as somehow supporting the argument that the situation at issue in that process is of an essentially bilateral character, is baffling given the very nature of the Security Council and the legal basis on which it makes determinations. Indeed, for member States of the Council to make this 'essentially bilateral' argument ignores that Council members act in that position on behalf of the organization as a whole. And it ignores how the Council's involvement in any situation, including the present one, is itself both reflective and partly constitutive of the situation having a multilateral character.

62. In truth, what these few States are doing is articulating a substantive position on what the common global multilateral position is and should be on the issues that have been put before the present Court. And dissimulating what they are doing here through the disingenuous claim that there is no or not much multilateral character to these issues. Echoing what was said earlier when it comes to the positions advanced by certain States, who overlap with the States making the present argument, there is a policy preference for the situation in the Palestinian West Bank (including East Jerusalem) and Gaza to be addressed by the multilateral system without full reference to and adherence with the usual application of international law. In both how that situation is understood now, and the basis on which a settlement to it might be arrived at. For these States and Israel, the Court's opinion risks underscoring how their agenda for global public policy on this subject runs

counter to the multilateral position on the situation when this position is appraised according to international law.

63. This is, then, an attempt by a few States to prevent the Court from revealing how far their own position is from the multilateral position arrived at on the basis of international law. And, as earlier, this is an attempt to co-opt the Court into endorsing their dismissal of the significance of the multilateral character of the situation, in order support their agenda of having that situation understood and addressed on a basis other than that arrived at through the application of international law. Again, this is an effort to interfere with the Court's judicial function. And to do so in the service of a treatment of the situation that would run counter to the requirement that disputes are settled in accordance with international law. This is, then, not merely an attempt to persuade the Court not to exercise its discretion to accept jurisdiction in the present case. It is also an attempt to get the Court to accept their characterization of the situation, with important, exemplary implications beyond the proceedings for the way the situation is understood and should be resolved.

## 5. The Court is capable of addressing a complex and long-running situation, in its entirety, and, indeed, in doing so it would discharge an indispensable function under the UN Charter

64. It has been suggested that the question requires the Court to address matters that are so complex, requiring so much information, and covering such a long period of time, that this is, essentially, too much for the Court to handle. In consequence, either jurisdiction should not be exercised at all, or the Court should make things more manageable by cherry-picking certain discrete matters covered by the question while leaving other matters covered by it unaddressed.

65. It is difficult to understand this argument if one has respect for the Court and its members. And if one possesses even a passing knowledge of the Court's jurisprudence, which demonstrates a clear track record, over a very long period, of dealing with the type of matters now being pronounced as somehow beyond the Court's capabilities. It will be recalled that apartheid-era South Africa raised the factual-complexity issue to challenge the Court's jurisdiction in the *Namibia* case. It "expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues."[11] The Court concluded that such a "limitation of the powers of the Court … has no basis in the Charter or the Statute."[12]

66. As before, what might seem simply like an effort to prevent or limit the question being addressed can also be viewed as a more troubling attempt to present the situation before the Court in a manner that supports a political agenda of bypassing the rule of international law. This is achieved by presenting the situation as somehow beyond human understanding, incapable of being rationally and fairly addressed, on the basis of evidence, in this case by a judicial body applying international law. What is left in such a situation is that the matters put before the Court are only to be determined on the basis of power. This is an affront to the very idea of the rule of international law. In asking the Court to

[11] *Namibia* Advisory Opinion (1971), p. 27, para. 40.
[12] Id.

exercise its discretion to decline the exercise of jurisdiction on this basis, these States are attempting to co-opt the Court in their political agenda. This is not just an ordinary form of disrespect for the Court's judicial function. Here, the Court is being asked to engage in a form of self-sabotage (in addition to self-criticism in terms of supposed limited capabilities), degrading the very operation of the international legal system which it is not just part of, but whose very existence is bound up in that of itself.

67. The cherry-picking alternative to the drastic totalized-rejection approach concerning the seeming unintelligibility of the subject also pursues a political agenda running counter to the international rule of law. And also, in particular, contrary the role of the United Nations and, within this, the present Court and the fellow principal organ, the General Assembly, asking the question of the Court. A partial answer to the question would support an approach to addressing global issues through international law that is selective, superficial, and does not address structural matters that are major determinants of issues appearing at the surface.

68. This runs counter to the UN Charter, the legal instrument that is the basis for the General Assembly and the present Court's existence and role. The point of the organization of which they are principal organs is to address the structural matters which these few States claim should be excised from the present case. The preamble to the United Nations Charter States that the objective of the organization is:

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
>
> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
>
> to promote social progress and better standards of life in larger freedom.

The first two, and the fourth, objectives are the objectives of the legal rules that the Court has been asked to apply to the present question, and which the General Assembly has decided it wishes to receive advice about. The first concerns the existential legality of the occupation as a matter of the law on the use of force, and the legality of the conduct of the occupation as a matter of IHL and IHRL. The second concerns the existential legality of the occupation as a matter of the international law of self-determination, the associated right to resist vested in peoples deprived their right to external self-determination, and the legality of the conduct of the occupation as a matter of international human rights law across the full spectrum of rights, including, notably, the prohibition of racial discrimination generally and the prohibition of apartheid in particular, and including the right to return. The fourth concerns the existential legality of Israel's economic domination and exploitation of the Palestinian people and their land, and the negative impact on the enjoyment of socio-economic rights by the Palestinian people of the conduct of the occupation. The third objective reflects the function of the Court in providing an advisory opinion clarifying the legal position when it comes to these three sets of rules, and the value to the General Assembly of this. It is only possible to seek to realize the objective of maintaining the establishment of "conditions under which justice and respect for the

obligations arising from treaties and other sources of international law" if the meaning and application of these obligations is clear. Thus, the Court is, as usual, being asked to play an essential role in the functioning of the organization of which it forms an central part, by providing such clarity in the form of an advisory opinion. The States challenging this are, therefore, asking the present Court, and by extension the General Assembly for whom the advisory opinion would be provided, to somehow demur in part from the proper function they have under the UN Charter.

69. Such a departure from Charter objectives would suit Israel and those States who take a one-sided or lopsided approach, in favour of Israel, when it comes to the matters before the Court. It is easier to justify the existence, maintenance and conduct of the occupation of the Palestinian territory if the legal questions determining these matters are only partially considered. This is not just a matter of lessening the range and scale of what has to be justified. It also would constitute a *distorted picture that provides justification where none exists.* As explained in the written statement, the question put to the Court by the General Assembly can be simplified into a two-part matter of whether the occupation of the Palestinian West Bank (including East Jerusalem) and Gaza is existentially illegal, and whether and how it is illegal in the way it is conducted. If only parts of these two issues were addressed, this would have the following effect.

70. On existential legality/illegality, a partial answer would, in one important sense, be a non-answer. Unless the matter is addressed completely, it would, of necessity, be left open whether on some remaining, unconsidered basis the existence of the occupation might be legally permissible. Linking back to the earlier drastic approach of rejecting the request in its entirety, this would amount to a statement to the world that, in the view of the principal judicial organ of the United Nations, the ultimate question of whether or not the occupation is, in the final analysis, existentially lawful, is somehow unknowable. This would enable efforts by Israel and its supporters to argue, incorrectly, that the matter of whether and when the occupation can and should end is exclusively a matter of power and politics. The matter of Palestinian self-determination could be presented not, as it is, a legally-binding, automatic entitlement to freedom, but, rather, something that may, in some vague way, be a legal 'right', but one that operates only in a endlessly-deferrable sense, to be realized only if and when there is an agreement to it by the very state that is the source of its deprivation. In international law terms, such an approach would turn the clock back to a period in history where people, such as the Palestinian people, did not have a right of external self-determination as it is understood now. In earlier times, whether and when colonial peoples might be free was, legally, in the gift of the colonizer. For the Palestinian people, as addressed further below, their legal position in this regard changed with the provisions of Article 22 of the League of Nations applicable to A class mandates, and with complementary, supplementary emergence around the middle of the twentieth century of a right of external self-determination applicable to all colonial peoples. A partial answer to the question of existential legality, then, would have the effect of abrogating much of the practical and political significance of this right, enabling the Palestinian people to be treated as if they inhabit the world of over a century ago. This would equally require the present Court and the General Assembly to themselves set aside their consistent concern with the normative position on self-determination as it has evolved in international law. In the words of the present Court in the *Chagos* Advisory Opinion in relation to the Assembly,

the "long and consistent record in seeking to bring colonialism to an end", and in relation to the UN as a whole, "the matter of decolonization which is of particular concern to the United Nations."[13] And in doing so stepping back from the crucial role that they have played and continue to play in securing one of the purposes and principles of the United Nations, viz.:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. (Art 1(2)).[14]

71. On illegality of conduct, a partial answer to the question would mean that whereas the question of violations might be clarified in certain discrete areas (e.g., perhaps, in the implanting of settlements), whether or not there are violations in other, more complex and structural ways (e.g., perhaps, in terms of racial discrimination in general and apartheid in particular) will be left unaddressed or only partly determined. But discrete violations are often linked to structural violations, and an appraisal of the former in the absence of considering the latter is often, as a result, inadequate even on its own terms. More fundamentally, failing to address structural matters would support a superficial appraisal of a situation that so manifestly requires being addressed properly if there can be any hope of its resolution.

72. Finally, as reflected in the comprehensive and in some places interlinked treatment of the different legal issues set out in written statement, the two matters – existential legality and legality of conduct – cannot each be properly appraised in the absence of a full appraisal of the other. If, for example, as is submitted in the written statement, the occupation is existentially illegal, this has important consequences for the illegality of how the occupation is conducted. For example, all exercise of authority by Israel through its soldiers in the West Bank would be unlawful, not just such authority that breaches occupation law/IHL and IHRL generally. Equally, certain aspects of existential illegality, such as the test of necessity and proportionality in the law on the use of force, require a full-spectrum consideration of whether or not the conduct of the occupation complies with IHL (even if such compliance, which is manifestly not the case, would not be sufficient to render the occupation existentially lawful bearing in mind the other, more fundamental legal problems with its existence).

## 6. The applicability of Palestinian self-determination to the territory of the West Bank (including East Jerusalem) and Gaza, and the significance of this to the (il)legality of the occupation and to the implanting of settlements

### 6.a. Fiji's argument: only Israel has an international legal entitlement concerning the enjoyment of sovereignty and related matters linked to the territory of the West Bank and Gaza

73. The written statement of Fiji, which in its arguments on substantive issues bears striking resemblance to certain Israeli approaches (the written statement of Israel itself is limited

[13] *Chagos* Advisory Opinion (2019), p. 118, paras. 87 and 88 respectively.

[14] On the significance of the General Assembly's role in relation to self-determination when it comes to the request for the Advisory Opinion, see also the written statement of Malaysia in the present case, para. 20.

to jurisdictional issues) raises an important question about the territorial applicability of the right of self-determination of the Palestinian people and, relatedly, the scope of Israel's territorial entitlements. This fundamental general matter is partly determinative of whether or not the existence of the occupation of the West Bank, including East Jerusalem, and Gaza, and Israel's purported annexation over all or parts of the West Bank, including East Jerusalem, and Gaza, and Israel's implanting of settlements in this territory, are lawful.

74. On the one hand, Fiji claims that "there is no doubt that the Palestinian people have a right to self-determination" (page 7). On the other hand, its written statement suggests that there is no clear territorial entitlement embedded in this right, whereas there are territorial entitlements over the West Bank, including East Jerusalem, and Gaza, vested in Israel.

75. When dealing with East Jerusalem in particular, Fiji observes that "allegations that Israel illegitimately annexed East Jerusalem presume that international law prohibits annexation in any circumstances, including even reunification of a national capital city" (p. 6). In international law, annexation is indeed only prohibited if the territory is already the sovereign territory of another international legal entity (a state or a non-state self-determination unit) or such a legal entity has an international legal entitlement to sovereignty over it. Thus for Israel's purported annexation of East Jerusalem to escape this prohibition, East Jerusalem has to not form part of the sovereign territory of the State of Palestine, or the Palestinian people as a self-determination unit if the State of Palestine is to be set aside (either on the incorrect basis that it is not, legally, a state, or to cover the period before its statehood became operative in international law). Or, absent the foregoing, it is not territory that the Palestinian people have an international legal right to enjoy sovereignty over.

76. East Jerusalem is part of the West Bank, which Israel captured in the illegal 1967 war. This is referred to as the "Palestinian territory occupied since 1967" in the question put by the General Assembly to the present Court. Fiji claims that the term "Palestinian territory" in the question constitutes "a political concept without legal specificity". For Fiji, "[t]he sovereignty of these territories is, arguably, in abeyance until such a time as a peace agreement is reached" (p. 7). The concept of sovereignty being "in abeyance" was used by Judge Arnold McNair in his separate opinion to the *International Status of South West Africa* Advisory Opinion of the present Court.[15] It was intended there, and presumably is intended here, to denote a situation where sovereignty in the sense of territorial title—international legal 'ownership' of the land, as it were—is not currently vested in any international legal person. If this is correct, then according to Fiji, Israel's purported annexation of East Jerusalem, which forms part of the West Bank, has not been legally effective.

77. However, and more broadly, Fiji argues that although sovereignty over the West Bank and Gaza may not be currently vested in any international legal entity, Israel has a right to such sovereignty, and, by implication, the Palestinian people lack such a right. For Fiji,

> It is relevant to mention that Article 2 of the Mandate for Palestine, created by the Council of the League of Nations in 1922, carries legal weight. It recognized the rights

[15] *International Status of South West Africa*, Advisory Opinion, 11 July 1950, Separate Opinion of Judge Arnold McNair, p. 150.

> of the Jewish people in its legal obligation to ensure the establishment of the Jewish national home in the territory between the Mediterranean and the Jordan River. The Mandate included in Article 6 a right to immigration and settlement for the Jewish people in that territory [footnote omitted].
>
> The international law principle of "acquired legal rights", constituted part of the transitional arrangements from the system of Mandates under the League of Nations to the system of Trusteeships under the UN Charter. Article 80 of the UN Charter continued the rights of Jewish and other peoples under the Mandates system. When the British unilaterally terminated their responsibilities under the Mandate and the [sic] Israel was proclaimed a State on 14 May 1948, rights under the Mandate remained relevant in the mandate territory not yet under Israeli control. The Court has underlined the relevance of the rights bestowed by a Mandate on the people concerned in its Advisory Opinions on Southwest Africa and Namibia [footnotes, referencing pages 133 of the former decision and 33-38 of the latter decision, omitted]. (p. 7).

### 6.b. Implications and consequences of the argument

78. The implication of Fiji's argument is that Israel has a legal right in international law to enjoy sovereignty over the entire territory of former Mandatory Palestine, including the territory occupied since 1967. The relationship between Israel and that territory, then, is that of a state that does not enjoy sovereignty, but is entitled to it. This presumes that the West Bank and Gaza are not 'Palestinian' territory in the sense that the State of Palestine and/or the self-determination unit of the Palestinian people are not sovereign over it. It also presumes that, as an alternative to such current enjoyment of sovereignty, the Palestinian people do not have a territorial entitlement over the West Bank and Gaza (in other words, they lack a right to have sovereignty over this territory vested in them).

79. In consequence, there is no legal bar to the Israeli annexation of all or part of the West Bank and Gaza. Indeed, any annexation by Israel would be pursuant to a valid international legal basis to enjoy sovereignty. Thus, although Fiji seems to suggest that Israel's purported annexation over East Jerusalem has not been legally effective in terms of Israel acquiring sovereignty (the assertion that sovereignty over the West Bank is 'in abeyance' – unless, perhaps, Fiji's reference to the West Bank here is supposed to exclude East Jerusalem), this cannot be regarded as an unlawful act since Israel is simply asserting a right it is entitled to in international law.

80. A further consequence is that the question of the existential legality of Israel's control over the West Bank and Gaza does not have to account for the effect the occupation has on the self-determination right of the Palestinian people to exercise territorial sovereignty and control there, since no such right can exist, given that it would conflict with what we are told is Israel's legal right to sovereignty over the territory. Consequently, when Fiji says that "there is no doubt that the Palestinian people have a right to self-determination" (p. 7), the 'right' is emptied of a crucial element: a territory. The Palestinian people seem to enjoy this right only in a virtual sense, without any connection to the material world in terms of there being territory they would inhabit. (Israel might agree to let the Palestinian people inhabit, control, and even eventually have sovereignty over, some of the territory

in the West Bank and Gaza, but such arrangements would be based on not legal entitlements vested in the Palestinian people but, rather, a gift by the rights-holder, Israel). This is not the right in the sense of the international law right to external self-determination. Fiji is effectively denying that the Palestinian people have this legal right, and occluding this through its earlier general affirmation which, it turns out, does not relate to that right as generally understood in international law.

81. A yet further consequence is that the existential legality of Israel's occupation of the West Bank and Gaza does not depend on the legal significance of this for the enjoyment of the Palestinian people to self-determination linked to that territory, since there is no such enjoyment with that link.

82. With the bars concerning annexation and self-determination removed, the occupation is existentially lawful (the illegality of the occupation as a use of force only applies if there is a right of self-determination negatively affected by the use of force).

83. When it comes to the legality of the conduct of the occupation, one of the key prescriptions of occupation law—the prohibition of implanting settlements—is expressly and also impliedly challenged when it comes to the legality of Jewish settlers in Palestinian territory. The express challenge involves disputing that the occupation law prohibition covers civilian migration other than if it is forced (p. 6). Such a bold reach challenges the consensus view on the matter in general and as it applies to the present situation held by a large number of states (reflected in many of the written statements in the present case), and various UN bodies including principal organs, the latter including the present Court in the *Wall* Advisory Opinion. The implied challenge is in the invocation of the Mandate arrangements. A cognate right to Israel's supposed international legal right to all the territory between the Jordan river and the Mediterranean Sea is the right to settle that territory: expressly invoked by Fiji with its reference "a right to immigration and settlement for the Jewish people in that territory." In a sense, then, it may not matter what view is taken on the meaning of the occupation law prohibition on settlements, because there is the Mandate arrangement, which presumably is understood to operate in some sort of trumping fashion, perhaps via the doctrine of *lex specialis*.

84. Thus, according to Fiji, not only is the existence of the occupation lawful, but the implanting of Jewish settlements on occupied territory is also lawful.

85. All of the foregoing hinges on a particular approach to the Mandate arrangements that is completely mistaken. In the original written statement, it was indicated that the Palestinian people have a legal right to external self-determination in part because of the provisions of Article 22 of the League of Nations Covenant (para. 13(1) of the written statement). It is now necessary to set out the reasoning that lay behind that one sentence,[16] in order to explain why the foregoing suggestions based on the Mandate arrangements by Fiji are incorrect.

[16] As set out in Ralph Wilde, 'Tears of the Olive Trees: Mandatory Palestine, the UK, and accountability for colonialism in international law', *Journal of the History of International Law* (2022), available at: https://brill.com/view/journals/jhil/aop/article-10.1163-15718050-12340216/article-10.1163-15718050-12340216.xml?language=en.

### 6.c. Mandate arrangements vest a sovereign entitlement over the land between the Jordan river and the Mediterranean Sea in the Palestinian people and not in Israel

86. At the end of the so-called First World War, the victorious allies took over the colonies of the defeated powers, one of the prizes of victory. The UK became the power in Palestine, displacing the defeated Ottoman Empire. These arrangements were placed under the authority of the League of Nations in the Mandates system. Unlike with other colonies, they were subject to the stipulations of the Covenant of the League of Nations. The Covenant formed part of the Versailles Treaty, thereby binding in international law on the states administering the Mandated territories as part of that international agreement to which they were a party.

87. The administration of each particular Mandate was set out in a dedicated 'Mandate Agreement' (referred to in the quotation from the written statement of Fiji above as the 'Mandate for Palestine'), itself a binding international law instrument adopted by the governing Council of the League of Nations (not, it must be stressed, an 'agreement' involving participation or consent by the inhabitants of the territory). In the case of the Palestine Mandate, covering the entire land between the Jordan river and the Mediterranean Sea, the Agreement, adopted in 1922 and entering into force in 1923, incorporated the terms of the so-called Balfour Declaration made in 1917.[17] The preamble to the Mandate Agreement stated that:

> the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people…

Under Article 2,

> The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions…

Under Article 6,

> The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

[17] Mandate for Palestine, text approved by the League of Nations Council 19th Session, 13th Meeting, 24 July 1922, UN Library reference C.529. M.314. 1922. VI., obtainable from https://www.un.org/unispal/document/auto-insert-201057/ entry into force on 29 September 1923, Minutes of the Meeting of the League of Nations Council held at Geneva on 29 September 1923, UN Library reference C.L.101.1923.VI., available at: https://www.un.org/unispal/document/auto-insert-204395/

As indicated in the quotation earlier, Fiji cites these two Articles as the basis for the arguments it makes concerning Israel's supposed territorial entitlement over the West Bank and Gaza and related entitlement to settle Jewish people there.

88. Some critics of the League Council's adoption of the Mandate Agreement, and/or the UK's implementation of it, invoke the idea of a right of self-determination in international law vested in the inhabitants of the territory. Typically, they associate this, somewhat vaguely, with Wilsonian self-determination and the League of Nations. However, the settled view in international law is that in this period there was no legal right of external self-determination—the right to be free from colonial rule—for colonial peoples. This came later, in the middle half of the 20th Century. Thus, the Palestinian people may have that legal right now, but they did not have it then. (Hence, in the written statement, it was indicated that the Palestinian people have a right of external self-determination on this basis – see para 13(2) of that written statement). In consequence, it is said, the UK and the League of Nations Council had a free hand on the question of the future of Palestine. If they decided that all or part of it was to be a "national home for the Jewish people", even though most people living in Palestine at that time were not Jewish, there was nothing, legally, impermissible about this. And thus, as Fiji suggests, these stipulations can be the basis for Israel having sovereign entitlements over the West Bank and Gaza, and the right to implant settlements on this territory.

89. This is incorrect. There was no internationally valid legal basis for the League of Nations to incorporate the Balfour commitment into the Mandate Agreement. And insofar as it did this, including in the provisions extracted above, such stipulations are a nullity. As mentioned, the League of Nations Mandates system was conceived legally through Article 22 of the League of Nations Covenant, an instrument binding in international law as part of the Treaty of Versailles which entered into force 1920.[18] According to Article 22, the arrangements constituted a "sacred trust of civilization". That article contained a crucial provision. For Mandates covering the former dominions of the Ottoman Empire, what became referred to as 'A' class mandates (the mandates were divided up into three classes in the Covenant), it stipulates that:

> their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.

This is, effectively, a *sui generis* model of self-determination. It is not the same as the immediate right to independence which became the right in international law applicable to people in all colonial territories in the second half of the twentieth century (and so, as indicated, applicable to the Palestinian people in Jerusalem, the West Bank and the Gaza Strip now). But it is close to it, through the requirement that independent statehood is the clear objective, and, moreover, that this should be "provisionally recognized". The people in 'A' class Mandates were placed in a privileged category compared to the people of all other colonies, including other classes of Mandate, as far as their entitlement to self-rule in general international law was concerned.

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[18] Treaty of Peace Between the Allied and Associated Powers and Germany, Signed in Versailles, 289 June 1919, entry into force 10 January 1920, (1919) UKTS 4 (Cmd. 153), Part I, League Covenant 1919: Covenant of the League of Nations, 28 April 1919, available at: https://www.ungeneva.org/en/about/league-of-nations/covenant.

90. This is commonly ignored because of the lack of such an entitlement for peoples in colonial territories generally, which only came later. 'A' class Mandates are sometimes mistakenly lumped together into a general category, whereby self-determination as it came to be understood from the middle of the 20th century did not have any relevance in the earlier period. This oversight treats the position of the people of these Mandates, such as the population of Mandatory Palestine, as if the status of their territory was to be determined at the complete discretion of the League Council and/or the Mandatory authority. Such discretion did indeed prevail in the case of many other colonial territories (until the later emergence of the general right of self-determination in international law). However, things were different for 'A' class Mandates.

91. The *sui generis* regime of Article 22 was to be in operation from the start of the Mandate. The community that was to be "provisionally recognized" as an "independent nation" was that of Mandatory Palestine at that time, the population of which being 90 percent non-Jewish Palestinian.

92. There is, therefore, a fundamental contradiction between the provisional independence obligation in Article 22 of the Covenant, and the Balfour Declaration plan enshrined in the Mandate Agreement, implemented by the UK in practice, and now claimed by Fiji as the basis for Israel's supposed entitlements concerning sovereignty and settlement over the West Bank and Gaza. A few commentators suggest that it can be somehow reconciled in favour of the Agreement—and so, actually, there is no contradiction. The argument advanced by Fiji may be based on this. But most of the actors involved in and reacting to the process of adopting the Agreement, including Balfour himself, and commentators at the time and since, proceeded from an assumption that there was a fundamental contradiction between it and the Covenant. Some commentators criticise the Agreement as an unjustified departure from the Covenant, characterising this as a 'violation' of the Covenant. But they do not then explain whether this had any consequences for the legal effectiveness of the Agreement and, in turn, the lawfulness of UK actions in implementing it. It is as if the Covenant was violated but the Mandate Agreement was nonetheless legally valid insofar as it departed from the Covenant and thus constituted such a violation. To ultimately the same effect, others assume, without even acknowledging they are doing this, let alone justifying their reasons for doing so, that the Agreement legally-validly overrode the Covenant insofar as there were contradictions between the two. Either way, then, the suggestion is that the Mandate Agreement was legally effective notwithstanding the fundamental contradiction with the Covenant. These may be alternative explanations for the argument advanced by Fiji in its written statement.

93. As Wilde argues, all these approaches ignore a fundamental legal question that always arises when organs of international organizations—here the Council of the League of Nations—act.[19] It is necessary to ask whether that organ had the legal competence under the constituent instrument of the organization that it forms part of—the League of Nations Covenant—to modify the operation of a fundamental stipulation of that constituent instrument in the way it did here. And to consider, if it did not, what the consequences are for the legal validity of the provisions of the Mandate for Palestine that contradicted Article 22. According to the general principles of international law relating to the powers of

[19] Wilde, 'Tears of the Olive Trees', above.

international organizations, the League Council's competence to act was limited: it had to stay within the bounds of the Covenant as the constituent instrument of the organization. In consequence, the Council did not have the power to take action that contradicted the express provisions of the Covenant. Thus, the Council could not validly approve any stipulations in the Mandate Agreement which were incompatible with those provisions. Any such purported approval would involve the Council acting *ultra vires*. As a result, the relevant approval would be without legal effect—void *ab initio*.

94. In the same way, all states, including the UK as the Mandatory in Palestine, were bound to respect and comply with the provisions of the Covenant, as part of a binding international treaty, insofar as they related to Mandatory Palestine. This prohibited the UK from any action which did not respect and comply with those provisions. Any breach of this prohibition is not only a violation of international law. Also, necessarily, it could not act as a valid basis for new arrangements which purported to trump the prior relevant stipulations in the Covenant. The consequence, as a matter of both the limited legal powers of the League Council, and the legal position of the UK as a party to the Treaty of Versailles, is as follows. The operative international legal regime for Mandatory Palestine comprised the relevant provisions of the League Covenant taken together with *only those elements of the Mandate Agreement compatible with the Covenant provisions*.

95. It follows that it is necessary to read the Mandate Agreement as if those parts of it implementing the Balfour commitment and contradicting Article 22 of the Covenant are not there.

96. The consequence of this is that there is no international legal basis for a Jewish homeland, or a cognate legal basis for Jewish settlement, in Palestine rooted in the Palestine Mandate Agreement. That instrument does not carry "legal weight" for these things, to borrow the words of the written statement of Fiji.

97. It will be recalled that the statement of Fiji asserts that:

> The international law principle of "acquired legal rights", constituted part of the transitional arrangements from the system of Mandates under the League of Nations to the system of Trusteeships under the UN Charter. Article 80 of the UN Charter continued the rights of Jewish and other peoples under the Mandates system. When the British unilaterally terminated their responsibilities under the Mandate and the [sic] Israel was proclaimed a State on 14 May 1948, rights under the Mandate remained relevant in the mandate territory not yet under Israeli control. The Court has underlined the relevance of the rights bestowed by a Mandate on the people concerned in its Advisory Opinions on Southwest Africa and Namibia. (p. 7, footnotes, referencing pages 133 of the former decision and 33-38 of the latter decision, removed).

98. There are multiple mistakes and misunderstandings in the foregoing account.

99. The reference to Article 80 concerning the UN Trusteeship system is irrelevant, since, of course, Palestine was not formally placed under the Trusteeship system. That said, the reference to "acquired legal rights" in a broader sense—from Mandate or Mandatory (the UK) to Israel, rather than from Mandate or Mandatory (the UK) to Trust Territory/Trust Territory administering authority—would indeed be the legal basis for the contention that Israel has a territorial right over the West Bank and Gaza because of the legal regime

applicable to the Palestine Mandate. However, the particular "rights of" the Jewish people "under the Mandates system" that would need to have been 'acquired' by Israel—the right to the land of Palestine as a homeland (i.e., the right to sovereignty) and the right to settle this land—were not, for the reasons explained, rights that the Jewish people had under that system. There were, then, no such rights for Israel to acquire.

100. Moreover, and relatedly, because there were no such rights under the Mandate system, the proclamation of Israel in part of the territory of the Mandate in 1948, and the recognition of Israeli statehood by certain states, and its membership of the United Nations, necessarily cannot be based on the legal stipulations of the Mandate. Instead, it was an illegal secession. Israel was not and is not, therefore, somehow the legal successor or the legal continuation, in a different form (its statehood covering only part of the territory) of the Palestine Mandate. It was and is a novel and separate international legal entity established in defiance of and at odds with the Mandate and its operative legal regime, which was the commitment to independent statehood operating at the level of the entire territory of the Mandate, as set out in the "sacred trust of civilization" obligations of Article 22 of the Covenant.

101. The written statement of Fiji is correct when it says that on the proclamation of Israel in 1948, "rights under the Mandate remained relevant in the mandate territory not yet under Israeli control." But these are rights not vested in the Jewish people on or before 1948 and they have not been vested in Israel since then. They were and are, rather, rights vested in the Palestinian people. The written statement of Fiji observes that

> The Court has underlined the relevance of the rights bestowed by a Mandate on the people concerned in its Advisory Opinions on Southwest Africa and Namibia. (page 7, footnotes, referencing pages 133 of the former decision and 33-38 of the latter decision, removed).

The present Court did indeed do this in those opinions, but, crucially, by referencing the rights in both the relevant mandate agreement *and* Article 22 of the Covenant, not simply the former. Moreover, significantly for present purposes, the particular mandate agreement at issue, that for South West Africa, did not contain a radical divergent position in relation to that territory from the position applicable to it under Article 22 of the Covenant. Thus, there is nothing in these decisions to support Fiji's contention about the legal effect of the Palestine Mandate Agreement in terms of legalizing a departure from Article 22.

102. These decisions affirm the continued operation of the international legal regime applicable to the land between the Jordan river and the Mediterranean Sea under Article 22 of the League of Nations Covenant, supplemented by the Mandate Agreement only insofar as its provisions are compatible with Article 22. This legal regime stipulates that there is a right of what is effectively self-determination on the part of the Palestinian people over this entire land. And it does not enshrine a competing equivalent right, nor a cognate right of settlement, vested in the Jewish people and somehow inherited by Israel. The only difference now from the position in the League era is that, as indicated above, the right of self-determination in international law is to be realized instantly and automatically, not merely 'provisionally recognized'. This is the effect of synthesizing the two separate international legal grounds for Palestinian self-determination, the Article 22 of the League

of Nations Covenant grounds and the subsequent generalized anti-colonial grounds (set out, as indicated, in paragraphs 13(1) and 13(2) of the original written statement).

103. It follows, then, that the West Bank, including East Jerusalem, and Gaza, are, as set out in the original written statement, part of the sovereign territory of the State of Palestine and the Palestinian people as a self-determination unit. Israel has no legal sovereign entitlement over this territory nor a legal right to settle Jewish people there. The legality of Israel's exercise of control over this territory, its purported annexation of all or part of it, and its implanting of settlements, therefore, falls to be determined according to international law in the light of the status of the territories in this regard. Such a determination based on the application of the law of self-determination, the law on the use of force, and occupation law, leads to the conclusion, as set out in the written statement, that the occupation is existentially illegal as a breach of self-determination and an aggression, the purported annexation is illegal also in these two senses, and the implanting of Jewish settlements in the territory is illegal as a breach of occupation law and the law of self-determination.

## 7. The illegality of the existence of the occupation according to the *jus ad bellum*

104. The Written Statement of Fiji insists that the occupation is existentially legal in *jus ad bellum* terms. The reasoning behind this is somewhat unclear. On the one hand, Fiji states that "the mere fact of occupation does not entail illegality" and that "international law imposes no constraint on the duration of occupation" (p. 5). This would suggest that the existence of the occupation does not fall to be determined by international law, and that the only matter the present Court can address, therefore, is the question of the legality of the conduct of the occupation. However, Fiji also asserts that "the right of occupation continues throughout an armed conflict and endures until it is resolved" (p. 5). Presumably, then, an occupation is only legally permissible if there is a "right" to conduct it, and the test for this is a negative one: if the "armed conflict" is not "resolved."

105. The only references to armed conflict made in the written statement of Fiji are when it says that "Israel is occupying a remainder of territories over which it gained control in self-defense in June 1967" and references "continuing acts of aggression against Israel emanating from the Gaza Strip."

106. The 1967 war was between Israel and Egypt, Jordan and Syria, not between Israel and the Palestinian people in the West Bank and Gaza. The war between Israel and these three states was over after six days. Israel subsequently entered into peace agreements with Egypt and Jordan, the states from whom it captured, respectively, Gaza and the West Bank during that six-day period. The situation between Israel and Egypt and Jordan is not in any sense, and, within this, not in any international legal sense, an "armed conflict". There is, then, manifestly no link between the 1967 war and the current occupation in terms of the legal justification Israel claimed (erroneously, as addressed in the written submission) for that war, correctly characterized by Fiji as self-defence.

107. The situation between Israel and West Bank and the Gaza Strip is one between an occupying state and occupied territory, the latter of the Palestinian people with a right to self-determination in international law. Fiji's reference to "acts of aggression against Israel

emanating from the Gaza Strip" implies that attacks on Israel from Gaza are somehow illegal in the *jus ad bellum* (hence "aggression"), which, if correct, would necessarily imply that Israel has a legal right to self-defence, which could therefore provide a legal basis for the existence of the occupation, at least of Gaza (assuming the requirements of necessity and proportionality were met—not, actually, an assumption that can be made). As addressed in the written submission, more broadly one potential explanation for Israel maintaining the occupation over the West Bank and Gaza is a defensive objective: to prevent threats to Israel from emerging from these territories (preventative action of this kind does not, of course, fall within the boundaries of lawful self-defence).

108. But this is all circular reasoning: acts of violent resistance to the occupation, and/or the risk of such acts, are invoked to supposedly give rise to a right to use force to maintain the occupation. The starting point has to be the occupation itself, and whether it is justified from the beginning, given that by definition its origins had nothing to do with any acts of resistance to it by the Palestinian people in Gaza or the West Bank, but something entirely different from, and necessarily antecedent to, such acts. If there was no original lawful basis for introducing and conducting the occupation in terms of threats emanating from the Palestinian people (and Israel has never claimed this was the reason why it captured the West Bank and Gaza), there cannot somehow then be such a basis based on threats that are acts of resistance to the occupation. A justification for maintaining the occupation cannot be constructed simply out of the consequences of resistance to it.

**Original copy filed at the Registry of the Court**

**Signed by Ambassador Abdelhamid ZEHANI**

**Chief of the Permanent Mission of the League of Arab States in Brussels**