



REPUBLIC OF NAMIBIA

**WRITTEN COMMENTS
TO THE
INTERNATIONAL COURT OF JUSTICE
ON**

**ADVISORY OPINION ON THE LEGAL CONSEQUENCES ARISING FROM THE
POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN
TERRITORY, INCLUDING EAST JERUSALEM**

SUBMITTED BY THE REPUBLIC OF NAMIBIA

OCTOBER 2023

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WRITTEN STATEMENT OF NAMIBIA

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I. INTRODUCTION

1. These written comments by the Republic of Namibia are filed in accordance with the Order of the Court of 3 February 2023 in response to the request by the General Assembly of the United Nations for an Advisory Opinion contained in Resolution 77/247 of 30 December 2022.¹ They seek to address to the Court four matters, in response to the written statements provided by other States parties, and which may assist the Court in its deliberations related to the request by the General Assembly of the United Nations for an Advisory Opinion contained in Resolution 77/247 of 30 December 2022.²
2. These four matters include:
 - a. The political process supporting a negotiated solution for the Palestine/Israel conflict;
 - b. The extent of third State party obligations pertaining to their economic dealings with the Occupying Power;
 - c. The current attempt to commit, if not actively commit, genocide in the Occupied Palestinian Territory (OPT); and
 - d. The precise relationship of the *ius ad bellum* to the matters raised by the request for an advisory opinion.
3. Several written statements³ have argued that the Court should exercise its discretion not to issue an advisory opinion in light of a political process instigated over 30 years ago that supports a negotiated solution; or that the Court should respond only to those legal questions raised by the advisory opinion in as far as its response would be in line with the outlines of this political process. Namibia does not share this view, and Namibia does not agree that the outlines of this process would permit Israel's continued

¹ UNGA Res 77/247, 30 December 2022, A/Res/77/247.

² UNGA Res 77/247, 30 December 2022, A/Res/77/247.

³ U.S.; Israel; Fiji; Nauru; Togo; United Kingdom; Russia; Italy; Czech Republic; Hungary; Spain.

occupation of the Occupied Palestinian Territory irrespective of its international legal obligations, up until a negotiated peace.

4. Namibia takes this position because nothing in the Security Council Resolutions argued to demonstrate political support of the international community to a negotiation process grants a mandate for Israel to persist in violations of *ius cogens*. Namibia also takes the position that the Palestinian Liberation Organisation (PLO) did not consent to any violations of *ius cogens* by Israel, including the maintenance of an illegal occupation, in its agreements with Israel.
5. Several written statements,⁴ have outlined the obligations of third States with respect to economic dealings with the Occupying Power should the continued occupation by Israel of the Occupied Palestinian Territory be found unlawful by the Court. Namibia agrees with this view and would like to make several additional observations on the extent of this obligation.
6. Specifically, Namibia observes that, in order to comply with their customary duty of non-recognition of Israel's sovereignty over the Occupied Palestinian Territory, third States must ensure that all their international agreements with Israel unequivocally and explicitly indicate their non-applicability to the Occupied Palestinian Territory. In order to ensure their compliance with their customary duty of not aiding and assisting, third States must ensure the import, marketing and sale of settlement goods and services is prohibited.
7. Cuba has outlined in its submission that "In this regard, the Republic of Cuba believes that, rather than an obvious apartheid situation, pursued as a crime against humanity, this is an act of low-intensity genocide that is being perpetrated with systematic and effective cruelty."⁵ Namibia will address this view in this submission.
8. Several written statements have suggested that the illegality of the occupation *per se* may result in the failure to apply the law of occupation to the Occupying Power's conduct, and have confused the request to determine the legal status under international

⁴ Including: League of Arab States; Ireland; Syrian Arab Republic; State of Palestine; African Union; Saudi Arabia.

⁵ Cuba, Written Statement of July 2023, page 15.

law of the prolonged occupation with a request to determine the legal status of the occupation under international humanitarian law.⁶ These are misguided suggestions that Namibia wishes to address.

II. THE POLITICAL PROCESS SUPPORTING A NEGOTIATED SOLUTION

9. Several submissions appear to confuse the international community's support for a political process for a negotiated solution to Israel's occupation of the West Bank, including East Jerusalem, and the Gaza Strip (the Occupied Palestinian Territory), with a blanket approval, acquiescence, or consent by that international community to violations of peremptory norms by the Occupying Power.
10. In determining the legal nature and consequences of Israel's conduct and its effects *inter alia* on the Palestinian people's inalienable right to exercise external self-determination and full independence, and the status of its occupation of the Occupied Palestinian Territory, the matters of law on which the Court is requested to advise will involve; the principle of self-determination, grave violations of core principles of international humanitarian law, the use of force and the principle of non-acquisition of territory by force, and the prohibition against apartheid, i.e. they involve obligations *ius cogens*.⁷

⁶ France § 51.: De l'avis de la France, les conséquences juridiques de ce constat doivent être appréciées à leur exacte mesure. Le caractère prolongé d'une occupation, s'il est contraire au fait que celle-ci devrait être provisoire par nature, n'a pas pour conséquence de rendre celle-ci illicite per se. En effet, ce constat d'illicéité per se pourrait conduire à soutenir l'inapplicabilité du régime juridique de l'occupation. Cela aboutirait à un résultat, manifestement absurde ou déraisonnable, qui serait de priver les populations civiles de la protection offerte par ce régime, protection d'autant plus nécessaire que ladite occupation dure dans le temps,

U.S. §4.2: The second referred question rests on a faulty premise. It asks the Court to opine on how the policies, practices and alleged violations referred to in the first question, including Israel's prolonged occupation, settlement and annexation of occupied territory "affect the legal status of the occupation." The straightforward answer is the legal status of the occupation under international humanitarian law results from the fact of occupation alone. The legal status of a belligerent occupation under international humanitarian law does not change if the occupation is prolonged or if alleged violations of international humanitarian law or other international law have been committed by the Occupying Power.

⁷ Report of the International Law Commission, Seventy-first Session (29 April – 7 June and 8 July – 9 August 2019), UN General Assembly, A/74/10, 'Chapter V: Peremptory norms of general international law (*jus cogens*)' available at < <https://digitallibrary.un.org/record/3827355?ln=en>>.

11. Namibia submits that a negotiated political solution, cannot be predicated on a mandate to the Occupying Power to persist in violations of peremptory norms, nor can it require its persistence in such wrongful conduct.
12. Namibia further submits that there is no legal framework requiring a negotiated solution. Rather, the international community's support is for a political process that seeks a negotiated solution, and Israel's consent to such a political process, is generally considered to be outlined in the following documents:⁸
 - (i) U.N. Doc. S/RES/242 (Nov. 22, 1967)
 - (ii) U.N. Doc. S/RES/338 (Oct. 22, 1973)
 - (iii) Exchange of Letters between Yitzhak Rabin, Prime Minister of Israel, and Yasser Arafat, PLO Chairman, concerning Israel-PLO Recognition (Sept. 9, 1993)
 - (iv) Declaration of Principles on Interim Self-Government Arrangements, A/48/486- S/26560 (Sept. 13, 1993); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, A/51/889-S/1997/357 (Sept. 28, 1995).

The Palestinian Liberation Organisation's (PLO) consent is considered to be derived from the letters, Declaration of Principles and Interim Agreement outlined under (iii) and (iv) above.

13. With respect to UN Security Council Resolution 242 and UN Security Council Resolution 338, Namibia understands that the "withdrawal of Israeli armed forces from territories occupied in the recent conflict" was required subsequent to Israel's unlawful use of force and territorial aggression against its Arab neighbours,⁹ and was not made explicitly conditional by the text of those resolutions on any peace agreements concluded with those neighbours (the supposed "land for peace" formula).
14. In as far as the political process supporting a negotiated peace was established based on, and in accordance with, UN Security Council resolutions, Namibia submits that the

⁸ Some have referred to these documents and the support from the international community for negotiations between the parties as the "framework for negotiations". Namibia does not find this term helpful in establishing the extent, nature or content of the international community's support for a political process supporting a negotiated solution; or in establishing the extent, nature or content of the legal obligations incumbent upon the PLO by virtue of its political support for a peaceful process supporting a negotiated solution.

⁹ See Namibia's written statement, Paragraph 141-142.

Security Council remained bound by *ius cogens* and the UN Charter in the exercise of its functions, including its issuance of the abovementioned resolutions.¹⁰ Article 24(2) of the UN Charter stipulates that “in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations”. These principles include (*emphasis added*):

- a. “To maintain international peace and security, and to that end: to take effective collective measures (...) for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and **in conformity with the principles of justice and international law**, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (*emphasis added*)”;
- b. “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, (...)”;
- c. “(...) in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

15. It must therefore be presumed that the UN Security Council did not intend to ask States, or non-State actors, to consent to, mandate, or require, Israel’s breaches of peremptory norms through the Council’s promotion of a peaceful resolution. The Security Council can therefore not have authorized a framework through Resolution 242 and Resolution 338 that required, or consented to, Israel’s continued presence in the Occupied Palestinian Territory, or to Israel’s other internationally wrongful acts.¹¹ Israel’s continued presence in occupied Palestine is in breach of peremptory norms of international law.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 13 September 1993, 440 (Judge ad hoc Lauterpacht, sep. op., para. 100-102); see also Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 465 (para. 28).

¹¹ On other wrongful acts, see e.g. Namibia’s Written Statement of July 2023, Paragraph 151.

16. Alternatively, should the UN Security Council be at liberty to require State action that violates peremptory norms pursuant to Article 103 of the UN Charter,¹² its functions as outlined under Article 24(2) of the Charter do not presume that it would require, acquiesce to, or consent in internationally wrongful conduct as a matter of ordinary Security Council practice. In interpreting the Security Council's resolutions there is an implicit presumption that the Security Council does not intend to impose any obligations on UN Member States that breach peremptory norms. In the event of any ambiguity as to the meaning of Resolutions' terms, resolutions should be interpreted in that light.¹³ In this vein, the language enshrined in UN Security Council resolutions 242 and 338, promoting a peaceful resolution to the conflict by the UN Security Council cannot therefore be interpreted as implicitly conditioning Israel's withdrawal from the territories occupied by it in 1967 on the conclusion of a peace process, given that Israel's continued presence there breaches peremptory norms prohibiting the acquisition of territory through use of force and the denial of self-determination, amongst others. This view was also expressed by several of the participants to the UN Security Council Debates preceding the vote.¹⁴

17. In light of the above, it is clear that the provisions of UN Security Council resolutions 242 and 338, do not in any way impede the exercise of the Court's discretion to issue an Advisory Opinion, finding that the occupation is illegal and as a consequence, requiring that Israel's administration of the Occupied Palestinian Territory is brought to an immediate and unconditional end.

18. Namibia further considers that the agreements signed by Israel and the PLO and co-signed by other members of the international community, do not contain any legally

¹² Article 103, UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

¹³ *Al-Jedda v. the United Kingdom*, European Court of Human Rights, Grand Chamber, Application no. 27021/08, Judgement, Strasbourg, 7 July 2011; available on <http://hudoc.echr.coe.int/sites/eng>, para. 102; See also *Namibia* advisory opinion, paragraph 53 "(...) Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. (...)". See also *Prosecutor v. Duško Tadić*, Judgment on Appeal, IT-94-1-A (July 15, 1999), para. 296.

¹⁴ Security Council Official Records, 1379th meeting, 16, intervention of the United Arab Republic ; Security Council Official Records, 1382nd meeting, 22 November 1967, S/PV.1382 November 1967, S/PV.1379, intervention of the USSR and Jordan.

binding provisions on negotiation that defer the matter of ending Israel's illegal occupation to a politically negotiated process exclusively. For example, in the Israeli-Palestinian Interim Agreement both Israel and the PLO emphasised that, "[T]he two parties agree that the outcome of the permanent status negotiations should not be prejudiced or pre-empted by agreements reached for the interim period."¹⁵ They also agreed that "[N]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations" and that "[T]he two Parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period".¹⁶ This essentially means that regardless of the outcome of the ongoing political negotiations, the "status" of the West Bank and the Gaza Strip, remained that of an occupied territory.

19. Where the Oslo accords and other agreements promoting a negotiated peace conflict with peremptory norms, they would be invalid.¹⁷ The arrangements concluded between Israel and the PLO at most committed the parties to politically support and engage in good faith negotiations during the interim period, which expired on 4 May 1999, and required Israel's withdrawal. Their transfer of certain administrative functions from the Occupying Power to the local authority, did not change the status of the West Bank and the Gaza Strip as occupied territory, and as such, constituted a special agreement governed by Articles, 7, 8 and 47 of the Fourth Geneva Convention (1949).¹⁸

¹⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, A/51/889-S/1997/357 (Sept. 28, 1995), Article XXXI(6).

¹⁶ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, A/51/889-S/1997/357 (Sept. 28, 1995), Article XXXI(7) &(8)

¹⁷ "The ILC confronted this basic question: What would the legal position be where two or more parties seek to derogate by treaty from a norm of general international law the integrity of which lay in States' collective interest? Nearly all States agreed during the drafting of the VCLT that derogation by treaty from certain legal norms should not be legally possible and that the attempt to do so should result in the treaty's invalidity. Their disagreement turned primarily on the criteria for identifying non-derogable legal norms and, crucially, on how the question of a treaty's validity ought to be adjudicated in these circumstances." From Costelloe, Daniel, *Legal Consequences of Peremptory Norms in International Law*: 132 (Cambridge Studies in International and Comparative Law) (p. 54). Cambridge University Press; See also VCLT Article 53, see also UN GA Resolution 1/RES/34/65/B of 29 November 1979, which "Declares that the Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967."

¹⁸ Article 7 of the Fourth Geneva Convention provides that "No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them". Article 8 emphasises that, "Protected persons may in no circumstances renounce in part or in entirety the

20. The Occupying Power's retention of its effective control over the Occupied Palestinian Territory and other administrative functions was accepted as a *de facto* reality but it did not confer *de jure* legality under the *ius ad bellum* by virtue of the signing of the agreements. The accords do not involve the PLO's consent to Israel's violations of any peremptory norms. While the law of State responsibility envisages that a State could consent to an otherwise internationally wrongful act, jurisprudence establishes that the waiver of such claims must be "clear and unequivocal",¹⁹ while bearing in mind the explicit caveat that there cannot be a valid waiver of a violation of a peremptory norm of international law (such as permanent sovereignty and right of self-determination over natural resources), even by the "consent or acquiescence of the injured State".²⁰
21. The arrangements concluded between Israel and third parties, and Israel and the PLO, and those arrangements' mandating of a peace process, cannot therefore be perceived as providing any State or non-state actor *fiat* to act in disregard of their applicable international legal obligations of *ius cogens* and *erga omnes* nature, from which no derogation is permitted.
22. It should also be pointed out that, whether or not Israel has an indefinite right to continue its occupation pending a negotiated resolution is in fact partly the subject of this Advisory Opinion. While the parties are free to negotiate, they must do so within the bounds of applicable international law, and the clear establishment of what those

rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article". While Article 47 provides that, "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory".

¹⁹ *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment of 26 June 1992, ICJ Reports 1992, p. 240, 247, Para 13.

²⁰ Article 45, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), para 4: "Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law."

bounds are can only assist the parties in any good faith efforts.²¹ In order to understand how the General Assembly can best contribute to the process of bringing Palestine to full independence in the fulfilment of its exercise to full external self-determination,²² the Court is now being asked by the General Assembly to help it determine what exactly the legal status of that prolonged occupation is.

23. The fact that a negotiated solution carries the political support of the international community, but is not legally required, is also evident in the fact that nothing in the negotiation roadmap precludes Israel from deciding to unilaterally withdraw from the entirety of the Occupied Palestinian Territory and dismantle its belligerent occupation and associated administration in accordance with the relevant human rights law responsibilities that it has.

24. Namibia warns, that should the Court find otherwise, the consequences for international conflict prevention would be grave. Essentially, it would give rise to a precedent, where a State may occupy another State in violation of the *ius ad bellum*, and then obtain that other State's commitment to indefinite negotiations, and essentially acquire territory through the use of force. An occupied State may be unduly forced to commit to negotiations where, for example, the subjugated State does not have sufficient military might to free itself from an act of continued territorial aggression.

25. While the international community can support such a political process, provide resources for it and take measures to facilitate it (as opposed to, for example, support the use of armed resistance, and the act of aggression), its support does not oblige the

²¹ See also Norway's written statement: "Norway believes that a lasting, peaceful solution to the Israeli-Palestinian conflict must be found through political negotiations and must be in conformity with the framework of international law"; See also the *Wall Advisory Opinion*, paragraph 162: "efforts to be encouraged with a view to achieving as soon as possible, **on the basis of international law**, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region" (emphasis added).

²² Namibia, Written Statement of July 2023, paragraphs 145-146: "The special status of right of the Palestinian people to external self-determination was recognized under Article 22 of the Covenant of the League of Nations. That Covenant classified Palestine as a Class A mandate, whose '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'. As the International Court of Justice outlined in the Namibia Advisory Opinion), the 'ultimate objective' of the Mandate as a sacred trust was the 'self-determination and independence of the peoples concerned'. As such, the right of Palestinian self-determination continues as a 'sacred trust'. There is no reversion of this sacred trust – no reversion back to a colonial status."

State whose territory is occupied to negotiate, nor does it alleviate the Occupying Power and third States from their relevant obligations under international law, nor could it alter the *ius ad bellum* status of an occupation from illegal to legal.

26. Namibia further stresses that the right to self-determination of a State and of a People, also entails the right to free and informed consent to the imposition of any obligations on it. In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court underscored that consent has to be freely provided (the “freely expressed” and “genuine will” of the people of the territory concerned).²³ It would be helpful if the Court could indicate, what the consequences are of an occupation that is illegal on *ius ad bellum* grounds for the ability of the representatives of the occupied State or people, to provide *free and genuine consent* to any cession of its territory, in light of the unlawful use of force against the occupied State that such an illegal occupation entails.²⁴ While the principles laid down in the *Chagos Advisory Opinion* pertain to a Non Self-Governing Territory, the Occupied Palestinian Territory has an equal right to external self-determination deriving from its Mandate status as a ‘sacred trust’, and the principles related to consent are therefore equally applicable to it.²⁵

III. ECONOMIC DEALINGS WITH THE OCCUPYING POWER

27. Several member states have correctly asserted that the obligations laid out in the *Namibia Advisory Opinion*, providing that Member States must “abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory”²⁶ would

²³ UN Security Council S/2002/161, ‘Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Addressed to the President of the Security Council’. See also Written Submission by Palestine, paragraph xxx (re: content of the right to self-determination).

²⁴ Free and informed consent as a corollary of the principle of self-determination. See, *mutatis mutandis*, *Chagos Advisory Opinion* “any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.” - *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ (Advisory Opinion) 2019, para 160

²⁵ See, written submission of Namibia to the Court of July 2023, paragraph 146-148.

²⁶ *Namibia Advisory Opinion*, paragraph 124.

apply *mutatis mutandis* to third State obligations *vis-à-vis* their dealings with Israel, in light of its unlawful occupation of the Occupied Palestinian Territory. They have also highlighted what their duty of non-recognition entails for their treaty relations with the Occupying Power.²⁷

28. As outlined in the written statement of the African Union:

“It is of crucial importance that the duty not to recognise does not amount “to an obligation without real substance.” (...) Instead, concrete steps must be taken to ensure that the breach’s consequences are minimised, and in particular that the breaching state obtains no benefit thereof. These steps may include: (...) (c) A moratorium on any international legal agreement with the breaching state that would apply or extend its benefits to the unlawfully occupied territory. Existing international instruments between any state and Israel, to the extent that they extend to the occupied territories (if the definition of “territory” in that instrument is capacious enough), should be disregarded to that extent.”²⁸

29. With respect to such international legal agreements with the Occupying Power, Namibia would like to provide the following additional comments to the content of these obligations:

30. As Namibia understands the current status of customary treaty law, States may not conclude treaties with an Occupying Power that impose obligations on the territory it occupies or its people, as the exercise of such treaty-making powers is reserved for the legitimate sovereign, and its exercise by an Occupying Power would infringe on the occupied people’s right to self-determination (see also the principle of *pacta tertiis nec nocent nec prosunt*).²⁹

²⁷ See also UN SC Res 2334 and Namibia Advisory Opinion §122 (member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental Co-operation.”

²⁸ See Written Submission of the African Union, July 2023, paragraph 262-263.

²⁹ See, VCLT Section 4, see also CJEU Case C-104/16 P *Council v Polisario*; CJEU Case T-279/19 *Council v Polisario*; Preliminary Ruling of the CJEU in *Western Sahara Campaign UK v HMRC* etc. of 27 February 2018

31. Nevertheless, States have at times desisted from inserting a territorial clause that explicitly and unequivocally excludes the Occupied Palestinian Territory from the territorial scope of applicability of an agreement they conclude with the Occupying Power, while simultaneously arguing they could unilaterally ensure that they do not recognise the Occupying Power's sovereignty over the Occupied Palestinian Territory, or could unilaterally ensure they do not give any legal effect to the Occupying Power's imposition of its sovereign treaty-making powers over the Occupied Palestinian Territory.³⁰

32. Namibia considers this position to be misguided. Where a State has knowledge that an Occupying Power applies its international treaties to some or all of the territories occupied by it in accordance with the wrongful elements of that Occupying Power's own national law (e.g., its *de jure* or *de facto* annexation. See also VCLT Article 29), it must negotiate its treaties with that Occupying Power in full consideration of this knowledge. Where third States have knowledge that Israel applies its treaties with other parties to the Occupied Palestinian Territory, in accordance with Israel's national legislation and in accordance with the ordinary meaning of the term "the State of Israel" under its national legislation:

- States that fail to insert a clear and unequivocal territorial clause in their bilateral or multilateral agreements with Israel would implicitly consent to that Occupying Power's extension of its sovereign treaty-making authority to the Occupied Palestinian Territory;
- Their failure would constitute such consent in light of their awareness that the Occupying Power will unilaterally apply that agreement to the Occupied Palestinian Territory, as mandated under its own legislation, and in the absence of an explicit and unequivocal territorial clause excluding the Occupied Palestinian Territory from the territorial scope of applicability of that agreement;

(C-266/16); CJEU's ruling of 2021 in joined cases T-344/19 and T-356/19. CJEU Judgment of 25 February 2010 in *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*.

³⁰ See also UN SC Resolution 2334, operative paragraph 5, which "Calls upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".

- By virtue of such implicit consent, States would recognise and give legal effect to the Occupying Power's exercise of powers reserved for legitimate sovereigns in the Occupied Palestinian Territory, specifically, to their exercise of sovereign treaty-making powers over the Occupied Palestinian Territory. This would amount to a violation of their duty of non-recognition;
 - States would also be violating their duty of not aiding and assisting in as far as their omission would predictably assist the Occupying Power in its infringement of the occupied territories' people's right to self-determination, and the infringement of the occupied people's right to permanent sovereignty over their own natural resources.
33. With respect to treaties that do not have a clear territorial scope of applicability, the duty of non-recognition would require a careful investigation by third States of all treaty provisions to ensure that their application or implementation of that treaty will not result in their treating as lawful, giving legal effect to, or implying consent to the Occupying Power's exercise of competences reserved for the legitimate sovereign in the Occupied Palestinian Territory, or to acts by the Occupying Power in the Occupied Palestinian Territory, that are otherwise unlawful.
34. With respect to other dealings with the Occupying Power, the duty of non-recognition would at least entail that third States are prohibited from:
- Recognising as lawful any acts or extra-territorial exercises of authority reserved to legitimate sovereigns carried out by Israeli authorities in the Occupied Palestinian Territory. The Occupied Palestinian Territory does not fall under Israel's national authorities' territorial competence;
 - Recognising as lawful any application of Israel's domestic legislation extra-territorially and in violation of the limitations on an Occupying Power laid down in Article 43 of the Hague Regulations of 1907;
 - Recognising as lawful any measures that discriminate against protected persons in the Occupied Palestinian Territory, or are intended to render more sustainable the establishment of Israel's natural and legal persons on that territory, or their exploitation, use or control of the Occupied Palestinian Territory's natural resources without the consent of its people. It includes their recognition of such acts in the

context of their governance of commercial exchanges, transactions in goods and services, and the implementation of trade-related measures.

35. On the other hand, the duty of non-recognition does not extend to acts such as the registration of births, deaths and marriages, where such non-recognition could only work to the detriment of the protected persons of the occupied territory (*mutatis mutandis* from *Namibia* Advisory Opinion, para.125).

36. With specific regard to economic dealings with the Occupying Power, Namibia would like to provide some additional comments on a matter raised by Ireland and other States³¹ in their submissions:

55. (...) The General Assembly and Security Council have, in the past, called upon all states to refrain from rendering any assistance to the maintenance of situations of denial of self-determination.

56. In Ireland's view, these obligations require all states, as well as international organisations competent in the field of external trade (which for Ireland is the European Union), to review their trading relationships with the settlements in the Occupied Palestinian Territory and to take steps to prevent trade that assists in the maintenance of the situation created by the settlement activity, or that implicitly recognises or serves to entrench Israel's settlement or annexation of that territory.

37. Namibia notes that States are required not to aid and assist in the commission of an internationally wrongful act, nor to render aid or assistance in maintaining a situation created by a serious breach of international law.³² It is Namibia's understanding that States who trade in settlement products are doing so in breach of their obligations not to aid or assist serious breaches of international law, or the situations created by them.

³¹ Among others: the League of Arab States; Syrian Arab Republic; State of Palestine; African Union; Saudi Arabia.

³² Draft Articles on State Responsibility, Article 16 and 41 + commentaries.

38. The International Law Commission stipulates that, whether or not a State aids and assists in a wrongful act depends on three elements:³³

- a) the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful;
- b) secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so;
- c) and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

39. When it comes to States' obligations not to, through their acts or omissions, contribute to maintaining or sustaining the *situations* created by serious breaches of international law, the standard has been argued by commentators to be lower and only requires States' knowledge of such a breach and the resulting situation.³⁴

40. With respect to the serious breach at stake, and the situation created by it, the unlawful appropriation of property³⁵ is a corner stone of Israel's settlement enterprise and colonisation of the Occupied Palestinian Territory. No Israeli nationals can be effectively transferred into the Occupied Palestinian Territory, without the Occupying Power reserving and allocating property to their exclusive use, conveying such property to them, and enforcing such allocations and conveyance through the use of force *vis-à-vis* the protected persons, the Palestinian people. Such uses include the property's residential and commercial (including agricultural and industrial) use by Israeli natural or legal persons to which the property is conveyed. The appropriation of property, not justified by military necessity and carried out wantonly and unlawfully, including where done so for the purpose of facilitating the transfer of Israel's own civilian population into the Occupied Palestinian Territory, constitutes a grave breach of the

³³ ILC draft articles on state responsibility, commentary to Article 16.

³⁴ Harriet Moynihan, 'Aiding and assisting: the mental element under article 16 of the international law commission's articles on state responsibility', page 18, *International & Comparative Law Quarterly*, Volume 67, Issue 2, April 2018, pp. 455 – 471 DOI: <https://doi.org/10.1017/S0020589317000598>: "The reference to a 'serious breach' in this context means a gross and systematic failure by the responsible State to fulfil an obligation imposed by a peremptory norm. The ILC Commentary notes that the lack of the subjective element in Article 41(2) is motivated by the fact that 'it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State'."

³⁵ Under the meaning of Article 47 of Geneva Convention IV of 1949

Fourth Geneva Convention. As such, it is a continuous crime, i.e., the unlawful appropriation continues until the property is reverted to its original use or another lawful purpose. The unlawful appropriation of property by Israeli authorities in the Occupied Palestinian Territory, in widespread and systematic manner, is an essential element to the establishment of Israel's settlements, in flagrant violation of international law.

41. Once the Occupying Power appropriates property, it transfers possession and control over such property to several of its own natural or legal persons. It does so for its own unlawful purposes and objectives – i.e., facilitating the transfer and habitual residence of its own (Israeli) natural or legal persons in the Occupied Palestinian Territory. Those natural or legal persons subsequently obtain possession and control over that property. The possession by Israeli natural and legal entities of unlawfully appropriated property in the Occupied Palestinian Territory, for the uses allocated to such property by the Occupying Power, constitutes a situation created by a serious breach of international law.

42. In order for Israeli natural and legal persons to maintain such possession and control they must derive some utility from the property conveyed to them by the Occupying Power, i.e., that possession needs to confer some advantage to the controlling entity:³⁶
 - a. Such advantage can be derived from their residential use of the property;
 - b. Such advantage can be derived from their commercial use of the property and subsequent economic gain from it.

43. Natural and legal persons which possess unlawfully appropriated property use such property as a factor of production in their production of goods and services, i.e., they utilise their possession of the land together with other factors of production they have also obtained (i.e., capital and labour) and transform them into a new good or service that can be exchanged gainfully/profitably through commercial transactions.

³⁶ Possession of immovable property also often involves its maintenance or safeguarding, which includes investing in it and improving it. Such activities would only be engaged in by an entity with respect to property if some advantage can be seen to be derivable from its continued possession of the immovable property.

44. Where commercial transactions in such goods and services are permitted and take place, the ability to profitably sell goods and services obtained using such unlawfully appropriated property facilitates the continued possession of that property by those controlling Israeli natural and legal persons. Namibia understands that the purchase of goods or services produced using unlawfully appropriated property ensures that the natural and legal persons to whom the property was unlawfully conveyed can maintain their gainful use of that property. Those commercial transaction also ensure that the Occupying Power can continue to satisfy the purposes for which it has unlawfully appropriated the property, allocated it to its own nationals' use, conveyed it to their possession, and continuously enforces and protects their possession of it. In sum: Israeli natural and legal persons' gainful use of unlawfully appropriated immovable property in the Occupied Palestinian Territory, is essential to maintaining their continued possession of such property, and is essential to the satisfaction of the unlawful purposes of the Occupying Power that are served by its unlawful appropriations.
45. By failing to prohibit the import, marketing and sale in their jurisdictions of settlement goods and services, States facilitate the maintenance of such natural and legal persons' possession of that unlawfully appropriated property; and facilitate the Occupying Power's accomplishment of the goals it is pursuing through maintaining and continuing to enforce the property's unlawful appropriation, in as much as maintaining the gainful uses by its own nationals to which that property has been allocated, must be consummated by economic advantages derived from trading in the products the property is used to produce.
46. Namibia notes that whether States violate their duty of not aiding and assisting is not dependent on whether their commercial dealings in such settlement goods or services are necessary or sufficient to maintain possession by Israeli natural or legal persons of unlawfully appropriated property (the situation resulting from a serious breach), but merely requires that such commercial dealings contribute to maintaining their possession.
47. While a State engaging in trade relations with another State does not normally assume the risk that its trade may amount to its assistance or aid in maintaining the situation resulting from a serious breach, the situation pertaining to the Occupied Palestinian

Territory, is markedly different. States that are members of the United Nations, in view of the many Security Council resolutions and General Assembly resolutions, the Human Rights Council's work, the work of the UN Special Rapporteur on the situation in the Occupied Palestinian Territory, and the work of the UN Commission of Inquiry, are all aware of the relevant wrongful acts of the Occupying Power and the various situations resulting from such wrongful acts (such as settlements, or the resulting possession and control by Israeli natural and legal persons over property unlawfully appropriated).

48. The ILC states in its commentary to Article 41³⁷ that “[A]s to the elements of “aid or assistance”, article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has “knowledge of the circumstances of the internationally wrongful act”. There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State”.
49. The ILC commentary suggests that only knowledge of the wrongful conduct itself occurring is required. On that basis, the relevant third States continuing their trade in settlement products would appear to be in breach of their customary obligations as third States if they continue such trade.
50. However, should the Court find that the ILC commentary on Article 41 of its Articles on State Responsibility does not reflect customary international law, and the principles regarding intent laid down for the legal concept of aiding and assisting in Article 16 are equally applicable to determine whether a State is rendering aid and assistance to the maintenance of a situation resulting from a wrongful act, we here outline some additional points for its consideration:
51. The commentary to Article 16 reads that “the aid or assistance must be given **with a view to facilitating** the commission of that act, and must actually do so;” i.e; “A State is not responsible for aid or assistance under article 16 **unless the relevant State organ intended**, by the aid or assistance given, **to facilitate the occurrence of the wrongful**

³⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001

conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.” [our emphasis]

52. Intent, for the purpose of determining whether a State is ‘aiding or assisting’ must be understood not merely as the “desire or will to bring about the consequences of the crime but” also as the awareness, i.e. the knowledge, that facilitating the maintenance of the situation created by another State’s serious breach of international law will be an almost inevitable outcome of the first State’s acts or omissions, i.e. intent must be understood as involving ‘oblique intent’.³⁸ The State must not have had the *purpose* to facilitate the maintenance of a situation created by a serious breach, but must have been *aware* (had *knowledge*) that such facilitation would be an outcome of its own conduct (acts or omissions) barring rare or unforeseen events.

53. If the requirement for establishing intent was that a State had to be in common cause with the perpetrating State or needed to have as its purpose to facilitate the maintenance of the situation created by a serious breach of international law, the requirement not to render aid or assistance would swiftly be rendered meaningless. States would simply be able to claim that the purpose of their conduct is not the facilitation of the wrongful act or of the situation resulting from a serious breach and that they therefore can persist in such facilitating conduct irrespective of its consequences, as their purpose may be – depending on the breach and situation in question - ensuring the economic stability of

³⁸ Harriet Moynihan, ‘Aiding and assisting : the mental element under article 16 of the international law commission’s articles on state responsibility’, page 15, *International & Comparative Law Quarterly* , Volume 67 , Issue 2 , April 2018 , pp. 455 – 471 DOI: <https://doi.org/10.1017/S0020589317000598>: “The ICC Pre-Trial Chamber in *Prosecutor v Bemba*, in its consideration of Article 30 of the Rome Statute, stated that direct intent requires that the suspect ‘knows that his or her acts will bring about the material elements of the crime and carries them out with the purpose, will or desire to attain this result’. The second part of sub-paragraph (b)—‘is aware that it will occur in the ordinary course of events’—describes a more oblique form of intent, where a person does not have the desire or will to bring about the consequences of the crime but is aware that those elements will be the almost inevitable outcome of his or her acts or omissions. The ICC Pre-Trial Chamber in Bemba stated that, **in relation to this more oblique form of intent, the volitional element decreases substantially and is overridden by the cognitive element, i.e., awareness that his or her acts ‘will’ cause the undesired proscribed consequence.** This reflects the orthodox standard of intention in English criminal law, which includes knowledge that the consequence was virtually certain to follow” (emphasis added). See also the concepts of ‘*dolus eventualis*’ or ‘subjective recklessness’.

their own markets through continued trade, ensuring they do not harm bilateral relations with the perpetrating state, ensuring continued profit from arms sales, etc.³⁹

54. Based on that standard of ‘oblique intent’, a third State who fails to regulate the import and sale in its market of settlement goods and services would thereby appear to be in breach of its duty not to render aid or assistance to the situation resulting from a serious breach of international law where:

- a. The specific third State’s market constitutes a market for settlement goods and services;
- b. The specific third State has knowledge of the unlawful appropriations of property and their unlawful purpose (i.e., the transfer and settlement of Israel’s civilian population in occupied territory), and the resulting possession by Israel’s natural and legal persons of such property;
- c. The specific third State is aware that settlement goods and services are imported, marketed, and sold within its own jurisdiction;
- d. The specific third State has knowledge of the sustaining economic interface between the sale of settlement goods and services in its market and the continued gainful possession and use by Israel’s natural and legal persons of such unlawfully appropriated property;
- e. The specific third States nevertheless fails to prohibit such import, marketing and sale in its own jurisdiction.

55. Namibia therefore takes the position that States that do not have as the *purpose* of their omission to prohibit the import, sale and marketing of settlement goods to render aid and assistance to maintain the situation created by the serious breach are therefore not relieved of their obligations to prohibit such trade.

56. Moreover, in as far as the conveyance of the unlawfully appropriated property in the Occupied Palestinian Territory, to Israel’s natural and legal persons, and the resulting possession of such property by such persons, constitutes part of the act of appropriation

³⁹ Because the serious breach that gave rise to the situation in question is a peremptory norm, other States legitimate interests that they may pursue in their activities that constitute aiding or assisting would not trump that norm and the importance of preventing its breach.

as a continuous act, the rendering of aid and assistance to such continued possession and commercial use would constitute a violation of the customary obligation of not aiding and assisting in the commission of a wrongful act under the meaning of Article 16 of the ILC Articles on State Responsibility as well.

57. Namibia would find it helpful if the Court could elaborate, in light of the above, on whether it finds that the continued import of settlement goods may constitute a violation of States' obligations not to render aid or assistance in the maintenance of a situation resulting from a wrongful act, or not to aid and assist in the commission of a wrongful act, and if it could elaborate on what the elements of facts and law are that must be established for a State to be found in violation of that customary obligation in the present context.

IV. GENOCIDE

58. With respect to Cuba's statement that "rather than an obvious apartheid situation, pursued as a crime against humanity, this is an act of low-intensity genocide that is being perpetrated with systematic and effective cruelty," Namibia would like to make two additional observations:

- 1) That, without prejudice to whether what is termed as "a low-intensity genocide" was occurring prior to 7 October 2023, Israel is now attempting to commit, if not actively committing crimes against humanity which could be tantamount to an act of genocide in the Occupied Palestinian Territory.
- 2) That Israel's commission of the crime against humanity could amount to an act of genocide in the Occupied Palestinian Territory, in any shape or form does not exclude its ability to simultaneously impose a system of apartheid over the Occupied Palestinian Territory, as it indeed is doing.⁴⁰

⁴⁰ Namibia, Written Statement of July 2023, p.8-33.

59. The prohibition against genocide is a peremptory norm, i.e., no derogation from that prohibition is permitted.⁴¹ The Convention on the Prevention and Punishment of the Crime of Genocide⁴² specifies genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

60. The distinctive feature that renders the acts listed above genocidal, is their intent, i.e., whether they are intended to destroy, in whole or in part, a national, ethnical, racial, or religious group, they can amount to genocide.

61. Since 7 October 2023, Israel has been engaged in a large-scale indiscriminate bombing campaign of Gaza that has cost at least 4500 lives its first two weeks and has amounted to the wilful and systematic destruction of civilian homes (‘domicide’).⁴³ It has also been engaged in a ruthless tightening of its 17-year siege on Gaza through the cutting of electricity and water provision to the Gaza Strip and prohibiting any transport of food, fuel and medicine into the Gaza through its border crossings with it. The Israel Defence Force has issued evacuation orders for the 1.1 million population living in the North of the Gaza Strip to move to the South of the Gaza Strip,⁴⁴ while simultaneously bombing the South of the Gaza Strip to which it required people to evacuate, including

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*; Judgment dated 3 Feb. 2015, para. 87.

⁴² Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by the General Assembly of the United Nations on December 9, 1948 as General Assembly Resolution 260, and entered into force on 12 January 1951.

⁴³ See the flash updates provided by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) at <https://www.ochaopt.org>; see also United Nations Office of the High Commissioner for Human Rights, Press Release, 19 October 2023, ‘Gaza: UN experts decry bombing hospitals and schools as crimes against humanity, all for prevention of genocide.’

⁴⁴ Israel Defence Force, IDF announcement sent to civilians of Gaza City, available at: <https://twitter.com/IDF/status/1712707301369434398>

areas marked for safe passage.⁴⁵ The World Health Organisation referred to the evacuation order for hospitals in the North of the Strip as “a death sentence for the sick and injured”.⁴⁶

62. The abovementioned serious and systematic violations of international humanitarian law (war crimes) and possible crimes against humanity involve the killing of Palestinians in Gaza, the causing of serious bodily or mental harm to Palestinians in Gaza, and the deliberate infliction on Palestinians in Gaza of conditions of life that can bring about their physical destruction in whole or in part. Namibia warns that Israel may be imposing such conditions and perpetrating such crimes which could amount to acts done with genocidal intent, i.e., they are calculated to bring about the physical destruction of the Palestinian people in whole or in part. Namibia is led to believe this through the nature of Israel’s acts and the severe effects of such acts on the Palestinian lives, bodily and mental well-being, and through the accompanying rhetoric indicating genocidal intent, as well as possibly constituting incitement to genocide, on behalf of Israel’s public officials. Those statements (translated from Hebrew) include, but are not limited to, the following:

- a. “We are imposing a complete siege on Gaza. There will be no electricity, no food, no water, no fuel. Everything is closed. We are fighting human animals and we act accordingly.” - Israeli Defense Minister Yoav Gallant.⁴⁷
- b. “Human animals must be treated as such. There will be no electricity and no water [in Gaza], there will only be destruction. You wanted hell, you will get hell.” - Israeli Major General and COGAT chief Ghassan Alian.⁴⁸

⁴⁵ Al-Haq, Al Mezan, PCHR, “No Safe Place: Despite ‘Evacuation Order’, Israel Continues to Carpet-Bomb Gaza from North To South” (18 October 2023), available at: <<https://www.alhaq.org/advocacy/21927.html>>

⁴⁶ World Health Organization, Statement, ‘Evacuation orders by Israel to hospitals in northern Gaza are a death sentence for the sick and injured’, 14 October 2023

⁴⁷ Emmanuel Fabian, “Defense minister announces ‘complete siege’ of Gaza: No power, food or fuel” (9 October 2023), available at: < https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/>

⁴⁸ Gianluca Pacchiani, “COGAT chief addresses Gazans: ‘You wanted hell, you will get hell’” The Times of Israel (10 October 2023), available at: https://www.timesofisrael.com/liveblog_entry/cogat-chief-addresses-gazans-you-wanted-hell-you-will-get-hell/

- c. “We are fighting against human animals... Gaza won’t return to what it was before. We will eliminate everything.” - Israeli Defense Minister Yoav Gallant.⁴⁹
- d. “It’s an entire nation out there that is responsible. It’s not true, this rhetoric about civilians not aware, not involved. It’s absolutely not true. They could have risen up against that evil regime, which took over Gaza in a coup d’etat. But we are at war. We are at war. We are defending our homes. We are protecting our home. That’s the truth. And when a nation protects its homes, it fights. And we will fight until we break their backbone.” - Israeli President Isaac Herzog.⁵⁰
- e. All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world.” - Israeli Minister of Energy Israel Katz.⁵¹

63. UN Experts⁵² have also sounded the alarm: “There is an ongoing campaign by Israel resulting in crimes against humanity in Gaza. Considering statements made by Israeli political leaders and their allies, accompanied by military action in Gaza and escalation of arrests and killing in the West Bank, there is also a risk of genocide against the Palestinian People.”⁵³

⁴⁹ “Israeli defence minister orders ‘complete siege’ on Gaza” *Al-Jazeera* (9 October 2023), available at: < [⁵⁰ “‘No Innocent Civilians in Gaza’, Israel President Says as Northern Gaza Struggles to Flee Israeli Bombs” *The Wire* \(13 October 2023\), available at: < \[>\]\(https://thewire.in/world/northern-gaza-israel-palestine-conflict\)](https://www.aljazeera.com/program/newsfeed/2023/10/9/israeli-defence-minister-orders-complete-siege-ongaza#:~:text=%F2%80%9CWe%20are%20fighting%20against%20human.attack%20by%20Hamas%20n%20Israel.></p>
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⁵¹ Bethan McKernan, “No power, water or fuel to Gaza until hostages freed, says Israel minister” *The Guardian* (12 October 2023), available at: < [>](https://www.theguardian.com/world/2023/oct/12/no-power-water-or-fuel-to-gaza-until-hostages-freed-says-israeli-minister#:~:text=The%20energy%20minister%2C%20Israel%20Katz.which%20is%20a%20war%20crime)

⁵² Special Rapporteur on the human rights to safe drinking water and sanitation; Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967; Special Rapporteur on Violence against women and girls; Special Rapporteur on the human rights of internally displaced persons; Special Rapporteur on the right to food; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the right to adequate housing; Special Rapporteur on the right to education.

⁵³ United Nations Office of the High Commissioner for Human Rights, Press Release, 19 October 2023, ‘Gaza: UN experts decry bombing hospitals and schools as crimes against humanity, all for prevention of genocide.’

64. In light of the above, Namibia considers that Israel is now attempting to commit, if not actively committing crimes against humanity and such brutal acts could amount to, genocide in the Occupied Palestinian Territory. Namibia respectfully asks the Court to elaborate on what the legal consequences are for Israel and third States of such an attempt or commission.

V. THE *IUS AD BELLUM* ILLEGALITY OF THE OCCUPATION

65. France's written statement cautioned that the illegality of the occupation *per se* may result in the failure to apply the law of occupation to the Occupying Power's conduct.⁵⁴ This is a misguided and dangerous suggestion that Namibia wishes to address.

66. Namibia would like to comment on the relationship between the various bodies of law of relevance to this advisory opinion, in order to ensure this relationship has been fully clarified on the record.

67. The *ius in bello* governs the conduct of an Occupying Power during an occupation. It does so whether or not an occupation is illegal, as the status of the occupation does not alter the obligations of the Occupying Power under that body of law, or the obligations of the international community to ensure the Occupying Power's respect with that body of law.

68. The *ius ad bellum* governs the use of force. A belligerent occupation, such as Israel's occupation of the Occupied Palestinian Territory, entails the use of force: it entails the

⁵⁴ France § 51.

France § 51 : De l'avis de la France, les conséquences juridiques de ce constat doivent être appréciées à leur exacte mesure. Le caractère prolongé d'une occupation, s'il est contraire au fait que celle-ci devrait être provisoire par nature, n'a pas pour conséquence de rendre celle-ci illicite *per se*. En effet, ce constat d'illicéité *per se* pourrait conduire à soutenir l'inapplicabilité du régime juridique de l'occupation. Cela aboutirait à un résultat, manifestement absurde ou déraisonnable, qui serait de priver les populations civiles de la protection offerte par ce régime, protection d'autant plus nécessaire que ladite occupation dure dans le temps.

placing of a territory under the control of hostile forces, without the consent of its legitimate sovereign or that territory's people.

69. Namibia's position with respect to Israel's initial aggression and occupation of the Occupied Palestinian Territory in 1967 has been laid out in its Written Statement of July 2023, paragraph 142: "Israel's use of force against Egypt and other Arab States in 1967 was a pre-emptive use of force in the absence of an armed attack, and therefore an unlawful act of aggression in violation of Article 2(4) and Article 51 of the UN Charter. Israel's presence in the Palestinian territory has been illegal from the outset in 1967 and the consequent occupation is also illegal."⁵⁵

70. Should the Court disagree with this position, the Court has to address the effect of Israel's prolonged occupation on the right to self-determination of the Palestinian people and the consequent status of that occupation. Should the Court determine that Israel's occupation was lawful in 1967, Namibia respectfully submits that "*An occupation as an act of self-defence against an armed attack is legitimate for as long as the armed attack continues (...) The question of when the continuing act of self-defence ends is answered simply: when it is no longer necessary to repel an armed attack through the use of force. Either of two scenarios may arise: first, the armed attack has taken place, giving rise to a right to use necessary and proportionate force in self-defence, and is over; or secondly, an armed attack leads to an occupation, and the armed attack continues as long as the occupation lasts.*"⁵⁶ It is clear in the case of Israel's occupation of the Occupied Palestinian Territory that the armed attack has not lasted as long as the occupation. The occupation, if not illegal at the outset, has become unlawful through its unnecessary and disproportionate prolongation from a *ius ad bellum* perspective.

71. Israel may argue that its maintenance of its occupation, if no longer necessary and proportionate on grounds of self-defence prior to 7 October 2023, became necessary

⁵⁵ See also UN General Assembly Resolution 3314, Annex (Definition of Aggression), Article 5(3).

⁵⁶ 2023 Study, 'the legality of the Israeli occupation of the occupied Palestinian territory, including East Jerusalem' UN Committee on the exercise of the inalienable rights of the Palestinian people, University of Galway Irish Centre for Human Rights

and proportionate on *ius ad bellum* grounds in light of the hostilities by non-State actors taking place in its territory on 7 October 2023.

72. First, it should be noted that the attacks of 7 October 2023 resulted from acts of a non-State actor operating in territory unlawfully occupied by Israel.

73. Namibia recalls that in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court confirmed that Article 51 of the UN Charter recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. The Court concluded that since Israel does not claim that the attacks against it are imputable to a foreign State, that Israel exercises control in the Occupied Palestinian Territory, and that threats which it regards as justifying its conduct originate within, and not outside, occupied territory: “the Court concludes that Article 51 of the Charter has no relevance in this case”.⁵⁷

74. It should also be noted that there has not been a UN Security Council Resolution since 7 October 2023 purporting that Israel has a right to self-defence against those attacks that justifies its continued blockade, bombardment, and occupation of parts or the whole of the Occupied Palestinian Territory, as necessary and proportionate on *ius ad bellum* grounds.

75. Further, Israel, the Occupying Power has *refused* to recognise that there is a State or people with an externally recognised right to self-determination whose territorial integrity it is infringing on. That refusal is one of the root causes for its 56-year-long occupation. That unlawful occupation has in turn given rise to resistance of the occupied population. Such resistance is an inevitable consequence of the act of aggression against the Occupied Palestinian Territory and attempts by the Occupying Power to the permanent subjugation of its people, characterised by the imposition of an

⁵⁷ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) International Court of Justice Reports 136 (2004), para. 139

apartheid system, amount to serious violations of core norms of international humanitarian law, and the wrongful *de facto* and *de jure* annexation of that territory.⁵⁸

76. The UN General Assembly has reaffirmed the legitimacy of resistance, including in the form of armed struggle. Namibia takes the position that such activity is not just legitimate but also lawful under the *ius ad bellum*.⁵⁹ Just like States have a right to self-defence against territorial aggression by another State, peoples with a recognised right to external self-determination, who are placed under the colonial subjugation and foreign occupation and control by another State, can use armed means in order to defend themselves against and seek to put to an end that continued territorial aggression against them.⁶⁰

77. Namibia also takes the position that the means and methods employed under the *ius in bello* by non-State actors do not alter the legality of their armed activities on *ius ad bellum* grounds, and *vice versa*. This distinction between *ius in bello* and *ius ad bellum* is one of the cornerstones of the international legal system regulating armed conflict.

78. Should the Court take the position that States have a right to self-defence against non-State actors that involves the violation of the territorial integrity of another State or people with an external right to self-determination through continued occupation, and that they have such a right irrespective of the absence of a UN Security Council resolution, and irrespective of whether the act against it was in response to its own initial act of aggression, any act of armed resistance by a non-State actor⁶¹ against an unlawful act of aggression would be sufficient to turn an unlawful occupation into a lawful one. Such an interpretation of the law would incentivise the persistence in illegal wars of aggression and the indefinite acquisition of territory by force globally.

⁵⁸ See also Spain's Written Statement, paragraph 8.2: "8.2. Any practice conducive to de jure or de facto annexation of the Palestinian occupied territories would render such an occupation illegal."

⁵⁹ See, e.g., UN GA Resolution 3246 of 29 November 1974, which "reaffirms the legitimacy of the people's struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle;" see also League of Arab States Written Statement of July 2023, Chapter 18: 'Consequences for the Palestinian people: the right to resist' (p.41-43).

⁶⁰ See also UN General Assembly Resolution 3314, Annex (Definition of Aggression), Article 7.

⁶¹ Where the Occupying Power does not recognise the Statehood of the occupied State, any act of resistance including by the displaced sovereign would fall under this category according to it.

79. In light of the above, Namibia concludes that the attack of 7 October 2023 by a non-State armed group on Israel's territory did not constitute an act of aggression against the territorial integrity of Israel that triggers a right to self-defence against that non-State actor granting Israel a right to occupy the territory, in which that actor operates and from which the threat originates. In other words, there is no legal basis on which the hostilities of 7 October 2023 could be determined to have altered the status of Israel's occupation of the Occupied Palestinian Territory from illegal to legal.

Dated at Windhoek, Namibia on this 25th day of October 2023.


.....
Netumbo Nandi-Ndaitwah, MP
Deputy Prime Minister and
Minister of International
Relations and Cooperation

**ON BEHALF OF THE
GOVERNMENT OF THE
REPUBLIC OF NAMIBIA**