

DECLARATION OF JUDGE XUE

1. I voted in favour of all paragraphs in the operative part of the Opinion. I generally agree with the reasoning and conclusions reached by the Court. In this declaration, I wish to clarify a few points with regard to the application of the principle of self-determination in the present case.

2. The right of the Palestinian people to self-determination was well elaborated and affirmed by the Court in the *Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 182-183, para. 118)*. In the present case, the Court has further determined the scope of this right and the effects of Israel's policies and practices on the exercise of this right by the Palestinian people. It states that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (see paragraph 233). I share this view but with a nuance.

3. Under contemporary international law, it is well established that the principle of self-determination applies to all peoples under colonialism, alien subjugation, foreign domination and exploitation (Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV), adopted on 14 December 1960; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), adopted on 24 October 1970). This principle has obtained a peremptory character in international law with regard to peoples in those contexts. Foreign occupation, by definition, is a type of foreign domination. By virtue of the principle of prohibition of acquisition of territory by force, it must be temporary in nature and terminated as soon as possible.

4. Given the ample evidence as demonstrated in the Opinion, Israel's prolonged occupation of the Palestinian territory, coupled with its policies and practices adopted therein, has severely impeded the Palestinian people from exercising its right to self-determination. The situation on the ground in the Occupied Palestinian Territory in the past half-century, as recorded in the voluminous documents of the United Nations, has gone from bad to worse. Referring to Israel's discriminatory treatment of the Palestinian people, Archbishop Desmond Tutu of South Africa once remarked:

"I have been very deeply distressed in all my visits to the Holy Land, how so much of what was taking place there reminded me so much of what used to happen to us Blacks in Apartheid South Africa. I have seen the humiliation of the Palestinians at the roadblocks and recall what used to happen to us in our motherland" (Transcript of Archbishop Desmond Tutu's keynote address at the Old South Church, Boston, Massachusetts, USA, 13 April 2002; see also an editorial by Archbishop Desmond Tutu in *The Guardian*, 29 April 2002, entitled "Apartheid in the Holy Land").

The effects of Israel's occupation in that regard have little difference from those under colonial rule, which has been firmly condemned under international law (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), p. 95)*.

5. I am of the opinion that the peremptory character of the right to self-determination of the Palestinian people rests on this solid basis of international law, rather than the special circumstances

of Israel's occupation. The Court's pronouncement would be more convincing if that idea were further developed in the Opinion.

6. My second point relates to the Court's conclusion that Israel's continued presence in the Occupied Palestinian Territory is unlawful. In substance, I am convinced that there are sufficient legal and factual bases to support that conclusion, and indeed, those reasons are scrupulously presented and analysed in the Opinion. Regarding the conclusion, however, a question may be raised as to whether the General Assembly and the Security Council in their resolutions have indeed taken the view that the effects of Israel's policies and practices have rendered illegal the continued presence of Israel in the Occupied Palestinian Territory; legality of occupation is purportedly governed by the principle of non-use of force and the law of occupation.

7. There is no doubt that the resolutions adopted by the General Assembly and the Security Council have categorically condemned and opposed Israel's policies and measures aimed at changing the legal status, geographical nature and demographic composition of the Occupied Palestinian Territory and declared that those policies and measures are "invalid and cannot change the status" of the Occupied Palestinian Territory. Strictly speaking, those resolutions did not directly address the legality of Israel's continued presence in the Occupied Palestinian Territory, per se, but the legality of the policies and measures taken by Israel. Legality of the continued presence of Israel and legality of Israeli policies and practices may arguably be two different things, as stated by the Court, which are governed by separate rules (*jus ad bellum* and *jus in bello*). The questions that are placed before the Court for an advisory opinion are nevertheless intended to address the link between the two. In the Court's view, when the unlawfulness of Israel's policies and practices is decided, the subsequent question for the Court to answer should logically be the legality of the continued presence of Israel in the Occupied Palestinian Territory. That is to say, when certain acts are found internationally wrongful, in principle, they should not be permitted to continue to exist, which consequently may have a bearing on the lawfulness of the continued presence of Israel in the occupied territory.

8. When the General Assembly requests the Court to address the legal consequences of Israel's breach of its obligation to respect the right of the Palestinian people to self-determination and to answer whether Israel's policies and practices have affected the legal status of the occupation, the matter before the Court becomes one for the Court itself to decide. The resolutions adopted by the General Assembly and the Security Council not only provide credible evidence of Israel's wrongful conduct but also contain views and positions of the Member States on such conduct. It is in that context, I believe, that the Court refers to the resolutions in reaching its own conclusions on the questions before it.

9. Some participants argue that Israel has the right to maintain its presence in the Occupied Palestinian Territory, in particular for its security needs. I agree with the Court that Israel's policies and practices, as they have presented themselves, are not justified by its security concerns. The Court found that, apart from annexation of large parts of the occupied territory in the West Bank and East Jerusalem, changes effected by Israel's policies and practices "manifest an intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian Territory" (see paragraph 252). Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people.

10. The Palestinian people's right to self-determination was recognized at the very outset in the partition plan stated in the General Assembly resolution 181 (II) and reaffirmed in subsequent resolutions. As the Court points out in the Opinion, the ultimate realization of the right of the Palestinian people to self-determination lies in the final settlement of the conflict between the State

of Palestine and the State of Israel. Before that goal is reached, in any event, Israel must immediately cease its internationally wrongful acts and observe its international obligations in the Occupied Palestinian Territory.

(Signed)

XUE Hanqin.
