

JOINT DECLARATION OF JUDGES NOLTE AND CLEVELAND

Agreement with the Court's conclusion that Israel's presence in the Occupied Palestinian Territory is unlawful — The legality of the presence of occupying forces is determined by the rules governing the use of force (jus ad bellum) — Self-defence cannot justify the acquisition of territory — Israel's policies and practices express a clear intention to appropriate East Jerusalem and the West Bank in its entirety in breach of the jus ad bellum — The consequence of such a breach is the obligation to withdraw from the Occupied Palestinian Territory.

1. We agree with the core conclusion of the Court that Israel's continued presence in the Occupied Palestinian Territory is unlawful. However, we think that a fuller explanation is necessary.

2. We note at the outset that the Court's Opinion appropriately does not address “conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023” (paragraph 81 of the Opinion), an ongoing armed conflict to which the questions of the General Assembly are not directed. With regard to the relevant situation, the Court states as follows:

“The Court considers that the violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the Occupied Palestinian Territory. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful” (paragraph 261 of the Opinion).

There is broad agreement, which we share, that Israel's conduct as an occupying Power violates not only specific prohibitions of international humanitarian law and human rights law, but also the prohibition of the acquisition of territory by force and the right of the Palestinian people to self-determination (at paragraphs 179 and 243). In this joint declaration, we offer our views as to why the violation by Israel of the prohibition of the threat or use of force and the right to self-determination make its continued presence in the territory unlawful (at paragraph 261) and justify the Court's conclusion that Israel must withdraw from the Occupied Palestinian Territory “as rapidly as possible” (at paragraphs 267 and 285 (4)).

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3. Article 2, paragraph 4, of the United Nations Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. As the Court recognizes, for a situation to be characterized as one of occupation, there must be effective control of a foreign territory (at paragraph 90), while the *legality* of an occupation (in the sense of the lawfulness of the presence of the occupying forces in the occupied territory) is determined by the international rules regarding the use of force in foreign territory (*jus ad bellum*) (at paragraph 251). An occupation is an ongoing use of force and, thus, the military presence of a State in foreign territory may be unlawful either as a result of an unlawful use of force

leading to the occupation, or because the ongoing use of force that an occupation represents can no longer be justified as legitimate self-defence or as authorized by the Security Council (Article 51 and Chapter VII of the United Nations Charter).

4. The Court has not addressed the question whether the presence of Israel in the Occupied Palestinian Territory since 1967 resulted from an initial lawful or unlawful use of force (see paragraph 57, “an armed conflict . . . broke out”). Even if Israel’s initial use of force was justified as an exercise of the right of self-defence under Article 51 of the United Nations Charter, and Security Council resolutions 242 and 338 and the Oslo Accords — in aiming to “establish[] a just and lasting peace” — have a bearing on the application of the rules on the use of force, the relevant question before the Court today is whether Israel’s continuing presence in the Occupied Palestinian Territory can still be justified under the *jus ad bellum*.

5. Israel points to ongoing security concerns to justify its presence in the Occupied Palestinian Territory. Indeed, it must not be forgotten that the legitimacy of Israel’s existence as a State is called into question by a number of States and non-State actors, some of which are located in its vicinity, and that Israel has suffered numerous attacks coming from the Occupied Palestinian Territory. In this regard, we recall that the Court, in its *Nuclear Weapons* Advisory Opinion, pointed out that “the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake”¹. Any such use of force, of course, must be employed within the strict confines of international law.

6. We also recognize that once a State has exercised its right of self-defence and, as a result, has occupied territory that is not its own, a reasonable period should be available for an occupying State to assess the situation on the ground and the extent to which its continued presence is necessary to ensure that remaining relevant threats warranting the ongoing use of force in self-defence are not revived; to negotiate, in good faith, an arrangement laying down the conditions for a complete withdrawal in exchange for security guarantees; and, eventually, to organize an orderly withdrawal of its troops. Accordingly, the confines laid down by Article 51 of the United Nations Charter, which include the requirements of necessity and proportionality with respect to acts undertaken in self-defence, need to be interpreted in such a way as to allow for such considerations in determining, after the end of major hostilities resulting from an exercise of the right of self-defence, when an occupation must come to an end.

7. On the other hand, as the Court explains, the threat or use of force to seek to permanently acquire territory is prohibited — indeed, it is absolutely prohibited. The right of self-defence can never justify the acquisition of territory by force, including such use of force for the protection of perceived security interests. Such acts are strictly prohibited by the United Nations Charter and by customary international law².

8. Israel has legitimate security concerns. Nevertheless, the presence of occupying forces can only be justified by a credible link to a defensive and temporary purpose; in our view, therefore, any possible justification is necessarily lost if such a presence is abused for the purpose of annexation and suppression of the right to self-determination. An occupying Power may violate certain of its obligations under international humanitarian law or human rights law, including in ways that infringe the right to self-determination, but such conduct does not render its military presence in the occupied territory unlawful, provided that the presence is justified by the right of self-defence. However, when

¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 96.

² See e.g. UNSC resolution 478 (1980) and UNSC resolution 479 (1981).

the presence of occupying forces becomes a vehicle for achieving annexation, the occupying Power violates the prohibition of the acquisition of territory by force under the *jus ad bellum* and thereby loses any possible justification for the presence of its forces, including on the basis of the right of self-defence. Moreover, in the present case, no conceivable authorization by the Security Council of the presence of Israel's forces would extend to a policy and practice of annexation. Nor do the Oslo Accords provide a legal basis to this effect.

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9. The Court has established that Israel has entrenched its control, notably over East Jerusalem and Area C of the West Bank, through its settlements, land confiscations, application of Israeli law, and related policies and practices (paragraph 173 of the Opinion). Israel's assertion of permanent control extends to the West Bank as a whole, thereby depriving the Palestinian people of the territorial contiguity to which they are entitled. Israeli settlements and infrastructure in the West Bank have expanded inexorably since 1967, including deep into Area C and, more recently, Area B. They have also been located strategically in order to constrict increasingly Palestinian communities and fragment them from each other, entrenching Israeli control throughout the West Bank and constraining both the daily existence of Palestinians and the prospect for any viable and coherent Palestinian State³.

10. Israel's intent to extend permanent sovereignty over the entire West Bank, as a matter of official policy, has been expressed at the highest levels of the Israeli Government. The 2018 "Basic Law: The Nation State of the Jewish People" explicitly establishes "the development of Jewish settlement as a national value" for which the State "shall act to encourage and promote its establishment and consolidation"⁴. The guiding principles of the current government coalition agreement support "the application of sovereignty in . . . Judea and Samaria" (i.e. the West Bank)⁵. A 2021 Israeli Defense Forces "topographical map" depicted "the state of Israel — including Judea and Samaria" as a single territory⁶. In September 2023, Prime Minister Benjamin Netanyahu spoke before the United Nations General Assembly holding a map that depicted Israel as encompassing the entire Occupied Palestinian Territory⁷. Such statements of intent have been accompanied by policies and practices, including the significant expansion of settlements deep into the West Bank, the continued construction of the wall, the reduction of legal and policy constraints on settlements and their placement under *de jure* civilian control to promote their expansion, all in the face of the clear proclamation by this Court, in 2004, regarding the illegality of settlements.

³ See OCHA, Map of West Bank Access Restrictions, May 2023, <https://www.ochaopt.org/content/west-bank-access-restrictions-may-2023>.

⁴ Basic Law: Israel as the Nation-State of the Jewish People, 19 July 2018.

⁵ Coalition Agreement between the Likud Party and the Religious Zionist Party for the Establishment of a National Government, presented to the Knesset on 28 December 2022, Art. 118.

⁶ Israeli Ministry of Foreign Affairs, "Topographical map of Israel", 24 October 2021, <https://www.gov.il/en/Departments/General/topographical-map-of-israel>.

⁷ Netanyahu brandishes map of Israel that includes West Bank and Gaza at UN speech, *Times of Israel*, 22 September 2023, https://www.timesofisrael.com/liveblog_entry/netanyahu-brandishes-map-of-israel-that-includes-west-bank-and-gaza-at-un-speech/.

11. In our view, these developments, together with the others described by the Court, express the clear intention of Israel to permanently appropriate the West Bank in its entirety, within the meaning of the prohibition of the acquisition of territory by force.

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12. Furthermore, through the construction of settlements and related infrastructure, severe restrictions on movement within and between the parts of the Occupied Palestinian Territory, and other policies and practices detailed by the Court, Israel has exploited its use of force as an occupying Power across the Occupied Palestinian Territory in a manner that seeks to permanently obstruct the exercise of the right of the Palestinian people to self-determination, particularly its right to territorial integrity and political independence, including the right to an independent and sovereign State. This suppression is part and parcel of Israel's effort to permanently control the Occupied Palestinian Territory in violation of the *jus ad bellum*.

13. We also agree that Israel's violation of the right of the Palestinian people to self-determination applies to the *entirety* of the Occupied Palestinian Territory. The principle of the unity of the Occupied Palestinian Territory ultimately derives from the principle of territorial integrity. That principle applies not only to States; it may also apply to territorial units within which a people exercises its right of self-determination⁸, and force cannot be threatened or used to frustrate it. It would, after all, undermine the principle of territorial integrity if the occupying Power could use force to fragment the occupied territory.

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14. Under the general rules of State responsibility, the legal consequence of violations by an occupying Power of international humanitarian law or human rights law is an obligation to "wipe out all the consequences" of the violation, through the cessation and reversal of that policy⁹. In the context of an unlawful settlement policy contrary to Article 49 of the Fourth Geneva Convention, for example, this would involve repatriating settlers, revoking and reversing acts supporting the settlement policy, and other forms of reparation. Yet, by itself, such a violation of the *jus in bello* would not give rise to a broader duty to bring the occupation itself to an end.

15. However, as we conclude above, and without prejudice to the exclusion from the Court's analysis of conduct by Israel in the Gaza Strip in response to the 7 October 2023 attack (see paragraph 2 above), the comprehensive nature of Israel's effort to transform the occupation of the Occupied Palestinian Territory into a form of annexation and permanent control, and the accompanying frustration of the Palestinian people's right to self-determination, renders Israel's presence in the Occupied Palestinian Territory unlawful. Accordingly, the breaches of the prohibition of the acquisition of territory by force and the right of the Palestinian people to self-determination

⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. 160.

⁹ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47; Art. 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts.

entail the duty to end this unlawfulness, which gives rise, *inter alia*, to the duty to withdraw from the Occupied Palestinian Territory under the rules of State responsibility. We therefore agree with this aspect of the Court's conclusion.

16. The Court concludes that Israel must end its presence "as rapidly as possible". Notably, the Court did not adopt the formulation urged by some participants that Israel must end the occupation "immediately, totally and unconditionally". The Court's wording recognizes that there are significant practical issues that would make an "immediate" withdrawal and cessation of some aspects of Israel's presence not possible. Moreover, Israel's duty to end its presence does not mean that its duty to withdraw from the Occupied Palestinian Territory must necessarily be fulfilled in the same way, or at the same time, with respect to every part of that territory. While the duty to withdraw "as rapidly as possible" applies as a general matter, this duty nevertheless may be implemented differently depending on the situation that prevails in a particular part of the occupied territory.

(Signed) Georg NOLTE.

(Signed) Sarah CLEVELAND.
