INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN

25 OCTOBER 2023

I. INTRODUCTION

1. This Written Comment is filed by the Islamic Republic of Pakistan in accordance with the Order of the Court dated 3 February 2023.

2. Pakistan considers that the need for the Court to issue an advisory opinion is all the more pronounced in light of Israel's ongoing military activities in Gaza and the humanitarian crisis of the Palestinian people.

3. In **Part II**, Pakistan examines three issues concerning **Question (a)** of the Request:

   a. **Section A** addresses the legal consequences under the *jus ad bellum* of Israel's prolonged occupation, which is tantamount to annexation (i.e., the attempted acquisition of territory by force) and the attempted acquisition of territory through denial of the right of self-determination.

   b. **Section B** explains that the mental element of the prohibition on apartheid requires the existence of a specific purpose, which is to be distinguished from the specific intent (*dolus specialis*) requirement under Article II of the Genocide Convention.

   c. **Section C** provides an overview of Israel's obligations to provide access to and to preserve the Holy Places of Jerusalem. Pakistan, home to the second largest Muslim population in the world, considers this to be an important issue.

4. In **Part III**, Pakistan addresses two issues concerning **Question (b)** of the Request:

   a. **Section A** explains that Israel cannot benefit from its own wrong in adopting and implementing practices and policies of prolonged occupation that are contrary to peremptory norms of general international law (i.e., the prohibition on acquisition of territory by force, the denial of the right of the Palestinian people to self-determination, and the prohibition on racial discrimination and apartheid), contrary to the basic tenets of the law of occupation, and contrary to Israel's obligations under international humanitarian law and international human rights law. As a

result, Israel cannot benefit from the liberties afforded to an occupying Power under the law of occupation.

b. **Section B** explains that, as a legal consequence, with respect to the Occupied Palestinian Territory, all States are under an obligation not to recognise Israel's purported exercises of the liberties afforded to an occupying Power under the law of occupation, and a further obligation not to aid or assist Israel in the purported exercise of those liberties.

II. QUESTION (A)

A. Legal consequences under the *jus ad bellum* of Israel's prolonged occupation and annexation

5. Under question (a), the Court is asked to advise on the "legal consequences" arising from Israel's "prolonged occupation, settlement and annexation of the Palestinian territory since 1967".

6. Pakistan considers that "annexation" entails the attempted acquisition of territory, including territory which is under another State's peacefully established control,[1] by force. As a corollary of the prohibition on the threat or use of force in Article 2(4) of the Charter of the United Nations, annexation is prohibited under customary international law.[2]

7. Pakistan also considers that the right of peoples to self-determination has the status of a peremptory norm of general international law, as the International Law Commission has recognised.[3] It follows from such status that international law contains an absolute prohibition on the attempted acquisition of territory, including territory which is under

[1] See Written Statement of Japan, para. 14: "not only territory which is within another State's internationally recognized border, but also territory under another State's peacefully established control shall not be subjected to attempts to acquire territory by force", referring to Eritrea–Ethiopia Claims Commission, *Partial Award, Jus ad Bellum: Ethiopia's Claims 1–8* (2005) 26 R.I.A.A. p. 465, paras. 10–16.
[2] *Wall*, p. 184, para. 87.
[3] International Law Commission, "Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries" (2022) vol. II, Yearbook of the International Law Commission, Part II, draft conclusion 23 and commentary, para. (14) read together with Annex, para. (h).

another State's peacefully established control, through the denial of the right of the people of that territory to self-determination.

8. In order to address the legal consequences arising from Israel's attempted annexation of the Occupied Palestinian Territory, the Court will need to examine whether Israel's policies and practices of prolonged occupation entail a violation of Article 2(4) of the Charter.[4]

9. This is consistent with the Court's approach in its 2004 Advisory Opinion:

   a. The Court found that: "the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation."[5]

   b. In this connection, the Court considered whether such actions could be justified as measures taken in self-defence under Article 51 of the United Nations Charter.[6] Implicit in this was an acceptance that the *de facto* annexation would otherwise entail a violation of the prohibition on the use of force in Article 2(4) of the Charter.[7]

10. Pakistan's position is that Israel's prolonged occupation of the Occupied Palestinian Territory creates a permanent situation on the ground that is tantamount to *de facto* annexation. In its 2022 report to the General Assembly, the UN Independent International Commission on Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (the "**IICI**") concluded:

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[4] See similarly Written Statement of Switzerland, para. 51: "Dans ce cadre, il serait opportun que la Cour se prononce sur les conséquences du caractère permanent des mesures prises par Israël dans le Territoire palestinien occupé quant au statut de l'occupation au regard du droit international général, en particulier de la Charte des Nations Unies."

[5] *Wall*, p. 184, para. 121.

[6] *Wall*, p. 194, paras. 138–139.

[7] The Court also found that Israel was in violation of various obligations under international human rights law and international humanitarian law. Unlike the prohibition on annexation, however, none of those violations was capable in principle of being justified under Article 51 of the Charter. Self-defence within the meaning of Article 51 cannot serve, for example, as a circumstances precluding the wrongfulness of grave violations of international humanitarian law.

> "Israel treats the occupation as a permanent fixture and has – for all intents and purposes – annexed parts of the West Bank … Actions by Israel constituting de facto annexation include expropriating land and natural resources, establishing settlements and outposts, maintaining a restrictive and discriminatory planning and building regime for Palestinians and extending Israeli law extraterritorially to Israeli settlers in the West Bank".[8]

11. Pakistan considers that Israel's *de facto* annexation of the Occupied Palestinian Territory cannot be justified as an exercise of self-defence under Article 51 of the United Nations Charter. This is so, *inter alia*, because Israel's policies and practices of prolonged occupation that are in breach of the law of occupation and international humanitarian law more generally, as well as the right of the Palestinian people to self-determination, cannot be characterised as necessary and proportionate. Israel is therefore in violation of the prohibition on the use of force in Article 2(4) of the Charter.[9]

B. Mental element for the prohibition of apartheid

12. Pakistan considers that the term "apartheid" in Article 3 and in the preamble of the CERD is to be given the same meaning as in the Apartheid Convention.[10] The Court has previously interpreted CERD by reference to other conventions concluded around the same time.[11] In the present context, the express reference in the preamble of the Apartheid Convention to the prohibition of apartheid in the CERD evidences that the drafters of the Apartheid Convention understood the two conventions to be mutually reinforcing.

13. Article II of the Apartheid Convention defines "apartheid" as involving the commission of any specified:

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[8] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/77/328, 14 September 2022, para. 76. See also UNGA resolution 77/126. UN Doc. A/RES/77/126, 15 December 2022, para. 7.

[9] See also the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/77/356, 21 September 2022, para. 10(b): "Israeli occupation constitutes an unjustified use of force and an act of aggression.".

[10] The preamble to the CERD states: "*Alarmed* by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation". Article 3 of the CERD provides that: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

[11] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011*, p. 84, para. 29.

"inhuman acts … for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."

14. Article II requires that the inhuman acts must be committed for "the purpose" of establishing a régime of racial discrimination and oppression:

    a. As follows from the ordinary meaning to be given to the unqualified words "the purpose", there is no requirement that the "sole" or "primary" purpose of the relevant inhuman act be the establishing of and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

    b. Had the drafters of the Apartheid Convention meant to impose such a stringent test, they would have done so expressly. Consistent with the absence of such a requirement, Article III of the Apartheid Convention establishes international criminal responsibility wherever the unlawful acts are committed, "irrespective of the motive involved".

15. A State will be in breach of the prohibition of apartheid under Article 3 of the CERD where it undertakes inhuman acts with the purpose of using racial domination and systematic oppression as a tool to achieve some other goal, such as establishing or maintaining its own security or its control over occupied territory. The existence of an additional or ultimate purpose to acquire the territory does not prevent the inhuman acts undertaken to secure that end from breaching Article 3.[12]

    a. An interpretation of the term "purpose" in Article II as not limited to the sole or primary purpose is consistent with the established interpretation of other offences that involve a specific purpose requirement. The Appeals Chamber of the ICTY has held that: "If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose … is immaterial".[13] Thus,

[12] See also M. Jackson, "The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination" (2022) 71 I.C.L.Q. 831, 848.
[13] See e.g., with respect to the specific purpose element of the offence of torture, *Prosecutor* v. *Kunarac et al.*, Case Nos. IT-96-23 & 23/1, Appeals Chamber Judgment (12 June 2002), para. 155.

"[t]he prohibited purpose needs not be the sole or the main purpose of the act or omission in question".[14]

b. Moreover, interpreting the term "purpose" in Article II as being restricted to the sole or primary purpose would empty the prohibition on apartheid of much of its force,[15] leading to unreasonable results, since it would always be open to a State to claim that it had not committed the unlawful acts solely or primarily for the purpose of domination and oppression.

16. The purpose of domination and oppression may be inferred from the facts and surrounding circumstances, including the State's pattern of conduct directed against a racial group. This is reflected in the approach of the CERD Committee, which in its concluding observations found that Israel's occupation has "apartheid features",[16] and the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, who concluded that "Israel has imposed upon Palestine an apartheid reality in a post-apartheid world".[17]

17. The "purpose" requirement in Article II of the Apartheid Convention is to be distinguished from the express inclusion of the requirement of specific intent (*dolus specialis*) in Article II of the Genocide Convention:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such …"

[14] *Prosecutor* v. *Limaj et al.*, Case No. IT-03-66-T, Trial Chamber Judgment (30 November 2005), para. 239.
[15] The Court has held that the principle of effectiveness is "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence": *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 25, para. 51.
[16] Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventeenth to nineteenth reports of Israel, 27 January 2020, CERD/C/ISR/CO/17-19 (https://undocs.org/CERD/C/ISR/CO/17-19), para. 22. See also Written Statement of Palestine, para. 4.10.
[17] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 12 August 2022, A/HRC/49/87 (https://undocs.org/A/HRC/49/87), paras. 52–56. See also Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 30 August 2010, A/65/331 (https://undocs.org/A/65/331), paras. 3 & 5; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 13 January 2014, A/HRC/25/67 (https://undocs.org/A/HRC/25/67), paras. 71, 77, 78.

18. In the *Bosnian Genocide* Case, the Court explained that Article II of the Genocide Convention:

> "requires the establishment of the 'intent to destroy, in whole or in part, … [the protected] group, as such.' … The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis* … It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with the intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group."[18]

19. In *Croatia* v. *Serbia*, the Court recalled its earlier finding that:

> "the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution."[19]

20. The specific intent requirement under Article II of the Genocide Convention is "to be distinguished from other reasons or motives the perpetrator may have" and, in the specific context of genocide, "[g]reat care must be taken in finding in the facts a sufficiently clear manifestation of that intent".[20] Thus, the Court held that "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question".[21] This reasoning is not to be transposed to the context of apartheid, which contains no specific intent requirement.

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[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), I.C.J. Reports 2007*, p. 121, para. 187.
[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), I.C.J. Reports 2015*, p. 64, para. 139. See also p. 62, para. 132, which states that the specific intent requirement of genocide is its "essential characteristic, which distinguishes it from other serious crimes". See too M. Forteau, A. Miron and A. Pellet, *Droit international public* (9th edn., L.G.D.J. 2022) 1000: "[*p*]*rogressivement, le genocide s'est donc détaché du crime contre l'humanité pour constituer une catégorie autonome. Sa spécificité tient à son* dolus specialis".
[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), I.C.J. Reports 2007*, p. 121, para. 189.
[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), I.C.J. Reports 2015*, p. 64, para. 148.

C. Israel's obligations to allow access to and to preserve the Holy Places of Jerusalem

21. Israel has important legal obligations as regards the Christian, Jewish, and Islamic Holy Places of Jerusalem.[22] In its 2004 Advisory Opinion, the Court advised in general terms that Israel "must ensure freedom of access to the Holy Places that came under its control following the 1967 War".[23] These obligations include (a), under the so-called "historic *status quo*", guaranteeing freedom of access and unimpeded right to worship in the Holy Places and (b), under the law of occupation, guaranteeing the preservation of the Holy Places.

(a) The historic status quo

22. In 1948 the Security Council urged "all Governments and authorities concerned to take every possible precaution for the protection of the Holy Places and of the City of Jerusalem, including access to all shrines and sanctuaries for the purpose of worship by those who have an established right to visit and worship at them".[24]

23. Israel is bound by certain "specific guarantees of access to the Christian, Jewish and Islamic Holy Places".[25] These guarantees, which date back to the eighteenth century, are referred to as the historic *status quo*.[26] An early instance, from the Ottoman period, is the Treaty of Berlin of 13 July 1878 for the Settlement of the Affairs of the East,[27] Article

[22] These are: *Christian*—Basilica of the Holy Sepulchre (inclusive of I–IX Stations of the Cross); Bethany; Cenacle; Church of St. Anne; Church of St. James the Great; Church of St. Mark; Deir al Sultan; Tomb of the Virgin and Gardens of Gethsemane; House of Caiphas and Prison of Christ; Sanctuary of the Ascension and Mount of Olives; Pool of Bethesda; Ain Karim; Basilica of the Nativity; Milk Grotto; Shepherds Field; *Muslim*—Tomb of Lazarus; El Burak esh-Sharif; Haram esh-Sharif (Mosque of Omar and Mosque of Aqsa); Mosque of the Ascension; Tomb of David (Nebi Daoud); *Jewish*—Tomb of Absalom; Ancient and Modern Synagogues; Bath of Rabbi Ishmael; Brook Siloam; Cemetery on Mount of Olives; Tomb of David; Tomb of Simon the Just; Tomb of Zachariah and other tombs in Kidron Valley; Wailing Wall; Rachel's tomb. See Central Portion of the Jerusalem Area: Principal Holy Places, Map No. 229, November 1949 (https://www.un.org/unispal/document/auto-insert-205535/); E. Lauterpacht, *Jerusalem and the Holy Places* (Anglo-Israel Association 1968) 5.
[23] *Wall*, p. 197, para. 149.
[24] Security Council resolution 50 (1948), 29 May 1948; see also Security Council resolution 54 (1948), 15 July 1948.
[25] *Wall*, p. 188, para. 129.
[26] The historic *status quo* is at times referred to as the "*status quo* of 1757": Yearbook of the United Nations, 1950, p. 335; E. Lauterpacht, *Jerusalem and the Holy Places* (Anglo-Israel Association 1968) 28.
[27] 153 C.T.S. 171.

63 of which provides that "no alterations can be made in the *status quo* in the Holy Places".[28]

24. The Mandate for Palestine given to the British Government similarly provided in its Article 13 that:

> "All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory …"[29]

25. The Mandate also provided that there was no authority "to interference with the fabric or the management of purely Moslem sacred shrines".[30]

26. In signing the General Armistice Agreement, Israel and Jordan undertook in 1949 to guarantee freedom of access to the Holy Places.[31] This undertaking by Israel "has remained valid for the Holy Places which came under its control in 1967".[32] It was confirmed by Israel and Jordan in the Peace Treaty of 1994, which provides that: "Each party will provide freedom of access to places of religious and historical significance."[33]

27. Since the 1967 War, the United Nations has continuously reinforced the importance of Israel observing the historic *status quo.* For example:

    a. On 4 July 1967, the General Assembly adopted resolution 2253 (ES-V), proposed by Pakistan, which declared that it was "[*d*]*eeply concerned* at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City".[34] The General Assembly has since called "for respect for the historic status quo at the holy places of Jerusalem, in word and in practice".[35]

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[28] *Wall*, p. 188, para. 129; see Written Statement of Jordan, Part II, para. 39; Written Statement of Türkiye, p. 4–5.
[29] Mandate for Palestine, 24 July 1922, C.P.M.466 — C.529.M.314.1922.VI — C.667.M.396.1992.VI.
[30] *Ibidem.*
[31] 42 U.N.T.S. 303, Art. 8; see Written Statement of the United Arab Emirates, para. 29.
[32] *Wall*, p. 188, para. 129.
[33] 2042 U.N.T.S. 393, Art. 9(1).
[34] General Assembly resolution 2253 (ES-V), 4 July 1967, preamble, para. 2.
[35] General Assembly resolution A/RES/76/12, 6 December 2021, para. 4; see also General Assembly resolution A/RES/77/247, 9 January 2023, preamble.

b. The Security Council, expressing itself on the basis of consensus among its members in a Presidential Statement,[36] has called for "upholding unchanged the historic status quo at the holy sites in Jerusalem in word and in practice".[37] In this connection, Pakistan recalls that the principle of good faith governs the "performance of legal obligations, whatever their source";[38] it obliges Israel to perform its legal obligations under the historic *status quo* "in a reasonable way and in such a manner that its purpose can be realized".[39]

28. As is evident from the instruments cited above, over many years and on the part of different Powers, the core object has been the achievement of a permanent settlement as regards the Holy Places of Jerusalem. In a context where, during the course of history, the Holy Places have been under the control of different Powers, it has been necessary to give expression to a set of rules "particularly marked in their permanence".[40] The historic *status quo* is a régime characterized precisely by such permanence. Although it was established by a system of undertakings where one treaty would build on another, the historic *status quo* has achieved "a permanence which the treaty itself does not necessarily enjoy and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed".[41] The fact that the historic *status quo* is an objective régime of this kind means that "every State interested has the right to insist upon compliance" with it.[42] It follows also that any State in control of the Holy Places of Jerusalem, at present and in the future, must conform to it.[43]

29. Israel, however, has failed to observe the historic *status quo*.[44]

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[36] Presidential statements "require consensus among the members of the Council": M. Wood and E. Sthoeger, *The UN Security Council and International Law* (C.U.P. 2022) 55; see also Written Statement of the United Arab Emirates, para. 31.
[37] S/PRST/2023/1, 20 February 2023, para. 10; see Written Statement of Palestine, para. 3.143; Written Statement of France, para. 77.
[38] *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 268, para. 46.
[39] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 79, para. 142.
[40] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), I.C.J. Reports 2009*, p. 243, para. 68.
[41] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, I.C.J. Reports 2007*, p. 861, para. 89.
[42] *Aaland Islands* (1920) L.N.O.J. Spec. Supp. No. 3, 15, 19.
[43] *Ibidem.*
[44] See Written Statement of the United Arab Emirates, paras. 33–34; Written Statement of Jordan, Part 2; Written Statement of Qatar, paras. 2.225–2.230 & 3.79; Written Statement of Türkiye, p. 3 & 7–12; Written Statement of the League of Arab States, para. 81; Written Statement of Palestine, para. 3.134; Written Statement of Egypt, paras. 275–76; Written Statement by Saudi Arabia, para. 63; Written Statement of Spain, para. 7.1; Written Statement of Kuwait, para. 12.

(b) Obligations under the Law of Occupation

30. Israel also has obligations under the law of occupation as regards the Holy Places.

31. First, under Article 43 of the Hague Regulations, Israel is required to take all the measures in its power "to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". The laws in place prior to Israel's occupation in 1967 were the Laws of the Hashemite Kingdom of Jordan,[45] which gave Muslim worshippers freedom of access and unimpeded right to worship on the Al-Haram Al-Sharif and in other Islamic Holy Places of Jerusalem.[46]

32. Second, Israel also has obligations under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict,[47] to which Israel is a State Party:

    a. Under Article 4(1), the States Parties are required to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties "by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property."

    b. Article 4(3) provides that the States Parties "further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property".

    c. Article 5(1) provides that: "Any High Contracting Party in occupation of the whole of part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property."

[45] V. Kattan, "The Special Role of the Hashemite Kingdom of Jordan in the Muslim Holy Shrines in Jerusalem" (2021) 35 Arab Law Quarterly 503, 520 & 532–33.
[46] See generally M. Benvenisti, *Jerusalem: The Torn City* (University of Minnesota Press 1976) 277–304.
[47] 249 U.N.T.S. 215.

33. Third, the deliberate destruction of historic monuments is prohibited by Article 56 of the Hague Regulations.[48] Further, Article 53 of the Fourth Geneva Convention prohibits "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations", unless "such destruction is rendered absolutely necessary by military operations".[49]

34. Israel has failed to observe its obligation of guaranteeing the preservation of the Holy Places.[50]

III. QUESTION (B)

A. Israel cannot benefit from its own wrongs

35. In its 2004 Advisory Opinion, the Court found that the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate:

> "were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of an occupying Power. Subsequent events in these territories … have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of an occupying Power."[51]

36. Events since 2004 have done nothing to alter this situation. The Occupied Palestinian Territory remains under the occupation of Israel and, regardless of whether the occupation is internationally wrongful, this factual situation has direct legal effects resulting in the continued application of Israel's obligations under the law of occupation and international humanitarian law more generally, as well as under international human rights law.

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[48] *Central Front—Eritrea's Claims 2, 4, 6, 7, 8 & 22* (2004) 26 R.I.A.A. p. 149–50, para. 113.
[49] *Ibidem.*
[50] Written Statement of Jordan, paras. 219–58; Written Statement of Palestine, para. 3.137; Written Statement of the Organisation of Islamic States, para. 393; Written Statement of the United Arab Emirates, para. 34.
[51] *Wall*, p. 167, para. 78.

37. Question (b) of the Request asks the Court to examine how the "legal status of the occupation" is affected by "the policies and practices of Israel referred to in" Question (a). There is a large measure of agreement in the Written Statements that Israel's prolonged occupation of the Occupied Palestinian Territory constitutes an internationally wrongful act. As shorthand, many Written Statements refer to Israel's occupation as an "illegal occupation" or an "unlawful occupation".[52]

38. There is broad agreement, in the Written Statements before the Court,[53] that the prolonged occupation of the Palestinian territory occupied since 1967 entails the continuing:

a. purported annexation by Israel of that territory (i.e., its acquisition by force), in breach of a peremptory norm of general international law;

b. denial by Israel of the right of the Palestinian people to self-determination, in breach of a peremptory norm of general international law;

c. racial discrimination and apartheid by Israel, in breach of a peremptory norm of general international law;

d. adoption and implementation by Israel of a policy aimed at altering the demographic composition, character, and status of the Holy City of Jerusalem; and

e. adoption and implementation by Israel of a policy of discriminatory legislation and measures.

39. As to how this wrongfulness affects the legal status of Israel's occupation, the Court is presented with two different views.

[52] See e.g. Written Statement of Bangladesh, paras. 17–18; Written Statement of Qatar, para. 5.1; Written Statement of South Africa, para. 143; Written Statement of Chile, para. 120; Written Statement of Belize, para. 3; Written Statement of Kuwait, para. 32; Written Statement of Mauritius, para. 23; Written Statement of the Organisation of Islamic Cooperation, para. 279.

[53] See e.g. Written Statement of Palestine, "submissions"; Written Statement of Jordan, *passim*; Written Statement of Namibia, para. 151; Written Statement of the League of Arab States, para. 76; Written Statement of Egypt, para. 326; Written Statement of Saudi Arabia, *passim*; Written Statement of Qatar, para. 7.1; Written Statement of the African Union, para. 266; Written Statement of South Africa, *passim*; Written Statement of Kuwait, *passim*; Written Statement of Senegal, *passim*; Written Statement of Djibouti, *passim*.

40. First, Palestine's position is that in view of its defining policies and practices: "Israel's occupation of the OPT is in and of itself unlawful, rendering Israel's continued presence in the OPT an internationally wrongful act as it seriously breaches at least three peremptory norms of general international law",[54] namely: (a) the inadmissibility of the acquisition of territory by force, (b) the prohibition against racial discrimination and/or apartheid, and (c) the obligation to respect the right of the Palestinian people to self-determination. Palestine concludes that:

> "Because Israel's prolonged 56-year occupation of the OPT is structurally and existentially reliant upon and inseparable from its egregious violations of peremptory norms of general international law, derogation from which is not permitted, the occupation itself must be regarded as illegal, with all relevant legal consequences that attach under the law of international responsibility. This means that it must be brought to an 'immediate, unconditional and total' end."[55]

41. Second, Jordan's position is that the internationally wrongful character of Israel's prolonged occupation of the Occupied Palestinian Territory arises from the law of occupation. It contends that Israel's occupation is unlawful as a whole because its "policies and practices contravene in the most fundamental way the basic principles of the modern international law of occupation", namely: (a) the temporary nature of occupation, (b) the prohibition on the acquisition of sovereignty over the occupied territory by force, including by annexation, and (c) the duty to respect the right of self-determination of the people of the occupied territory, as well as their applicable human rights.[56] Jordan concludes that:

> "Israel's occupation of the Occupied Palestinian Territory, including East Jerusalem, in addition to involving systematic violations of several rules of international law, including *jus cogens* norms, is contrary to basic principles of the law of occupation and therefore unlawful as a whole. The occupation has become an instrument to suppress the right of the Palestinian people to self-determination, becoming indistinguishable from unlawful regimes such as colonial domination or apartheid."[57]

[54] Written Statement of Palestine, para. 6.4.
[55] *Ibid.*, para. 6.19.
[56] Written Statement of Jordan, para. 5.6.
[57] *Ibid.*, para. 5.13.

42. Pakistan considers that, in approaching the question of the impact of Israel's illegal policies and practices, the fundamental principle of international law, as well as of many municipal systems, that no one can benefit from their own wrong (*nullus commodum capere de sua injuria propria*) has an important role to play, both in identifying how Israel's wrongful acts affect the legal status of its prolonged occupation and in identifying the legal consequences for all States.[58]

43. Whilst the Court's specific applications of the principle that no one can benefit from their own wrong are perhaps best known in the context of treaty relations and in relation to estoppel, these applications are no more than instances of the general principle. They do not represent its limits. As Sir Gerald Fitzmaurice explained:

> "The general principle is that States cannot profit from their own wrong … and similarly that rights and benefits cannot be derived from wrong-doing. This admits of no doubt. It is a wide general principle having many diverse applications under international law. … of course these principles apply not merely as regards treaty obligations but to general international law obligations also."[59]

44. The prohibition on the acquisition of territory either by force or through the denial of self-determination are further specific applications of the principle that a state cannot benefit from its own wrong, in this context the breach of a peremptory norm of general international law.

45. Since 1967, the organs of the United Nations have called on Israel to end its occupation of the Occupied Palestinian Territory. Security Council resolution 242 (1967), adopted unanimously, called for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict" and the "termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force". This resolution has been

[58] It is noted that this maxim was invoked by Israel itself in the context of the 2004 Advisory Opinion, the Court recording Israel's position that it considered the principle to be "as relevant in advisory proceedings as it is in contentious cases": see *Wall*, p. 163, para. 63.

[59] G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", (1957) 92 *Recueil des Cours*, pp. 117–118. See also H. Lauterpacht, (1937) 62 *Recueil des Cours*, "Règles générales du droit de la paix", p. 184: "Lorsque la Cour permanente de Justice internationale appliqua le principe … d'après lequel personne ne peut profiter de sa propre faute, elle appliqua un principe équitable, qui est devenu un principe générale de droit reconnu par les États civilisés."

reaffirmed repeatedly over the years and it continues to reflect the position of the Security Council and the General Assembly.[60] Consistent with this, as the Court emphasised in its 2004 Advisory Opinion, "both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of 'the inadmissibility of the acquisition of territory by war'".[61] Likewise, the General Assembly has adopted numerous resolutions reaffirming "the right of the Palestinian people to self-determination, including the right to their independent State of Palestine".[62]

46. Under the law of occupation, the occupying Power is required to administer the occupied territory in good faith and in the best interests of the occupied population, subject only to the legitimate security requirements of the occupying Power.[63] The occupying Power is therefore required to administer the territory as the temporary conservator or trustee for the occupied population. The law of occupation affords to the occupying Power certain liberties to take measures in the administration of the occupied territory.[64] Where such measures are imposed in good faith in the best interests of the occupied population or, where absolutely necessary, to meet legitimate security requirements of the occupying Power, those measures will not be in breach of international law.

47. In the case of the Occupied Palestinian Territory, the organs of the United Nations have repeatedly found that Israel has abused its liberties as an occupying Power by imposing its policies and practices of prolonged occupation, not for these limited purposes but to serve its own interests, including the ultimate goal of annexing the occupied territory.

48. First, with regard to Israel's programme of settlement of the Occupied Palestinian Territory in breach of its obligation not to transfer parts of its own civilian population into the occupied territory and not to confiscate private property:

    a. In 1968, the Security Council declared that "all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties

[60] See e.g. UNSC resolution 2334, S/RES/2334 (2016), 23 December 2016, preamble, para 1; UNSC resolution 258, S/RES/258 (1968); UNGA resolution 77/25, 30 November 2022.
[61] *Wall*, p. 182, para. 117; see also p. 166, para. 74. See further Written Statement of Palestine, paras. 2.28–2.30.
[62] Written Statement of Jordan, para. 4.11.
[63] See further Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/72/556, 23 October 2017, paras. 34–38.
[64] See C. Greenwood, "The relationship between the *ius ad bellum* and the *ius in bello*", (1983) 9 *Review of International Studies* 221, 228: "The true position is that the occupant has a liberty to govern within certain limits without being guilty of a violation of the *ius in bello*".

thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status".[65]

b. In 1979, the Security Council reaffirmed that Israel's policies and practices of settlement in the Occupied Palestinian Territory were in breach of international law and "have no legal validity".[66] In 1980, in addition to declaring Israel's "Basic Law" null and void,[67] the Security Council also declared that "Israel's policy and practices of settling parts of its population and new immigrants … constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War."[68]

c. In its 2004 Advisory Opinion, the Court concluded that "Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law".[69]

d. In its 2022 Report to the Human Rights Council, the IICI concluded that "the strength of prima facie credible evidence available that convincingly indicates that Israel has no intention of ending the occupation, has clear policies for ensuring complete control over the Occupied Palestinian Territory, and is acting to alter the demography through the maintenance of a repressive environment for Palestinians and a favourable environment for Israeli settlers".[70]

e. In 2023, the President of the Security Council recently issued a statement on behalf of the Security Council strongly opposing "Israeli occupation and expansion of settlements, confiscation of Palestinians' land, and the 'legalization' of settlement outposts, demolition of Palestinians' homes and displacement of Palestinian civilians".[71]

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[65] UNSC resolution 252 (1968), UN Doc. S/RES/252(1968), 21 May 1968, para. 2. This statement was repeated, for example, in UNSC resolution 267 (1969), UN Doc. S/RES/267(1969), 3 July 1969, para. 4 and UNSC resolution 298 (1971), UN Doc. S/RES/298(1971), 25 September 1971, para. 3.
[66] UNSC resolution 446 (1979), UN Doc. S/RES/446(1979), 22 March 1979, para. 1; UNSC resolution 452 (1979), UN Doc. S/RES/452(1979), 20 July 1979, preamble.
[67] UNSC resolution 478 (1980), UN Doc. S/RES/478(1980), 20 August 1980, para. 3.
[68] UNSC resolution 465 (1980), UN Doc. S/RES/465 (1980), 1 March 1980, para. 5.
[69] *Wall*, p. 184, para. 120.
[70] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/HRC/50/21, 9 May 2022, para. 70.
[71] Statement of the President of the United Nations Security Council, UN Doc. S/PRS/2023/1, 20 February 2023.

49. Third, Israel's policies and practices of prolonged occupation, by design and effect, entail the denial of the right of the Palestinian people to self-determination. As the IICI has concluded, these polices and practices include:

> "evictions, deportations and the forcible transfer of Palestinians within the West Bank, the expropriation, looting, plundering and exploitation of land and vital natural resources, movement restrictions and the maintenance of a coercive environment with the aim of fragmenting Palestinian society, encouraging the departure of Palestinians from certain areas and ensuring that they are incapable of fulfilling their right to self-determination." [72]

50. Fourth, Israel's policies and practices of prolonged occupation are also characterised by serious violations of its obligations under international humanitarian law and international human rights.

51. Israel cannot be allowed to benefit from its policies and practices of prolonged occupation that are contrary to peremptory norms of general international law (i.e., the prohibition on the acquisition of territory by force, the obligation to respect the right of the Palestinian people to self-determination, and the prohibition on racial discrimination and apartheid), as well as contrary to the basic tenets of the law of occupation (i.e., the temporary nature of the occupation and the requirement to exercise the liberties of administration in good faith and in the best interests of the Palestinian people), and contrary to Israel's obligations under international humanitarian law and international human rights law.

52. Pakistan's position is that, applying the principle that Israel cannot benefit from its own wrongs, and taking into account that Israel's wrongdoing entails the breach of peremptory norms of general international law:

    a. Israel cannot benefit from reliance on the liberties ordinarily conferred upon an occupying Power under the law of occupation as a legal basis for the adoption and implementation of its wrongful policies and practices of prolonged occupation.

[72] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/77/328, 14 September 2022, para. 77.

b. Pending the recission and withdrawal of all its wrongful policies and practices of prolonged occupation, Israel cannot benefit by maintaining that occupation through reliance on the liberties ordinarily afforded to an occupying Power under the law of occupation.

53. At the same time, however, Israel remains bound by all of its obligations under the law of occupation, as well as its obligations under international humanitarian law as a whole and under international human rights law.[73] Recognising that the fact of Israel's prolonged occupation continues to give rise to such legal affects in no way entails allowing Israel to benefit from its wrongs.

54. It is also important to emphasise that the application in the present case of the principle that no State can benefit from its own wrong rests on a unique set of facts and does not undermine the basic proposition that the law of occupation (which is part of the *jus in bello*) applies independently of the legality of the occupation under the *jus ad bellum*.[74]

55. Notably, the Court applied the principle that States cannot profit from their own wrong in its 1971 Advisory Opinion on *Namibia*, where it found, in the context of South Africa's disavowal of the Mandate, that:

> "One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship".[75]

56. In its Advisory Opinion, the Court concluded that "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus to put an end to its occupation of the Territory".[76]

57. The Court's use of the term "occupation" is of some significance. Following the termination of the Mandate, South Africa's continued presence on the territory of

[73] *Cf.* Written Statement of France, para. 51: "En effet, ce constat d'illicéité per se pourrait conduire à soutenir l'inapplicabilité du régime juridique de l'occupation".
[74] *Cf.* Written Statement of Switzerland, para 51: "Le caractère potentiellement illégal d'une occupation ne doit pas remettre en question la séparation fondamentale entre le Ius ad bellum et le Ius in bello."
[75] *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. 46, para. 91.
[76] *Ibid*., p. 58, para. 133(1).

Namibia constituted an "occupation" within the meaning of Common Article 2 of the 1949 Geneva Conventions (which contains no requirement of armed resistance), and it follows from the terms of Article 6 of the Fourth Geneva Convention (which South Africa had ratified in 1952[77]) that at least certain provisions of that Convention applied.[78] While the Court did not consider the law of occupation, its conclusion that South Africa was required to withdraw its administration and put an end to its occupation of Namibia is consistent with Pakistan's present position in two respects.

58. First, neither the fact of the occupation nor the law of occupation confers upon the occupying Power a legal entitlement to administer the occupied territory. As the Court had earlier found in its 1950 Advisory Opinion on *South West Africa*: "The authority which the Union Government exercises over the Territory is based on the Mandate. If the mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed".[79] In this connection, it is noted that South Africa in the *Namibia* advisory proceeding had claimed that it had an independent right to administer the territory of Namibia by reason of, *inter alia*, its original conquest and its "long occupation".[80]

59. Second, in light of its application of the régime of apartheid to the territory, South Africa could not in any event have claimed to benefit from the liberties conferred on an occupying Power under the Fourth Geneva Convention. The Court's reasoning that "a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship"[81] applies with equal force to the relationship between an occupying Power and the occupied population.

60. In the context of Namibia, the Security Council had expressly declared, in its resolution 276 (1970), that "the continued presence of the South African authorities in Namibia is illegal"; it was this resolution that was specifically mentioned in the request for an

[77] South Africa ratified the Fourth Geneva Convention on 31 March 1952.
[78] The *Pictet Commentary to the Fourth Geneva Convention* (ICRC 1958) 60 explains in connection with Article 6 that: "the word 'occupation', as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907". This passage was quoted with approval by the ICTY Trial Chamber in *Prosecutor v. Rajić*, IT-95-12, Review of the Indictment (Trial Chamber), 13 September 1996.
[79] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950,* p. 133.
[80] I.C.J. Pleadings, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Vol. II, p. 550.
[81] *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. 46, para. 91.

Advisory Opinion. The Court explained that this resolution had a "combined and cumulative effect" together with two earlier resolutions in which the Security Council had expressly called on South Africa to withdraw its administration from Namibia.[82] With respect to Israel's occupation of the Occupied Palestinian Territory, the Security Council has likewise expressly called on Israel to withdraw from that territory. While the Security Council has refrained from taking the further step of declaring Israel's occupation as such to be "illegal", this in no way precludes the Court from finding that Israel's policies and practices of prolonged occupation are wrongful and applying the principle that no one can benefit from their own wrong. The absence of such an express declaration of "illegality" merely means that there is no decision to this effect that is binding on all Member States under Article 25 of the Charter of the United Nations.[83]

B. The consequences for all States

61. The principle that Israel cannot benefit from its wrongful policies and practices of prolonged occupation entails that, with respect to the Occupied Palestinian Territory, all States (when acting individually or collectively, including through the United Nations) are under an obligation not to recognise Israel as being entitled to benefit from the liberties to govern occupied territory that are ordinarily afforded to an occupying Power under the law of occupation. Further, all States are under an obligation not to render aid or assistance to Israel in exercising those liberties with respect to the Occupied Palestinian Territory. Thus, all States are required to refrain from any dealings with Israel or Israeli nationals and companies or any other person that would imply recognition of Israel's exercise of liberties, under the law of occupation, to administer the Occupied Palestinian Territory. The only exception to this is where such non-recognition would specifically result in depriving members of the occupied Palestinian population of their individual rights.[84]

[82] *Ibid*., p. 51, para. 108, referring to Security Council resolutions 264 (1969) and 269 (1969).
[83] *Cf. 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. 52–54, paras. 111–116.
[84] 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. 56, para. 125.

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