DECLARATION OF JUDGE TLADI

The situation in the Occupied Palestinian Territory is not a bilateral dispute — The policies and practices of Israel are in breach of peremptory norms of international law — The security concerns of Israel cannot override its international legal obligations — The policies and practices can be characterized as apartheid — The United Nations is under an obligation to consider further measures and modalities in the event of non-compliance.

I. INTRODUCTION AND CONTEXT

1. I have voted in favour of all the paragraphs of the operative clauses of the Court's Opinion and, overall, I am pleased with the outcome. Given the collective nature of the Court's decision-making process, the reasoning is not always going to be as clear as it could be, but this should not detract from the overall significance of the Opinion in the continuing search for peace in the Middle East. In this declaration, I wish to address certain salient points in the Advisory Opinion that merit some elucidation.

2. Some may question the main conclusion of the Opinion, namely that the continued presence of Israel in the Occupied Palestinian Territory ("OPT") is unlawful and, as a consequence, that Israel must terminate its presence. In this context, it may be questioned whether the breaches of international law by Israel necessarily lead to the conclusion that Israel's presence is unlawful and that it must therefore withdraw from the OPT. It is true that the mere fact of violation of certain rules of international law would not always lead to the unlawfulness of the presence itself. What the Opinion illustrates however, is that, the seriousness and magnitude of Israel's violations, as well as the nature of the rules breached, are such as to remove any pretences concerning the purpose of Israel's presence — transforming what *may have been* lawful presence based on occupation, to unlawful presence because such presence clearly amounts to a manifest violation of fundamental rules of international law prohibiting the acquisition of territory by force and the denial of the right of self-determination.

3. It is not just the fundamental character of the rules breached, or the egregiousness of the breaches, but also the fact that the breaches have continued, and indeed worsened, notwithstanding repeated calls for their cessation from multiple organs and entities that leads to the Court's conclusion. The seriousness and magnitude of the violations, in effect, unrobe the emperor, leaving the truth bare; it reveals that there is nothing about the enterprise in question that justifies it as a temporary occupation. It is simply annexation, which breaches the right of self-determination of the Palestinian people and the prohibition of acquisition of territory by force. Put differently, from the facts presented to the Court, it is clear that Israel has used occupation as a front to cover up its breaches of some of the most fundamental principles of international law. This is what I understand by the Court's reference to "sustained abuse by Israel of its position as an Occupying Power"[1]. Under these circumstances, any lingering suggestion that Israel's unlawful conduct somehow does not affect the lawfulness of its presence would have the effect of shrouding Israel's presence in the OPT with a cloak of legality — something which I find simply incomprehensible.

4. Many, on the other hand, will praise the Opinion, rightfully so, for confirming the unlawfulness of Israeli presence on the Occupied Palestinian Territory, and the duty on Israel to withdraw from that territory. Yet, this conclusion should hardly come as a surprise given the 2004 *Wall* Opinion and the terms of the question posed by the General Assembly in Resolution 77/247

[1] Opinion, para. 261.

which identified particularly important rules, namely the right of self-determination, rules of international human rights law, in particular those prohibiting discrimination, the prohibition of the acquisition of territory by force and the basic rules of international humanitarian law, against which to assess the policies and practices of Israel. As I will go on to expand below, serious violations of these fundamental rules of international law could scarcely have resulted in a different conclusion. With most legal issues there are arguments and counterarguments that pull in different directions, even if there is an objectively correct legal position. The situation in the OPT, however, is one of the few cases in international law in which it is challenging to find legal and political arguments that pull in a direction in opposition to the Palestinian right of self-determination and in favour of the prolonged Israeli occupation of Palestinian territory and the subjugation of the Palestinian people. Even in the course of the current proceedings, States that can be described as "arguing on the side of Israel", with the exception of two States, namely Zambia and Fiji, took a decidedly procedural stance, arguing on jurisdiction and urging the Court either not to exercise its jurisdiction or to limit its jurisdiction. But given the clear facts and the state of the law, few States appeared willing to argue that the rules and principles referred to in the question put by the General Assembly have not been violated by Israel. The Court's finding that there have been grave and serious violations of the right of self-determination and the prohibition of the acquisition of territory by force, seen in that context, is not surprising or earth-shattering.

5. In this declaration, I wish to address five issues that arose in the context of these advisory proceedings, and which I believe warrant further analysis. First, I am troubled by arguments made by some participants in the course of these proceedings that seek to describe the Israeli occupation, and the consequences of that occupation, as a bilateral dispute between Israel and Palestine (see Section II below). The Court addresses this only briefly and in so doing misses an important normative opportunity. I will also, in this context, address the Court's over-indulgence of arguments concerning its discretion to decide to not respond to a request for an advisory opinion, particularly when the request comes from the General Assembly or the Security Council. The second, and perhaps the most important issue for me is the right of self-determination and its status as *jus cogens* (see Section III below). Third, I will explain why, in my view, the Court was correct to find that the policies and practices of Israel in the Occupied Palestinian Territory amount to apartheid (see Section IV below). Fourth, the Court does not directly and comprehensively address the issue of Israel's security concerns, a decision I fully understand. Nonetheless, since Israel's security concerns are at the heart of much of the justification for its policies and practices, it is important to say something about them, and I will do so in this declaration (see Section V below). Fifth, in the context of the consequences flowing from Israel's breaches for the United Nations, the Court states that the United Nations should consider the "precise modalities and further action required to bring to an end as rapidly as possible" the unlawful presence of Israel in the OPT[2]. While this conclusion is correct, I believe that the Court could have described more concrete action that the United Nations should consider to bring to an end the unlawful presence of Israel in the OPT and to have Israel comply with its obligations under international law. I will provide some thoughts on the concrete action that the United Nations might consider in furtherance of the Palestinian right of self-determination and compliance with the terms of the Court's Opinion in general (see Section VI below).

II. THE PALESTINIAN QUESTION IS NOT A BILATERAL DISPUTE

6. All the participants in these proceedings have accepted that the Court has jurisdiction to render the requested advisory opinion. Yet it has been suggested by some that the Court ought not to exercise its jurisdiction — the legal jargon in use for the plea to the Court not to exercise its jurisdiction is that the Court has discretion and should exercise that discretion to decline to render an opinion in respect of this question, even though it has jurisdiction. The reasons that have been put forward in these proceedings for the Court to so exercise its discretion are several. In addition to the

[2] Opinion, para. 285 (9).

reason that will be the subject of this section, namely that the question involves a bilateral dispute, it has also been said that any opinion rendered will not be of assistance to the General Assembly, that it would undermine the political peace process, that it would undermine the role of the United Nations Security Council, that the Court does not have sufficient information to render an opinion, and that the questions are formulated in a biased way. These reasons are, by and large, drawn from the Court's jurisprudence.

7. I have no intention to address each of these. However, I would like to make a general point about the discretion that the Court is said to have to decline rendering an opinion. According to what has now become the Court's jurisprudence, further entrenched by the current Advisory Opinion of the Court, the Court has the discretion to decide not to exercise its advisory jurisdiction if there are compelling reasons. This jurisprudence, at least in lip-service, suggests that this discretion is unfettered[3].

8. This notion of a discretion not to exercise jurisdiction validly established is now firmly part of the Court's jurisprudence and there is little chance of its displacement[4]. As a result, in respect of each Advisory Opinion in the future the Court will continue, to the detriment of many trees and our climate, to rehearse and formulaically repeat these grounds and explain why they do not apply in that particular case. In my view, whatever discretion the Court may have, is extremely narrow — so narrow that the Court should stop being as indulgent with arguments concerning discretion as it has been in the past. The narrowness of the discretion to decline to give an advisory opinion is acknowledged by the Court itself in numerous cases, where it has observed that the Court's answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, *in principle*, should not be refused"[5]. This is particularly the case where the request emanates from the other organs of the United Nations, i.e. the General Assembly or the Security Council. If a request should, in principle, not be refused, and if a refusal requires the existence of a *compelling* reason (the threshold for which is, in fact, so high that this Court has never found a reason compelling enough to refuse a request for an advisory opinion) then does the Court really have discretion in this matter? It would appear to me that what the Court has available to it is not discretion in the traditional sense, which is defined as "freedom in the exercise of judgment; the power of free decision-making"[6], but rather it has recourse to an overriding consideration of judicial propriety that can provide a legitimate excuse for refusing to reply to a request for an advisory opinion.

9. For the Court to refuse to respond to a request from the General Assembly or the Security Council *when it has jurisdiction to do so* would, in my view, amount to the Court second-guessing the decisions of the other principal organs in a way that would be legally problematic. This is not to say that the Court can never refuse to provide a requested opinion, even to the other principal organs

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[3] Georges Abi Saab, "On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice" in Laurence Boisson de Charzounes and Philippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999), at 37; see also, Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), p. 78.

[4] For the record, I share in Professor Abi Saab's view (*ibid.*) that the founding of this jurisprudence on *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, is erroneous because a careful reading of the Court's Opinion suggests that it was concerned not with "discretion" but with whether it had jurisdiction (based on a lack of competence of the Council of the League of Nations). But that is now water under the bridge and we have to accept that the earth is flat.

[5] See e.g. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71 (emphasis added); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I),* pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 156, para. 44.

[6] *Black's Law Dictionary* (11th ed., 2019), p. 585.

of the United Nations. I can think of several reasons that the Court *might* exercise its very narrow discretion to decline to render an opinion. For example, I can imagine that the Court would not provide an opinion if the object of the question had since become moot[7], or where the request from an organ no longer enjoyed the support of many of its members that had previously supported the request (in a sense, piercing the "corporate veil"). The Court *might* also decline to offer an opinion where one principal organ makes the request, and the other expresses its displeasure at the request.

10. At any rate, the notion that the subject-matter of a request involves a bilateral dispute is not one which should prevent the Court from exercising its jurisdiction, notwithstanding the Court's previous statements that the bilateral character of an issue may be a compelling reason for declining to exercise its advisory jurisdiction[8]. In its current Advisory Opinion, the Court responds to the bilateral dispute objection by noting that it does not regard the present case as only a bilateral matter between Israel and Palestine[9]. Rather, in the Court's view, "this issue is a matter of particular interest and concern to the United Nations" because the "involvement of the United Nations organs, and before that the League of Nations, in questions relating to Palestine dates back to the Mandate System"[10].

11. While I think this institutional reasoning is correct, I also think it is important to emphasize that, quite apart from this institutional reason linked to the United Nation's long-standing responsibility, the Israeli-Palestinian conflict cannot be seen as a bilateral dispute for a much more normative reason. While international law cannot as yet (and maybe never will), be described, as a solidarity-based system, it is beyond doubt that the international legal system has moved beyond the era of pure bilateralism, which was the hallmark of traditional international law. It is for this reason that international law concerned itself with the situation in my own country prior to 1994, even though it was technically, in a purely bilateralist tradition, an internal matter; it is because of this reason that international law concerns itself with alleged cases of genocide whether happening within the boundaries of one State or not; it is for this reason that cases of human rights violations are the subject of consideration by international bodies. Then how can a case where some of the most fundamental norms of international law, in particular norms of *jus cogens*, are at stake be a bilateral dispute. I find it morally unthinkable that it could even be contemplated that what is happening in Palestine is a purely bilateral dispute. It is not. There is little that is bilateral about the situation in Palestine. With or without the United Nations' special institutional responsibility, the depravation of some of the most fundamental rights of a people is an issue which concerns all of humanity. There is little bilateral about a situation in which generations of a people are forced to live a life of subjugation and indignity, as orphans without the rights that the rest of us take for granted.

12. The Court is, of course, not wrong to refer to the institutional reason, which is the United Nations' institutional responsibility. Already in 2004, the Court based its rejection of the bilateral dispute objection on this point, stating that, "[g]iven the powers and responsibilities of the United Nations in questions relating to international peace and security, . . . the construction of the wall must be deemed to be directly of concern to the United Nations" [11]. That reason, while also

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[7] See e.g. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46 ("The Court has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may 'render an application without object'").

[8] See e.g. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

[9] Opinion, para. 35.

[10] *Ibid.*

[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 49.

institutional in nature, went even further than the reason provided by the Court in the current Advisory Opinion because, over and above the institutional reasons, it gave substantive reasons related to peace and security.

13. The institutional reasoning given by the Court in the current Advisory Opinion does not account for the humanitarian reasons why the situation in the Occupied Palestinian Territory cannot be seen as a bilateral dispute. It leaves unaccounted for, the moral and social imperative why international law *must* concern itself with that situation and, more to the point, why international law must dictate the "international community's" centrality in resolving that situation. I regret that the Court did not take this opportunity to do so. For while it was understandable for the Court, in 2004, to rely on the United Nations' institutional responsibility, in 2024 it should have relied on the responsibility of the "international community" as such regardless of the historical institutional responsibility of the United Nations.

III. PEREMPTORY CHARACTER OF THE RIGHT OF SELF-DETERMINATION

1. General

14. The main finding of the Court is that the presence of Israel in the Occupied Palestinian Territory is unlawful and that, as a consequence, it is under a legal obligation to withdraw from, or to bring to an end its unlawful presence in, the Palestinian territory. The main basis for this finding is that Israeli presence in the Occupied Palestinian Territory constitutes a violation of the Palestinian right of self-determination, in addition to constituting a breach of the prohibition on the acquisition of territory by force. The Court reaffirms its previous descriptions of the right of self-determination as "one of the essential principles of contemporary international law" and that the obligation to respect this right is owed *erga omnes*[12]. These are not new, and the Court had previously used these descriptions[13]. What is new is the Court's explicit recognition of the right of self-determination as a peremptory norm of international law. At paragraph 233 the Court states that it "considers that, in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law". The qualifier "in cases of foreign occupation such as the present case" is rather unclear, but I understand it to mean that the element of the right of self-determination which is implicated in the present case, i.e. the right of the Palestinian people to not have their right of self-determination impeded by the ongoing foreign occupation by Israel, is assuredly a peremptory norm of international law. This statement would be without prejudice to the peremptory status of other elements of the right of self-determination (which were not at issue in this case). In the same way, stating that the (narrower) prohibition of aggression is a peremptory norm does not necessarily mean that the broader prohibition on the use of force is itself not peremptory.

15. While the Court's recognition of the peremptory status of self-determination is a welcome departure from its historical reluctance to refer to *jus cogens* in general, and in particular to describe self-determination as *jus cogens*, the Opinion retains some of its historical reluctance to recognize peremptory norms. For starters, a point I will return to later, the Court appears rather ambivalent about the role that the peremptory status of self-determination plays in the Opinion — I imagine that some will regard the Court's statement in this respect as *obiter*. Second, other norms that undoubtedly qualify as *jus cogens* are not referred to as such. These are the prohibition on the use of force, the prohibition of apartheid and some of the basic principles of international humanitarian law. I am less

[12] Opinion, para. 232.

[13] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 156.

concerned about the Court's reluctance to refer to these obvious *jus cogens* norms as peremptory because, first, the prohibition on the use of force has already been described by the Court as *jus cogens* in a previous case[14], and secondly, the main finding of the Court in this case is based on self-determination. Further, I can understand the Court's reluctance to refer to *some* principles of international humanitarian law as peremptory without identifying which ones. At any rate, given the historical reluctance of the Court to refer to peremptory norms, with its residual effects in this Opinion, it is appropriate to say a few words about it.

16. The Court's historical reluctance to pronounce itself clearly on the peremptory status of norms that are widely accepted as having that character, in particular self-determination, is difficult to understand. There is no rational reason for this reluctance. Whether the speculation that the Court has historically avoided using the terms "*jus cogens*" and "peremptory norms" due to the influence of French judges on the Court, and France's reputation as being opposed to those terms, is true or not is irrelevant[15]. What is clear is that, to avoid identifying particular norms as *jus cogens,* the Court employed a number of tools or methods including, (i) referring to descriptions by others that a norm is *jus cogens* without specifically expressing support[16], (ii) using terms that might be construed as synonyms for *jus cogens*[17], or (iii) using the related but distinct concept of *erga omnes*[18]. Sometimes the Court's recognition of a norm as *jus cogens* is couched in clumsy or convoluted language to create the impression of ambiguity, such as is arguably the case with the Court's reference to the

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[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 81.

[15] Catherine Maia, "Consécration du *jus cogens* : un dialogue à raviver entre cours internationale et régionales dans l'œuvre de reconnaissance de droits humains impératifs", *Civitas Europe*, Vol. 45 (2020), p. 302, fn 25 ("Précisons que cette reconnaissance explicite a été facilitée par le départ du juge français Gilbert Guillaume, qui a siégé à la CIJ de 1987 à 2005. On retrouve néanmoins cette position hostile au *jus cogens* chez d'autres juges français à la CIJ. V. notamment, dans l'arrêt de 2012 sur les *Questions concernant l'obligation de poursuivre ou d'extrader*, l'opinion individuelle du juge Abraham (§ 27) et l'opinion dissidente du juge *ad hoc* Sur (§ 4)"). See, in more detail, Catherine Maia "*Jus Cogens* and (in)Application of the 1969 Vienna Convention on the Law of Treaties in the Jurisprudence of the International Court of Justice", in Dire Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations* (Brill, 2021), pp. 342-365 ("It should be noted that [the first explicit recognition of *jus cogens*] was facilitated by the departure of the French judge Gilbert Guillaume, who sat on the ICJ from 1987 to 2005. However, [the criticism of *jus cogens* by French judges] can be found among other French judges at the ICJ. See, in particular, the separate opinion of Judge Abraham in [*Belgium* v. *Senegal*] ('the qualification of the prohibition of torture as a peremptory norm "is clearly a mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element") and the dissenting opinion of Judge *ad hoc* Sur, at para. 4 ('the reference to *jus cogens* which appears in the reasoning [is] a reference which is entirely superfluous and does not contribute to the settlement of the dispute, as will be seen. The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance has yet to be established')"). See, slightly more tentatively, Hélène Ruiz Fabri and Edoardo Stoppioni, "*Jus Cogens* before International Courts: The Mega-Political Side of the Story", *Law and Contemporary Problems*, Vol. 84 (2021), p. 157 ("Ten more years were necessary for the ICJ to mention *jus cogens* in its reasoning, and even then, the *jus cogens* argument was not conclusive. Whether such longlasting resistance was related or not to an intense internal lobbying of the French judge, well known for his strong opposition to *jus cogens*, is impossible to say. However, the ICJ stayed its hand for as long as it could, and in some ways, probably still does.").

[16] The best example of this tool is *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 190 ("The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*"). See also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 125, para. 61, and p. 135, para 80.

[17] The best example of this particular method is in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 79 ("Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.").

[18] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29*; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 199, para. 156.

jus cogens character of the prohibition on the use of force in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [19]. Why has the Court gone through so much trouble in the past to avoid describing self-determination as a peremptory norm? The question remains important here because even having referred to the right of self-determination as a peremptory norm of international law in the Opinion, the remnants of the Court's historical hesitance remain visible, as I will show below.

17. There may be one of several explanations for the Court's historical reluctance to explicitly acknowledge the peremptory status of norms, and in particular of the right of self-determination. First, it might be that describing self-determination as a peremptory norm was seen by the Court as unnecessary, or to use the language of Judge Abraham's separate opinion in *Belgium* v. *Senegal* in respect of the peremptory norm of prohibition of torture, a "mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element"[20]. In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (hereinafter "*Chagos*") too, apparently, the Court believed that to describe self-determination as a peremptory norm was unnecessary for the purposes of answering the question posed by the General Assembly[21]. The second possibility is that the Court simply did not accept until now that self-determination was a norm of *jus cogens*. Indeed, in the aftermath of *Chagos* it was argued by some that the Court's approach was evidence that it did not believe self-determination to be a peremptory norm[22]. Neither of these reasons are remotely convincing and I wish to address each in turn.

2. The necessity of referring to the peremptory character of self-determination

18. I begin first with the most probable reason for the Court's avoidance up to now of the issue of the peremptory status of self-determination, namely that it has been unnecessary. Indeed, one might point to the fact that there are other norms, such as the prohibition on the use of force, the peremptory status of which has to my knowledge only been questioned by one State — Morocco[23] — which the Court does not, in the current Advisory Opinion, describe as peremptory.

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[19] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 81.

[20] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, separate opinion of Judge Abraham, p. 477, para. 27 ("With regard to the prohibition on torture, the Judgment states (para. 99) that it is part of customary law and that it has even become a peremptory norm (*jus cogens*), but that is clearly a mere *obiter dictum*, which the Court could have omitted without depriving its reasoning of any vital element.").

[21] See comment by then President of the Court, Judge Yusuf, during the annual interaction between the International Law Commission (ILC) and the President of the Court, A/CN.4/SR.3478, p. 10,

> "that the Court had deemed it unnecessary to address the matter of whether the right to self-determination was a peremptory norm of international law in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, because that had not been the point at issue. The General Assembly's question had been whether the decolonization process of Mauritius had been lawfully completed. The Court did not usually engage in rambling *obiter dicta* or make statements that were not directly relevant to its conclusions, especially in an advisory opinion."

[22] See comments by Israel, in Peremptory norms of general international law (*jus cogens*): Comments and observations received from Governments, A/CN.4/748, 9 March 2022, p. 104 ("Indeed, in the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice itself appears to have deliberately refrained from referring to the right to self-determination as a jus cogens norm.").

[23] See Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace, 9 January 2024, PSC/PR/Comm.1196. Para. 38, which describes the prohibition on the use of force as *jus cogens*, is subject to asterisk, which reads: "One Member State, the Kingdom of Morocco, expressed a reservation regarding the reference to the concept of 'jus cogens' in Paragraph 38 of the present document."

19. Justifying the Court's approach in *Chagos*, then former President of the Court, Judge Yusuf, suggested that to describe self-determination as a peremptory norm when it was not necessary would amount to "rambling" which the Court "did not usually engage in"[24]. Yet I can find many examples in the case law of the Court where the Court made statements that were not necessary for the resolution of the matter before it[25]. One could mention the famous dictum in *Barcelona Traction* in which the Court first made the distinction between obligations *erga omnes* and "those arising vis-à-vis another State"[26]. Similarly, the Court's recognition of the *jus cogens* status of the prohibition of torture in the context of *Belgium* v. *Senegal* was, as noted by Judge Abraham and Judge *ad hoc* Sur, not essential for the settlement of the dispute[27]. Neither, for that matter, was the Court's characterization of certain norms of international humanitarian law as "intransgressible"[28] — a term whose meaning continues to elude me. Indeed, it may even be argued that given the Court's reliance on General Assembly Resolution 2625 (XXV) in *Chagos*, it was also not necessary to characterize the right of self-determination as *erga omnes* there[29], i.e. the duty to co-operate and to render assistance flowed from the resolution. It is not only in respect of *jus cogens* norms and *erga omnes* character of obligations that the Court has made declarations that are not strictly necessary for the ultimate settlement of the case. The Court's invocation of "the concept" of sustainable development in *Gabčikovo-Nagymaros* was also unnecessary for its settlement of the dispute between Hungary and Slovakia[30]. In *Kasikili/Sedudu* the Court, having made an observation that its earlier findings were "sufficient to dispose of the matter" proceeded to add a fact that it itself described as "unnecessary"[31]. These are but random examples, and I am sure many more examples can be provided. Indeed, in this Opinion too the Court refers to many elements that play no role in the final conclusions drawn by the Court, like for example, the several symbolic references to the Oslo Accords. Can all these examples be described as "rambling *obiter dicta*"? I don't think so. They all perform important functions related to the judicial responsibility of the Court.

20. At any rate, and for avoidance of doubt, there are at least three reasons why it was *necessary* to opine on the peremptory status of self-determination in *this Opinion*. First, the peremptory status of self-determination was argued by a great many participants. The Court cannot, or should not, simply ignore arguments made by such a significant number of States. Second, whenever the Court invokes a rule of international law, it is important that it, to the extent that it is capable of doing so, fully describes the status of that rule. Describing the status of a rule that has been invoked is not mere *obiter*, just as much as describing the number of instruments in which that rule can be found is not *obiter* — it is part of judicial reasoning. Third, and more importantly, the consequences for third States for the breach of the right of self-determination identified by the Court in the current Advisory Opinion, i.e. the duty to co-operate to bring to an end Israeli presence in the

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[24] See fn 21 above, comment by Judge Yusuf.

[25] Indeed, in her separate opinion in *Wall,* Judge Higgins lamented the "irrelevant" invocation of the *erga omnes* nature of violations of humanitarian law by the Court. *Wall* Advisory Opinion, separate opinion of Judge Higgins, p. 217, para. 39.

[26] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.

[27] See fns 15 and 18 above.

[28] See fn 17 above.

[29] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180.

[30] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140.

[31] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1091, para. 69 ("The Court has reached the conclusion that there was no agreement between South Africa and Botswana 'regarding the . . . application of the [1890 Treaty]'. This *is in itself sufficient* to dispose of the matter. It is *unnecessary* to add that in 1984 and 1985 the two States had no competence to conclude such an agreement, since at that time the United Nations General Assembly had already terminated South Africa's Mandate over South West Africa" (emphasis added)).

Occupied Palestinian Territory[32], the duty not to recognize situations arising from Israel's presence and the duty not to render assistance in the maintenance of such situations, do not, in my view, flow from the breach of any rule of international law, but rather from the breach of peremptory norms[33]. I will address this aspect more fully below when I address the Court's ambivalence in connection with consequences for third States flowing from the unlawfulness of Israel's presence in the Occupied Palestinian Territory (Section IV below).

21. To summarize, the argument that the Court has not, in the past (and could have done so here), specified that the right of self-determination is a peremptory norm because it was not strictly necessary to do so, is flawed for at least two reasons. First, it is flawed because the Court routinely makes statements that are not strictly necessary for the resolution of the case before it. Second, it is flawed because in this case, the peremptory character of self-determination was essential for proper judicial reasoning.

I turn now to the second possible reason for the Court's past hesitance.

3. Uncertainty over the peremptory character of self-determination

22. Perhaps by choosing to remain silent about the peremptory status of the right of self-determination in the past, the Court was, in fact, signalling that it did not believe that the right of self-determination had reached peremptory status, or perhaps was uncertain about the peremptory status of the right. The significance of the Court's decision, particularly in light of its historical reluctance to refer to peremptory norms, cannot be overstated.

23. While the Court, consistent with its practice, does not provide evidence for the peremptory character of the right of self-determination, there have been several individual opinions by Members of the Court in the past that have done so[34]. That self-determination is widely regarded as having peremptory status is beyond doubt. Perhaps, the most succinct and clear statement supporting the peremptory character of self-determination is to be found in the declaration of Judge Sebutinde, our current Vice-President, in *Chagos*:

> "Characterizations of the right to self-determination as a peremptory norm stretch back many decades and are now far too common to ignore. Eminent jurists, including former and current Members of this Court, have recognized the peremptory character of the right to self-determination. It has also been recognized as a peremptory norm by courts and tribunals, United Nations Special Rapporteurs, ILC members, and the ILC itself. In 1964, when the Sixth Committee of the General Assembly discussed the ILC's

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[32] While the duty to co-operate is not expressly mentioned in the relevant operative paragraph of the Opinion (para. 285 (7)), the Court does conclude in its reasoning that third States have such a duty which is a consequence of the breaches of the right of self-determination. See Opinion, paragraph 275 ("With regard to the right to self-determination, the Court considers that, while it is for the General Assembly and the Security Council to pronounce on the modalities required to ensure an end to Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the right of the Palestinian people to self-determination, all States must co-operate with the United Nations to put those modalities into effect.").

[33] See Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission (YILC),* 2001, Vol. II (Part Two), Art 41.

[34] See, e.g. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* separate opinion of Judge Robinson, paras. 70-77, which based the peremptory status of the right of self-determination on instruments of near-universal application, the Court's jurisprudence, an assessment of the views of States, views and international bodies, such as the ILC, and scholarly views. See also *ibid.*, separate opinion of Judge Sebutinde, paras. 30 and 31, relying on, *inter alia*, the international jurisprudence and the work of the ILC; *ibid.*, joint declaration of Judges Cançado Trindade and Robinson; *ibid.*, separate opinion of Judge Cançado Trindade, paras. 120-150.

> draft articles on the law of treaties, many States endorsed the characterization of the right to self-determination as a peremptory norm and only one State voiced opposition. These statements and instruments inexorably demonstrate that the right to self-determination is a rule of special importance in the international legal order."[35]

24. The real elephant in the room, however, is the fact that the peremptory status of the right of self-determination has recently been questioned in some quarters. It is this elephant that I will turn my attention to. In particular, do the recent rejections of the peremptory status of self-determination in any way affect its claim to peremptoriness? Put in the context of the criteria for the identification of peremptory norms, does the fact that the peremptory status of the right of self-determination has been questioned recently imply that the right is not "accepted and recognized by the international community as a whole" as a peremptory norm[36]?

25. In assessing what impact, *if any*, recent objections to the peremptory status of the right of self-determination have had on its claim to peremptoriness, it is important to recall, first, that these objections come from relatively few States. In this connection, while a very large majority of States participating in the *Chagos* and current proceedings described the right of self-determination as having peremptory character[37], not a single State opposed this view (for context, it should be recalled that participants in both written and oral proceedings have the opportunity to respond to each other's arguments and claims, and often do, so that the claim of peremptoriness could have been responded to). A similar pattern can be observed in respect of the views of States commenting on the work of the International Law Commission. In 2001, when States commented on the final set of Articles on State Responsibility, not a single State questioned the peremptory status of the right of self-determination[38]. Further, in 2022, out of a total of 86 States commenting on the ILC Draft Conclusions on Peremptory Norms, the text of which included self-determination as an example of

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[35] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, separate opinion of Judge Sebutinde, p. 285, para. 30 (footnotes omitted).

[36] Conclusions 3, 6 and 7 of the Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), A/77/10.

[37] In the current proceedings, for example, statements representing the views of more than 100 States, have taken the view that self-determination is a peremptory norm: Chile, Lebanon, Algeria, League of Arab States (which comprises 22 Member States), Egypt, Saudi Arabia, Brazil, Jordan, Mauritius, Guyana, The Gambia, Ireland, Malaysia, Djibouti, Organisation of Islamic Cooperation (which comprises 57 Member States), South Africa, Palestine, Qatar, and African Union (which is comprised of 55 Member States).

[38] See the following summary records of the Sixth Committee of the General Assembly, during its 56th Session, where the Report of the ILC was considered in 2001: A/C.6/56/SR.11; A/C.6/56/SR.12; A/C.6/56/SR.13; A/C.6/56/SR.14 (here the delegate of India, without questioning the status of self-determination as a peremptory norm, circumscribed it as excluding secession); A/C.6/56/SR.15; A/C.6/56/SR.16; A/C.6/56/SR.17; A/C.6/56/SR.18; A/C.6/56/SR.19; A/C.6/56/SR.20; A/C.6/56/SR.21; A/C.6/56/SR.22; A/C.6/56/SR.23; A/C.6/56/SR.24.

a peremptory norm, only Israel[39], the United States[40], Estonia[41], the United Kingdom[42], and Morocco[43], questioned the peremptory status of the right of self-determination.

26. These statistics provide context to illustrate that only a few States have questioned the peremptory status of self-determination — a norm which has long been regarded as peremptory. With this context in mind, the elephant in the room seems more like a gentle cat, sitting quietly in a corner minding its own business. The recent objections from only five States, cannot have the effect of casting doubt on what has, for a long time, been seen as an eminently uncontroversial proposition.

27. Thus, in my view, the Court was correct to identify explicitly the right of self-determination as a peremptory norm in its present Advisory Opinion. Should some point to the scant evidence put forward in the Opinion to support the peremptory character of self-determination; I can only say that it is not the practice of the Court to engage in a rambling exercise to support its conclusion about the status of particular rules of international law, and there is no reason why an exception should be made for self-determination.

4. Consequences flowing from peremptory norms

28. If there is one aspect of the Opinion that gives me cause for pause it is that having identified the right of self-determination as a peremptory norm, the Court adopts an ambivalent approach to the consequence of its finding. For instance, in paragraph 274, when preparing to identify the consequences of Israel's presence on the Occupied Palestinian Territory for third States, the Court "observes that the obligations violated by Israel include certain obligations *erga omnes*." This language might suggest that the obligations for third States — what we might refer to as the Article 41 consequences for shorthand[44] — flow not from the peremptory status of the right of self-determination but rather from the *erga omnes* character of the obligations breached.

29. Given that States and commentators generally accept that the consequences in Article 41 of the Articles on State Responsibility attach to peremptory norms, the Court cannot put forward an alternative proposition in this Advisory Opinion without offering an explanation. While commenting on the ILC's 2022 Conclusions on Peremptory Norms, which, in Conclusion 19 affirms Article 41 of the Articles on State Responsibility, *not a single State* suggested that these consequences flowed, not from peremptory norms, but from the *erga omnes* character of some obligations. There is also very little, if any, literature presently supporting the view that the consequences in Article 41 flow

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[39] ILC, Peremptory norms of general international law (*jus cogens*): Comments and observations received from Governments (A/CN.4/748), 9 March 2022, pp. 102-104.

[40] *Ibid.*, p. 113.

[41] UNGA Sixth Committee, Seventy-Seventh Session, Summary Record of the 22nd Meeting (A/C.6/77/SR.22), dated 12 December 2022.

[42] UNGA Sixth Committee, Seventy-Seventh Session, Summary Record of the 23rd Meeting (A/C.6/77/SR.22), dated 22 November 2022 (A/C.6/77/SR.23), p. 14.

[43] Le Royaume du Maroc, Commentaires et Observations sur le texte du projet de conclusions de la Commission du droit international relatif aux normes impératives du droit international général. See also UNGA Sixth Committee, Seventy-Seventh Session, Summary Record of the 24th Meeting (A/C.6/77/SR.24), dated 12 December 2022 (A/C.6/77/SR.24), p. 12.

[44] To clarify, when I say "Article 41 consequences" I refer to the consequences for serious breaches of a peremptory norm reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (Part Two), Art. 41.

from the *erga omnes* character of an obligation[45]. Domestic jurisprudence, a form of State practice, also generally accepts the traditional view[46]. Thus, for the Court to suggest that it was in fact not the peremptory status of the norm but the *erga omnes* character of the obligations that forms the basis of these consequences, *would be* to establish an approach that is unsupported by the views of States, our sister entity the International Law Commission or academic writings. This in itself would be a questionable practice, but to do so without even engaging with the broadly accepted, dominant understanding would amount to a dismissiveness unbecoming of a court of justice.

30. Quite apart from the fact that this approach finds no support in the views of States, the ILC or in academic writings, it would be based on a complete miscomprehension of the relationship between peremptory norms and *erga omnes* obligations. The *erga omnes* character of *an obligation* is itself a consequence of the nature of *the norm* from which the obligation arises[47]. Consequent to this, the *erga omnes* character permits all States, even if not directly injured, to invoke the responsibility of another State for a wrongful act[48]. It is for this very reason, i.e., peremptory norms are concerned with the scope of secondary obligations while the *erga omnes* character of norms is concerned with the invocation of the secondary obligations, that the ILC decided to replace references to "serious breach of an obligation owed to the international community as a whole" with the category of "peremptory norms" in its Articles on State Responsibility during its 53rd Session in 2001[49].

31. The *erga omnes* character of the obligations does not *itself* create obligation on third States. A point that was articulated by Judge Higgins in her separate opinion appended to the *Wall* Advisory Opinion[50], where she expressed her disagreement with the Court's position that the consequences specified in the Opinion for the identified violations of international law (in paras. 154-159) flowed from the *erga omnes* character of the obligations breached. In her view, the *erga omnes* concept concerns "jurisdictional *locus standi*", which "has nothing to do with imposing substantive obligations on third parties"[51]. She thus concluded that the consequences specified by the Court did not "have anything to do with the concept of *erga omnes*"[52], and that "[t]he obligation upon United Nations Members of non-recognition and non-assistance [did] not rest on the notion of *erga*

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[45] For examples of academic writings supporting the traditional view, i.e. the duties of non-recognition, non-assistance and co-operation to bring to an end any serious breach are consequences of breaches of peremptory norms, see Anne Lagerwall "The non-recognition of Jerusalem as Israel's capital: a condition for international law to remain relevant?", *Questions of International Law*, Vol. 50 (2018), p. 33; Rebecca J. Barber "Cooperating through the General Assembly to end serious breaches of peremptory norms", *International and Comparative Law Quarterly,* Vol. 71 (2022), p. 1.

[46] Examples of these are provided in paras. 3, 4, 6 and 13 of the Commentary to Conclusion 19 of the Conclusions on Peremptory Norms.

[47] See para. 7 of the General Commentary to Chapter III of Part 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (Part Two). See also para. 4 of the Commentary to Conclusion 17 of the International Law Commission's Conclusions on Peremptory Norms of General International Law (*Jus Cogens*).

[48] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 17, para. 41; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 516, para. 108.

[49] Report of the Commission to the General Assembly on the work of its fifty-third session, *YILC*, 2001, Vol. II (Part Two), p. 22, para. 49.

[50] Admittedly, Judge Higgins' opinion would not support the conclusion that these consequences flowed from peremptory norms.

[51] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, separate opinion of Judge Higgins, p. 216, para. 37.

[52] *Ibid.*

omnes"[53]. This is precisely why there is *virtually* no support for the view that the *erga omnes* character of the obligation also gives rise to the consequences identified in Article 41 of the ILC's Articles on State Responsibility. It should be recalled that not all *erga omnes* obligations derive from peremptory norms. Obligations arising from customary international law norms concerning common spaces, for example, also have an *erga omnes* character whether they flow from peremptory norms or not. Without ruling out the possibility, it is not at all clear to me that *all* obligations having an *erga omnes* character produce the threefold duties of non-recognition, non-assistance and co-operation as formulated in Article 41 of the Articles on State Responsibility. It is possible that they do, but it is not at all clear that this is the case. What is clear, however, is that peremptory norms do. Accordingly, for the sake of sound and coherent judicial reasoning, the Court ought to have tied explicitly the Article 41 consequences identified for third States in this Opinion to the peremptory status of the right of self-determination (or even better, explicitly reaffirmed the peremptory character of other norms discussed in the Opinion).

32. I am not averse to the Court deciding to develop the law in order to broaden the scope of Article 41 consequences to include all *erga omnes* obligations. However, first, if that is what the Court seeks to do, it should be transparent to avoid confusion and thus do so explicitly. Second, such a development should not be accidental and should be based on a clear and considered understanding of the distinction between *erga omnes* obligations and peremptory norms as legal concepts. *Erga omnes* obligations *arise from particular types of norms,* such as peremptory norms. But, in addition to peremptory norms, what other types of norms produce such obligations? In my view, and as already stated above, the only other type of norms that produce *erga omnes* obligations are, *because of their very character as not being capable of being owed bilaterally*, obligations concerning the commons. If the Court wishes to establish the principle that obligations arising from norms relating to common spaces produce Article 41 consequences, then the conflation between peremptory norms and *erga omnes* obligations in the context of Article 41 consequences may be justified, and I would have no objection against such a development. The extension of Article 41 consequences to all *erga omnes* obligations would be less justified and ineffective if it were done with primarily humanitarian objectives in mind. If the objectives were more humanitarian, then in my view, the effort should be directed at showing the peremptory character of the relevant norms rather than seeking to stretch the concept of obligations owed *erga omnes* beyond its current remit.

33. There is another consequence of peremptoriness that the Court, because of the remnants of its hesitancy, does not address, namely the implications of the right of self-determination for agreements relating to the Occupied Palestinian Territory concluded in the past and those that may be concluded in the future. This is the primary consequence of peremptoriness as provided for in Article 53 of the Vienna Convention on the Law of Treaties. To take as an example, one of the consequences flowing from the recognition of the right of the Palestinian people to self-determination must surely be that an agreement concluded to resolve the crisis may not derogate from the principle[54]. The closest that the Court comes to acknowledging this fundamental principle is paragraph 257 where it states that the right of self-determination "cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right". Two points are worth making about this formulation. The first, the Court is clearly making an attempt to avoid "yet another" reference to peremptory norms and instead refers to the concept of "inalienable" rights. Second, the Court avoids invoking issues of non-derogation and the language of Article 53 of the

[53] *Ibid.*, para. 38.

[54] See e.g. General Assembly Resolution 33/28 A of 7 December 1978, para. 4 ("*Declares* that the validity of agreements purporting to solve the problem of Palestine requires that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, and with the participation of the Palestine Liberation Organization"); General Assembly Resolution 34/65 B, para. 2 ("*Rejects* those provisions of the accords which ignore, infringe, violate or deny the inalienable rights of the Palestinian people, including the right of return, the right of self-determination and the right to national independence and sovereignty in Palestine").

Vienna Convention on the Law of Treaties, by stating that the right of self-determination "cannot be subject to conditions" imposed by the State of Israel.

34. Reference might also be made to paragraph 263 of the Opinion, for example, where the Court recalls arguments by Israel, Fiji and Zambia to the effect that Israel's presence on Palestinian territory is justified by the Oslo Accords. In the same paragraph, the Court responds as follows:

> "The Court observes that these Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs."

35. This view reflects a perfectly reasonable interpretation of the Oslo Accords. But, at the same time, it is obviously an incomplete response to a rather complex question. In my view, a proper judicial response would have required the Court to consider the legal implications of the argument raised by these States and therefore the relationship between the right of self-determination and the Oslo Accords. Such a response would have to be based on Article 53 of the Vienna Convention on the Law of Treaties. In other words, *even if* the Oslo Accords justified the current presence of Israel on the Occupied Palestinian Territory, the Accords would, if they are in breach of the peremptory norm of self-determination, be invalid. Having laid out this basic proposition, the Court could then state that at any rate, the Oslo Accords ought to be interpreted in such a way as to render them consistent with the right of self-determination[55], which leads to the interpretation of the Accords offered by the Court. But to engage in this legal reasoning, the Court would need to acknowledge (yet again) the peremptory character of the right of self-determination (and the other norms in question). Unfortunately, because of its residual hesitancy to acknowledge peremptory norms, the Court skips several steps and jumps to conclusions which, without more, are devoid of legal reasoning.

IV. APARTHEID

36. The Court was able to find a breach of Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination, i.e. the prohibition of segregation and apartheid. I interpret this finding to be an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid, which itself is a peremptory norm of international law. I can understand that there is a reluctance to describe the policies of Israel in the OPT as apartheid. I suspect the main reason for this hesitation is that, to date, only the policies of the pre-1994 South African government in South Africa and elsewhere in Southern Africa have been described as apartheid. But recall, the term apartheid was coined by that régime not as a pejorative term, but as a positive concept to explain the benevolence of its policies as separate development, and moreover, at a time when many other States still practised racial discrimination themselves in some form or another[56]. Once the term attained a negative meaning, and international condemnation of racism swelled, no other State would self-describe its policies as apartheid.

37. But if we compare the policies of the South African apartheid regime with the practices of Israel in the OPT it is impossible not to come to the conclusion that they are similar. On the basis of the Court's finding concerning the various policies and practices it is hard not to see that Israeli

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[55] See Conclusion 20 of the Conclusions on Peremptory Norms of General International Law (*Jus Cogens*).

[56] For a description of the struggle of anti-racism within the United Nations itself in the 1940s, see William A. Schabas, *The International Legal Order's Colour Line: Racism, Racial Discrimination and the Making of International Law* (Oxford University Press, 2023), p. 106 *et seq.*

policies, legislation and practices involve widespread discrimination against Palestinians in nearly all aspects of life much like the case in apartheid South Africa. There is for the most part an intentional effort to ensure separation of and discrimination between Israelis and Palestinians: separate roads, separate schools, separate facilities, and separate legal systems. Whether one speaks of the discriminatory detention practices, including detention without trial (not addressed in the Opinion but for which there is extensive information in the case file), residence permit system, restrictions of movement or demolition of property, deprivation of land, or the encircling of Palestinian communities into enclaves reminiscent of South African Bantustans from which I come, it is impossible to miss the similarities.

38. In the course of the proceedings, the Court heard many arguments about the definition of apartheid in customary international law since the Convention on the Elimination of All Forms of Racial Discrimination, to which Israel is a party, does not contain a definition. These proceedings may have provided the Court with an opportunity to provide a standard definition of apartheid under customary international law. That the Court did not do so should not detract from the cogency of its finding. Whether one relies on the definition in the Rome Statute or the definition in the Apartheid Convention, there seems to be a common core in all the definitions put forward by participants in the course of these proceedings, namely the existence of one or more racial groups, perpetration of one or more several inhuman acts against one or more of the racial groups in a systematic manner and the perpetration of those acts with the purpose of establishing and maintaining domination.

39. No one will seriously suggest that the first two of these elements are not present in the Occupied Palestinian Territory and so I do not intend to address these elements. Some may argue that the Israeli practices and policies do not rise to the level of apartheid because there is insufficient evidence that the third element is met, i.e. there is insufficient evidence that the enumerated inhuman acts were committed for the purposes of establishing and maintaining domination by one racial group. To this I would make only three brief points.

40. First, in interpreting the phrase, it is important to recall that the Apartheid Convention definition is prefaced by the statement "which shall include policies and practices of racial segregation and discrimination as practiced in southern Africa . . .". As explained above, the policies and practices of Israel in the Occupied Palestinian Territory are, in many respects, alike to those of apartheid South Africa. The second point is that it would be incredibly rigid to insist on direct evidence of an intention to dominate. As the International Criminal Tribunal for the former Yugoslavia observed in the context of genocide, intention and purpose can be "inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group"[57]. I find it difficult to see how anyone can look at the policies and practices that have been detailed before the Court and find that, when taken together, the systemic character of these segregationist acts, including the explicit, legislated policy that self-determination in Palestine is reserved for Jewish persons only[58], do not reveal the purpose of dominating the Palestinians. As a third and final point, it should be recalled that it is not necessary for the purpose of establishing "the purpose of domination" for domination to be the sole, or even dominant reason, for the discriminatory measures. Apartheid South Africa, it will be recalled, promoted its policy not solely for the purpose of domination, but to ensure what it termed "equal but separate development"[59].

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[57] International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Jelisić,* Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, para. 47.

[58] Opinion, paras. 192-222.

[59] This policy was implemented by the National Party, following its election in 1948, through a series of racial legislation and measures.

41. In the context of all of this, in my view, the Court was correct to find that the policies and practices of Israel in the Occupied Palestinian Territory are in breach of the prohibition of racial segregation and apartheid in Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination, a conclusion that implicitly recognizes the apartheid character of Israeli practices and policies in the OPT.

V. ISRAEL'S SECURITY CONCERNS

42. The main issue raised in the defence of Israeli policies, not only in the context of the current proceedings, but also in the context of other proceedings before this Court, namely the *Wall* Advisory Opinion, *South Africa* v. *Israel*, *Nicaragua* v. *Israel*, is the amorphous "security concerns of Israel". Stripped bare to its essence, the argument seems to be that while the policies and practices of Israel impact negatively on the rights of the Palestinians, and prevent the full enjoyment of their rights under international law, because Israel finds itself under threat from Palestinians (and possibly others in the region), it should be permitted to continue with its policies until the threat to its security no longer exists (or at least it should be permitted to continue to deny Palestinians the enjoyment of their right of self-determination until this threat no longer exists). In these proceedings, the message was most clearly articulated by Fiji and Zambia. It has also been articulated by separate and dissenting opinions in *South Africa* v. *Israel*[60].

43. In its Opinion, the Court refers to the issue only briefly and does not offer any comprehensive response. For example, at paragraph 47 the Court notes that Israel's written statement, while mainly focused on jurisdictional matters and questions of judicial propriety, also referred to Israel's security concerns. The Court, understandably, only offers fleeting responses. For instance, it states, at paragraph 254 that Israel's security concerns cannot "override the principle of the prohibition of the acquisition of territory by force". However, given that the "security concerns" argument can form an important undercurrent of the defence of the relevant policies and practices, and "explanation" of the denial of the right of self-determination of the Palestinian people, I feel it important to address the question more explicitly.

44. I accept that security concerns are very important, and that Israel faces threats to its security, from amongst others Hamas, as the events of 7 October 2023 illustrate. Yet, as a first general point, when addressing security concerns, it should be recalled that all States, and not just Israel, have security interests. This includes Palestine. Often, when the "security concerns" claim is made, it is as if only Israel has security concerns or that somehow, Israel's security concerns override those of Palestine's. The second general point to make is that security interests *as such*, no matter how serious or legitimate, cannot override rules of international law, a point made by the Court. Indeed, save where called for by a specific rule, security concerns cannot even serve as a balance against rules of international law and certainly not against peremptory norms. Thus, the notion that the Palestinian right of self-determination must be balanced with, or is even subject to, Israeli security concerns is incongruous as a matter of international law. In fact, such arguments are not only incongruous, they also are dangerous. Allow me to illustrate by means of a "hypothetical" scenario: Imagine that one State believes, legitimately perhaps, that another State joining a defence alliance is a threat to its security interests. Can such a State decide to use military force to prevent the other State from joining the defence alliance? If so, we are moving dangerously into the Athenian paradigm where "the strong do what they can and the weak suffer what they must".

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[60] See for example, generally, dissenting opinion of Judge *ad hoc* Barak and dissenting opinion of Vice-President Sebutinde (especially paras. 8 and 25) in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 24 May 2024*.

45. I should not be misunderstood. International law is not agnostic to security concerns. International law finds different ways to protect security interests. Treaty rules, for example, can permit States to depart from protected rights in the interest of State security. More pertinent to the issues in the current proceedings, security interests are protected through rules of international law such as the duty to co-operate, and the law of the Charter on the prohibition on the use of force (including self-defence and the rules on the collective security framework). But the notion of security interests does not constitute an independent legal rule, or exception, permitting a State to depart from fundamental rules of the system.

46. In the context of the current proceedings, for example, the Court has found violations of a number of rules of international human rights law and international humanitarian law. It is possible, of course, to identify a particular rule within the relevant treaty permitting, for security purposes, the impugned conduct. A typical example is Article 4 of the International Covenant on Civil and Political Rights, which permits derogation from obligation under the Covenant for purposes "strictly required by the exigencies" of a situation "which threatens the life of a nation". I leave aside whether the policies of Israel meet the requirement of Article 4 or whether its declaration of a derogation can be valid after such a long period of time. For current purposes, it is only important to point out that the security interest as such would not constitute an independent *legal* basis for departing from a rule of law in the Covenant. The legal basis would, in fact, be Article 4 of the Convention. The same point can be made in respect of Article 12 (3) of the Covenant which provides for restrictions to the right of liberty of movement on the basis of reasons related to the protection of national security. Again, national security does not provide an autonomous legal basis for restricting the right. The legal basis is the treaty provision. Similarly, Article 49 of the Fourth Geneva Convention permits an Occupying Power to effect transfers of population "if the security of the population or imperative military reasons so demand". Any transfer of the population would be consistent with international law if "imperative military reasons" so demand not because of an autonomous argument based on security concerns but because the treaty rule provides for an exception.

47. At places, the Opinion might be read as suggesting that "security concerns" are in themselves a basis for departing from the rules of international law. For example, at paragraph 205, the Court considers whether Israeli restriction of freedom of movement of persons could be justified by reference to security concerns and concludes in the negative because the security concerns are related to illegal settlements. Nonetheless, it should be recalled that even there, Article 12 of the Covenant provides for the possibility of restriction of the right "to protect national security [and] public order (ordre public)". The consideration of security concerns must thus be seen in that context.

48. Two particular legal bases addressing Israel's security concerns may be referred to. These are self-defence and the United Nations Security Council framework for addressing the Middle East conflict. In relation to the situation in the Occupied Palestinian Territory, the self-defence argument is multifaceted and raises different issues depending on the context in which it is raised. It may be raised in the context of Israeli occupation as such, i.e. the occupation itself is an act of self-defence (or was established pursuant to an act of self-defence), or it may be raised in the context of particular practice, policies or acts, such as the construction of the wall or various military operations launched against the Palestinian territory. In whatever context it is raised, it is important to emphasize that self-defence is subject to strict requirements, including that of an armed attack from a State, proportionality and necessity. Moreover, given the overall situation of occupation, the self-defence argument (in the context of particular acts or practices, such as military operations) will run up against the Court's finding in the *Wall* Advisory Opinion to the effect that self-defence does not apply (or "has no relevance") because Israel "exercises control in the Occupied Palestinian Territory and that . . . the threat which it regards as justifying [forcible measures] originates within, and not

outside, that territory"[61]. For present purposes, I can say only that any one of these provides insurmountable hurdles for anyone seeking to justify Israeli practices and policies as acts of self-defence.

49. It is the second argument i.e. the Security Council framework, that I wish to focus on. The argument, as I understand it, is that the framework established by the Security Council requires that the right of self-determination of the Palestinians cannot be addressed without also addressing the security concerns of Israel. These two issues, it is argued, should be seen as inextricably linked and, as such, the withdrawal of Israel from the Occupied Palestinian Territory must occur concurrently or simultaneously with the attainment of Israel's security. The basis for this contention is to be found in the provisions of Security Council 242 (and subsequent resolutions which affirm resolution 242). I leave aside the question whether these resolutions are law — or establish binding obligations under Article 25 of the Charter of the United Nations — and whether, assuming they do establish legal obligations under Article 25 of the Charter, they can take priority over the right of self-determination which has peremptory character. I also leave aside the fact that those that focus on simultaneous achievement of self-determination and security concerns as the pathway to the two-State solution seem to have no qualms with the fact that Israel already enjoys *fully* its right of self-determination without insisting on the simultaneous or concurrent enjoyment of the same right by Palestinians or the simultaneous or concurrent achievement of the security of Palestinians.

50. United Nations Security Council Resolution 242, the content of which was endorsed in Resolution 338, affirms that the solution to the Middle East situation requires the "application of both the following principles", and then refers to (i) the "[w]ithdrawal of Israel armed forces" from the occupied territory and (ii) the "[t]ermination 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". Presumably it is the word "both" that forms the basis of the belief that one element ("occupation") cannot be addressed outside the other ("security").

51. The rules of interpretation of resolutions of political organs of international organizations are, in general, with the necessary adjustments, similar to the rules for interpreting treaties[62]. The golden rule being the ordinary meaning to be given to the words of the resolutions in their context and in light of the object and purpose of the resolution. First, it bears mentioning that there is nothing in the language of the resolution that suggests that at issue is the security *of Israel*. The resolution speaks of "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". Let's not forget, Palestine has none of these! It's political independence is severely compromised; the occupation by Israel, which has now morphed into annexation, ensures that it does not have recognized borders; it is decidedly not free from threats, so that its security concerns remain unachieved.

52. Second, and more importantly, there is nothing in the ordinary meaning of the words of Resolution 242 that suggests that the two elements are interdependent, at least not in the sense that

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[61] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 194, para. 139.

[62] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 442, para. 94. See Sâ Benjamin Traoré, *L'interprétation des résolutions du Conseil de Sécurité des Nations Unies — Contribution à la théorie de l'interprétation dans la société internationale* (Helbing 2020). See also, Alexander Orakhelashvili "Unilateral Interpretation of Security Council Resolutions: UK Practice", *Goettingen Journal of International Law*, Vol. 2, No. 3 (2010), p. 825.

they must be simultaneously or concurrently achieved. As observed above, the insistence on interdependence in the sense that one element cannot be finalized before the other, is presumably based on the word "both" in Resolution 242. Yet, the fact that both elements are essential to "the establishment of a just and lasting peace in the Middle East" does not preclude that one is acted upon before the other, or even as I see it, that one is finalized as a precursor to the finalization of the other.

53. Finally, this reading of the resolution, i.e. that the two elements are not forever and inextricably tied at the hips, is clear from the fact that the Security Council itself has on occasion addressed the question of occupation without, at the same time addressing the second element. In Resolution 476, for example, the Council reaffirmed "the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem" without referring at all, not even in the preamble, to the second element.

54. In conclusion, security concerns apply to all States. All States have a legitimate interest in peaceful existence without threats to their security. How States promote and protect their security, however, is subject to international law and security interests cannot override legal rules, and certainly not the most fundamental rules having the character of *jus cogens*.

VI. CONSEQUENCES FOR THE UNITED NATIONS

55. I am generally comfortable with the consequences identified by the Court. I would have been particularly pleased if the Court had spelt out other consequences flowing from the peremptory status of the norms in question, such as the implications for a potential final status agreement, i.e. that any such agreement must be consistent with the right of self-determination, or had the Court engaged with the (rather difficult) question of whether the peremptory character of the norms in question has any impact whatsoever on the question of reparations — I believe it does, but I understand that this would be going against the grain, something a court of law should avoid doing unless it has a watertight basis.

56. In addition to consequences for the United Nations and for third States, the Court also concludes that the United Nations "should consider . . . further action required to bring to an end" the unlawful presence of Israel in the OPT as rapidly as possible. This is an important statement, but what does it mean? Is it a legal consequence? Is it a duty? Why use "should" as opposed to "under an obligation" as is the case for the other consequences? Does this suggest that this recital is, in fact, of no legal consequence?

57. No! I believe this recital to be a legal consequence of the breaches in question and that the United Nations organs have a duty to "consider" what further action is required, particularly in the event that Israel does not comply with the legal consequences identified in the Opinion. The requirement for the United Nations to consider further measures follows from the Court's emphasis on the "necessity for the United Nations . . . to redouble its efforts" in the context of the Middle East peace process[63]. Indeed, the Security Council itself has committed to, "in the event of non-compliance by Israel [with its own determinations] . . . to examine practical ways and means in accordance with relevant provisions of the Charter of the United Nations to secure the full" compliance by Israel with international law[64]. The Court, of course, has to be careful not to impose on the political organs of the United Nations, which would amount to usurpation of their

[63] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 200, para. 161.

[64] Security Council Resolution 476 (1980) of 30 June 1980, para. 6.

responsibilities. But stating that the United Nations is under a duty to consider further action is not inconsistent with the respect for the discretion that the political organs have in addressing matters they are seized with[65]. However, once a judicial determination has been made by the Court that fundamental rules having peremptory status have been breached, the discretion is no longer *whether* to take action but only *what* action to take. Thus, while the Court states that the United Nations "should" consider what action, I understand this "should" to mean, is obliged to. I understand that the Court uses "should" only to emphasize that it is not for it to dictate to the political organs of the United Nations what action they should take.

58. Political organs have a wide margin of discretion in their consideration of what action to take, so long as such action is consistent with international law. The Charter provides a number of options, including enforcement action, to ensure compliance. But there are other ways. For example, the political organs could, as a way of solidifying the basis on which Palestine and its people can enjoy self-determination, act positively on Palestine's request for membership in the United Nations. To this end, it is to be noted that earlier this year, the General Assembly has taken the steps to accord the State of Palestine rights akin to those of a Member State[66]. Similarly, the political organs could consider curtailment of Israel's participation in the activities of the United Nations, or similar action, as was done in respect of South Africa in 1974[67].

59. Political organs of the United Nations also have an important role to play in ensuring Israel's compliance with its reparation obligation identified in the Opinion[68]. As the Court observed, Israel "has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons, and populations" that have suffered any form of material damage as a result of Israel's wrongful acts under the occupation (para. 271). These rules were recently reaffirmed by the General Assembly in its Resolution A/RES/ES-11/5 dated 15 November 2022, titled "Furtherance of remedy and reparation for aggression against Ukraine".

60. In view of the nature and scale of the violations of international law identified by the Court, and the potentially large pool of claimants resulting therefrom, the United Nations might want to consider the establishment of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of Israel identified in the Opinion. The revitalization and expansion of the mandate of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD), which was established by the General Assembly in 2006 following the issuance of the *Wall* Advisory Opinion, is relevant in this respect[69].

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[65] For an expression of this discretion, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* p. 139, para. 179, and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II),* p. 421, para. 44.

[66] A/ES-10/L.30/Rev.1.

[67] On November 12, 1974, the President of the General Assembly ruled that the South African delegation to the General Assembly could not continue to participate in the work of the Twenty-Ninth Session of the Assembly because the delegation's credentials had not been accepted by the Assembly. The text of the ruling is given in *Resolutions of Legal Interest Adopted by the General Assembly at its Sixth Special Session and Twenty-Ninth Regular Session*; the ruling is referred to, but not reproduced, in *Resolutions Adopted by the General Assembly at Its Twenty-Ninth Session*, 29 UN GAOR, Supp. (No. 31) 10-11, U.N. Doc. A/9631 (1974). See also, G.A. Res. 3206, 29 U.N. GAOR, Supp. (No. 31) 2, UN Doc. A/9631 (1974); 29 U.N. GAOR, Annexes (Agenda Item 3) 2, UN Doc. A/9779 (1974).

[68] Opinion, paras. 269, 270 and 285 (6).

[69] UNRoD was established in accordance with General Assembly resolution ES-10/17 of 15 December 2006, and serves as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the Wall by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem.

VII. CONCLUSION

61. In this Opinion, for the first time, the Court has held that the presence of Israel on the Occupied Palestinian Territory is unlawful. It has come to this conclusion because policies and practices on the Occupied Palestinian Territory have revealed the true purpose of Israel as being the forceful acquisition of the Palestinian territory in violation of fundamental rules of international law, some of which are peremptory norms of international law. In particular the Court found breaches of the right of self-determination, the peremptory character of which the Court confirmed in the Opinion, the prohibition of the acquisition of territory by force, the prohibition of segregation and racial discrimination and basic rules of international humanitarian law.

62. These norms, even those not identified as such by the Court, are generally regarded as having peremptory status. The Court's conclusion that these norms have been egregiously and systematically violated by Israel in the Occupied Palestinian Territory should be applauded as an important contribution to the development of international law and the reinforcement of some of its most fundamental tenets: force cannot be used to acquire territory, the right to self-determination of peoples is sacrosanct, the obligations of an occupying power towards protected persons continue as long as the occupation persists, the practice of racial segregation and apartheid is not exclusive to Southern Africa, to name but a few tenets.

63. Yet, as important as these fundamental principles of international law are, ultimately the main purpose of an advisory opinion should not be just the development of rules of international law and the contribution to doctrine. The main function of any advisory opinion should be to assist the organization requesting it to address whatever problem it may be faced with. In this context, the main function of the current Opinion is to assist the General Assembly, and indeed the United Nations as a whole, in resolving the decades-long subjugation of the Palestinian people. The 285 paragraphs of this Advisory Opinion will be meaningless if the United Nations does not act upon the advice provided by the Court to promote the resolution of this conflict which is a large stain on the claim that there exists an international community, for how can any community permit such indignity and suffering as that imposed on the Palestinian people.

(Signed) Dire TLADI.
