DECLARATION OF PRESIDENT SALAM

[Original English text]

Agreement with the Court's reasoning and conclusions in the present Advisory Opinion — Israel aware since 1967 of the unlawful nature of its settlement policy — Israeli discriminatory policies and practices tantamount to apartheid — Question of the ab initio *unlawfulness of the occupation — Effects of resolution 181 (II) and its legal consequences for Israel — Modalities of reparation arising from Israel's violations — Need for concrete action by the United Nations — Role of the Court and the achievement of peace through law.*

1. I fully agree with both the reasoning and conclusions of the Court in this Advisory Opinion, which is why I voted in favour of all the points in the operative part. In this declaration I would like to set out a few additional reasons that are not stated in the Advisory Opinion but which, in my view, help to justify the conclusions reached by the Court, in particular the finding that Israel's continued presence in the Occupied Palestinian Territory is unlawful and that Israel is under an obligation to bring to an end as rapidly as possible its unlawful presence and cease immediately all new settlement activities and withdraw all settlers.

2. I shall therefore present my additional views on the following points: Israel's policies and practices in the Occupied Palestinian Territory, the unlawfulness of the occupation, the effects of United Nations General Assembly resolution 181 (II) and the modalities for the reparations owed by Israel for its violations of international law in the Occupied Palestinian Territory.

1. Additional Observations on Certain Israeli Policies and Practices

3. The Court devotes a large part of its Opinion to the analysis of Israel's policies and practices in the Occupied Palestinian Territory (paras. 103-243). It is a thorough analysis based on highly credible sources, the conclusions of which are difficult to contest. I fully agree with these conclusions. However, I would like to focus specifically on two of these policies which, in my view, demonstrate the systematic and deliberate nature of Israel's conduct in breach of international law in the Occupied Palestinian Territory, namely settlement and apartheid.

4. Regarding the first point, the Court recalls that Israel has implemented a policy of settlement and annexation throughout its occupation of Palestinian territory. The Advisory Opinion highlights the following components of this policy: the transfer of Israeli civilians into the Occupied Palestinian Territory, the forced displacement of the Palestinian population, the confiscation of land, the exploitation of natural resources and the extension of Israeli law to this territory. Each of these already constitutes in itself a serious violation of the relevant norms of international humanitarian law and international human rights law, with which Israel, as an occupying Power, is bound to comply.

5. What is important to note first is that Israel has been repeatedly reminded of the unlawful nature of these policies and of its obligation to bring them to an immediate end. The Advisory Opinion refers to numerous resolutions by various United Nations bodies and institutions, including the Security Council, the General Assembly, and the Human Rights Council, and to reports of the Office of the High Commissioner for Human Rights and the Secretary-General, all of which have repeatedly deplored both the policy of establishing settlements in the Occupied Palestinian Territory and the accompanying measures. These have contributed to depriving the Palestinians of the occupied territories of the enjoyment of fundamental rights inherent to human dignity, undermined the integrity of the Palestinian territory and, above all, prevented the Palestinian people from exercising its right to self-determination.

6. Unfortunately, Israel has repeatedly refused to heed these calls to respect international law and comply with its international obligations, thus ignoring the Court's 2004 Opinion, which states that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 184, para. 120).

7. Similarly, Israel must have been aware of the conclusions of the "guardian" of the Geneva Conventions, the International Committee of the Red Cross (ICRC), whose President declared the following:

> "The ICRC's publicly stated position is that this policy amounts to a violation of IHL, in particular the provision of the Fourth Geneva Convention prohibiting the transfer of part of the population of the Occupying Power — in this case Israeli citizens — to the occupied territory . . . The Israeli government's decisive and systematic support over the years to the establishment of settlements, including by taking away land, has effectively achieved just that: a profound alteration of the economic and social landscape of the West Bank, which hinders its development as a viable nation and undermines future prospects for reconciliation." (P. Maurer, "Challenges to international humanitarian

law: Israel's occupation policy", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, p. 1507.)

8. However, what is most important to note is that the Israeli authorities were warned from the very first months of the occupation that the establishment of settlements in the Occupied Palestinian Territory constituted a violation of international law. Indeed, the then legal adviser to Israel's Ministry of Foreign Affairs, Theodor Meron, had made it clear in a memorandum to the Israeli Prime Minister's office, as early as September 1967, that "the establishment of civilian settlements in the occupied West Bank and other conquered territories violates the Fourth Geneva Convention related to the protection of victims of war and, specifically, its prohibition on settlements (Art. 49 (6))".

9. Meron explained that:

> "This prohibition, I wrote, is categorical and 'not conditioned on the motives or purposes of the transfer, and is aimed at preventing colonialization of conquered territory by citizens of the conquering state.' Any steps to place citizens in occupied land could only be done 'by military bodies and not civilian ones [on military] bases' clearly temporary in nature. With reference to the position of the government of Israel that the West Bank was disputed territory, and therefore not 'occupied territory,' I opined that this position had not been accepted by the international community, which regards the territory concerned as normal occupied territory. Israeli settlements in the area of 'Etzion Bloc' would be viewed as evidence of an intent to annex that area, I warned." (T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", *American Journal of International Law (AJIL)*, Vol. 111, 2017, No. 2, p. 358.)

10. Meron had also warned the Israeli authorities of the illegality of deportations and the demolition of Palestinian homes in the occupied territories (Memorandum from Theodor Meron, Legal Adviser to Israel's Ministry of Foreign Affairs, to the Director General of the Prime Minister's Office on "Geneva Convention: Blasting Homes and Deportation", 12 March 1968, cited in T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", *AJIL*, Vol. 111, 2017, No. 2, pp. 358-359).

11. It is therefore in full knowledge of the illegality of its actions that, instead of putting an end to its settlement of the occupied territories, Israel has been intensifying its efforts since 1967. For example, it is to be noted that

> "[d]uring the past 10 years, the settlement population in the occupied West Bank, including East Jerusalem, has grown from 520,000 in 2012 to just under 700,000. The population lives in 279 Israeli settlements spread across the West Bank, including 14 settlements in East Jerusalem, with a total population of more than 229,000 persons." ("Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/52/76 (15 March 2023), para. 5.)

12. The Opinion rightly points out in paragraph 115 that the establishment of these settlements is a clear violation of Article 49 (6) of the Fourth Geneva Convention, which prohibits the deportation of the population of the occupied territory and the transfer by the occupying Power of its population to the occupied territory. These are therefore serious violations that the States parties to the Geneva Conventions are obliged to punish; they are also under an obligation to track down those responsible for committing or ordering the commission of such offences. The ICRC has pointed out that this obligation is also a customary one, extending to all States, which must not only investigate such grave breaches allegedly committed by their nationals or their armed forces, or on their territory, they also have the right to confer on their national courts universal jurisdiction for the punishment of such grave breaches for which no statute of limitations may apply (ICRC, "Customary International Humanitarian Law, Volume 1: Rules", Rules 156 to 158, 160 and 161).

13. In this respect, it is also undoubtedly worth recalling that the "[d]eportation . . . of population" is an act constituting a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court (hereinafter the "Rome Statute"). Similarly, the direct or indirect transfer by an occupying Power of part of its civilian population into the territory that it occupies constitutes a war crime under Article 8 of the Rome Statute. It should also be noted that, according to Article 8*bis* (2) of the Rome Statute, "any annexation by the use of force of the territory of another State or part thereof" constitutes a crime of aggression "regardless of a declaration of war". In accordance with their obligations under the Rome Statute, the States parties should draw all the legal conclusions from the Court's findings in this Advisory Opinion to prevent and punish the perpetrators of these acts.

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14. The second policy which I would like to address concerns Israel's discriminatory legislation and measures in the Occupied Palestinian Territory (Advisory Opinion, paras. 180-229). On this point, the Court concludes that "Israel's legislation and measures impose and serve to main-

tain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities", and therefore "constitute a breach of Article 3 of CERD [Convention on the Elimination of All Forms of Racial Discrimination]" (*ibid*., para. 229).

15. Article 3 of CERD reads as follows: "States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." The Court's conclusion on this point is especially important given the reluctance of some internationalists to refer to the particularly heinous crime of apartheid outside the context of South Africa.

16. While it must be recognized that the definition of apartheid in Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter the "Apartheid Convention") is marked by the experience in South Africa, which is expressly mentioned, this cannot mean that for any policy to be characterized as constituting apartheid it must fully reproduce the policies and measures implemented in South Africa at that time. Such an approach would effectively deprive the Apartheid Convention of any effect today, since it is doubtful that any State in today's world would openly claim to pursue a policy of racial segregation as practised in South Africa at the time the convention was adopted. In order to prevent and punish what constitutes a crime under international law, whose prohibition is an undisputed *jus cogens* norm, a non-restrictive reading of this definition is therefore necessary.

17. As noted above, Article 3 of CERD, to which Israel is a party, establishes an obligation to prevent, prohibit and eradicate any act of apartheid. Furthermore, although Israel is not a party to either the Apartheid Convention or the Rome Statute, there can be no doubt that the prohibition of apartheid is a customary norm, that is recognized as a peremptory norm from which no derogation is possible and whose violation constitutes a crime against humanity. It is to be noted that, following in the steps of the United Nations General Assembly (see resolution 2202 (XXI) of 16 December 1966), the Security Council described apartheid as

> "a crime against the conscience and dignity of mankind [which] is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security" (resolution 473 of 13 June 1980, para. 3).

18. In its Advisory Opinion on *Namibia*, the Court identified the effects of measures adopted by South Africa in Namibia as characteristic of a policy of apartheid. According to this jurisprudence, measures could constitute apartheid if they

> "establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 57, para. 130).

19. Moreover, the Court unequivocally stated in that Opinion that a State may be guilty of apartheid outside its national territory and against persons who are not its nationals (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 57, para. 130).

20. It was clearly not appropriate for the Court to seek to determine the constitutive elements of apartheid in customary international law in this Advisory Opinion. However, by drawing on the elements highlighted by the Court in its 1971 Advisory Opinion and the provisions of Article II of the Apartheid Convention and Article 7 (2) *(h)* of the Rome Statute, it is possible to identify the elements that constitute the essence of this crime and therefore to assess whether Israel has implemented such a policy in the Occupied Palestinian Territory. Accordingly, apartheid would be established based on the following elements: the existence of two or more distinct racial groups; the commission of inhumane acts against one or more groups; an institutionalized régime of systematic oppression and domination by one racial group over one or more other racial groups and an intention to maintain this régime.

21. Regarding the first element, it should be noted that in the context of international human rights law, the term "race" or "racial group" must be understood in its broadest sense. Thus, by stating that the term "racial discrimination" refers to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin", Article 1 of CERD clearly indicates that "race" is not the only criterion of racial discrimination. Furthermore, in its General Recommendation VIII on the interpretation and application of Article 1, paragraphs 1 and 4, of CERD, the Committee on the Elimination of Racial Discrimination considers that the identification of individuals belonging to a particular racial or ethnic group or groups "shall, if no justification exists to the contrary, be based upon [the] self-identification by the individual concerned" (Report of the Committee on the Elimination of Racial Discrimination, Forty-fifth Session of the General Assembly, A/45/18, 28 September 1990, p. 79). As international criminal tribunals have pointed out, when considering the definition of "racial group" in the context of other crimes under international law, in the absence of a scientific definition or an objective method to determine

whether a person belongs to a supposed "race", it is necessary to refer to the perception of the groups concerned of their distinct identity. Thus, in the *Rutaganda* case, Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR),

> "notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group" (ICTR, *The Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 56).

In the same vein, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that "a national, ethnical, racial or religious group is identified 'by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics'" (ICTY, Trial Chamber I, Section A, *The Prosecutor* v. *Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, 17 January 2005, para. 667).

22. Palestinians and Israeli Jews identify themselves as two distinct groups based on "subjective" elements relating to "descent, or national or ethnic origin", including those relating to religion and culture, and should therefore be considered as two "racial groups" within the meaning of the first constitutive element of apartheid. In this respect, it should also be pointed out that Israel's 2018 Basic Law states that "[t]he Land of Israel is the historical homeland of the Jewish People" and that the State will "strive to secure the welfare of members of the Jewish people", thus drawing a clear distinction between Jewish and non-Jewish people. ("Basic-Law: Israel — The Nation State of the Jewish People", 5778-2018, Article 1 *(a)*, and Article 6 *(a)*, see the full text at https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf). Similarly, it should be noted that the Court recently stated that "[t]he Palestinians appear to constitute a distinct 'national, ethnical, racial or religious group'" (*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 26 January 2024, I.C.J. Reports 2024 (I)*, p. 20, para. 45).

23. With regard to the second element, the commission of inhumane acts, the Advisory Opinion sets out numerous violations that undoubtedly come under this heading, some of which are expressly listed in the Apartheid Convention and the Rome Statute. They include the transfer of members of the Israeli population into the occupied territory, together with the deportation of part of the Palestinian population (Advisory Opinion, para. 118); the

punitive demolition of Palestinian property (*ibid*., paras. 208-212); forced evictions, numerous house demolitions for lack of building permits, and restrictions on residence which leave members of the Palestinian population with no choice but to leave their place of residence (*ibid*., para. 147); the confiscation of land (*ibid*., paras. 118-123), thus depriving the Palestinians in the occupied territory of their means of subsistence; the exploitation of natural resources in the occupied territory, "including water, minerals and other natural resources, for the benefit of [Israel's] own population, to the disadvantage or even exclusion of the local Palestinian population" (*ibid*., para. 126); numerous acts of violence against the Palestinian population, both by settlers in the Occupied Palestinian Territory and by the Israeli security forces (*ibid*., paras. 148-154); unjustified and abusive restrictions on the freedom of movement of the Palestinian population in the occupied territory (*ibid*., paras. 200-206).

24. It is evident from the magnitude and consistency of these violations that they are not isolated acts but are part of an institutionalized régime of systematic oppression by Israelis, over Palestinians in the occupied territory. As the Opinion demonstrates, settlers and Palestinians live in the occupied territory under a régime established by Israel which grants different rights and benefits to each of the two groups. Numerous reports from United Nations bodies have already established and decried this situation. For example, the Independent International Fact-Finding Mission set up by the General Assembly concluded that

> "[t]he settlements are established for the exclusive benefit of Israeli Jews, and are being maintained and developed through a system of total segregation between the settlers and the rest of the population living in the Occupied Palestinian Territory. This system of segregation is supported and facilitated by a strict military and law enforcement control to the detriment of the rights of the Palestinian population" "Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem", 7 February 2013, UN doc. A/HRC/22/63, para. 103).

25. The systematic nature of the occupying Power's oppression of the Palestinians is also evidenced by the discriminatory measures relating to housing, and land and property rights. As noted by the United Nations High Commissioner for Human Rights,

> "[i]t is clear that Israeli planning and zoning regimes in Area C and East Jerusalem are discriminatory, rendering it almost impossible for

> Palestinians to obtain building permits. Data from the Israeli Civil Administration made public in December 2021 revealed that fewer than 1% of Palestinian building permits (24 out of 2,550) in Area C had been approved between 2016 and 2020. In contrast, 8,356 permits for Israeli settlement housing units were issued" ("Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/52/76 (15 March 2023), para. 30).

26. In addition, there are restrictions on the freedom of movement which, according to the International Fact-Finding Mission, quoted by the Court,

> "come in many forms, including settler-only roads, a regime of checkpoints and crossings (closure obstacles), impediments created by the wall and its gate and permit regime, as well as administrative restrictions" (Advisory Opinion, para. 200).

27. The Advisory Opinion also notes that Israel put in place two different legal systems in the Occupied Palestinian Territory, which are applied separately to each of the two groups. Thus, while the Israeli military authorities apply "to settlers the law applicable to civilians in Israel, as well as to non-Israeli Jews present in the West Bank" and that "[a]s a result, settlers in the West Bank enjoy the rights and privileges of Israeli citizenship, as well as the protections of Israeli domestic laws and social benefits", Palestinians in the West Bank are subject to Israel's military law and military courts (Advisory Opinion, para. 136).

28. Finally, Israel's pursuit of its policy of settlement expansion and annexation, as well as repeated declarations by senior Israeli officials of their intention to remain in the Occupied Palestinian Territory, demonstrates that Israel fully intends to continue the established régime of domination of the Palestinians on which this policy is based. In December 2022, Israeli Prime Minister Netanyahu wrote on *X* (formerly *Twitter*) that

> "[t]he Jewish people have an exclusive and indisputable right to all areas of the Land of Israel. The government will promote and expand settlement in all areas of the Land of Israel — in the Galilee, the Negev, the Golan Heights, Judea and Samaria" (Benjamin Netanyahu, *Twitter*, 28 December 2022: https://x.com/netanyahu/status/1608039943817007105).

More recently, in September 2023, Mr Netanyahu showed the United Nations General Assembly a map representing the "new Middle East" which incorporates all the Occupied Palestinian Territory into the State of

Israel (https://www.gov.il/en/pages/epmungaspeech, https://www.youtube.com/watch?v=V0M7eoAjBdE, at minute 9:18).

29. Israel's commission of inhumane acts against the Palestinians as part of an institutionalized régime of systematic oppression and domination, and its intention to maintain that régime, are undeniably the expression of a policy that is tantamount to apartheid.

30. This is also the conclusion reached by United Nations Special Rapporteurs on the Occupied Palestinian Territory since 2007 (see, for example, A/HRC/53/59 of 28 August 2023, A/HRC/49/87 of 21 March 2022, A/HRC/40/73 of 30 May 2019, A/HRC/25/67 of 13 January 2014, A/HRC/16/72 of 10 January 2011, A/HRC/4/17 of 29 January 2007), mainstream organizations such as Amnesty International (see *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity*, 2022) and Human Rights Watch (see *A Threshold Crossed. Israel Authorities and the Crimes of Apartheid and Persecution*, 2021), and renowned Israeli human rights organizations (see in particular B'Tselem, "A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid", p. 3 (https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_fr.pdf) and Yesh Din (Volunteers for Human Rights), "The Israeli Occupation of the West Bank and the Crime of Apartheid, Legal Opinion", June 2020, p. 57).

31. Numerous Israeli public figures who were privileged witnesses to events in the Occupied Palestinian Territory have also concluded that these acts are tantamount to a situation of apartheid. For example, Michael Ben-Yair, former Attorney General of Israel, said in 2022 that Israel had become "an apartheid regime . . . a one state reality, with two different peoples living with unequal rights". Ami Ayalon, former director of the Shin Bet (the Israeli intelligence service), wrote in his memoirs: "We've already created an apartheid situation in Judea and Samaria, where we control the Palestinians by force, denying them self-determination". Finally, it is significant that two former Israeli ambassadors to South Africa, Ilan Baruch and Alon Liel, declared in 2021 that the systematic discrimination of Israel, "on the basis of nationality and ethnicity", constituted apartheid (Michael Ben-Yair, "Former AG of Israel: With great sadness I conclude that my country is now an apartheid regime", *thejournal.ie*, 10 February 2022; Ami Ayalon, *Friendly Fire: How Israel Became Its Own Worst Enemy and the Hope for Its Future*, Steerforth Press, 2021, p. 260; Ilan Baruch and Alon Liel, "It's apartheid, say Israeli ambassadors to South Africa", *GroundUp*, 8 June 2021).

32. Even more tellingly, many of those who lived under apartheid in South Africa state that, based on their experience, the discriminatory and segregationist policy implemented by Israel in the Occupied Palestinian Territory is similar to that of South Africa under apartheid. According to

South African Archbishop Desmond Tutu, who won the Nobel Peace Prize in 1984 for his fight against apartheid,

> "[m]any black South Africans have travelled to the occupied West Bank and have been appalled by Israeli roads built for Jewish settlers that West Bank Palestinians are denied access to, and by Jewish-only colonies built on Palestinian land in violation of international law. Black South Africans and others around the world have seen the 2010 Human Rights Watch report which 'describes the two-tier system of laws, rules, and services that Israel operates for the two populations in areas in the West Bank under its exclusive control, which provide preferential services, development and benefits for Jewish settlers while imposing harsh conditions on Palestinians.' This, in my book, is apartheid. It is untenable." (Desmond Tutu, "Justice requires action to stop subjugation of Palestinians", *Tampa Bay Times* (30 April 2021), https://www.tampabay.com/opinion/columns/justice-requires-action-to-stop-subjugation-of-palestinians/1227722. See also John Dugard, *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine*, Jacana Media, 2018, pp. 171-268.)

2. Illegality of the Israeli Occupation and Its Legal Consequences

33. The Court recalls in its reasoning that

> "the rules and principles of general international law and of the Charter of the United Nations on the use of force in foreign territory (*jus ad bellum*) have to be distinguished from the rules and principles that apply to the conduct of the occupying Power under international humanitarian law (*jus in bello*) and international human rights law" (Advisory Opinion, para. 251).

It explains that

> "[t]he former rules determine the legality of the continued presence of the occupying Power in the occupied territory; while the latter continue to apply to the occupying Power, regardless of the legality or illegality of its presence. It is [therefore] the former category of rules and principles regarding the use of force, together with the right of peoples to self-determination, that the Court considers to be applicable"

in its response to the question regarding the legality of the occupation (*ibid.*).

34. I share both the Court's reasoning and its conclusion that

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

35. The question posed by the General Assembly related to Israel's "continued presence" and not to the circumstances in which its occupation of Palestinian territory occurred. Therefore, it was not for the Court to pronounce on the latter aspect, that is on the legality *ab initio* of the occupation. It is worth recalling, however, that the General Assembly has several times had occasion to affirm the illegality *ab initio* of Israel's occupation. In 1977, it declared that it was "*[d]eeply concerned* that the Arab territories occupied since 1967 have continued, for more than ten years, to be under *illegal Israeli occupation* and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights" and "*[r]eaffirm[ed]* that the acquisition of territory by force is inadmissible and that all territories thus occupied must be returned"; it concluded by "*[c]ondemn[ing]* Israel's continued occupation of Arab territories, in violation of the Charter of the United Nations" (resolution 32/20, "The Situation in the Middle East", 25 November 1977 (emphasis added). See also resolution 33/29, "The Situation in the Middle East", 7 December 1978, and resolution 34/70, "The Situation in the Middle East", 6 December 1979).

36. Recalling the General Assembly's finding on the illegality *ab initio* of Israel's 1967 occupation of Palestinian territory, and its condemnation of the continuation of this occupation in violation of the United Nations Charter, can only reinforce the Court's findings in this Opinion on the illegality of Israel's continued presence in the Occupied Palestinian Territory.

37. The Court considers, in paragraph 267 of the Opinion, that Israel's wrongful presence in the Occupied Palestinian Territory constitutes an act engaging the international responsibility of that State, and adds that it is a wrongful act of a continuing character "which has been brought about by Israel's violations, through its policies and practices, of the prohibition on the acquisition of territory by force and the right to self-determination of the Palestinian people". While I fully subscribe to the Court's finding that Israel

has an obligation to "bring an end to its presence in the Occupied Palestinian Territory as rapidly as possible", in my view the reasoning of the Court requires a precision and an addition. It should be clarified that, while Israel's policies and practices in the Palestinian territory occupied since 1967 clearly constitute a violation of the Palestinian people's right to self-determination, the failure to respect this right dates back to 1948 and not 1967, as recalled by General Assembly resolution 32/20, adopted in 1977 and quoted above, in which the Assembly stated that it was "*[d]eeply concerned* . . . that the Palestinian people, *after three decades*, [were] still deprived of the exercise of their inalienable national rights" (emphasis added). In this respect, I feel that the Court's reasoning should be supplemented by a reference to Israel's obligations under resolution 181 (II).

38. As recalled in the Advisory Opinion (see para. 52), on 29 November 1947 the United Nations General Assembly adopted an important resolution, resolution 181 (II), which, in my view, remains the cornerstone for any lasting solution to the Israeli-Palestinian conflict based on the vision of two States. In this resolution, the General Assembly adopted a "Plan of Partition" providing for the creation of two independent States on the territory of Palestine, one Arab and the other Jewish, which "shall come into existence . . . two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948", and the creation of a special international régime (*corpus separatum*) for the city of Jerusalem to be administered by the United Nations.

39. It was on the basis of resolution 181 (II) that both Israel and Palestine proclaimed their existence (see Advisory Opinion, paras. 53 and 64) and sought admission to the United Nations, each in their own time, as a Member State and as an observer State (see *ibid*., paras. 55 and 70). This resolution forms a whole, whose terms must be read together and inseparably. In other words, neither Israel nor Palestine can claim to derive rights from the resolution while rejecting or ignoring the rights of the other party enshrined in the same text. It follows that the proclamation of an independent Jewish State on 14 May 1948 based on resolution 181 (II) necessarily entails a commitment to the establishment of an independent Arab State. In this regard, it should be recalled that the State of Israel's proclamation of independence provides that the former is "ready to cooperate with the agencies and representatives of the United Nations in implementing the [said] resolution". Israel has therefore indisputably committed itself not only to respecting resolution 181 (II), but also to implementing it.

40. It was, in any event, on this express condition that Israel was admitted to the United Nations. Thus, in resolution 273 (III) by which it admitted Israel as a Member of the United Nations, the General Assembly stated that it did so while

> "*[r]ecalling* its resolutions of 29 November 1947 [181 II] and 11 December 1948 [194 III] and taking note of the declarations and explanations

made by the representative of the Government of Israel before the *Ad Hoc* Political Committee in respect of the implementation of the said resolutions".

41. However, in this Opinion the Court has not determined all the legal consequences arising from this situation, in particular the obligations incumbent on Israel. Israel's admission to the United Nations gives rise to rights but also to legal obligations. Thus, having undertaken to implement resolution 181 (II), Israel is under a legal obligation not to hinder the exercise of the Palestinian people's right to self-determination, or to oppose the proclamation of a Palestinian State by the representatives of the Palestinian people, and indeed it cannot do so without undermining its own rights, the existence of the two States being inextricably linked in the same legal instrument.

42. Having committed to implementing resolution 181 (II), Israel also has an ongoing obligation to co-operate with the United Nations to ensure that the State of Palestine, proclaimed in Algiers in 1988 and admitted to the United Nations as an observer State on the basis of resolution 181 (II), can exercise its full sovereignty over its territory and achieve total independence, which requires the complete withdrawal of Israel from the Occupied Palestinian territory.

43. In this respect, it should be noted that in the exchange of letters of 9 September 1993 between Yasser Arafat, President of the Palestine Liberation Organization (hereinafter "PLO") and Yitzhak Rabin, Prime Minister of Israel, the PLO President recognized "the right of the State of Israel to exist in peace and security" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 183, para. 118).

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44. Furthermore, as the Court points out, the obligations that Israel has violated include *erga omnes* obligations (Advisory Opinion, para. 274), which entail "special legal obligations" for other States in accordance with customary international law, as reflected in Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts. Consequently, with respect to Israeli policies and practices that infringe the Palestinian people's right to self-determination, all States are bound by the customary obligations laid down in that Article. This requires not only taking no action that might hinder the exercise of that right, but also providing the necessary lawful support for the realization of that right and co-operating actively with the United Nations to that end. The Court has set out in general terms the content of these obligations for all States in paragraphs 275 to 279 of the Opinion.

45. These obligations are both negative and positive. The negative obligations require States to refrain from encouraging, aiding or assisting Israel in

violation of the rules of international humanitarian law applicable in the Occupied Palestinian Territory. As the ICRC clarified in its 2016 commentary on the First Geneva Convention,

> "financial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though it may not amount to aiding or assisting the commission of a wrongful act by the receiving States for the purposes of State responsibility". (See ICRC Commentary, Geneva Conventions, Common Article 1, https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949?activeTab=1949GCs-APs-and-commentarie%20s, para. 160.)

Thus, any unconditional financial, economic, military or technological assistance to Israel would constitute a breach of this obligation.

46. With respect to positive obligations, States must take proactive measures to bring violations to an end and ensure respect for the relevant conventions in the Occupied Palestinian Territory, including by using their influence over Israel (see ICRC Commentary, Geneva Conventions, Common Article 1, https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949?activeTab=1949GCs-APs-and-commentarie%20s, para. 164).

47. As our esteemed late colleague, James Crawford, wrote, it is important to note that the obligation to ensure respect is not satisfied by mere diplomatic protests (James Crawford, "Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories", https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf, para. 86), or solely by co-operating with the United Nations. Indeed, as the Court has emphasized with regard to the crime of genocide, a State's referral of a violation of obligations *erga omnes* to the organs of the United Nations does not relieve other States of their obligations "to take such action as they can" to ensure respect for those obligations and prevent or punish violations thereof, "while respecting the United Nations Charter and any decisions that may have been taken by its competent organs" (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 220, para. 427).

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48. The nature of the obligations violated by Israel also has numerous implications for the United Nations and its various organs and institutions. The "duty" of the Organization and its institutions to "ensure respect for international law" in the Occupied Palestinian Territory, recalled in paragraph 277 of the Advisory Opinion, requires them to take concrete steps

to put an end to the violations by Israel identified in the Opinion, and to enable the full realization by the Palestinian people of its right to self-determination.

49. Of course, as the Court has previously stated, it is not for the Court to "determine what steps the General Assembly may wish to take after receiving the Court's [O]pinion or what effect that [O]pinion may have in relation to those steps" (*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) and it is for the General Assembly, as well as for the Security Council to "consider what further action is required to put an end to the illegal presence of Israel, taking into account the present Advisory Opinion" (Advisory Opinion, para. 281).

50. The fact remains, however, that the United Nations, its principal organs and its institutions must ensure that the measures they adopt are efficient and effective given that those addressed to Israel in almost all the resolutions of the General Assembly and the Security Council have remained without effect. These include, in particular, Security Council resolutions 237 (1967), 242 (1967), 252 (1968), 267 (1969), 298 (1971), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 484 (1980), 592 (1986), 605 (1987), 607 (1988), 672 (1990), 681 (1990), 904 (1994), 1073 (1996), 1322 (2000), 1397 (2002), 1515 (2003), 1544 (2004), 1850 (2008), 1860 (2009), 2334 (2016) and 2720 (2023), in violation of Article 25 of the Charter of the United Nations, which states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

51. It is therefore essential that the Security Council and the General Assembly take further appropriate and concrete measures to bring to an end, without delay and within a well-defined time frame, the violations of international law resulting from Israel's policies and practices in the Occupied Palestinian Territory.

52. In particular, the Security Council may wish to update the Quartet Roadmap endorsed by its resolution 1515 (2003) in order to "achieve the vision of two States living side by side in peace and security", and reach "a final and comprehensive agreement" negotiated between the parties, based on the relevant Security Council resolutions, which provide for a resolution of "final status issues" (Security Council resolution 2334 (2016), adopted by the Security Council at its 7853rd meeting on 23 December 2016, S/RES/2334 (2016), para. 8).

53. To this end, the United Nations should strengthen international cooperation among its Member States and use all the means provided for in the Charter, in particular those in Chapter VI and, if necessary, Chapter VII.

54. In sum, as already stated in Security Council resolution 2334 (2016), quoted in paragraph 71 of the Opinion, the United Nations should work towards

> "the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving, without delay a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap and an end to the Israeli occupation that began in 1967" (resolution 2334 (2016) adopted by the Security Council at its 7853rd meeting, on 23 December 2016, S/RES/2334 (2016), para. 9).

3. Modalities of Reparation

55. The final point I would like to address is that of the reparations owed to Palestinians and to Palestine as a result of Israel's policies and practices in the Occupied Palestinian Territory in breach of international law.

56. The main consequence of the violations must be the obligation to bring them to an end. This primarily and necessarily entails the obligation for Israel to put an end to its unlawful presence in the Occupied Palestinian Territory (see Advisory Opinion, para. 267). Only the imperative withdrawal of Israel from the Occupied Palestinian Territory will enable the Palestinian people to fully exercise its right to self-determination, including its right to a fully independent, sovereign and viable State. This is therefore the main objective that the United Nations and all States must pursue.

57. Accordingly, this withdrawal cannot be conditional on the success of negotiations whose outcome will depend on Israel's approval. In particular, Israel cannot invoke the need for a prior agreement on its security claims for such a condition may lead to perpetuating its unlawful occupation. Indeed, in accordance with the principle expressed by the maxim *ex injuria jus non oritur* — no one may benefit from their own illegal act. Otherwise, the cessation of violations of international law, including violations of peremptory norms (*jus cogens*), would be subject to the veto of the perpetrator of those violations.

58. Negotiations between the parties — which remain necessary — would then focus mainly on the modalities of implementation, rather than on the question of Israel's withdrawal, which must take place, according to the terms of the Opinion, "as rapidly as possible". They would also focus on other matters necessary to achieve a just, comprehensive and lasting peace, such as the question of refugees, mutual security arrangements between the two States and changes that could be made by mutual agreement to the 1967 boundary lines.

59. Such negotiations would be more likely to succeed if they take place under the auspices of the United Nations and on the basis of international law, whose respective impartiality and legitimacy would go some way to

offsetting the great power imbalance between the occupier and the occupied.

60. The other important point that ought to be mentioned is that of the reparations owed by Israel for its violations of international law to the victims in the Occupied Palestinian Territory and to the Palestinian people. This has to be "full reparation", including restitution and compensation, which must, according to the well-known formula of the Permanent Court of International Justice in the *Chorzów Factory* case, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (see Advisory Opinion, para. 269).

61. Thus, as the Court previously stated in 2004, Israel is under an obligation to, *inter alia*, "return the land, orchards, olive groves and other immovable property [that has been] seized from any natural or legal person" in an abusive, discriminatory manner and in violation of international law in the Occupied Palestinian Territory. "In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, para. 153).

62. As regards compensation, it is not for the Court, in the context of the present Opinion, to establish the specific elements or quantum thereof. It has affirmed the principle and it is now up to all parties concerned to determine the modalities of such compensation, which must be made in accordance with the rules of international law. As the United Nations International Law Commission (ILC) notes, the injury to be repaired "includes all damage, whether material or moral, resulting from the internationally wrongful act of the State". Compensation covers "any financially assessable damage including loss of profits so far as this is established in the given case" (ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), paragraph 2 of the commentary on Article 31 and paragraph 1 of the commentary on Article 36). There are many precedents that could guide such an approach.

63. In this regard, it should be recalled that in its 2005 Judgment in the case concerning *Armed Activities on the Territory of the Congo*, the Court found that Uganda was required to make reparation for the injury resulting from the

> "illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder, and exploitation of the DRC's natural resources" (*(Democratic*

Republic of the Congo v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 259).

On this basis, it then fixed the amount of compensation to be paid to the Democratic Republic of the Congo in a further proceeding (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, pp. 137-138, para. 409). It should also be noted that, because of the illegal occupation of Kuwait and for the purpose of "restitution or financial compensation by Iraq", the Security Council affirmed that Iraq was, under international law, "liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq" (resolution 674 (1990) adopted by the Security Council on 29 October 1990 at its 2951st meeting, S/RES/674 (1990), items 8 and 9).

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64. I would like to conclude by making a general remark on an argument concerning the impact of the Court's Opinion on the negotiations, which was put forward by some participants in these proceedings to invite the Court to decline to give the Advisory Opinion requested by the General Assembly. It was argued that the Court's Opinion would be likely to jeopardize the peace negotiations. In accordance with its jurisprudence, the Court has responded that this would not be the case.

65. Over and above this response, one must question the opposition that some appear to draw between peace and law. Quite apart from the fact that in the present case peace negotiations have been practically non-existent for more than ten years, in my view it is incorrect to suggest that, by stating the law, the Court would undermine any peace process. Quite the contrary, the very philosophy that led to the establishment of the various judicial mechanisms for the settlement of disputes — from the first arbitrations to the creation of the Permanent Court of Arbitration and the Permanent Court of International Justice to this Court — is that international law and justice unquestionably provide a means for the pacification of international relations. By stating the law, the Court provides the various actors with a reliable basis for a just, comprehensive and lasting peace.

66. I am convinced that a negotiation process that is shorn of legal and equity considerations would carry within itself the seeds of future conflict. Negotiations on all issues, including the legitimate security concerns of both States, Israeli and Palestinian, can only be successful if they have international law and justice as their cornerstone.

67. In stating the law in these proceedings, the Court, in keeping with its role, has contributed to laying the foundations for a just and enduring solution to a conflict that has lasted far too long, has caused immense human

suffering in this part of the world and whose repercussions are felt far beyond. It is with this deep conviction that I participated in the present proceedings, as no doubt my colleagues did too.

(Signed) Nawaf SALAM.