JOINT OPINION OF JUDGES TOMKA, ABRAHAM AND AURESCU

[Original English text]

Scope of the Opinion — Unfounded inclusion of Gaza in the conclusions of the Opinion.

Failure to apply distinction between the rules on the conduct of an occupation and those on the use of force — Incorrect conclusion that Israel's presence as an occupying Power in the OPT is illegal — Israel's policies and practices in the OPT having no effect on the legal status of the occupation — Lack of link between the conclusion on the annexation of (parts of) the occupied territory and the conclusion that the occupation itself is illegal — Erroneous identification of the occupation itself as the wrongful act and of its legal consequences — Termination of the annexation as the correct legal consequence — Obligation to end the occupation as soon as no longer needed for security reasons — Israel's withdrawal from the OPT subject to guarantees of its right to security.

The Oslo Accords and the relevant Security Council resolutions not duly taken into account — Ignoring of the close relationship between the right to self-determination of the Palestinian people and the right to security of Israel and of Palestine, as well as between this "package" and the negotiation framework for the "two-State solution" — Failure to take into account the right to security of Israel and of Palestine.

Incorrect identification of the annexed territories — Only East Jerusalem and the West Bank Area C settlements annexed by Israel — Israel's obligation in Oslo II (1995) not to alter the status of West Bank resulting in illegality of any new settlements in Area C and beyond it.

Lack of comprehensive, balanced and nuanced approach in the Opinion — Failure to address Palestine's responsibilities and obligations — Israel and Palestine under obligation to resume without delay direct negotiations leading to the "two-State solution" — Failure to draw attention of Security Council and General Assembly to the need to reinforce efforts for achieving the "two-State solution" and to encourage all States to support Israel, Palestine and the United Nations to this end.

I. Introduction

1. We had to vote against certain points in the final conclusions (para. 285) of the present Advisory Opinion, particularly points 3 and 4. We are indeed not convinced that "Israel's continued presence in the Occupied Palestinian Territory is unlawful" (point 3), nor that, as a consequence of this statement, which, for the reasons set forth below, has no legal basis, "Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible" (point 4).

2. We fully agree with the assertion, already formulated in the *Wall* Advisory Opinion delivered by the Court in 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 184, para. 122), according to which the Palestinian people has the right to self-determination.

3. We are also convinced that a large number of Israel's policies and practices in the territories it occupies since 1967 are in breach of its obligations under international law. In this respect, we can endorse most of the observations presented in Section IV of the Opinion, on the basis of which the Court concludes that these "policies and practices" are unlawful. In particular, we share the view that the general and systemic practice of establishment and development of settlements in the West Bank is contrary to Article 49 of the Fourth Geneva Convention, as the Court already observed in 2004 (*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). More generally, we believe that numerous aspects of Israel's policy, especially over the past 20 years, can only be understood as aiming to gradually incorporate the majority of Area C of the West Bank into Israel's own territory (in addition to the formal annexation of East Jerusalem in 1980). The implementation of such an objective, as the Court observed in 2004 within the narrower context of construction of the wall, "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (*ibid.*, para. 122). What was true in the limited context of the Opinion delivered in 2004 is even more so in the broader context of Israel's "practices and policies" in the Occupied Palestinian Territory considered in the present Opinion.

4. Nevertheless, based on a rigorous legal analysis, we cannot draw the same conclusions as those set out in the Court's replies.

5. Indeed, for the first time, the Court does not only declare that Israel's practices in the territories it occupies are unlawful, in light of the obligations incumbent upon it as an occupying Power, but it also asserts that Israel's very presence in the territories is unlawful and that it must therefore with-

draw from them without any prior guarantee, particularly regarding its security, even though the respect of Israel's right to security is one of the essential elements to consider in order to achieve a lasting peace.

We are of the view that, by doing so, the Court has embarked on a legally wrong path and reached conclusions that are not legally correct.

We will explain the reasons for our disagreement in more detail in the remainder of this opinion.

6. In short, the Opinion provides no convincing reason that would justify moving from the finding that Israel's "practices and policies" in the Occupied Palestinian Territory are, in many instances, unlawful, to the conclusion that the very presence of Israel in the territories is unlawful. In our view, on this point, there is a missing link in the Opinion's reasoning for reasons we will expand upon below. The Court chose to portray the Israeli-Palestinian conflict in a biased and one-sided manner, which disregards its legal and historical complexity. It gives little weight to the successive resolutions by which, from 1967 to present, the Security Council established and endorsed the legal framework for resolving the conflict based on the coexistence of two States and on the right of each of the two peoples to live in peace and security. When it does not ignore these resolutions, it makes a selective reading of them.

7. Moreover, we believe that the Opinion's legally incorrect conclusions stem, to a large extent, from a misappreciation of the Oslo Accords signed between the representatives of Israel and Palestine. These Accords, along with the relevant resolutions of the Security Council, define the fundamental framework of a peaceful resolution of the conflict aiming at implementing the "two-State solution", as explained below.

8. The final conclusions of the Opinion are clearly inspired by those of the two Advisory Opinions that the Court has rendered in the past on situations where one State was present on a territory on which its presence, or its sovereignty, was contested: the 1971 Opinion relating to South Africa's presence in Namibia (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16), and the 2019 Opinion relating to the Chagos Archipelago (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 95).

In both cases, the Court concluded that the presence of the State in question in the considered territory was illegal and had to cease "immediately" (*Namibia*) or "as rapidly as possible" (*Chagos*).

9. In our view, the two situations previously examined by the Court are entirely different from the one at issue in the present case. In this case, we are dealing neither with a presence maintained by a mandatory Power in

violation of a Security Council decision declaring this presence illegal after the General Assembly terminated the mandate, nor with a situation in which a colonial Power failed in its obligation to complete the decolonization process, nor with any other situation comparable to the above.

10. The Israeli-Palestinian conflict is of a different nature. It must be approached in a balanced, nuanced and comprehensive manner that is entirely absent from the Opinion rendered. For many decades, the Israeli and the Palestinian peoples have been in conflict — a conflict with many complex legal, political and historical aspects — related to the territory of Palestine, entrusted by mandate of the League of Nations to the United Kingdom in 1922. The rights of one cannot be exercised to the detriment of the rights of the other. The "two-State solution", required by successive Security Council resolutions, which we will analyse below, is the only one that can respond to the legitimate need for security of both Israel and Palestine. This solution can only arise from a comprehensive understanding reached through negotiations, which must take into account all rights and interests involved: the right of the Palestinian people to self-determination is not incompatible with that of Israel to exist in security, while Palestine's right to security must also be taken into account. The right to self-determination and the right to security must be implemented simultaneously in order to achieve the coexistence of the two States, which will also mark the end of Israel's presence as an occupying Power in the Palestinian territory.

11. As Judge Higgins recalled in her separate opinion attached to the *Wall* Opinion, in the successive resolutions of the Security Council "the key underlying requirements have remained the same — that Israel is entitled to exist, to be recognized, and to security, and that the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State" (*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. 211, para. 18).

We believe that this statement remains valid today. While it is true that Israel's current policy — which has not always been the same — does not tend towards such a result, this is not a reason to ignore the legitimate concerns of this State regarding its security, and to completely depart from the framework outlined by the Security Council, as the present Opinion does.

II. The Temporal and Territorial Scope of the Questions Posed to the Court

12. The questions put to the Court by the General Assembly refer to Israel's policies and practices in the "Occupied Palestinian Territory since 1967".

There is no doubt that, in the General Assembly's intention, what it designates as the Occupied Palestinian Territory encompasses the West Bank, East Jerusalem and the Gaza Strip. Besides, the questions are drafted in the present tense.

13. However, we believe that the Court should have limited its Opinion to the West Bank, including East Jerusalem, and should not have included the Gaza Strip in its analysis and its findings for the following reasons.

14. The situation in the Gaza Strip has undergone a fundamental change following the murderous attacks committed by Hamas from Gaza on Israeli territory on 7 October 2023 and Israel's large-scale military operation that followed.

The request for the Advisory Opinion was submitted prior to these events, which the General Assembly could not have foreseen. One can infer from this that the situation in Gaza after 7 October 2023 is not included in the scope of the questions put to the Court. It is therefore appropriately that the Opinion refrains from taking any position on the events that have occurred in Gaza after 7 October 2023. Moreover, had the Court taken a stance on this situation in the present Opinion, it would have risked prejudging some questions raised in two contentious cases currently pending before the Court. We are of the view that, as a general rule, an advisory opinion should not interfere with the resolution of pending contentious cases.

15. With regard to the prior period, it should be noted that since 2005 the Gaza Strip has been in a fundamentally different situation than that of the West Bank. In 2005, Israel withdrew from the territory of the Gaza Strip and dismantled the settlements which it had established, while maintaining the control over the airspace and maritime zones, and land borders. Shortly after the Israeli army's withdrawal, the Hamas movement gained control of the administration of Gaza's territory.

16. The Court did not have evidence before it which would allow it to assert whether and to which extent the control Israel continued exercising over the Gaza Strip after the 2005 withdrawal was justified by security motives, considering, in particular, the military actions conducted by Hamas directed at Israeli territory, even before 7 October 2023. Moreover, nearly all of Israel's "policies and practices" mentioned in the Opinion refer to the situation in the West Bank.

17. Due to insufficient information presented to it, the Court should have concluded that it was unable to properly pronounce itself on the situation in Gaza prior to 7 October 2023. In these circumstances, we can only regret that, in its conclusions, according to which "Israel's continued presence in the Occupied Palestinian Territory", which includes Gaza, "is illegal" (para. 267) and that "Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible" (para. 285, point 4), the Opinion makes no distinction whatsoever

between the West Bank, including East Jerusalem, and Gaza, referring to the "Occupied Palestinian Territory" as a whole.

III. The Issue of the Legality of the Occupation

18. One of the most questionable aspects of the Opinion lies in the lightness with which it addresses the question of the legality of the occupation itself, a question to which it answers in the negative without relying on any convincing legal basis.

19. According to the Opinion, Israel's policy of establishing and developing settlements in the West Bank aims at gradually incorporating this territory into that of the State of Israel and demonstrates an aim to annex, driven by an "intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian Territory" (para. 252). The Court asserts that Israel's policies and practices constitute violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination. Up to this point, we can follow the reasoning and we do not have substantial objections.

20. But then the reasoning abruptly takes an entirely different turn. The Opinion concludes from the foregoing that "Israel's continued presence in the Occupied Palestinian Territory is illegal" (para. 267), this illegality applying, moreover, to the entire territory occupied by Israel in 1967, including Gaza, and without making any distinction between the various parts of the West Bank. In other words, according to the Opinion, it is not only Israel's conduct in the Occupied Palestinian Territory that is illegal, but its very presence, and thus the occupation itself.

21. We cannot subscribe to such a conclusion, which is not based on any serious or sound legal reasoning.

22. We do not question whatsoever the assertion that "[t]he annexation of occupied territory by an occupying Power is unlawful" (para. 175) and that "occupation can under no circumstances serve as the source of title to territory" (para. 253). We are of the view, and so is the majority of the Court, that Israel's policy for quite a long time already turns its back on the principle according to which an occupying Power cannot pursue a policy aimed at extending its sovereignty over the whole or part of the territory it occupies by incorporating it, *de jure* or *de facto*, into its own territory.

But we do not see how we can go from the finding that the annexation policy pursued by the occupying Power is illegal to the assertion that the occupation itself is illegal. Yet that is exactly what the Opinion does, without any explanation of even minimal legal substantiation.

23. The rules governing the conduct of an occupation and the obligations of the occupying Power, on the one hand, and those concerning the use of

force and its consequences, on the other hand, constitute two distinct sets of rules. The question of whether and to what extent the occupying Power's conduct complies with its obligations in the occupied territory, irrespective of the legality of the occupation, must be examined under the first set of rules. The question of the legality of the occupation itself must be examined under the above-mentioned second set of rules. The Opinion recalls this distinction (para. 251) without, however, drawing the correct conclusions.

24. By pursuing a policy of gradual annexation of part of the Occupied Palestinian Territory, namely Area C of the West Bank, Israel fails to comply with the obligations imposed on it as an occupying Power. The same stands true when it violates various specific obligations laid down by international humanitarian law, such as the obligation not to transfer its own population into the occupied territory or not to take discriminatory measures against the population of the territory.

25. However, it cannot be concluded from the above that the occupation itself is illegal, which is a question of a fundamentally different nature. The Opinion does not justify in any way, except through general and vague formulations, the abrupt transition from the finding that, by its conduct in the occupied territories, the occupying Power fails to comply with its obligations to the assertion of the illegality of the occupation itself. The illegality of the conduct of the occupying Power, even when it consists in seeking to annex the occupied territory, cannot deprive the occupant's presence of its character: this presence is and remains an occupation under international law. As for the question of whether this presence is illegal, as we mentioned earlier and as the Opinion itself seems to acknowledge, it falls under the application of a different set of rules.

26. The emphasis in the Opinion on the right to self-determination of the Palestinian people and its "inalienable" character cannot conceal the erroneous nature of the reasoning followed. It is evident that "occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination" (para. 257). But this does not support the conclusion the Opinion reaches regarding the illegality of the occupation. It is not the occupation itself which violates the right to self-determination; it is the annexation and the practices related to it. By its very nature, any military occupation hinders the full exercise by the population of the occupied territory of its right to self-determination. This alone cannot render the occupation unlawful. To rule on the legality of a prolonged occupation, security considerations, which are essential for this purpose but almost entirely ignored in the Opinion, must be integrated into the analysis. We will return to this point later.

27. Accordingly, we are of the view that "Israel's policies and practices" in the Occupied Palestinian Territory do not affect the "legal status of the occupation", if this encompasses, as the Opinion states (para. 82), the legal-

ity of Israel's presence in this territory as an occupying Power. To the question *(b)* posed by the General Assembly, the Court should have therefore responded in line with the above. Such a response, which we believe to be the only legally correct one, would have spared the Court from taking a stance on the legality of the occupation itself, an issue on which it was not directly asked to pronounce itself. In our opinion, it would have been sufficient to note that this issue is not affected by the "policies and practices" in question.

28. We will add the following remarks to the preceding analysis.

29. First, the Opinion declares Israel's continued presence illegal in the whole of the Occupied Palestinian Territory, including the Gaza Strip. Considering that this illegality is inferred — wrongly in our view — from the settlement and the annexation policies, there is an incomprehensible discrepancy between the cause and the consequences. Indeed, the policy aiming at annexation clearly concerns the settlements in Area C of the West Bank, and not the Gaza Strip. The latter was evacuated by the occupying army in 2005, and the settlements that had been established there were dismantled. The Opinion does not refer to any element that would demonstrate the existence of an intent or policy aiming to annex the Gaza Strip. Consequently, we believe that, besides the fact that the reasoning of the Opinion is flawed in its very principle, it is tainted by an internal inconsistency. The only justification provided by the Opinion in support of the conclusion that the occupation has become unlawful in the whole of the Occupied Palestinian Territory, including Gaza, is that this territory constitutes a territorial unit "the integrity of which must be respected" (para. 262). Such a justification is by no means convincing. There is no legal connection whatsoever between the assertion (which is correct per se) that the Palestinian people should be able to exercise its right to self-determination on the whole of the Occupied Palestinian Territory and the extension of the "illegality" of the occupation (which as such, as shown in this joint opinion, has no legal basis) to all various parts of this territory. In reality, this discrepancy only underscores the fundamental flaw that taints the entire reasoning.

30. Second, the consequences that the Opinion draws from the position it adopts, in terms of international responsibility, are not those it would have drawn if it had adopted a legally correct analysis of the wrongful act.

When an occupying Power annexes, *de facto*/implicitly or *de jure*/ explicitly, the occupied territory, it results in an unlawful situation that must cease, given its continuous character, under the law of international responsibility. This means that the occupying Power must cease the annexation and nullify all its effects. It remains bound to fully comply with its obligations under the legal régime of occupation, which, legally, has not ceased to apply.

Instead, the Opinion, as it erroneously defines the wrongful act not as the annexation but as the occupation itself, concludes that it is Israel's very presence in the Occupied Palestinian Territory that must cease "as rapidly as possible" (para. 267). Based on erroneous premises, the Opinion can only reach a false conclusion, which we cannot endorse.

The fact that the Opinion, probably in order to avoid too blunt a legal criticism as to the conclusion that the occupation itself became illegal, uses a terminology referring to the illegality of the "continued presence" of Israel in the Occupied Palestinian Territory "as an occupying Power" cannot disperse the erroneous character of that conclusion. The "occupation" and the "continued presence" of a State "as an occupying Power" in a territory which is not under its sovereignty are perfectly identical notions.

31. Third, given the central role that the concept of annexation plays in the Opinion's reasoning, it is surprising and regrettable that the Court did not meaningfully clarify the terminology by distinguishing between the different terms employed. The Opinion sometimes asserts that Israel proceeded to the annexation of large parts of the West Bank and East Jerusalem (para. 173); it sometimes describes this annexation as "gradual" (para. 252); it sometimes uses the distinction between *de jure* annexation and *de facto* annexation. In our view, this latter distinction is a source of confusion. Both types of annexation involve effective control of the territory, but they differ in the way in which the State expresses its intention to hold the territory permanently. *De jure* annexation entails a formal declaration of the State by which it claims permanent sovereignty over a territory it occupies. *De facto* annexation, by contrast, is not accompanied by an explicit declaration of sovereignty over the annexed territory, the intention to exercise permanent sovereignty being rather inferred from the situation on the ground. This means that, essentially, a *de facto* annexation is an implicit or informal annexation as opposed to the explicit and formal annexation that is *de jure* annexation. But both are intended to produce legal effects. In the present Opinion, the Court could have clarified the terminology, particularly because, without such a clarification, another term, that of "gradual" or "creeping" annexation, cannot be properly defined. Unfortunately, the Opinion (para. 160) does not fully clarify the distinction between these types of annexation, and limits itself to stating that both the *de jure* and the *de facto* annexations share the same objective of asserting permanent control over the occupied territory.

32. Finally, in the alternative, we believe that, even if the Court had been consulted by the General Assembly on the question of the legality of the occupation, which is not the case, and if, consequently, it had needed to address this question, it would have been impossible for it to conclude to its illegality. The information before the Court and the law it is bound to apply cannot support such a conclusion, for several reasons.

33. The legality *ab initio* of a situation of military occupation mainly depends on the question of whether the military action which gave rise to the occupation can be considered lawful or unlawful in terms of *jus ad bellum*. But the Court did not receive sufficient information to rule, on an objective basis, on the respective responsibilities of the various parties involved in the armed conflict of 1967. The Court therefore cannot assess the legality of Israel's use of force which is at the direct origin of the occupation at issue in the present case. Assessing the legality of this use of force, in the specific context of the events preceding the outbreak of the conflict, would involve ruling on complex issues of fact and law. This could only be done on the basis of complete information — which the Court does not possess — and an adversarial debate — which has not taken place.

It is therefore rightly that the Opinion refrains from taking a stance on the legality of Israel's use of force in 1967. Consequently, it is not possible to assert, in this Opinion, that the state of occupation is illegal *ab initio*, that is, since June 1967.

34. Obviously, it is not impossible that, even if an occupation is initially lawful, it ceases to be so at a certain point in time.

35. However, the mere passage of time does not suffice to render an occupation illegal, regardless of its duration. It is evident that an occupation is, by nature, a temporary situation that is destined to end at one point or another. However, international law does not lay out any time-limit beyond which an occupation would become *ipso facto* illegal. It all depends on the circumstances. Clearly, a duration of 57 years is exceptionally long, with few historical parallels. But that is not enough: this duration must be considered in light of the exceptionally complex history and nature of the Israeli-Palestinian conflict and the many successive attempts at resolution, the failure of which cannot be attributed to a single party.

36. In fact, the relevant question is whether the occupying Power — Israel — could today completely withdraw from the occupied territories "as rapidly as possible", in the absence of any guarantee, without exposing its security to substantial threats. In the current context, we find it quite difficult to answer this question in the affirmative. Israel's full withdrawal from the occupied territories and the implementation of the right to self-determination by the Palestinian people is intrinsically linked to Israel's (and Palestine's) right to security. The Hamas movement, which has gained control and subsequent administration of the Gaza Strip shortly after the withdrawal of the occupying forces on the ground, and which positions itself as a competitor to the Palestinian Authority for the political leadership of Palestinians in the Occupied Palestinian Territory as a whole, denies the very legitimacy of the existence of the State of Israel; it thus opposes the "two-State solution". From this perspective, the fact that "the existence of the Palestinian people's

right to self-determination cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right" (para. 257) cannot limit Israel's right to security. This right is an intrinsic part of the State's fundamental right "to exist in peace and security" (see *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) or "to survival" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 96), in other words, of the sovereignty.

37. The Opinion disregards all the preceding considerations. It relies on the implicit idea that Israel does not have serious security concerns, or that such concerns, if they exist, are irrelevant. We disagree. Without diminishing Israel's responsibility in the current deadlock in any way, or denying the illegality of several aspects of its policy in the Occupied Palestinian Territory and of its refusal to respect the rights of the Palestinian people and of the Palestinians, we believe it is simply fair to also acknowledge that this State faces serious security threats, and that the persistence of these threats could justify maintaining a certain degree of control on the occupied territory, until sufficient security guarantees, which are currently lacking, are provided. It is difficult to see how such guarantees could be provided outside the conclusion of a comprehensive settlement, which Israelis and Palestinians have indeed approached at times in their conflicted history.

38. It is regrettable that the Opinion, instead of taking into account the legitimate rights and interests of all parties involved, chose to portray the facts in an incomplete and one-sided manner, drawing an implicit parallel between the Israeli-Palestinian conflict and the two situations on which the Court has previously been asked to provide an opinion (*Namibia* and *Chagos*), from which it, however, radically differs.

39. Furthermore, to be fully carried out, the assessment of the legality of the occupation should also have included the consideration of two essential elements: the Oslo Accords and the relevant resolutions adopted by the Security Council from 1967 to present, which have significant effects in this regard.

These documents, and their legal consequences, will be examined in the next section of this opinion.

IV. The Legal Impact of the Oslo Accords and of Relevant Security Council Resolutions

40. We are of the opinion that the legal impact of the Oslo Accords[1] and of the relevant Security Council resolutions should have been duly taken

[1] Oslo I Accord (The Declaration of Principles on Interim Self-Government Arrangements, signed on 13 September 1993 in Washington, DC, between the State of Israel and the

into account by the current Opinion. The combined legal effects of the Oslo Accords and of the relevant Security Council resolutions are pertinent not just for Israel and Palestine, but also for the United Nations organs involved in the Middle East peace process and for the international community as a whole.

41. Indeed, it is striking that the Opinion ignored these important legal sources, which were very selectively cited and considered in the Opinion, and especially their significant legal effects for the proper analysis of the legality of the occupation, for the responsibilities and obligations of both Israel and Palestine, as well as for the future efficient unfolding of the negotiations which should result in the "two-State solution" "where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders, consistent with international law and relevant UN resolutions" (Security Council resolution 2735 (2024), para. 6)[2].

42. Actually, a correct combined interpretation of the Oslo Accords and of the relevant Security Council resolutions clearly illustrates their legal effects, which continue to be valid at present. These legal effects relate to the close relationship between, on the one hand, the "package" consisting of "right to self-determination — right to security" (these two rights being intrinsically interconnected) and, on the other hand, (1) the issue of the legality of occupation, as well as (2) the way this package needs to be implemented within the negotiation framework agreed between Israel and Palestine and supported by the relevant Security Council resolutions. Naturally, these legal effects impact the obligations of both Israel and Palestine related to the issue of the legality of occupation and to the implementation of the parameters established within the negotiation framework.

43. Thus, it is regrettable that the Opinion dismissed the Oslo Accords as being quasi-irrelevant. This approach is wrong for several reasons. First, the Oslo Accords, the relevance of which was emphasized by many participants to these proceedings, are the main instruments of the Israeli-Palestinian relationship. They have not ceased to be in force. Second, from a legal standpoint, the two Oslo Accords, in particular Oslo II, continue to be applicable to almost all aspects of daily life in Palestine, and are intended to govern the multidimensional relationship between Israel and Palestine. Despite their initial temporary purpose, they created a certain sense of

Palestine Liberation Organization (PLO) in the presence of PLO Chairman, Israeli Prime Minister and US President, by the representative of PLO, Israeli Foreign Minister, the US Secretary of State and Russian Foreign Minister; hereinafter "Oslo I") and Oslo II Accord (the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Taba, Sinai Peninsula, Egypt, by Israel and the PLO on 24 September 1995 and on 28 September 1995 by Israeli Prime Minister and PLO Chairman and witnessed by US President as well as by representatives of Russia, Egypt, Jordan, Norway and the European Union in Washington, DC; hereinafter "Oslo II").

[2] The "two-State solution" was mentioned at least 204 times in participants' written and oral statements, it was expressly mentioned by 47 out of 59 participants and a large majority (34 participants) expressed support for a negotiated "two-State solution".

stability. This stability based on having a clear set of rules in place may explain why neither of the parties has denounced the Accords.

44. But, most importantly, the 1993 and 1995 Oslo Accords formally adopted, between Israel and Palestine, the package "right to self-determination — right to security", based on the Security Council resolutions 242 (1967) and 338 (1973), with direct impact on the conditions for ending the occupation of the Occupied Palestinian Territory, as well as the framework for negotiations ultimately leading to the "two-State solution" — which again will signify the end of the occupation. Indeed, the occupation being temporary by nature, the occupying Power is under an obligation to end the occupation as soon as it is no longer necessary to ensure its security. The Opinion failed to articulate this reasoning.

45. Thus, Oslo I is the first international instrument where Israel recognized the existence of the Palestinian people (Oslo I, preambular paragraph). It also provides for recognition of the two sides' "mutual legitimate and political rights", which assume to "strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement" (*ibid.*). It also envisages that negotiations would be conducted by the two parties during a transitional period, "leading to a permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973)". Article I (Aim of the Negotiations) repeats the reference to the two Security Council resolutions:

> "It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council resolutions 242 (1967) and 338 (1973)." (Oslo I, Art. I.)

The reference to the two resolutions, especially to resolution 242 (1967), is of particular relevance, since it mentions the "right to live in peace within secure and recognized boundaries free from threats or acts of force". The term "recognized" (boundaries) should be interpreted as a reference to the territorial definition of the Palestinian State as resulting from the permanent status negotiations, while the term "secure" (boundaries) should be interpreted as a reference to the right to security of Israel and to the right to security of the Palestinian State.

46. In other words, the permanent peace settlement based on the "two-State solution" is directly linked with the right to security: the boundaries, which define the territory of both States, including the Palestinian one, are connected with ensuring the security of the two States, Israel and Palestine. Article V (Transitional Period and Permanent Status Negotiations) of Oslo I also mentions the important issues to be covered by the negotiations: Jerusalem, Palestinian refugees, settlements, security arrangements, borders and other issues (see also the Agreed Minutes of Oslo I in Article IV (2)), thus again putting in connection the main elements of the permanent

status: self-determination (the realization of which is dependent on the outcome of the negotiations on, *inter alia*, territory, borders, settlements) and security.

47. Oslo II also includes the above-mentioned elements, especially the reference to the determination of the parties to live in peaceful coexistence and mutual dignity and security, while recognizing their mutual legitimate and political rights, the reference to the permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973), and the above-mentioned link between self-determination and security.

48. Israel's right to security, but also that of Palestine, which represent the second element of the above-mentioned "package" along with the right to self-determination, as main elements of the "two-State solution", are of particular relevance. Regrettably, the right to security was almost completely ignored by the current Opinion.

49. But, in our view, the package "right to self-determination — right to security" does not exclusively refer to Israel's right to security. The Security Council resolution 242 (1967) sets out that to achieve a just and lasting peace in the Middle East, the relevant parties must respect and acknowledge "the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force". This connection between the outcome of the Middle East peace process and the right to security of all States in the region — the wording being not limited to the States existing at the moment of the adoption of the resolution, but extending to future ones as well, thus including the Palestinian State — is essential.

50. The obligation to implement resolution 242 (1967) "in all of its parts" is reaffirmed in Security Council resolution 338 (1973) and on many occasions thereafter. For instance, resolution 1515 (2003) "*[e]ndorses* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" and "*[c]alls* on the parties to fulfil their obligations under the Roadmap . . . and to achieve the vision of two States living side by side in peace and security". It has a balanced approach, by "*[r]eiterating* the demand for an immediate cessation of all acts of violence, including all acts of terrorism, provocation, incitement and destruction", by "*[r]eaffirming* its vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders", thus recalling the package "right to self-determination — right to security (of both sides)". At its turn, resolution 2334 (2016) of 23 December 2016 reaffirms resolutions 242 (1967), 338 (1973) and others, and

> "*[u]rges* . . . 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",

this last principle representing another term for the package "right to self-determination — right to security". The most recent Security Council resolution — 2735 (2024) — also restated

> "its unwavering commitment to the vision of the two-State solution where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders, consistent with international law and relevant UN resolutions",

thus reiterating the mentioned "package".

51. It is important to note that not only the resolutions adopted under Chapter VII of the Charter of the United Nations are binding. As the Court has explained in the *Namibia* Advisory Opinion, a careful analysis of the language of a resolution is required before a conclusion can be made as to its binding effect (*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. 53, para. 114). Regarding the Middle East peace process, the Security Council, in exercising its primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, adopted numerous relevant resolutions, some of them cited above. The analysis of those resolutions shows, in our view, that they are not merely declaratory, but mandatory and legally binding as far as the principles which they constantly reaffirmed on this matter, are concerned. We regret that the Opinion chose to ignore their relevance and value.

52. But unfortunately, the Opinion also ignores the Court's own previous findings in the *Wall* Opinion. Paragraph 118 of that Opinion acknowledges the intrinsic interdependence between the right to self-determination and the right to security: it mentions in essence that the existence of the Palestinian people "has . . . been recognized by Israel in the exchange of letters of 9 September 1993 between Mr Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr Yitzhak Rabin, Israeli Prime Minister", while in the same correspondence "the President of the PLO recognized 'the right of the State of Israel to exist in peace and security'", in other words, Israel's right to security. The *Wall* Opinion, in its same paragraph 118, referring to Oslo II repeated provisions regarding the "legitimate rights", "considers that those rights include the right to self-determination". In another paragraph of the *Wall* Opinion (para. 162), the Court also notes that "the situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolu-

tions 242 (1967) and 338 (1973)" and refers to the "Roadmap" approved by Security Council resolution 1515 (2003) towards the "two-State solution". In this way, the Court also endorsed the negotiation framework defined by the above-mentioned Security Council resolutions.

53. But the current Opinion neglects not only the above-mentioned references in the *Wall* Opinion, but also the General Assembly resolution 77/247 of 30 December 2022, which itself includes the Request for the current Opinion and represents its legal basis, and which refers in detail to the package and negotiation framework mentioned above. Thus, this resolution recalls "the relevant resolutions of the Security Council, and stress[es] the need for their implementation", it also stresses the

> "urgent need for efforts to . . . restore a political horizon for advancing and accelerating meaningful negotiations aimed at the achievement of a peace agreement that will bring a complete end to the Israeli occupation that began in 1967 and the resolution of all core final status issues, without exception, leading to a peaceful, just, lasting and comprehensive solution of the question of Palestine".

It also noted the

> "need for full compliance with the Israeli-Palestinian agreements reached within the context of the Middle East peace process, including the Sharm el-Sheikh understandings, and the implementation of the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict".

Finally, resolution 77/247 also reiterates the "demand for the full implementation of Security Council resolution 1860 (2009)", which, at its turn, calls for

> "renewed and urgent efforts by the parties and the international community to achieve a comprehensive peace based on the vision of a region where two democratic States, Israel and Palestine, live side by side in peace with secure and recognized borders, as envisaged in Security Council resolution 1850 (2008)".

54. The current Opinion ignores as well the fact that despite periods of violence and allegations by each side that the other failed to adhere to its commitments, neither the Israeli and Palestinian sides, nor the General Assembly, nor the Security Council have abandoned the central precept that direct negotiation on the basis of the "land for peace" principle is the path to comprehensive, just and lasting peace and security.

55. Another relevant element concerns the legal impact of the understanding reached between the parties in the Oslo Accords on the issue of

settlements in the Occupied Palestinian Territory, a matter yet again ignored by the current Opinion. "Settlements" in Oslo II encompass "settlements in Area C" (Oslo II, Art. XII (5)). The parties to the Oslo Accords agreed that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations" (*ibid.*, Art. XXXI (7)). We are of the view that this obligation of Israel not to alter the status of the West Bank implies that any new settlements created in Area C and beyond it (if any) after 1995 (when Oslo II was concluded) are in breach also of this Accord.

56. After thoroughly analysing the situation, both factual and legal, we are convinced that the post-1995 settlements combined with other measures, such as the expulsion of the local Palestinian population or the application of Israel's domestic legislation to the occupied territory, are indicative of the intent to annex the territory comprising these settlements of Area C, but not the West Bank as a whole. Unfortunately, the Opinion does not make such necessary distinctions.

57. Before concluding this section, we point out that the Opinion fails to take into account certain provisions of the Oslo Accords which are relevant for a complete analysis concerning the legality of the occupation. For instance, the Opinion includes no analysis of Israel's right to security as confirmed by the Accords. In Oslo I it is agreed that "Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order" (Oslo I, Art. VIII; see also Annex II of the Agreed Minutes of Oslo I). In Oslo II the parties agree, *inter alia*, to "take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority and against their property, and shall take legal measures against offenders" (Oslo II, Art. XV (1)). They also agree that they will

> "act to ensure the immediate, efficient and effective handling of any incident involving a threat or act of terrorism, violence or incitement, whether committed by Palestinians or Israelis. To this end, they will cooperate in the exchange of information and coordinate policies and activities. Each side shall immediately and effectively respond to the occurrence or anticipated occurrence of an act of terrorism, violence or incitement and shall take all necessary measures to prevent such an occurrence." (Oslo II, Annex I, Art. II (2).)

At the same time, Article XIII (2) *(a)* of Oslo II includes a provision underlining the importance of Israel's right to security: "Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism."

58. Of course, we are of the view that the provisions of the Oslo Accords, freely agreed by the parties, cannot be interpreted as derogating from the rules of international humanitarian law or international human rights law. Nor can such provisions entitle Israel to claim the respect of certain of its rights in the absence of the observance by Israel of its obligations set forth by these Accords.

59. We believe that the above elements are particularly relevant, since this Opinion does not deal, like the *Wall* Opinion, with "only one aspect of the Israeli-Palestinian conflict" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 160, para. 54), but with much more general, numerous and far-reaching elements of what the Court characterized in that Opinion as the "*greater whole*" (*ibid.*). A "greater whole" which made the Court state in the *Wall* Opinion that "it would take this circumstance carefully into account in any opinion it might give" (*ibid.*). Unfortunately, the Opinion does not do that.

V. Conclusion

60. Based on the preceding analysis, we have to express our deep regret that this Advisory Opinion did not take account of and develop further on the legal issues of pressing concern discussed above.

Thus, on the issue of the legality of occupation, the Court should have responded in the sense that "Israel's policies and practices" in the Occupied Palestinian Territory do not affect the "legal status of the occupation", as explained above. Such a response, which we believe to be the only legally correct one, would have spared the Court from taking a stance on the legality of the occupation itself, an issue on which it was not asked to pronounce. Since the Court has taken a stance on this issue, it should have done so correctly by taking into account all relevant parameters, which it did not do.

In this respect, a sound legal analysis would have compelled the Court to take into account the Oslo Accords, Israel's and Palestine's rights to security and the relevant Security Council resolutions, as well as the interdependence between the right to self-determination and the right to security, thus allowing the Court to fully contribute to the Middle East peace process, in conformity with its functions to interpret and apply international law to the complex set of circumstances incident on the matter. Unfortunately, the Advisory Opinion preferred to undertake a narrower analysis and reached conclusions that do not have a proper legal basis in international law.

61. The Court could have thus elaborated a more comprehensive, balanced and nuanced Opinion that would have been more beneficial for future Israeli-Palestinian peace negotiations, thus becoming a step forward and an

efficient instrument for Israel and Palestine to resume negotiations on the implementation of the "two-State solution" and for the two States to manage to live side by side in peace and security. In this way, this Advisory Opinion could have served as a guidepost to the Security Council and the General Assembly, that are directly responsible for supporting the efforts of Israel and Palestine to find a peaceful and sustainable solution.

62. It is thus regrettable that the Court did not discuss and establish, along with the findings (which we support) related to Israel's breaches of international law (including the impeding of the exercise of the right to self-determination of the Palestinian people) and the responsibilities and obligations stemming from them, Palestine's responsibilities and obligations arising from the intrinsic interdependence between the right to self-determination of the Palestinian people and the rights to security of Israel and of Palestine, and from the negotiation framework. As Israel must respect and facilitate the exercise of the right to self-determination of the Palestinian people and the right to security of the Palestinian State, Palestine must respect the right to security of Israel, offer guarantees for its implementation, and co-operate with Israel for this purpose. The intrinsic interdependence of these two rights (to self-determination and to security), as resulting from the Oslo Accords and the relevant Security Council resolutions, creates a legal obligation of their simultaneous implementation.

63. It is equally regrettable that the Opinion did not state that both Israel and Palestine are under the obligation to resume without delay the direct negotiations for the permanent status leading to the "two-State solution", based on the negotiation framework defined by the Oslo Accords and the relevant Security Council resolutions. It is also unfortunate that the Opinion did not draw the attention to the Security Council and General Assembly of the need to reinforce the efforts for achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and thus to the establishment of a Palestinian State, with the aim of reaching the objective of the two democratic States, Israel and Palestine, living side by side in peace and security, with secure and recognized borders. We regret that the Opinion does not encourage all States to support Israel, Palestine, and the United Nations in their efforts to achieve the objectives mentioned above, which include the full realization of the right to self-determination of the Palestinian people.

64. We therefore express our concern that the current Opinion will hardly serve the objective of achieving the "two-State solution", thus allowing for the peaceful coexistence of the Israeli and Palestinian peoples.

(Signed) Peter TOMKA.

(Signed) Ronny ABRAHAM.

(Signed) Bogdan-Lucian AURESCU.