

SEPARATE OPINION OF JUDGE YUSUF

The excessively prolonged character of Israel's occupation is a separate and additional ground for the illegality of Israel's presence in the Occupied Palestinian Territory — The law of occupation is founded on the premise that occupation must be temporary — Prolonged occupation is contrary to this basic tenet of the law of occupation (jus in bello) — Prolonged occupation is more akin to colonial occupation or conquest than to belligerent occupation — As such, it is unlawful under jus in bello — Israel's prolonged occupation also defies jus ad bellum — Prolonged occupation, as a continued use of force, must be justified as an exercise of the right to self-defence — Israel's prolonged occupation is neither necessary nor proportionate and is therefore an illegal use of force.

I. INTRODUCTION

1. In this Advisory Opinion, the Court concludes, in reply to the second question posed by the United Nations General Assembly (hereinafter the "General Assembly"), that Israel's continued presence, as an occupying Power, in the Occupied Palestinian Territory is illegal. The Court reaches this conclusion in view of Israel's violation of two fundamental rules and principles of general international law and of the United Nations Charter in the context of a belligerent occupation. These are the prohibition of the acquisition of territory by force and the right of peoples to self-determination (Advisory Opinion, para. 261). For the reasons explained below, I am of the view that the Court should also have reached this conclusion in view of the illegality of an excessively prolonged occupation under international law.

2. The rules of customary law governing belligerent occupation had their origin in the European public law of the nineteenth century (*jus publicum europaeum*). At the time, those rules were not considered to be applicable to "colonial occupation" of non-European territories. This exemption of colonization from the *jus in bello* made it easier for European powers to realize their colonial ambitions and to conquer foreign lands without any legal limitations. However, the belligerent occupation of the territory of those who belonged to the self-styled circle of "civilized nations" had to be regulated

and temporarily limited under the laws of war embodied in the aborted Brussels Project (1874), the Oxford Manual (1880) and the Hague Regulations (1907). Such territories could not be subjected to an indefinite "colonial occupation" but had to be returned to their sovereign soon after the cessation of hostilities, most often after one year.

3. It is only with the outlawing of colonialism following the gradual implementation of the United Nations Charter principle of equal rights and self-determination of peoples that the concept of "colonial occupation" was done away with in international law. This was done, among others, through the General Assembly resolutions codifying customary international law on decolonization (e.g. resolution 1514 (XV)) or elaborating on the fundamental principles of the United Nations Charter (e.g. resolution 2625). At the same time, the concept of belligerent occupation and its temporary character were further refined in the Fourth Geneva Convention and came to be widely accepted as the only legal standard governing occupation in international law.

4. Thus, any belligerent occupation which substitutes an indefinite occupation for the legally sanctioned temporariness of belligerent occupation takes on the characteristics of colonial occupation or of conquest, both of which are contrary to the United Nations Charter and to contemporary principles of international law. The most relevant issues to be considered in such a case are: first, the extent to which the prolonged occupation has departed from the tenets and rules of the law of belligerent occupation (*jus in bello*); and secondly, whether or not this prolonged occupation is contrary to the rules concerning the prohibition of the use of force (*jus ad bellum*). A prolonged occupation which runs afoul of both sets of rules can offer no justification under international law of the continued presence of the occupying Power in the occupied territory.

II. THE PROLONGED OCCUPATION OF THE OCCUPIED PALESTINIAN TERRITORY: DENYING THE APPLICABILITY OF THE LAW OF BELLIGERENT OCCUPATION (*JUS IN BELLO*)

5. As noted in the Advisory Opinion, the nature and scope of the powers and duties of an occupying Power "are always premised on the same assumption: that occupation is a temporary situation to respond to military necessity, and it cannot transfer title of sovereignty to the occupying Power" (para. 105). In this respect, certain individual rules of the law of occupation are identified in the Advisory Opinion as being particularly illustrative of the premise that occupation must be temporary:

“Under Article 64 of the Fourth Geneva Convention and the rule enshrined in Article 43 of the Hague Regulations, for example, the occupying Power is obliged to respect, in principle, the laws of the occupied territory in force. Similarly, under the fifth paragraph of Article 50 of the Fourth Geneva Convention, the occupying Power may not hinder the application of a series of preferential measures adopted prior to the occupation; and, under the first paragraph of Article 54, it may not alter the status of public officials or judges in the occupied territory. Furthermore, the rule set out in Article 55 of the Hague Regulations confers on the occupying Power only the status of administrator and usufructuary of public buildings, real estate, forests and agricultural estates in the occupied territory.” (Para. 106.)

6. The above rules require an occupying Power to preserve as much as possible the *status quo ante* in the occupied territory and to hold it in a certain kind of trust for the occupied population until such time as control over the territory is returned to the rightful sovereign. In the words of the Advisory Opinion, “[t]hese provisions emphasize that occupation is conceived of as a temporary state of affairs, during which the exercise by the occupying Power of authority over foreign territory is tolerated for the benefit of the local population” (para. 106).

7. This is supported by the commentary of the International Committee of the Red Cross on Article 47 of the Fourth Geneva Convention, which reads as follows:

“[T]he occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights. This is what distinguishes occupation from annexation, whereby the Occupying Power acquires all or part of the occupied territory and incorporates it in its own territory.”¹

8. It is evident from the foregoing that occupation must always be a temporary state of affairs. It is true that the rules of the law of occupation do not expressly impose precise time-limits according to which the occupying Power must terminate its occupation and withdraw from the occupied territory. However, if occupation were to be allowed to continue indefinitely, thus gradually transforming itself into conquest or colonization, the legal tenets underlying the régime governing belligerent occupation, such as the protection of the interest of the occupied people and the return of sovereignty, would be rendered meaningless.

9. In the case of the Occupied Palestinian Territory, Israel has maintained an occupation for over 57 years. The Security Council had already by 1980

¹ J. S. Pictet (ed.), International Committee of the Red Cross, Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War (1958), p. 275.

reaffirmed “the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem” (Security Council resolution 476 (1980)). It is notable that, already in 1980, the Security Council deemed the occupation prolonged. In the words of Mr Riyad Mansour of the Palestinian delegation during the oral proceedings: “If the occupation was deemed prolonged in 1980, how should it be characterized today, nearly 45 years later?”² Indeed, this situation can no longer be considered, in 2024, only as a prolonged occupation, but has to be characterized as an “excessively prolonged occupation”. Since 1980 — or even much earlier, when it was first called upon to withdraw from territory occupied in 1967, in Security Council resolution 242 (1967) — Israel has continued to disregard various resolutions of the Security Council and the General Assembly calling for an end to the occupation.

10. Israel’s excessively prolonged occupation has subjected the Palestinian people to a régime of indefinite alien subjugation and domination which is contrary to all rules and tenets of the law governing belligerent occupation. This is reflected in the realities on the ground, which also include, *inter alia*, Israel’s transfer of its civilian population into the occupied territory, the confiscation of land, the exploitation of natural resources, the extension of its domestic law into the occupied territory and the forced displacement of, and discrimination against, the Palestinian population. It is also corroborated by Israel’s repeated denials that the Fourth Geneva Convention is applicable to the Occupied Palestinian Territory and its consequent rejection of the rules and principles of the law on belligerent occupation.

11. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court felt obliged to clarify the legal situation regarding the applicability of the Fourth Geneva Convention by affirming that

“the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.” (*I.C.J. Reports 2004 (I)*, p. 177, para. 101.)

In the present Advisory Opinion, the Court has also confirmed that the Fourth Geneva Convention is applicable throughout the Occupied

² See CR 2024/4, p. 113, para. 28 (Mansour (Palestine)).

Palestinian Territory, including the Gaza Strip (see Advisory Opinion, paras. 78 and 96).

12. Israel's excessively prolonged occupation, which has lasted for more than half a century, violates the basic tenet that belligerent occupation must be temporary, which is one of the main features distinguishing such occupation from colonial occupation and conquest. Moreover, an indefinite prolongation of occupation has a direct bearing on the very legality of the occupation. Any military occupation of foreign territory that changes the characteristics of belligerent occupation under international humanitarian law and decouples it from its normative framework must be considered unlawful. It follows that Israel's prolonged occupation of the Occupied Palestinian Territory is to be considered unlawful by dint of its prolonged character in disregard of the law of belligerent occupation.

III. THE PROLONGED OCCUPATION OF THE OCCUPIED PALESTINIAN TERRITORY: DEFYING THE RULES OF THE LAW ON THE USE OF FORCE (*JUS AD BELLUM*)

13. As stated by the Court in the present Advisory Opinion, "an occupation involves, by its very nature, a continued use of force in foreign territory. Such use of force is, however, subject to the rules of international law governing the legality of the use of force or *jus ad bellum*." (Para. 253.) A prolonged occupation cannot be justified on the basis of those rules unless the conditions for lawful self-defence continue to exist throughout the period of occupation. In other words, the occupying Power must be able to show, at all times, that the maintenance of its prolonged occupation is due to military necessity, which has to be proportionate to legitimate military objectives. However, the self-defence rationale cannot be invoked against a potential or future threat that might emanate from the occupied territory.

14. Israel's maintenance of its excessively prolonged occupation of the Occupied Palestinian Territory does not meet these standards. It does not satisfy the criteria of necessity and proportionality for self-defence under Article 51 of the United Nations Charter. Moreover, the violation by Israel of the basic tenets of the law of occupation may point to an illegitimate continued use of force aimed at creating a perpetual situation of conflict to justify a prolonged occupation. However, if the prohibition of the use of force under the United Nations Charter is to be meaningful, the exception of self-defence cannot be allowed to prolong unlawfully a belligerent occupation.

15. The Security Council had already determined in its resolution 242 (1967) that the state of belligerency, following the June 1967 war in which

the Palestinian territories were occupied by Israel, had to be terminated. Thus, in paragraph 1 of the above-mentioned resolution, the Security Council

“[a]ffirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force”.

16. Although the law of occupation (*jus in bello*) does not impose, as pointed out above, a precise time-limit for the termination of belligerent occupation, the issue of the legality of the continued use of force, in the form of belligerent occupation, is determined by the law on the use of force (*jus ad bellum*). It is under this law that whether the conditions for self-defence still exist must be established. Indeed, the duration of a belligerent occupation is subject to an *ad bellum* test whereby, if the continued use of force can no longer be justified on grounds of self-defence against an imminent threat or use of force, it must be terminated.

17. In light of the above, a prolonged and indefinite use of force against an occupied population constitutes a breach of the law on the use of force. It cannot be justified for more than half a century on military necessity. It goes beyond the specific defensive needs which might have originally justified it, if they ever existed, and turns it into alien subjugation and domination of a people which is contrary to the principles and purposes of the United Nations Charter. Thus, Israel’s prolonged occupation is also to be considered unlawful in view of its continued violation of the law on the use of force (*jus ad bellum*).

(Signed) Abdulqawi Ahmed YUSUF.
