

## SEPARATE OPINION OF JUDGE CLEVELAND

*People of Palestine and Israel have right to self-determination — Israel's lack of participation in proceedings — General Assembly request addresses only one party.*

*Failure of Court to examine long-standing situation in Gaza — Temporal scope of Opinion excludes Israel's response in Gaza Strip to 7 October 2023 attack — Jus ad bellum determines legality of Israel's presence in Occupied Palestinian Territory — Court does not substantiate conclusion that Israel's presence is unlawful with respect to Gaza — Court should have identified legal obligations of Israel regarding Gaza.*

*Annexation in context of prohibition of acquisition of territory by force involves use of force to control foreign territory with intent to exercise permanent control — Court finds this violated in East Jerusalem and West Bank.*

*Conclusion that obligation to respect right to self-determination is a peremptory norm should be understood in context of alien subjugation and foreign domination — erga omnes character of self-determination informs Court's conclusions on responsibility of States and United Nations.*

1. In resolution 181 of 1947, the General Assembly proposed the partition of Mandatory Palestine into two States, Jewish and Arab, which it expected to come into existence within two months of Britain's withdrawal and no later than 1 October 1948. Israel accepted the partition proposal and declared independence in May 1948. Israel was admitted as a UN Member State in 1949 on the basis of, *inter alia*, its acceptance in principle of an Arab State in the remainder of Palestine (General Assembly resolution 273 (III)). In 1993, the Palestine Liberation Organization (hereinafter PLO) renounced violence and recognized the State of Israel and its right to live in peace and security. Israel in turn recognized the PLO as the legitimate representative of the Palestinian people.

2. In light of the General Assembly's request, the Court's Opinion understandably focuses on the enduring denial of the right to self-determination of the Palestinian people in the Occupied Palestinian Territory. It finds that “[a]s a consequence of Israel's policies and practices, which span decades, the Palestinian people has been deprived of its right to self-

determination” (Advisory Opinion, para. 243), a conclusion I share. However, the right to self-determination has not been fully realized for the people of either Palestine or Israel. The people of Israel, too, have the right to self-determination, including the right to political independence, to territorial integrity, and to live in peace and security within recognized borders. Violent attacks against the State of Israel and its people, and the refusal of other States to recognize the legitimate existence of the State of Israel — including a number of the States participating in these advisory proceedings — also violate this right. The right of the peoples of both Palestine and Israel to live in peace within secure and recognized borders is an essential element to securing regional peace (Security Council resolution 242 (1967); Security Council resolution 338 (1973); Security Council resolution 1515 (2003) and Security Council resolution 2334 (2016)).

3. Regrettably, the Court makes no meaningful effort to grapple with the assaults on the right to self-determination that have confronted the people of Israel since the State’s inception. In addition to addressing the ongoing obstacles to the right of self-determination of the Palestinian people — which are myriad and egregious — I believe that, in rendering this Opinion, the Court had a responsibility to acknowledge, and to take into greater account, the ongoing threats to Israel and its people.

4. It also is unfortunate that Israel did not meaningfully participate in these advisory proceedings. Israel submitted a five-page written statement to the Court, together with annexes. It chose not to participate in the oral proceedings, despite the fact that up to the opening of those proceedings, the Court had reserved three hours for Israel to present its views — the same amount of time allocated to the observer State of Palestine, and six times the amount allocated to any other participant. This is an advisory proceeding, and no State was under an obligation to participate, including Israel. Israel’s participation in the oral proceedings, however, would have benefited the Court. Conversely, the failure of a State to participate cannot prevent the Court from fulfilling its responsibilities in replying to a request for an advisory opinion.

5. Finally, it is regrettable that the General Assembly’s request focused only on the conduct of Israel in relation to Palestine, as opposed to the legal consequences arising from the policies and practices of all relevant actors in the Israel-Palestine situation. Israel and its population have also suffered grievous harms to their rights under international law in the period covered by the request. Resolution of the Israel-Palestine situation will not be achieved until the harms committed by all relevant actors are acknowledged and addressed.

6. That said, I agree with most of the Court’s conclusions, within the framing of the issues by the Court. In addition to my joint declaration with Judge Nolte, which addresses the question of the legality of Israel’s continu-

ing presence in the Occupied Palestinian Territory, I write separately to set forth my views on the Court's approach to the question of Gaza, the concept of annexation and self-determination as a peremptory norm of international law.

### I. THE QUESTION OF GAZA

7. The situation in the Gaza Strip has been tragic for decades and, as the Court has observed, is now "catastrophic" and "disastrous" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 28 March 2024, Order of 24 May 2024, I.C.J. Reports 2024 (II)*, p. 658, para. 28). It is unclear, however, what legal and practical conclusions can be drawn from the Court's Opinion regarding Israel's long-standing conduct toward the Gaza Strip. The circumstances of the current armed conflict in the Gaza Strip are not before the Court in this Advisory Opinion, and the temporal scope of the Opinion established by the Court makes the application of the Court's conclusions to Gaza difficult. In my view, the Court also does not substantiate its conclusion that the unlawfulness of Israel's presence, and the concomitant duty to withdraw, apply to the current situation in the Gaza Strip.

8. On the other hand, the Court could, and should, have addressed other questions regarding Israel's responsibilities and the legality of Israel's policies and practices with respect to the Gaza Strip which existed before 7 October 2023 and which are ongoing. I address some of these below.

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9. With respect to the temporal scope of the Advisory Opinion, the Court significantly states that "the policies and practices contemplated by the request of the General Assembly do not include conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023" (Advisory Opinion, para. 81). The Court then underscores this important temporal limitation on the Opinion just before providing its reply to the General Assembly's request, reiterating that its reply "rests on the totality of the legal grounds set forth by the Court above, each of which is to be read in the light of the others, taking into account the framing by the Court of the material, territorial and temporal scope of the questions (paragraphs 72 to 83)" (*ibid.*, para. 284). This clarifies, at a minimum, that the Opinion does not address Israel's response to the 7 October 2023 attack and the resulting devastating situation in Gaza. Nor

does it address how the current conflict may affect the legality of Israel's pre-existing and continuing military engagement with the Gaza Strip.

10. Otherwise the Opinion says very little about Gaza. In identifying the applicable law in paragraphs 88 to 94, the Court observes that after its withdrawal in 2005, Israel continued to exercise certain key elements of authority with respect to the Gaza Strip, including "control of the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone" (Advisory Opinion, para. 93). In this regard, it concludes that aspects of the law of occupation continued to apply with respect to the Gaza Strip, commensurate with Israel's degree of effective control (*ibid.*, para. 94). However, the Court does not identify which obligations continued to bind Israel after 2005, nor does it find any violations of such obligations. In fact, the Court's determination that the law of occupation continued to apply with respect to the Gaza Strip plays no subsequent role in the Court's analysis.

11. The Court's failure to identify what responsibilities Israel retained under the law of occupation in relation to Gaza, and its failure to draw any conclusions therefrom, leaves the status of Gaza in this period, and Israel's corresponding obligations, in a state of great uncertainty.

12. The Court's detailed discussion of Israel's settlement policies and annexation of parts of the Occupied Palestinian Territory does not address Gaza (Advisory Opinion, paras. 111-179). The Court's analysis of "related discriminatory legislation and measures" notes restrictions on movement between Gaza, the West Bank and East Jerusalem (*ibid.*, paras. 202-203) but makes no specific finding of discrimination with respect to Israel's policies and practices regarding Gaza. The Court's finding of a violation of Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination is expressly limited to Israel's policies and practices in East Jerusalem and the West Bank (*ibid.*, para. 226).

13. By contrast, the Court's consideration of the right to self-determination unquestionably applies to all Palestinians in the Occupied Palestinian Territory, including in the Gaza Strip. The Palestinian people constitute a people (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 182-183, para. 118), and the Occupied Palestinian Territory "constitutes a single territorial unit, the unity, contiguity and integrity of which are to be preserved and respected" (Advisory Opinion, para. 78). As the Court affirms, as part of its right to self-determination, the Palestinian people has the right to the

integrity of its territory and population, to permanent sovereignty over its natural resources and to freely determine its political status and to pursue its economic, social and cultural development across the Occupied Palestinian Territory (*ibid.*, paras. 238-241). Thus, violations of the right to self-determination that result from Israel's unlawful conduct necessarily obstruct the enjoyment of this right throughout the Occupied Palestinian Territory, regardless where in the territory Israel's policies and practices took place.

14. Most notably, Gaza is absent from the key findings underlying the Court's conclusion that Israel's presence in the Occupied Palestinian Territory is unlawful. As the Court makes clear, it is the violation of the rules regarding the use of force, the *jus ad bellum*, that makes the presence of an occupying Power unlawful (Advisory Opinion, paras. 251 and 253; see also joint declaration of Judges Nolte and Cleveland, para. 7). Instrumentalizing an occupation to achieve the acquisition of territory, as Israel has done in East Jerusalem and the West Bank, renders such presence unlawful, irrespective of any self-defence justification a State may have (joint declaration of Judges Nolte and Cleveland, para. 8).

15. None of the circumstances that lead the Court to conclude that Israel's presence violates the rules regarding the use of force apply to the Gaza Strip, however. The Court does not find that Israel has expanded settlements and related infrastructure in the Gaza Strip. Indeed, Israel evacuated its settlements from Gaza in 2005 (Advisory Opinion, paras. 68 and 114). The Court does not suggest that Israel has annexed, or has sought to annex, the Gaza Strip. Nor does it contend that Israel otherwise violated the prohibition on the use of force between 2005 and 2023 with respect to Gaza. Thus, the core conclusion of the Court — that Israel's policies and practices as an occupying Power violate the prohibition of the acquisition of territory by force, and thus exclude any justification of self-defence — is not applied to Gaza.

16. The Court nevertheless attempts, in the space of a single paragraph, to bring Gaza within its conclusion that Israel's presence in the "entirety" of the Occupied Palestinian Territory is unlawful, based on the integrity of the Occupied Palestinian Territory (Advisory Opinion, para. 262).

17. However, this solitary paragraph does not explain how a violation of the right to self-determination — in the *absence* of a violation of the prohibition of acquiring territory by force — renders an occupying Power's presence unlawful. Nor does it explain how such a violation can somehow override any legitimate exercise of the right to self-defence that Israel may have with respect to the Gaza Strip. As the Court's own examination of the question whether the Gaza Strip remained occupied after 2005 demon-

strates, the question whether an occupation exists requires a separate analysis of the circumstances with respect to a specific region or territory (Advisory Opinion, paras. 88-94; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, pp. 230-231, paras. 174-178). The legality of a State's military presence in foreign territory likewise requires separate analyses if different circumstances prevail in different regions. It is not determined by a principle of territorial unity. Thus, a use of force that is lawful in one part of a territory may not be lawful in another.

18. Some information before the Court may suggest that Israel has sought to exercise permanent control over the entire Occupied Palestinian Territory, including the Gaza Strip, in order to facilitate the progressive annexation of parts of the territory and the alteration of its demographic character, and to obstruct the right to a Palestinian State. The Court, however, does not make such a determination. It does not conclude that Israel is trying to permanently control the Occupied Palestinian Territory as a whole, or the Gaza Strip. It simply does not address the question. In the absence of such a finding, a determination that Israel's presence in relation to the Gaza Strip violated the *jus ad bellum* would have required a finding that Israel's military presence pertaining to the Gaza Strip prior to 7 October 2023 lacked any legitimate self-defence justification. This would have required the Court to grapple with legal and factual considerations regarding the scope of Israel's legitimate right to use force to protect its territory and its people, which the Court does not remotely purport to confront (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004 (I)*, p. 195, para. 141).

19. The temporal limitation imposed by the Court (Advisory Opinion, paras. 81 and 284) also makes very unclear what it means for the Court to say that Israel must withdraw from the Gaza Strip as rapidly as possible, somehow *without taking into account* the circumstances resulting from Israel's response to the 7 October 2023 attack.

20. There are understandable reasons for the Court's reticence with respect to its consideration of the Gaza Strip. The General Assembly's request of December 2022 asked the Court to examine Israel's policies of, *inter alia*, "settlement", "annexation" and "related" discriminatory measures, and their impact on the legal status of the occupation. This framing placed the lens primarily on East Jerusalem and the West Bank, where these policies and practices are in place (resolution 77/247 of 30 December 2022, para. 18). Participants in the advisory proceedings likewise focused their submissions primarily on these parts of the Occupied Palestinian Territory. The situation in the Gaza Strip after 7 October 2023, which emerged after the General Assembly adopted the request, was also difficult for the

Court to consider, given that it involves an ongoing armed conflict and is the subject of two sets of contentious proceedings before the Court.

21. Accordingly, for the reasons above and those set forth in my joint declaration with Judge Nolte, I agree with the Court's reply that "the State of Israel's continued presence in the Occupied Palestinian Territory is unlawful" (Advisory Opinion, para. 285 (3)). This is correct with respect to East Jerusalem and the West Bank. However, I disagree that the Court established that this conclusion applies to the "entirety" of the Occupied Palestinian Territory (*ibid.*, para. 262). The combination of the Court's temporal limitation, and its failure to substantiate its *jus ad bellum* analysis with respect to Gaza, render this particular conclusion of the Court inapplicable to the current situation in the Gaza Strip.

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22. Nevertheless, I believe that, at a minimum, the Court could and should have made clearer certain responsibilities of Israel with respect to the long-standing tragic situation in the Gaza Strip, and it is regrettable that it did not do so.

23. First, as the Court notes, Israel's settlement policy in Gaza prior to 2005 "was not substantially different" from the current policy in East Jerusalem and the West Bank (Advisory Opinion, para. 114). For the reasons stated by the Court, the transfer of the population of an occupying Power into an occupied territory is prohibited under Article 49 of the Fourth Geneva Convention (*ibid.*, paras. 115-119). Thus, any future attempt to resurrect such a settlement policy with respect to the Gaza Strip would constitute a "flagrant violation" of this prohibition (Security Council resolution 465 (1980) of 1 March 1980; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 183-184, para. 120).

24. Second, with respect to Israel's obligations under the law of occupation regarding Gaza after 2005 (see paragraph 10 above), it is clear that Israel did not exercise effective control over most of the day-to-day government administration of the Gaza Strip — a responsibility which, after 2007, was under the control of Hamas. Israel, therefore, did not generally possess the effective control necessary, for example, to incur the obligation under Article 43 of the 1907 Hague Regulations to maintain public order within Gaza. Nevertheless, the Court could have found that Israel's control over the sea and air space of the Gaza Strip, as well as land crossings (which it shared in part with Egypt (Advisory Opinion, para. 89), and its severe restrictions on, for example, imports of food, exports, and activities such as fishing in Gaza's maritime space (contrary to Israel's commitments under the Oslo

Accords), brought with it, *inter alia*, aspects of the duty to “ensur[e] the food and medical supplies of the population” under Article 55 of the Fourth Geneva Convention, as well as the duty to facilitate humanitarian relief under Article 59 of that Convention.

25. The Court could also have considered whether aspects of Israel’s restrictions on ingress and egress violated the economic and social rights and other human rights of the Palestinian population in the Gaza Strip. Furthermore, it is always the case that any use of military force that is disproportionate to a legitimate right of self-defence violates the *jus ad bellum*, and that any use of force that causes disproportionate civilian harm compared to the anticipated military advantage violates the *jus in bello*.

26. Finally, I believe the Court’s Opinion makes clear that it would violate the *jus ad bellum* for Israel to use its position as an occupying Power to seek to exercise permanent control over the Occupied Palestinian Territory as a whole, including the Gaza Strip. Such use of force also would further compound the violations of the Palestinian people’s right to self-determination.

27. All these obligations with respect to Gaza remain ongoing.

## II. THE CONCEPT OF ANNEXATION

28. It is perhaps unfortunate that the General Assembly framed part of question (a) in terms of “annexation”. International law, in the form of Article 2, paragraph 4, of the UN Charter and of custom, prohibits the “acquisition of territory” through the threat or use of force. The critical question, then, is what constitutes an unlawful “acquisition” of territory that could place the conduct of an occupying Power in violation of this fundamental norm. “Annexation” in this sense can be (mis)understood as involving the assertion of formal sovereignty over a territory or the incorporation of foreign territory into a State’s own territory — neither of which is required for a violation of the prohibition of the acquisition of territory by force. The Court at times appears to equate annexation with incorporation, which could suggest an unnecessary restriction on this prohibition (see e.g. paragraph 158 of the Advisory Opinion, defining annexation as “integration into the territory of the occupying Power”; and paragraph 170, stating that “Israel has also taken steps to incorporate the West Bank into its own territory”).

29. While many participants in these proceedings contended that at least part of the Occupied Palestinian Territory has been annexed, few addressed the meaning of this concept. Japan, however, elaborated on the forcible acquisition of territory in its submissions, stating that the principle consists of “the establishment of control over the territory through forcible measures”, coupled with “the intention to appropriate that territory permanently”<sup>1</sup>. Japan further maintained that this prohibition applies to “any unilateral attempts to change the peacefully established status of territories by force or coercion”.

30. The Court’s predominant reasoning is consistent with this approach. The Court makes clear that the essence of the prohibition of the acquisition of territory by force involves the use of force to control a foreign territory, with the intent of exercising permanent control. Thus, the Court observes that annexation “presupposes the intent of the occupying Power to exercise permanent control over the occupied territory” (Advisory Opinion, para. 158; see also paragraphs 159 and 161). It does not restrict “annexation” to the assertion of formal sovereignty or a situation of incorporation. Accordingly, the Court concludes that Israel’s policies and practices in large parts of the Occupied Palestinian Territory, notably East Jerusalem and in the West Bank, “are designed to remain in place indefinitely and to create irreversible effects on the ground” (*ibid.*, para. 173). In other words, they are intended to be permanent. Such conduct violates the *jus ad bellum* prohibition of the acquisition of territory by force.

### III. SELF-DETERMINATION AS A PEREMPTORY NORM

31. The Court declares, for the first time, that the right to self-determination is a peremptory norm of international law. In so doing, it states that “in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm” (Advisory Opinion, para. 233). Unfortunately, the Court provides no explanation of what it means by “cases of foreign occupation such as the present case”, or how this formulation relates to the concept of a peremptory norm of international law.

32. The right to self-determination is fundamental. In its full articulation, it is also a broad and indeterminate right, with both external and internal aspects. The external aspect of self-determination has been most extensively elaborated with regard to the right of peoples to be free from alien subjugation and foreign domination in the context of decolonization (General

<sup>1</sup> Citing Rainer Hofmann, “Annexation” in *Max Planck Encyclopedia of Public International Law* (January 2020) and Coleman Phillipson, *Termination of War and Treaties of Peace* (E. P. Dutton, 1916), p. 9.

Assembly resolution 1514 (XV) of 14 December 1960, para. 1). It is in this context that self-determination most clearly could be recognized as a peremptory norm.

33. In my view, in referring to “foreign occupation such as the present case”, the Court was focusing on the features of Israel’s occupation that are potentially analogous to a situation of foreign domination. These features include a situation of prolonged occupation characterized by annexation through permanent control and the accompanying suppression of self-determination, over a period of decades. Any foreign occupation, by definition, however lawful, will likely involve the temporary denial of aspects of the right to self-determination. Therefore, by using the formulation “foreign occupation *such as the present case*”, the Court intended to make clear that it is the particular features of Israel’s prolonged occupation that analogize it to a situation of alien subjugation and foreign domination which implicate the right to self-determination as a peremptory norm.

34. The Court has recognized for decades that the right to self-determination is a foundational principle of the UN Charter and a fundamental human right, and that it gives rise to obligations *erga omnes* (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-32, para. 55; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88 and p. 199, para. 155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 131, paras. 144 and 146 and p. 139, para. 180). The Court also focuses on the *erga omnes* character of the norm in this case. Indeed, in addressing the legal consequences that flow from Israel’s violations of international law, the Court draws upon the character and importance of the obligations at issue as “*erga omnes*”, not as peremptory norms of international law. It is the *erga omnes* character of the norms as “the concern of all States” that informs the Court’s determination of the responsibilities of States and the United Nations (Advisory Opinion, paras. 274 and 280). I believe that this approach is correct and is consistent with the Court’s prior case law.

35. In other words, the Court did not need the pronouncement that self-determination constitutes a peremptory norm of international law for its analysis and did not adopt it for that reason. The Court made the pronouncement because it believed it to be legally correct.

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36. On 7 October 2023, Hamas, the *de facto* governing authority in the Gaza Strip, together with other armed groups, violently attacked Israel and

its citizens. By contrast, the observer State of Palestine took its grievances to the UN General Assembly and to this Court, by way of this request for an advisory opinion. It thereby sought to invoke the assistance of the UN organs in the peaceful resolution of disputes and the maintenance of international peace and security, consistent with the mandate of the UN Charter and this Court, and with the obligations of all Member States of the United Nations.

37. At the close of its Opinion, the Court recognizes that

“the realization of the right of the Palestinian people to self-determination, including its right to an independent and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States, as envisaged in resolutions of the Security Council and General Assembly, would contribute to regional stability and the security of all States in the Middle East” (para. 283).

38. I hope that the Court’s Advisory Opinion can be understood to contribute to that worthy goal.

*(Signed)* Sarah H. CLEVELAND.

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