

*Position Paper of the United Nations Independent International
Commission of Inquiry on the Occupied Palestinian Territory,
including East Jerusalem, and in Israel*

Legal Consequences arising from the Policies and Practices of
Israel in the Occupied Palestinian Territory, including East
Jerusalem

Request for an Advisory Opinion from the
International Court of Justice

September 2023

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I. INTRODUCTION

1. On 30 December 2022, the General Assembly adopted resolution A/RES/77/247, in which it decided, in accordance with Article 96 of the Charter of the United Nations (“the UN”), to request the International Court of Justice (“the Court”) to render an advisory opinion pursuant to Article 65 of the Statute of the Court on the question of the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.
2. On 17 January 2023, the Secretary-General of the UN informed the President of the Court that, pursuant to Article 65, paragraph 2 of the Statute of the Court, the UN Secretariat would prepare a dossier containing all relevant documents pertaining to the request for an advisory opinion and the dossier would be transmitted to the Court.
3. On 3 February 2023, the Court issued an order that the UN and its Member States, as well as the observer State of Palestine, may provide the Court with written submissions, in accordance with Article 66, paragraph 2, of the Statute of the Court, by 25 July 2023.

II. QUESTIONS PRESENTED

4. The General Assembly, in resolution 77/247, asked the Court
[...] to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
 - (a) *What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?*
 - (b) *How do the policies and practices of Israel referred to above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?*

III. JURISDICTION

5. The Court is competent to “give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.¹ The General Assembly is competent to request an advisory opinion pursuant to Article 96, paragraph 1 of the Charter, provided that it is on a “legal question”. The Commission considers that the two questions presented to the Court in this request for

¹ Statute of the International Court of Justice, Article 65, para. 1.

an advisory opinion are legal in character and that the Court has jurisdiction to give an advisory opinion as requested by the General Assembly in resolution 77/247.

IV. THE COMMISSION'S POSITION ON THE QUESTIONS PRESENTED

6. The right of a people to self-determination is a peremptory norm of international law that implies obligations of an *erga omnes* character for the international community as a whole. In implementing its mandate from the Human Rights Council, the Commission has concluded on reasonable grounds that the continuing violation by Israel of the right of the Palestinian people to self-determination is unlawful under international law. In addition, the Commission has concluded that the occupation of the Palestinian territory by Israel is now unlawful under international law owing to its permanence and actions undertaken by Israel to annex parts of the land *de jure* and *de facto*.² The commission of these unlawful acts results in state responsibility for the State of Israel. Israel is under an obligation to cease the unlawful acts, offer assurances and guarantees of non-repetition, and make full reparations. The commission of these unlawful acts also obligates Member States of the UN to not recognize the illegal situation arising out of the violation, to not render aid or assistance in maintaining the illegal situation and to co-operate with a view to putting an end to the violations.

A. Legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination.

7. The principle of self-determination, as promulgated under the UN Charter,³ and set forth as the right to self-determination in both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights,⁴ provides for the obligation to respect the will of a people to form a sovereign independent State.⁵ The Court has stated that General Assembly resolution 1514 (XV) “clarified the content and scope of the right to self-determination” and considered that the resolution had a “declaratory character with regard to the right to self-determination as a customary norm”.⁶ The General Assembly in 1970 recognized “that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations”.⁷ The Court has observed that “the right of peoples to self-determination, as it evolved from the Charter and

² As envisaged in 2004 by this Court, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (“*the Wall Advisory Opinion*”), para. 121.

³ UN Charter, Articles 1(2), 2(4) and 55.

⁴ See common Article 1(1) and Article 1(3) of the International Covenant on Civil and Political Rights (“the ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“the ICESCR”).

⁵ *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, para. 59; UN General Assembly resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex. The ICCPR applies where the State exercises its jurisdiction on foreign territory. See *the Wall Advisory Opinion*, paras 109-111; UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Israel*, 21 August 2003, CCPR/CO/78/ISR, para. 11.

⁶ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019 (“*the Chagos Advisory Opinion*”), para. 152.

⁷ UN General Assembly resolution 2672C (XXV) of 8 December 1970.

from United Nations practice, has an *erga omnes* character”,⁸ and that subsequent developments of international law made the principle of self-determination applicable to all non-self-governing territories.⁹

8. In 2004, the Court concluded that the building of a wall or barrier by Israel on land that is part of the Occupied Palestinian Territory impeded the exercise by the Palestinian people of its right to self-determination.¹⁰ The Court also noted, “Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.”¹¹
9. Numerous UN Security Council resolutions have addressed the establishment of Israeli settlements and the occupation of territories by Israel and concluded that they are invalid under the Fourth Geneva Conventions, and repeatedly called upon Israel to abide by its legal obligations.¹² The Commission stresses that Article 25 of the UN Charter provides that Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter.¹³ As such, Member States are under an obligation to comply with decisions adopted by the Security Council under Article 25 of the UN Charter. The Commission further emphasizes that this obligation attaches to all Member States equally, including Members of the Security Council that voted against the decision and Member States that are not members of the Council.¹⁴ Accordingly, a “binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.”¹⁵ In relation to Israel’s admission into the United Nations, the preamble of General Assembly Resolution 273 (III) of 11 May 1949 reiterates the declaration that Israel “unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of the United Nations”.
10. In the Commission’s report to the General Assembly in September 2022, the Commission noted that, in the West Bank and East Jerusalem, the expansive Israeli settlements and outposts enterprise has been a significant driver of the protracted occupation, despite being considered illegal under international law.¹⁶ The Commission found that these settlements had fragmented and isolated Palestinians from their land and from other Palestinian communities.¹⁷ The Commission concluded that the occupation and *de facto* annexation

⁸ *The Chagos Advisory Opinion*, para. 180; *The Wall Advisory Opinion*, para. 156 (citing *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, para. 29).

⁹ *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, (“*the Namibia Advisory Opinion*”), para. 52.

¹⁰ *The Wall Advisory Opinion*, para. 122.

¹¹ *The Wall Advisory Opinion*, para. 149.

¹² See UN Security Council Resolutions 267 (1969), 298 (1971), 446 (1979), 478 (1980), 681 (1990), 799 (1992).

¹³ See also *the Namibia Advisory Opinion*, para. 112.

¹⁴ *The Namibia Advisory Opinion*, para. 115.

¹⁵ *The Namibia Advisory Opinion*, paras 113, 117.

¹⁶ Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/77/328 (14 September 2022) (hereinafter “Commission of Inquiry Report”), paras 25-26.

¹⁷ Commission of Inquiry Report, para. 30.

policies of the Government of Israel had violated the right of the Palestinian people to self-determination.¹⁸

11. The Commission considers that Israel's violation of the right of the Palestinian people to self-determination is unlawful and has legal consequences for the State of Israel.¹⁹ Accordingly, Israel has an obligation to respect the right of the Palestinian people to self-determination and obligations under international humanitarian law and human rights law.²⁰ Israel has the obligation bring to an end all actions that violate the right of the Palestinian people to self-determination, including its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967. Equally significant, the Commission emphasizes that Israel shall give appropriate assurances and guarantees of non-repetition in relation to its unlawful occupation. To this end, Israel must repeal and render ineffective all adopted legislation and regulations that have involved or resulted in violations of Israel's obligations under international law. Israel is under an obligation to make reparations for the damages arising from its unlawful conduct, and restitution in kind.²¹
12. The Court has stated that, since the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right.²² All Member States of the UN are also under an obligation to not recognize the illegal situation arising out of the violation of the right of the Palestinian people to self-determination. States shall not render aid or assistance in maintaining the illegal situation and shall co-operate with a view to putting an end to the violations and to ensuring that reparation will be made.²³

B. Legal status of the occupation and the legal consequences that arise for all States and the United Nations

13. International law does not prescribe specifically when a situation of belligerent occupation becomes unlawful. The main sources of law that govern occupation include the Hague Regulations of 1907,²⁴ the Fourth Geneva Convention of 1949, Additional Protocol I of 1977 and customary international law. These provisions, however, cannot be considered in

¹⁸ Commission of Inquiry Report, para. 77.

¹⁹ See *the Chagos Advisory Opinion*, para. 177; *Corfu Channel (United Kingdom v. Albania), Merits, Judgment*, I.C.J. Reports 1949, p. 23; see also International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UNGA Res 56/83, UN Doc A/RES/56/83 (12 December 2001), article 1.

²⁰ See *the Wall Advisory Opinion*, para. 151. See also *the Namibia Advisory Opinion*, para. 118.

²¹ The Permanent Court of International Justice laid down the general principles of reparation, “[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.” *Case Concerning the Factory at Chorzów, Merits, Judgment No. 13*, 13 September 1928, P.C.I.J., Series A, No. 17, p. 47; endorsed by the Court in *the Wall Advisory Opinion*, para. 153.

²² *The Chagos Advisory Opinion*, para. 180.

²³ *The Wall Advisory Opinion*, para. 159. See also *the Namibia Advisory Opinion*, para. 119.

²⁴ While Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed, the Court stated that the provisions of the Hague Regulations have become part of customary law (*The Wall Advisory Opinion*, para. 89).

isolation but must be interpreted and applied in the context of international law as a whole, including the *jus cogens* of absolute prohibition on the acquisition of territory by force.

14. The law of occupation is primarily concerned with the temporary nature of the occupation and the protection of the occupied population. In wartime, occupation is a temporary and exceptional circumstance where the occupying power is the *de facto* administrator of the occupied territory with the view that the territory will be returned to the sovereign people of the territory. This does not, however, deprive the people in the occupied territory of its statehood or sovereignty. For the occupied Palestinian territories, the applicable legal framework is the law of belligerent occupation which consists of the rules enshrined in the 1907 Hague Regulations, the Fourth Geneva Convention and customary international humanitarian law.²⁵
15. The Court has relied on Article 42 of the Hague Regulations for determining the existence of an occupation under international humanitarian law.²⁶ Article 42 states that “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”²⁷ In 2004, the Court stated that the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate had been occupied by Israel since 1967 and that all of these territories, including East Jerusalem, remained occupied territories with Israel as the occupying power.²⁸
16. In 2004, the Court had considered that the construction of the wall and its associated regime created a “fait accompli” that could become permanent, which would amount to *de facto* annexation.²⁹ Since the Court’s advisory opinion in 2004, Israel has continued and still continues to be the occupying power in the Occupied Palestinian Territory, including East Jerusalem. Both the Hague Regulations and the Fourth Geneva Convention envisage that occupation would be a temporary state that would end when peaceful arrangements have been met to end the armed conflict.³⁰ As such, situations of belligerent occupation cannot exist indefinitely and in no situation do they grant any right of sovereignty to the occupying power.³¹ Absent any formal declaration or “*de jure* annexation” by the occupying power,

²⁵ Note the International Committee of the Red Cross considers occupied territories being under belligerent occupation and affirms the *de jure* applicability of the law of occupation, namely the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949. The State of Israel accepts the *de jure* applicability of the Hague Regulations and the *de facto* applicability of the Fourth Geneva Convention.

²⁶ *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement of 19 December 2005, I.C.J. Reports 2005, paras 172-177; *The Wall Advisory Opinion*, para. 78.

²⁷ Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907; see also *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement of 19 December 2005, I.C.J. Reports 2005, para. 172; *The Wall Advisory Opinion*, paras 78, 89.

²⁸ *The Wall Advisory Opinion*, para. 78.

²⁹ *The Wall Advisory Opinion*, para. 121.

³⁰ See e.g. Article 43 of the Hague Regulations, where the occupant shall take all possible measures to restore and ensure, public order and safety, while respecting the laws in force in the country; Article 64 of the Fourth Geneva Convention, where penal laws of the occupied territory shall remain in force unless they constitute a threat to the security of the Occupying Power or an obstacle to the application of the Fourth Geneva Convention. See also, e.g. Security Council resolution 1483 (2003), in relation to the American-led occupation of Iraq, the Security Council welcomed the commitment to support the creation of an environment in which the Iraqi people may determine their own political future “as soon as possible”.

³¹ *Ibid.*

there is no legal definition or authority as to when an occupation which is permitted under international humanitarian law crosses the threshold into a situation of illegal acquisition of territory.

17. The Commission, in its 2022 report to the General Assembly (A/77/328), focused on two indicators that may be used to determine the lawfulness or otherwise of the occupation: the permanence of the Israeli occupation, and actions amounting to annexation, including unilateral actions taken to dispose of parts of the Occupied Palestinian Territory as if Israel held sovereignty over it.³² The Commission distinguished between *de jure* and *de facto* annexation, noting that “*de facto* annexation” was the term used by the Court in 2004.³³ The Commission found that there were reasonable grounds to conclude that the Israeli occupation of the Palestinian territory is now unlawful under international law owing to its permanence and actions undertaken by Israel to annex parts of the land *de facto* and *de jure*. The Commission highlighted policies and laws that maintain the permanence of the occupation and ensure the sovereignty of Israel over the occupied territories.
18. As stated in the previous section, the right of the Palestinian people to self-determination has been and continues to be violated by Israel. The occupation itself denies the Palestinian people their right to self-determination due to its permanence and actions amounting to annexation, including unilateral actions taken to dispose of parts of the Occupied Palestinian Territory as if Israel held sovereignty over it. It can be concluded that, when an occupation rests on a violation of a peremptory norm of *erga omnes* character, such as the right to self-determination, the occupation itself is unlawful.
19. The Commission considers that, whatever the status of the current occupation the responsibility of the State of Israel is engaged under international law.³⁴ Israel must comply with its obligations under international humanitarian and human rights law and has an obligation to put an end to the violation of international law, namely the occupation.³⁵ Israel may also be required to give appropriate assurances and guarantees of non-repetition, meaning, in this case, the ending of the occupation on a permanent basis.³⁶ Israel should be required, *inter alia*, to ensure the restoration of property requisitioned or expropriated from Palestinians, including land and property taken for expansive settlements; provide reparations and/or restitution; repeal restrictive laws on citizenship and status; respect the right of return of Palestinians who have suffered forcible transfer or deportation; and dismantle the dual legal system that applies in a discriminatory manner to Palestinians.
20. The Court stated that, under Article 1 of the Fourth Geneva Convention, “all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem” and that all States are “also under an obligation not to render aid or assistance” in maintaining the illegal

³² Commission of Inquiry Report, para. 11.

³³ Commission of Inquiry Report, para. 11.

³⁴ *The Wall Advisory Opinion*, para. 147.

³⁵ International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UNGA Res 56/83, UN Doc A/RES/56/83 (12 December 2001), Article 30(a).

³⁶ International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UNGA Res 56/83, UN Doc A/RES/56/83 (12 December 2001), Article 30(b). In 2004, the Court stated that Israel was under an obligation to return the land seized for the purposes of construction of the wall and to pay damages incurred from the wall’s construction (*The Wall Advisory Opinion*, para. 153).

situation.³⁷ Similarly, in this case, the Commission argues that all States are under the same obligation not to recognize the unlawful occupation and not to render aid or assistance in maintaining the unlawful occupation. Similarly, in this case, the Commission argues that all States are under the same obligation not to recognize the unlawful occupation and not to render aid or assistance in maintaining the unlawful occupation. In terms of non-recognition, States should distinguish, in all of their dealings, between the State of Israel and Palestine, such as abstaining from diplomatic or other activity that may lead to the actual or implied acceptance or prolongation of the occupation.³⁸ States should not render aid or assistance in maintaining the occupation, including financial assistance and business relations.

21. In 2004, the Court expressed the view that the UN, especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime.³⁹ The Commission notes that, despite numerous resolutions from the General Assembly and Security Council, there has been little or no implementation by Israel. The Commission identifies a need for the Court to articulate the actions that the UN, representing the international community as a whole, should take to bring an end to the unlawful acts and the legal consequences for their lack of action or enforcement.
22. The Commission notes that, where cooperation within the UN fails, States continue to have a duty to cooperate. States should uphold their obligations under international law, including obligations under common article 1 to the four Geneva Conventions and articles 146, 147 and 148 of the Fourth Geneva Convention. States should still discharge their obligations to the best of their ability and may do so in regional organizations, within other international organizations, or bilaterally or multi-laterally.

V. CONCLUSION

23. The Commission has concluded that Israel has violated and continues to violate the right of the Palestinian people to self-determination by its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967. The legal consequence of the violation of right to self-determination, which is an obligation *erga omnes*, is the responsibility of the State of Israel. The current occupation, which has lasted 56 years to date, is unlawful under international law. The result of the unlawful acts entails legal consequences for Israel to bring an end to the “internationally wrongful act”.⁴⁰ All States and the UN are also under an obligation to act urgently to bring the unlawful acts to an end.

³⁷ *The Wall Advisory Opinion*, paras 158-159.

³⁸ See *the Namibia Advisory Opinion*, para. 123. The Court stated that Member States, in compliance with the duty of non-recognition imposed by Security Council resolution 276 (1970), should abstain from sending consular agents to Namibia, withdraw agents already there, and make it clear to South Africa that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

³⁹ *The Wall Advisory Opinion*, paras 159-160.

⁴⁰ *The Wall Advisory Opinion*, para. 150, “The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation”, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 145; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 44, para. 95; *Haya de la Torre*, Judgment, I.C.J. Reports 1951, p. 82.