



AL - HAQ

**Al-Haq Position Paper**

**ICJ Advisory Opinion on the Legal Consequences Arising  
from the Policies and Practices of Israel in the Occupied  
Palestinian Territory, including East Jerusalem**



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## 1. Background:

On 30 December 2022, the United Nations (UN) General Assembly adopted resolution 77/247 requesting an advisory opinion from the International Court of Justice on the question of Palestine. The request asked the Court to provide a legal opinion on two specific questions, taking into account “the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant Security Council, General Assembly and Human Rights Council resolutions, and the Advisory Opinion of the Court of 9 July 2004”. The two questions are:

*(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 in paragraph 18 (a) 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?*

The present request differs from the 2004 Wall AO, in which the question before the Court was narrow and focused exclusively on the legal consequences of one aspect of the occupation: the construction of the Wall in the Occupied Palestinian Territories (OPT). The Court concluded not only that the construction of the wall was illegal under international law, but also the regime associated with it, and set out the legal consequences of this illegality for Israel as the Occupying Power, all states and the UN. As part of its assessment of the legality of the construction of the Wall in OPT, including in and around East Jerusalem, the Court addressed a number of critical issues relevant to the present request for an advisory opinion. The current request before the Court has a wider scope *ratione materiae* in two respects:

- **First**, it is asked to determine the legal consequences of Israel’s continued violation of the Palestinian people’s right to self-determination, its continued prolonged occupation, settlement and annexation of OPT including Jerusalem, and its adoption of related discriminatory legislation and policies.
- **Second**, there is the question of how such legal determinations affect the status of the occupation as a whole and its consequences for Israel, third states and the UN. Many of the policies and practises addressed in the Wall AO will certainly serve as a solid foundation for the Court to build upon in the present request, this time with the express purpose of determining their legal consequences.

## 2. Executive Summary

### I. The Right to Self-Determination

Israel's occupation of the Palestinian territory breaches the right to external self-determination of the Palestinian people, which includes the exercise of the right of the Palestinian people to an independent State. The special status of the right of the Palestinian people to external self-determination was recognised under Article 22 of the League of Nations Charter which classified Palestine as a Class A mandate, whose "existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone." As the International Court of Justice outlined in *the Namibia advisory opinion*, the "ultimate objective" of the Mandate as a sacred trust was the "self-determination and independence of the peoples concerned." Taking the precedent as established in the *Namibia advisory opinion*, which similarly examines the legality of the subsequent occupation of a Mandate territory, the ICJ concluded, "that the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter".

### II. The Inherent Illegality of the Occupation - Aggression

Israel's belligerent occupation has been illegal since the outset in 1967 as an occupation arising from an unlawful act of aggression, prohibited under Article 2(4) of the UN Charter. Israel's use of force against Egypt, in the absence of an armed attack, constituted a prohibited use of force amounting to an act of aggression. For example, at the UN General Assembly a number of States, including Cyprus and the Soviet Union concluded that there was "no evidence of Arab armed attack or invasion of the territory of Israel". Likewise, Israel's Ministry of Foreign Affairs recalls that Israel pre-emptively used force against Egypt, in the absence of an armed attack, stating: "Invoking its inherent right of self-defence, Israel pre-empted the inevitable attack, striking Egypt's air force while its planes were still on the ground". The subsequent establishment of a military administration in the Palestinian territory is accordingly a continued unlawful use of force and an act of aggression. Under the international law governing the use of force, the occupation is illegal *jus ad bellum*.

### III. Israel's Prolonged Occupation – An Ongoing Unlawful Use of Force

Even assuming for argument's sake, that Israel's use of force in 1967 amounted to a legitimate use of force in self-defence, the continuing belligerent occupation of the Palestinian territory breaches the principles of proportionality and necessity under Article 51 of the UN Charter. The belligerent occupation on this basis amounts to unlawful use of force *ad bellum* and an act of aggression. Israel's breach of peremptory norms of international law provides clear evidence of a breach of necessity and proportionality. The ongoing military control that Israel exercises over the West Bank and Gaza when understood as defensive, is not a response to actual or threatened attacks. Rather, it is preventive or pre-emptive self-defence, *i.e.*, the use of force to prevent the emergence of a threat, either entirely or largely. Another element is to understand the occupation as a mechanism to prevent the existence of another fully autonomous Arab state on its borders, out of a generally defined interest against that state. Moreover, the use of force in the West Bank is sometimes explained as self-defence to protect settlements and settlers. The argument provides that self-defence is an ongoing response to actual/immediate attacks and for long-term prevention and deterrence of emerging threats. Pre-emptive or preventive



self-defence is not a valid basis under international law for the use of force in self-defence. Therefore, occupation generally cannot be legally justified on this basis. The necessary actual or imminent threat of imminent armed attack that meets the relevant test is lacking, or there is such a threat, but a disproportionate relationship between the occupation and that threat.

#### **IV. Acquisition of Territory by Force – The Prohibition of Annexation and Settlements**

Israel’s conduct since the beginning of the occupation and until today confirms that it intends to make its occupation permanent, *i.e.* the objective is the illegal annexation of the territory it occupies. The *de facto* annexation of parts of OPT finds expression in an ongoing, step-by-step process that involves the implementation of measures and actions on the ground that demonstrate the intention of Israel, the Occupying Power, to maintain a permanent presence and unlawfully claim sovereignty over the occupied territory or parts thereof, including by the large scale, infrastructure and location of settlements aimed at maintaining them, controlling resources and creating territorial continuity between them and Israel. Most recently, the guiding principles and coalition agreements of the new Israeli government sworn in on 29 December 2022, in which it explicitly declares that “the Jewish people have an exclusive and unquestionable right to all areas of the Land of Israel” and pledge to “promote and develop settlements in all parts of the Land of Israel – in the Galilee, the Negev, the Golan [unlawfully annexed], Judea and Samaria [occupied West Bank]”; and the transfer of the administrative powers of the occupation to the Israeli government and the extension of direct civil legal authority over the settlements, which amounts to *de jure* annexation

#### **V. Discriminatory Legislations and Measures – Apartheid**

Israel has strategically fragmented the Palestinian people into at least four separate geographic, legal, political, and administrative domains as a tool to impose and maintain apartheid, comprising: Palestinians with Israeli citizenship; Palestinians of Jerusalem with a precarious “residency” status; Palestinians in the rest of the West Bank and Gaza living under military occupation; Palestinian refugees and exiles denied the right to return to their homes, lands, and properties. The Israeli apartheid strategic fragmentation ensures that the Palestinian people cannot meet, group, live together, or exercise any collective rights, particularly their right to self-determination and permanent sovereignty. Israel’s actions are not random and isolated, but part of a widespread and oppressive regime that is institutionalized and systematic. This racial segregation and discrimination have been deemed tantamount to apartheid after extensive factual and legal scrutiny by UN special procedures and by leading Palestinian, Israeli, and international human rights organizations. Apartheid is most evident in the occupied Palestinian territory, including Jerusalem, where illegally present settlers benefit from extensive privileges to the detriment of the fundamental rights of the Palestinian people. Apartheid is expressed, among other things, in the dual and discriminatory legal system and in discriminatory land-use planning and zoning, as well as in the concerted efforts of occupation forces and settlers to intimidate and oppress the Palestinian people. We urge that the ICJ examines the racist discriminatory founding laws in the State of Israel, which established the regime of apartheid, which continued after 1967 in the occupied Palestinian territory, and which continues to discriminate against the Palestinian people as a whole.

In conclusion, the Israeli occupation is illegal at the outset and constitutes a form of aggression. The illegality of Israel's occupation rests in the first instance on the *jus ad bellum* violation that brought it into the occupation. As a result of that violation, the occupation became unlawful the day it began, as there was no imminent threat that would justify Israel's use of force.

### 3. Detailed Outline of Arguments:

The current UN General Assembly's request for an advisory opinion from the ICJ includes at least five essential substantive legal issues that States may wish to address. This summary provides an overview of the possible arguments on these critical legal issues:

#### I. The Right Self-Determination

**Israel's occupation of the Palestinian territory, breaches the right to external self-determination of the Palestinian people, which includes the exercise of the right of the Palestinian people to an independent State.**

The right to self-determination is considered the most revolutionary of the principles enshrined in the UN Charter, Article 1(2). According to the UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, the right to self-determination includes the duty of each State to "refrain from any use of force which would deprive peoples [...] of their right to self-determination, liberty and independence" and to "promote, by common and separate action, the realisation of the principle."<sup>1</sup> The right of all peoples to self-determination is also reaffirmed in common Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), which imposes on States Parties the obligation to promote the realisation of this right and to respect it in accordance with the provisions of the UN Charter.

Moreover, the right to self-determination is a fundamental human right that is owed *erga omnes*<sup>2</sup> and enjoys an *ius cogens* character.<sup>3</sup> For almost a century, the various bodies of the UN have internationally recognised and repeatedly affirmed the inalienable right of the Palestinian people to self-determination. Moreover, Israel itself also recognised this right in the exchange of letters between Israel and the PLO on 9 September 1993.<sup>4</sup> Thus, the right of the Palestinian people to self-determination is universally recognised in international law. It is a right to freedom from all foreign domination, including occupation, which by its very nature prevents the full exercise of this right. For the right to be exercised, that domination must end. It exists simply and exclusively because the Palestinian people have a right to it. Therefore, the right of the Palestinian people to self-determination does not depend on anyone else agreeing to this right.

<sup>1</sup> UNGA, [A/RES/2625 \(XXV\)](#).

<sup>2</sup> ICJ, [East Timor](#), para. 29 & [Wall AO](#) para. 155, [Barcelona Traction](#), para. 33; [Chagos AO](#), para. 180.

<sup>3</sup> ILC, [ARSIWA with commentaries](#), p.85, [Cassese](#), p.365 & [Shaw](#), p. 320.

<sup>4</sup> [Wall AO](#), para. 118.



**The special status of right of the Palestinian people to external self-determination was recognised under Article 22 of the League of Nations Charter which classified Palestine as a Class A mandate, whose “existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.” As the International Court of Justice outlined in *the Namibia advisory opinion* the “ultimate objective” of the Mandate as a sacred trust was the “self-determination and independence of the peoples concerned.”<sup>5</sup>**

The anti-colonial form of external self-determination adopted in international law around the mid-20<sup>th</sup> century for the Palestinian people was a departure from the concept of ‘trusteeship over peoples’. According to this concept, people were supposed to be released into freedom by the colonial authorities when they were deemed ‘ready’ by those authorities. The anti-colonial rule of self-determination, which formed the basis in international law for the recognition of decolonisation, abolished this approach in favour of an automatic right. The new rule was and is based on people’s fundamental entitlement to freedom, not ‘willingness’. In the words of General Assembly resolution 1514(XV): “Insufficient readiness should never be used as a pretext for denying independence”. Moreover, this right applies whether the authority deprives the people of the capacity for self-determination or agrees to relinquish control. It must necessarily be realised immediately and automatically, without preconditions.

The occupation of the Palestinian territory as a prolonged use of force, in denial of the exercise of the right of the Palestinian people to external self-determination is in breach of peremptory norms of international law. **Taking the precedent as established in the *Namibia advisory opinion*, which similarly examines the legality of the subsequent occupation of a Mandate territory, the ICJ concluded, “that the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter”.**<sup>6</sup>

The right of the Palestinian people to national independence and sovereignty has been recognised in numerous UN resolutions. UNGA Res 3236 (XXIX) (1974) expressly recognises the right of the Palestinian people to self-determination without external interference, and the “right to national independence and sovereignty” and UNGA Res 3376 (1975), para 2(a) providing for “the right to self-determination without external interference and the right to national independence and sovereignty”. See also, as the right of self-determination recognised by the UN in numerous resolutions including Resolution 2672(XXV) of 1970, Resolution 3236 (XXIX) of 1974 and others thereafter.

The exercise of Palestinian self-determination and statehood has been severely impaired by the imposition of certain unlawful measures (including the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East

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<sup>5</sup> International Court of Justice outlined in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, at 31

<sup>6</sup> UNSC Res 264 The Situation in Namibia (20 March 1969), para. 2; UNSC Res 276 (30 January 1970); See also, A/RES/2403(XXIII), 16 December 1968.

Jerusalem).<sup>7</sup> The Palestinian people have been deliberately prohibited from gathering and exercising their inalienable and collective right to self-determination as a result of decades of imposed strategic fragmentation, placing them in different legal categories and across various spatial geographies in Palestine and exile.

The UN Security Council and the General Assembly continue to repeatedly and explicitly reaffirm the right of the Palestinian people to self-determination.<sup>8</sup> Moreover, they have urged all States and UN specialized agencies and organizations to continue to support and assist the Palestinian people in the early realization of their inalienable rights, in particular the right to self-determination and the right to an independent State.<sup>9</sup> In addition, the Human Rights Council continues to consistently recognize “the inalienable, permanent and full right of the Palestinian people to self-determination, including their right to live in freedom, justice and dignity and the right to an independent State of Palestine.”<sup>10</sup>

This right is violated by Israel through, *inter alia*, the existence and continued expansion of settlements in the OPT, including East Jerusalem. Of particular note here is Israel’s discriminatory and apartheid-charactered 2018 law, the “Basic Law”: Israel as the Nation-State of the Jewish People,” which grants the right to self-determination exclusively to the Jewish people and pledges to promote and support Jewish settlement, denying the Palestinian people the right to self-determination everywhere between the Mediterranean Sea and the Jordan River.

Notably, the ICJ has already held in the Wall AO that the existence of a “Palestinian people” is no longer in question. It found that the construction of the Wall, together with previous measures, significantly impedes the exercise of the Palestinian people’s right to self-determination and therefore constitutes a violation of Israel’s obligation to respect that right. Israel is obliged to fulfil its obligation to respect the right of the Palestinian people to self-determination. The Court also noted that, given that the right to self-determination is a right *erga omnes*, all states should contribute to its early realisation.

## II. The Inherent Illegality of the Occupation - Aggression

**Israel’s belligerent occupation has been illegal since the outset in 1967 as an occupation arising from an unlawful act of aggression, prohibited under Article 2(4) of the UN Charter.**

Israel’s use of force against Egypt, in the absence of an armed attack, constituted a prohibited use of force amounting to an act of aggression. For example, at the UN General Assembly a number of States, including Cyprus and the Soviet Union concluded that there was “no evidence of Arab armed attack or invasion of the territory of Israel”.<sup>11</sup> Likewise Israel’s Ministry of Foreign Affairs recalls that Israel pre-emptively used force against Egypt, in the

<sup>7</sup> International Criminal Court, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, No. ICC-01/18 (22 January 2022) para 9.

<sup>8</sup> UNGA, [A/RES/77/208](#).

<sup>9</sup> UNGA [A/RES/77/25](#).

<sup>10</sup> HRC, [A/HRC/RES/34/29](#), [A/HRC/RES/37/34](#), [A/HRC/RES/40/22](#), [A/HRC/RES/49/28](#).

<sup>11</sup> UNGA Official Records (29 June 1967) UN Doc. A/PV.1541, p. 7-8.





absence of an armed attack, stating: “Invoking its inherent right of self-defense, Israel preempted the inevitable attack, striking Egypt’s air force while its planes were still on the ground”.<sup>12</sup>

**The subsequent establishment of a military administration in the Palestinian territory, is accordingly a continued unlawful use of force and an act of aggression.** Under the international law governing use of force, the occupation is illegal *jus ad bellum*.

Israel’s control and occupation of the West Bank and the Gaza Strip, as a military action, is a “use of force.” In international law, the ‘use of force’ is an act of war, including the conduct of military occupation. International law potentially allows a state to control an area that is not part of its territory, necessarily affecting the right of self-determination of the affected population, by using military force under three circumstances: first, if the host sovereign entity has validly consented; second, if the UN Security Council has authorized it; and third, if it is a legally permissible exercise of self-defence within the meaning of international law on the use of force. The first two possibilities are not applicable here.<sup>13</sup>

As for the third possibility, namely the use of force in self-defence, this is permissible under the law on the use of force (*jus ad bellum*) only if there is an actual or imminent armed attack and the force used is necessary and proportionate to the actual attack or imminent threat of attack. As to this argument, states should argue in the first instance that the Israeli occupation is inherently illegal because it was the result of Israeli aggression in 1967. As Quigley shows, there was no imminent threat that would justify Israel’s use of force.<sup>14</sup> Israel even failed in its attempt to feign a threat, and then failed to provoke Egypt into starting the war and failed to convince the US, its closest ally, of the existence of an imminent threat and the necessity of its attack.<sup>15</sup> Quigley, therefore, concludes that:

*“[T]he illegality of Israel’s occupation rests in the first instance on the **jus ad bellum** violation that brought it into occupation. As a result of that violation, the occupation became unlawful the day it began. Despite its reticence at that time, the United Nations should revisit the **jus ad bellum** issue. In the immediate aftermath of the 1967 war, Israel, with the complicity of the United States, was able to deflect attention from its aggression. Today, the facts showing Israel’s aggression would be difficult to contest. A reasoned confirmation of Israel’s 1967 aggression by the UN would serve the cause of peace in the Middle East.”<sup>16</sup>*

In conclusion, the same applies to the UN’s principal judicial body, the ICJ. The Court has to address the question of the illegality of the Israeli occupation itself, *i.e.* the law governing the use of force (*jus ad bellum*), which constitutes an act of aggression. The Court would error in law if it only addresses the illegality of Israel’s practices as an Occupying Power, *i.e.* only the

<sup>12</sup> Israel Ministry of Foreign Affairs, 1967: The Six-Day War and the historic reunification of Jerusalem (2013).

<sup>13</sup> For more see Ralph Wilde, “[Legal Opinion on the il/legality of Israeli Occupation.](#)”

<sup>14</sup> John Quigley, “[Israel’s Unlawful 1967 Invasion of Palestine](#)” in Nada Kiswanson and Susan Power, “[Prolonged Occupation and International Law.](#)”

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*



law governing the conduct of the state during the use of force (*jus in bello*). States must reaffirm this point in their submissions to the Court and call on it to address the illegality of Israel's occupation at the outset considering the law governing the use of force (*jus ad bellum*).

**It should further be noted that there is already a precedent for illegal occupation.** For example, in 1971, the UN General Assembly condemned South Africa's "illegal control over Namibia and to destroy the unity of the people and the territorial integrity of Namibia" terming it an "**illegal occupation**".<sup>17</sup> Significantly, in 1977, the UN General Assembly considered "that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation and that the Palestinian people, after three decades, are still deprived of the exercise of their inalienable national rights".<sup>18</sup> In *Demopoulos and Others v Turkey* (2010), the European Court of Human Rights considered obiter, that "[w]hile it goes without saying that Turkey is regarded by the international community as being in illegal occupation of the northern part of Cyprus, this does not mean that when dealing with individual applications concerning interference with property, the Court must apply the Convention any differently".<sup>19</sup> UN Security Council resolution (674) issued on Iraq's occupation of Kuwait in 1990 reminded Iraq, "that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and Third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait".<sup>20</sup> In *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the ICJ considered that "[T]he **Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention**".<sup>21</sup> More recently, in 2008, the UN General Assembly called on Third States to not "recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan [by Armenia], nor render aid or assistance in maintaining this situation".<sup>22</sup>

### III. Israel's Prolonged Occupation – An Ongoing Unlawful Use of Force

**Even assuming for arguments sake, that Israel's use of force in 1967 amounted to a legitimate use of force in self-defence, the continuing belligerent occupation of the Palestinian territory breaches the principles of proportionality and necessity under Article 51 of the UN Charter. The belligerent occupation on this basis amounts to an unlawful use of force *ad bellum* and an act of aggression. Israel's breach of peremptory**

<sup>17</sup> A/RES/2372(XX.II), 12 June 1968, para. 9.

<sup>18</sup> UN General Assembly Resolution 32/20 (1977), preamble; See also UN General Assembly Resolution 3414 (XXX) (5 December 1975), para. 1.

<sup>19</sup> *Demopoulos and Others v Turkey*, App No 46113/99 3843/02 13751/02, Decision Court (Grand Chamber), (01 March 2010) para. 94).

<sup>20</sup> UN Security Council Resolution 674 (29 October 1990), para. 8.

<sup>21</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) ICJ Reports 168 (19 December 2005), p. 280.

<sup>22</sup> UN General Assembly Resolution 62/243 (25 April 2008) The situation in the occupied territories of Azerbaijan, para. 5.



**norms of international law provides clear evidence of a breach of necessity and proportionality. This includes:**

- **Self-determination:** The use of force, including the construction of settlements and the wall and its associated regime, breaches the exercise of the Palestinian people of its right to self-determination. The requires an examination of the prolonged duration of the occupation is contrary to the assumed temporary status of occupation under international humanitarian law. In addition to the prolonged closure and blockade of the Gaza Strip, part and parcel of the occupied Palestinian territory, and the implications on the civil, political, economic, social and cultural rights of the Palestinian population therein.
- **Annexation:** Israel's acquisition of territory by force in the occupied West Bank including Jerusalem, violates the prohibition on the acquisition of territory by force, including *de jure* and *de facto* annexation. Israel has enacted a myriad of laws, policies and practices that aim to alter the character and status of the Jerusalem, remove and erase Palestinians. This includes the confiscation of property, the discriminatory planning regime, the forcible displacement and transfer of Palestinians including through residency revocation and the transfer of settlers in.
- **Racial Discrimination and Apartheid:** The application of a discriminatory apartheid regime in breach of the prohibition on racial discrimination and apartheid. This includes, discriminatory laws, policies and practices – specifically in the domains of land, property, nationality, citizenship and residency – that afford preferential treatment for Jewish and Jewish-Israeli persons over those Palestinians, for the purpose of imposing domination on both sides of the Green Line. These blatantly constitute breaches of international human rights and humanitarian law and amount to the crimes against humanity of apartheid as per the Rome Statute of the International Criminal Court.
- In this respect, it is appropriate to examine these legislations, practices and policies against the inhumane acts listed in the Apartheid Convention of 1973, particularly murder and arbitrary deprivation of life; arbitrary arrest and illegal imprisonment; torture, ill-treatment and collective punishment; restrictions imposed on freedom of movement and residency; the deliberate imposition of living conditions calculated to cause the physical destruction of a group, in whole or in part; and the silencing and persecution of individuals and organisations, restricting their freedom of association and peaceful assembly for opposing apartheid practices.

Proceeding on the hypothetical assumption that there was a lawful basis for the imposition of the occupation in 1967, some seem to argue that the question of lawfulness is settled not only for that date but also for the continued duration of the occupation, if any. Thus, it is left to the occupier to decide when to end the occupation. More commonly, the view is that there is a legal obligation to terminate the occupation, but that the test for when termination should occur is different from the general *jus ad bellum* test. In particular, it has been suggested that the occupation may continue until a peace agreement is reached. Given the risk that such a test might allow the occupier to prolong the occupation by failing to seek an agreement, an



apparently stricter version is that the occupation may continue until a peace agreement is reached, provided the occupier makes a good-faith effort to reach such an agreement.

This is not correct. The requirement to meet the general *jus ad bellum* test applies to any continued use of force. Commentators and policymakers seem to overlook the fact that the use of force that must be justified on this basis includes not only the initial phase of the invasion that precedes and enables an occupation. It is also the implementation of the occupation, since the implementation of an occupation, regardless of the circumstances of its introduction, is itself a use of force.

The ongoing military control that Israel exercises over the West Bank and Gaza when understood as defensive, is not a response to actual or threatened attacks. Rather, it is preventive or pre-emptive self-defence, *i.e.*, the use of force to prevent the emergence of a threat, either entirely or largely. Another element is to understand the occupation as a mechanism to prevent the existence of another fully autonomous Arab state on its borders, out of a generally defined interest against that state. Moreover, the use of force in the West Bank is sometimes explained as self-defence to protect settlements and settlers. The argument provides that self-defence is an ongoing response to actual/immediate attacks and for long-term prevention and deterrence of emerging threats.

**Pre-emptive or preventive self-defence is not a valid basis under international law for the use of force in self-defence. Therefore, occupation generally cannot be legally justified on this basis. The necessary actual or imminent threat of imminent armed attack that meets the relevant test is lacking, or there is such a threat, but a disproportionate relationship between the occupation and that threat.** It is clearly impossible for such a situation to exist permanently and for more than a short period of time, since the test is narrow in terms of both the required threat and the proportionality requirement that the occupation must meet in order to be justified, even if there is a threat that meets the test. As for the use of force to defend settlers against actual/immediate attacks, there is no right of self-defence in international law for a state to use force outside its territory to protect its nationals there. As the ICJ clearly outlined in the Wall advisory opinion, Article 51 of the UN Charter only applies to cases where attacks against it are imputable to a foreign State, and therefore cannot arise from territory under that States military occupation.<sup>23</sup>

The foregoing analysis implies that there is no legal basis for Israel to maintain the occupation or, in other words, to lawfully impede the Palestinian right to self-determination by maintaining the occupation. Generally, and in the specific context of protecting Israeli settlers and settlements. It follows that the occupation is existentially illegal as a violation of international law on the use of force and the right to self-determination and that Israel must end it immediately. Every day that this does not happen constitutes an illegal situation.

The nature of the breaches of the international law of the use of force corresponds to the definition of ‘aggression’ in international law. This term is usually used as a synonym for a

<sup>23</sup> [The Wall, Advisory Opinion](#), para. 139.



violation of international law on the use of force, and occasionally for a subset of such particularly serious violations. As to the latter definition, the present violation meets and exceeds the threshold. It meets it with the existence of an unlawful occupation within the meaning of *jus ad bellum*. It exceeds it by the aggravating factors of a connection to annexation, a long duration, and egregious abusive conduct. The aggression is illegal both in terms of the responsibility of the State of Israel and in terms of the individual criminal responsibility of certain Israeli individuals in leadership positions. The offence of aggression in the Rome Statute of the International Criminal Court (ICC) is limited to acts of aggression that, by virtue of their “character, gravity and magnitude, constitute a manifest violation of the Charter of the United Nations.” For the same reasons that the violation of international law here falls within the (occasionally used) definition of aggression, which covers a subset of violations of the law on the use of force, the illegal nature of the use of force meets this ICC definition of the individual crime of aggression. Thus, in terms of this definition, the crime of aggression is being committed by certain individual Israelis.<sup>24</sup>

#### **IV. Acquisition of Territory by Force – The Prohibition of Annexation and Settlements**

While the preceding arguments focused on the illegality of the Israeli occupation itself, *i.e.* the law governing the use of force (*jus ad bellum*), the following arguments will focus on the illegality of Israel’s practices as an Occupying Power, *i.e.* the law governing the conduct of the state during the use of force (*jus in bello*).

Israel’s prolonged occupation was deliberately constructed with the explicit intention of acquiring the Palestinian territory by force, through both *de facto* and *de jure* annexation. This is advanced through several settler-colonial and apartheid-charactered practices, including the strategic fragmentation of the OPT and the Palestinian people, including through the establishment of settlements and the associated regime involving the transfer of Israeli citizens to the settlements and the forcible displacement of Palestinian families and communities, state-sanctioned settler violence aimed at creating a coercive environment to indirectly force the Palestinian out of the OPT, the implementation of demographic engineering policies in the OPT and the violation and denial of the Palestinian people’s right to self-determination, including the subjugation of the Palestinian people through a system of foreign military rule and an apartheid regime designed to institutionally persecute, dominate and discriminate against the Palestinian people on both sides of the Green Line.

The Israeli settlements and the regime associated with them are one of the main features of the settler-colonial character of the illegal Israeli occupation. The Israeli settlements are created through the illegal transfer of parts of the Israeli civilian population and their settlement in purpose-built colonial settlements in the territory occupied by Israel, with the explicit aim of establishing a permanent presence, *i.e.* to colonise the OPT. The associated regime includes all policies, practices, and infrastructure, including the Wall, designed to maintain this illegal presence and to drive Palestinians from their land. **This regime is based on the forcible**

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<sup>24</sup> For more see Ralph Wilde, “[Legal Opinion on the il/legality of Israeli Occupation.](#)”





**confinement and expulsion of Palestinians and the appropriation of their land, while simultaneously relocating Israeli settlers therein and building and expanding settlements on the appropriated land.** This is done through the continued and direct use and threat of physical violence, and the creation and maintenance of a coercive environment caused by, *inter alia*, attacks on civilians or indiscriminate attacks by Israeli occupation forces and the state-sanctioned settlers attacks, unlawful land appropriation and discrimination, including in relation to land-use planning and zoning, the blockade of the Gaza Strip and the enforcement of a buffer zone, house demolitions, arbitrary mass arrests and detentions, excessive and disproportionate use of lethal force, including Israel’s shoot-to-kill policy amid a prevalent state of impunity.

The forcible displacement of the occupied population and the transfer of citizens of the Occupying Power to the occupied territory are prohibited under Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and constitute grave breaches under Article 147 of the Convention. According to the International Committee of the Red Cross (ICRC), this prohibition was “intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories”.<sup>25</sup> All High Contracting Parties to the Convention, whether or not it is involved in a particular conflict, have an obligation *to ensure* that the requirements of the Convention are met. This is provided for in Article 1 of the Fourth Geneva Convention, which states, “The High Contracting Parties undertake to respect the present Convention in all circumstances and to ensure its observance,” and in Articles 146 and 147 of the Convention.

Israeli settlements have been consistently condemned by the General Assembly,<sup>26</sup> the Security Council,<sup>27</sup> and the Human Rights Council,<sup>28</sup> reaffirming the principle of the inadmissibility of the acquisition of territory by force. In addition, these bodies have also condemned and rejected Israeli actions aimed at changing the demographic composition, character, and status of Jerusalem and the OPT as a whole, including through the construction and expansion of settlements, the relocation of Israeli settlers, the confiscation of land, the demolition of homes, and the displacement of Palestinian civilians, all of which are illegal under international law.

Israel’s prolonged occupation, the longest in modern history, is in itself a clear indication of Israel’s intention, as an Occupying Power, to make its presence permanent in the OPT, in violation of the principle that the acquisition of territory by force is impermissible. The 56 years of the Israeli occupation is accumulative evidence of Israel’s intention to maintain permanent possession and rule over the OPT. The political program of the current and previous Israeli governments is also comprehensive evidence of the Occupying Power’s intention to ensure the permanence of their illegal occupation of OPT including East Jerusalem. They have consistently initiated, supported and financed the construction and expansion of colonial

<sup>25</sup> ICRC, Commentary of the Fourth Geneva Convention, 1958, [Article 49\(6\)](#), p. 283.

<sup>26</sup> E.g., UNGA, [A/RES/77/126](#).

<sup>27</sup> E.g. UNSC, [S/RES/446](#), [S/RES/2334](#).

<sup>28</sup> E.g. HRC, [A/HRC/RES/49/4](#).



settlements and adopted policies and practices to deprive the Palestinian people of their inalienable rights, including, *inter alia*, the right to self-determination and permanent sovereignty over land and natural resources.

**Israel formalised its *de jure* annexation of Jerusalem in 1967.** In June 1967, Israel occupied the Gaza Strip and the West Bank, including East Jerusalem. Both the UN Security Council and the UN General Assembly declared such forcible appropriation of territory impermissible.<sup>29</sup> Subsequently, Israel took a series of legislative and administrative measures to expand its jurisdiction over the city of Jerusalem. Most notably, in 1980, the Israeli Knesset passed the “Basic Law: Jerusalem,” which stated that Jerusalem “complete and united” is the “capital of Israel”, entrenching the annexation of city in its quasi-constitutional law in violation of international law and its special international status. In response, the **UN Security Council adopted Resolution 478, declaring that “all legislative and administrative measures and actions of Israel, the Occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent ‘Basic Law’ on Jerusalem, are null and void and must be immediately revoked”**. Since then, Israel has continued to solidify its annexation rather than reverse it. Most recently, in resolution 2334, the Security Council again condemned “all measures aimed at changing the demographic composition, character and status of the Palestinian territories occupied since 1967, including East Jerusalem, including, *inter alia*, the construction and expansion of settlements, the relocation of Israeli settlers, the confiscation of land, the demolition of homes and the displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions”. The UN General Assembly regularly “reiterates its determination that all measures taken by Israel as an Occupying Power to impose its laws, jurisdiction and administration on the Holy City of Jerusalem are illegal and therefore null and void and have no validity whatsoever, and calls upon Israel to immediately cease all such illegal and unilateral measures,” and calls for respect for the historical *status quo* at Jerusalem’s holy sites, including the Haram al-Sharif, in word and practice. The UN Security Council, in its presidential statement adopted in February 2023, called for “maintaining unchanged, in word and practice, the historical *status quo* at the holy sites in Jerusalem”.

Notably, the ICJ has already confirmed in its *Wall* AO that Israeli settlements in the occupied Palestinian territories, including East Jerusalem, were established in violation of international law. It also considered that “the construction of the wall and its associated régime create a *fait accompli* on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.” The Court thus paved the way for determining whether there was a *de facto* annexation. While the Court focused on the Wall in accordance with the question posed to it, it referred to the fear that Israel might integrate the settlements and their access routes, which it has in fact done. The criterion used by the Court to determine whether a *fait accompli* amounts to a *de facto* annexation is permanence. **Israel’s conduct since the beginning of the occupation and until today confirms that it intends to make its occupation permanent, i.e. the objective is the illegal annexation of the territory it occupies.**

<sup>29</sup> UNSC Resolutions [242 \(1967\)](#), [252 \(1968\)](#), [267 \(1969\)](#) and [298 \(1971\)](#).



The *de facto* annexation of parts of OPT finds expression in an ongoing, step-by-step process that involves the implementation of measures and actions on the ground that demonstrate the intention of Israel, the Occupying Power, to maintain a permanent presence and unlawfully claim sovereignty over the occupied territory or parts thereof, including by the large scale, infrastructure and location of settlements aimed at maintaining them, controlling resources and creating territorial continuity between them and Israel. Moreover, Israeli government masterplans and policies have enabled the establishment and expansion of settlements since the beginning of the occupation,<sup>30</sup> and Israeli military orders have created a dual legal regime in the OPT to the benefit of the settlers and to the detriment of the occupied population.<sup>31</sup> For example, the 2018 Basic Law: Israel as the Nation-State of the Jewish People, stipulates that the state considers the development of Jewish settlement as a national value and acts to encourage and promote its establishment and consolidation. In addition, the public statements by Israeli officials confirming that the settlements and the regime associated with them constitute a deliberate policy of permanent presence in order to annex the land confirm that *de facto* annexation has already taken place.<sup>32</sup>

Most recently, the guiding principles and coalition agreements of the new Israeli government sworn in on 29 December 2022, in which it explicitly declares that “the Jewish people have an exclusive and unquestionable right to all areas of the Land of Israel” and pledge to “promote and develop settlements in all parts of the Land of Israel – in the Galilee, the Negev, the Golan [unlawfully annexed], Judea and Samaria [occupied West Bank]”; and the transfer of the administrative powers of the occupation to the Israeli government and the extension of direct civil legal authority over the settlements, which amounts to *de jure* annexation.

## V. Discriminatory Legislations and Measures – Apartheid

**Israel’s apartheid regime straddles two jurisdictions, Israel and the Occupied Palestinian Territory. The discriminatory inhumane measures are carried out by Israel against the Palestinian people (Palestinians in the Occupied Palestinian Territory, Palestinian citizens of Israel, Palestinian refugees and exiles, and Palestinians in the diaspora). The Concluding Observations of the Committee on the Elimination of Racial Discrimination to Israel in 2019 in paragraph 23:**

*Draws the State party’s attention to its general recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urges the State party to give full effect to article 3 of the Convention to eradicate all forms of segregation between Jewish and non-Jewish communities and any such policies or practices which severely and disproportionately affect the Palestinian population in Israel proper and in the Occupied Palestinian Territory.*<sup>33</sup>

<sup>30</sup> See, Passia, [ISRAELI SETTLEMENT MASTER PLANS, 1976-1991](#)

<sup>31</sup> See, ACRI, One Rule, [Two Legal Systems: Israel’s Regime of Laws in the West Bank](#)

<sup>32</sup> Al-Haq, [Questions and Answers: Israel’s De Facto Annexation of Palestinian Territory](#)

<sup>33</sup> CERD/C/ISR/CO/17-19, Concluding observations on the combined seventeenth to nineteenth reports of Israel (12 December 2019) para. 23.

**We urge that the International Court of Justice adopts an expansive interpretation of “and from its adoption of related discriminatory legislation and measures?” as a separate and distinct question, arising from the Advisory Opinion, which is not limited by reference to the Occupied Palestinian Territory. Like the CERD, it includes measures against the Palestinian people, and examines discriminatory apartheid practices in both the State of Israel and the territories under its effective control.**

Since its establishment, Israel has enacted various discriminatory laws aimed at gaining control over a maximum of territories with a minimum of Palestinians in order to make the colonization of the OPT permanent. **Israel has strategically fragmented the Palestinian people into at least four separate geographic, legal, political, and administrative domains as a tool to impose and maintain apartheid, comprising: Palestinians with Israeli citizenship; Palestinians indigenous to Jerusalem assigned a precarious “residency” status; Palestinians in the rest of the West Bank and Gaza living under military occupation; Palestinian refugees and exiles denied their right to return to their homes, lands, and properties.**

**We urge that the ICJ examines the racist discriminatory founding laws in the State of Israel, which establish the regime of apartheid. These laws have incorporated under military order since 1967 and extended to the occupied Palestinian territory, and continue to discriminate against the Palestinian people.** These laws are outlined in the reports of Palestinian, Israeli and international human rights organizations, including Human Rights Watch and Amnesty International.<sup>34</sup> The laws include : example, the Law of Return (1950) and the Citizenship Law (1952) provides that citizenship ‘shall be granted to every Jew who has expressed his desire to settle in Israel’ and ‘every Jew has the right to come to this country as an *oleh*’, while discriminating against the Palestinian people indigenous to the land.<sup>35</sup> Under Israel’s Citizenship Law (1952) and the Law of Return, every ‘*oleh*’, which is ‘every Jew’ who enters territory within Israel’s control ‘shall become an Israeli national’, again expressing omitting any provision for Palestinian right of return.<sup>36</sup> The Absentee Property Law, provides for the confiscation of Palestinian refugee property from persons classified as ‘absentees’ or

<sup>34</sup> Al-Haq, Israeli Apartheid: Tool of Zionist Settler Colonialism (29 November 2022), available at: <<https://www.alhaq.org/advocacy/20931.html>>; Al Mezan, The Gaza Bantustan—Israeli Apartheid in the Gaza Strip (29 November 2021), available at: <https://reliefweb.int/report/occupied-palestinian-territory/gaza-bantustan-israeli-apartheid-gaza-strip>; Amnesty International, Israel’s Apartheid Against Palestinians: A Look Into Decades of Oppression and Domination (February 2022), available at: <<https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid/>>; B’Tselem, A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid (12 January 2021), available at: <[https://www.btselem.org/publications/fulltext/202101\\_this\\_is\\_apartheid](https://www.btselem.org/publications/fulltext/202101_this_is_apartheid)>; Harvard and Addameer, A Legal Analysis of Israel’s Actions, Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Territory, including East Jerusalem, and Israel (28 February 2022), available at: <<http://hrp.law.harvard.edu/wp-content/uploads/2022/03/IHRC-Addameer-Submission-to-HRC-COI-Apartheid-in-WB.pdf>>; Human Rights Watch, A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution (27 April 2021), available at: <<https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>>. See also, State of Palestine, It Is Apartheid: The Reality of Israel’s Colonial Occupation of Palestine (2021) p. 18, available at: <https://www.nad.ps/sites/default/files/20201230.pdf>.

<sup>35</sup> Law of Return 5710-1950 (5 July 1950), available at: <https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>

<sup>36</sup> Nationality Law, 5712 – 1952, available at: [https://www.knesset.gov.il/review/data/eng/law/kns2\\_nationality\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns2_nationality_eng.pdf)





‘persons who were expelled, fled, or who left the country after 29 November 1947, mainly due to the war’.<sup>37</sup> Meanwhile, appropriated Palestinian property was reallocated to Israel Jews under the Land Acquisition Law (1953) in a sweeping land expropriation.<sup>38</sup> Notably, the Jewish settlement of land continues to be enshrined in the Basic Law, Nation State of the Jewish People (2018) which provides that ‘State of Israel is the nation State of the Jewish people’ and limits the right to self-determination therein ‘to the Jewish people’, and as a matter of national priority provides for the development of Jewish settlements. For example, under No 40 of the Budgets Law, the Minister for Finance can refuse public funding to institutions that reject the existence of Israel as a ‘Jewish and democratic state’ or that seek to commemorate ‘Israel’s Independence Day or the day on which the state was established as a day of mourning’, laws which directly discriminate against the Palestinian population.<sup>39</sup>

Notably, the Zionist transfer of Palestinians in 1948 displaced 85 percent of the Palestinian population from the territory that would become the Israeli state, in what is today known as the *Nakba*.<sup>40</sup> Israel was then established on 77 percent of the land of Palestine. The Zionist leadership proceeded to install a regime to legalize and legitimize the denial of Palestinian return and the dispossession of the Palestinian people and ensure demographic domination, institutionalized through its discriminatory law and apartheid-chartered institutions. **Since 1948, Israel has established a regime of racial domination and oppression in a system of apartheid over the Palestinian people primarily in the domains of nationality and land appropriation.** Since 1967, Israel has operationalized its apartheid regime in the occupied West Bank and Gaza Strip through the imposition of military rule and the expansion of its illegal settler-colonial enterprise.

**The Israeli apartheid strategic fragmentation ensures that the Palestinian people cannot meet, group, live together, or exercise any collective rights, particularly their right to self-determination and permanent sovereignty.** This is further entrenched through the illegal closure and blockade of the Gaza Strip, the Annexation Wall, and Israel’s permit regime consisting of checkpoints and other physical barriers, severely impacting the freedom of movement of Palestinians. In 2018, Israel enshrined apartheid in the Basic Law: Nation-State of the Jewish People, which states that “[t]he exercise of the right to national self-determination in the State of Israel is unique to the Jewish people”. This legislation has been accompanied by policies and practices of racial segregation and discrimination aimed at establishing and maintaining the supremacy of one racial group of people over another racial group of people and systematically oppressing them. Relevant human rights treaty bodies and international human rights and humanitarian organizations have examined this situation and made well-

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<sup>37</sup> Article 19(a) of the Absentees’ Property Law, 1950, provides that “it shall be lawful for the Custodian to sell the property to that Development Authority”.

<sup>38</sup> Land Acquisition (Validation of Acts and Compensation) Law (1953). See Adalah to Attorney General and Custodian of Absentee Property: Israel’s Sale of Palestinian, available at: <https://www.adalah.org/en/content/view/7003>.

<sup>39</sup> “Nakba Law” – Amendment No. 40 to the Budgets Foundations Law, 2011, available at: <https://www.adalah.org/en/law/view/496>

<sup>40</sup> Al-Haq, [Israel’s Apartheid Regime over the Palestinian people and the Denial of Palestinian SelfDetermination in Violation of the ICCPR](#)





documented findings in this regard, including that Israel's discrimination against and persecution of the Palestinian people amounts to apartheid.<sup>41</sup>

Through the entrenchment of a settler colonial and apartheid regime, Israel denies the Palestinian people permanent sovereignty over natural resources while ensuring unrestricted access to its population and corporations. **The settlements and their associated regime are maintained through a system of blatantly discriminatory measures that continually inflict severe harm on the Palestinian people and violate their fundamental rights. These measures have been recognized by the UN Human Rights Council as “the combination of restrictions on movement consisting of the wall, roadblocks and a permit system that affects only the Palestinian population, the application of a two-tier legal system that has facilitated the establishment and consolidation of the settlements, and other violations and forms of institutionalized discrimination”.**<sup>42</sup> The impact of the Israeli settlement regime and its associated discriminatory and coercive policies and measures on the Palestinian people is immense and far-reaching. Such discriminatory policies severely deprive Palestinians of their fundamental rights, including their basic rights to self-determination, human dignity, freedom of movement, property and livelihood, access to justice, education and other basic services, freedom of religion, family life and privacy, security, and freedom from discrimination and inhuman treatment.

The UN General Assembly has condemned the existence of specific Israeli policies and practices that discriminate against and disproportionately affect Palestinians, including “the killing and injury of civilians, the arbitrary detention and imprisonment of civilians, the forced displacement of civilians, the transfer of its own population into the Occupied Palestinian Territory, the destruction and confiscation of civilian property, including home demolitions, including if carried out as collective punishment in violation of international humanitarian law, and any obstruction of humanitarian assistance”. Most recently, UN General Assembly resolution 77/126 underscored the urgent need to reverse negative trends on the ground, including settlement construction and the destruction of Palestinian homes, which imperilling the viability of the two-State solution and perpetuate a situation of inequality and discrimination and prevent the Palestinian people from exercising their fundamental rights.

In the Gaza Strip, Israel practices racial discrimination against the Palestinian people in the form of racially motivated exclusions and restrictions resulting from the ongoing blockade, which effectively impede the enjoyment and exercise of the human rights and fundamental freedoms of the Palestinian people.<sup>43</sup> **The discriminatory nature of the blockade of Gaza was recognized by the UN Committee on the Elimination of Racial Discrimination and found to be in violation of the Convention on the Elimination of Racial Discrimination, as it affects the right of Palestinians to freedom of movement, housing, education, health, water and sanitation.**

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<sup>41</sup> Al-Haq, [United Nations: In response to Unprecedented Recognition of Israel's Apartheid Regime, States Must Take Concrete Steps to End this "unjust reality"](#)

<sup>42</sup> A/HRC/46/L.30 (26 March 2021).

<sup>43</sup> Al-Mezan, [The Gaza Bantustan](#)



Israel's actions are not random and isolated, but form part of a widespread and oppressive regime that is institutionalized and systematic. This racial segregation and discrimination have been deemed tantamount to **apartheid** after extensive factual and legal scrutiny by UN special procedures and by leading Palestinian, Israeli, and international human rights organizations. Apartheid is most evident in the occupied Palestinian territories, including Jerusalem, where illegally present settlers benefit from extensive privileges to the detriment of the fundamental rights of the Palestinian people. Apartheid is expressed, among other things, in the dual and discriminatory legal system and in discriminatory land-use planning and zoning, as well as in the concerted efforts of occupation forces and settlers to intimidate and oppress the Palestinian people.

## VI. The Legal Consequences for Israel, Third States and the UN

The second question of this request asks the Court to render its opinion on the effect of Israel's policies and practices on the status of the occupation and the legal consequences for all states and the UN. The illegality of Israel's occupation, at the outset, as it continues, and as a consequence of its ongoing policies and practices has been determined above. This part focuses on the legal consequences that arise for Israel, the Occupying Power, third states and the UN. There are two sets of legal consequences to be addressed; first, entitlements and legal obligations arising from serious violations of peremptory rules; and second, countermeasures that third states can take to bring such violations to an end.

The legal obligations arising from serious violations of peremptory rules are regulated in Article 41 of the ILC Articles on State Responsibility (ARS), and Article 42 of the Articles on Responsibility of International Organizations (ARIO). These legal consequences have been recently endorsed in the International Law Commission's Conclusions on the Identification and Legal Consequences of Peremptory Norms of International Law (*jus cogens*) (Conclusion 19). These obligations are:

- The Obligation to cooperate through lawful means **to bring the violation to an end** (Art 41(1) ARS, Art 42(1) ARIO)
- The obligation of **non-recognition** of the legal situation created through the serious violation (Art 41(2) ARS, Art 42(2) ARIO)
- The Obligation **not to aid or assist** in the maintenance of the situation (Art 41(2) ARS, Art 42(2) ARIO)

Countermeasures are mentioned by the ICRC as measures that may be taken to ensure compliance with the Geneva Conventions. The ILC left the question open in the 2001 ARS, as States could not reach an agreement in the Sixth Committee about their inclusion and the practice available at the time was, in the words of the ILC, 'very limited and rather embryonic'. There have been several extensive studies since 2001, reviewing all available practices, and arguing that the practice is indeed sufficient to evidence a general customary rule permitting States other than the injured State to take countermeasures in response to violations of obligations established for the protection of collective interests (which peremptory rules surely are). But uncertainties remain, in particular as there is insufficient *opinio juris* from States, and there is no clarity as to how several of the requirements of countermeasures ought to apply in



this context, in particular: the requirement of proportionality, and some of the procedural conditions (*sommat*ion, notification of countermeasures and offers to negotiate).

In addition, it is also important to apply the principles of IHL and IHRL to situations of occupation. The Israeli occupation of Palestine is not only the most malignant and enduring international armed conflict but also the longest in modern history. There is a rich body of international law and values of equality to guide a just and lasting peace, therefore, there has to be a strong international consensus on the application of such legal principles of international law, which have been strikingly and unjustifiably absent from the so-called “Middle East Peace Process.”

Numerous UN resolutions have repeatedly called for the necessity of ending Israel’s prolonged occupation and strongly deplore Israel’s refusal to comply with the relevant UN Security Council and General Assembly resolutions, such as Security Council resolution 467 (1980). Moreover, resolutions like Security Council resolution 2334 (2016) re-affirmed that Israeli settlements constitute a flagrant violation of international law and called on Israel, the Occupying Power, to “abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention” and recalled the ICJ’s Wall AO. It further condemned Israel’s “measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem.” The resolution further demanded that Israel “immediately and completely cease all settlement activities” and “fully respect all of its legal obligations in this regard.” Significantly, the resolution also called upon *all States* “to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.”

There is an international consensus that the Fourth Geneva Convention applies in full to the OPT (the West Bank including East Jerusalem, and the Gaza Strip). Common Article 1 of the four Geneva Conventions stipulates that the High Contracting Parties “undertake to respect and *to ensure respect* for the...Convention in all circumstances”. The 2016 authoritative commentary of the ICRC affirms that the term “undertake” was “not merely hortatory or purposive”, but was itself intended to “accept an obligation.” The ICRC stressed that states will only satisfy their legal obligations under Common Article 1 “as long as they have done everything reasonably in their power to bring violations to an end.” Notably, the obligations in the Conventions are an *erga omnes partes*. Serious violations and grave breaches of the Conventions trigger a particularly compelling international onus on High Contracting Parties to use all available means to bring such violations and breaches to an end. This would include, *inter alia*, an occupying power moving parts of its civilian populations into the occupied territory (i.e. Settlements), changing the demographic composition of the occupied territory, practices of racial separateness and discrimination, and collective punishment.

In addition, Article 25 of the Charter of the United Nations stipulates that “The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the [...] Charter.” The word “decisions” refers to those resolutions of the UN Security Council where something is decided, and/or where a pronouncement on international law is given. The ICJ in the *Namibia Advisory Opinion* of 1971 stated that:



*“...the Court will now address itself to the legal consequences arising for States from the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. **Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.** As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: **“This decision entails a legal consequence, namely that of putting an end to an illegal situation”** (I.C.J. Reports 1951, p. 82, Para. 117).*

As for the legal consequences of a finding of illegality by the ICJ, the ICRC, in its 2016 commentary on the Geneva Conventions, has listed a series of non-exhaustive measures that may be taken individually and/or collectively by the High Contracting Parties to *ensure respect* for international humanitarian law:

- Applying measures of retorsion, such as the halting of ongoing negotiations or refusing to ratify agreements already signed, the non-renewal of trade privileges, and the reduction or suspension of voluntary public aid;
- Adopting lawful countermeasures such as arms embargoes, trade and financial restrictions, flight bans and the reduction or suspension of aid and cooperation agreements;
- Conditioning, limiting or refusing arms transfers;
- Referring the issue to a competent international organization, e.g. the UN Security Council or General Assembly;
- Resorting to penal measures to repress violations of humanitarian law; and
- Supporting national and international efforts to bring suspected perpetrators of serious violations of international humanitarian law to justice.

#### A. Legal Consequences for Israel

Israel must fulfil its obligation to respect the Palestinian people’s right to self-determination. Israel must immediately end the violation of its international obligation to respect the right of the Palestinian people to self-determination by ceasing all acts and measures that prevent and/or impede the Palestinian people from exercising their right to self-determination, including the immediate cessation of the occupation in all its manifestations.

The obligation of a State responsible for an act contrary to international law to bring that act to an end is firmly established in general international law. Accordingly, Israel is obligated to immediately cease all violations of its legal obligations in Jerusalem and the occupied Palestinian territories as a whole. The cessation of these violations includes, *inter alia*, the dismantling of the illegal structures, including the settlements and the wall, and the repeal or invalidation of all legal and administrative regulations issued in connection with the illegal settlements and the establishment of their associated regime. Israel shall be obligated to make restitution and compensation for the damage suffered by all natural or legal persons affected.



**Israel is obligated to immediately repeal all its laws that have the purpose or effect of perpetuating racial segregation and discrimination enshrining its apartheid regime imposed against the Palestinian people and the geographic fragmentation of the occupied Palestinian territories, including ending its settlement activities and the regime associated with them, and to cease all discriminatory policies and practises on both sides of the green line, and to provide assurances and guarantees of non-repetition and adequate reparations to all those affected by such policies and practises, including Palestinian refugees.**

**We urge that the right of Palestinians to return is specifically provided for in the recommendations of the Court, and the restitution and return of all properties appropriated unlawfully from its Palestinian owners, in Israel and the Occupied Palestinian Territory, resulting from racist segregationist policies and practices.**

### **B. Legal Consequences for Third States**

Given the *erga omnes* nature of the right to self-determination, and in accordance with the standing resolutions of the UN General Assembly, it is also incumbent upon **all States**, while respecting the Charter of the UN and international law, to ensure that any impediment to the exercise of the right to self-determination by the Palestinian people is brought to an immediate end.

In view of the nature and importance of the rights and obligations involved, all States have an obligation not to recognise the illegal situation resulting from Israeli violations in the occupied Palestinian territories, including in relation to Jerusalem. They are also obliged not to provide aid or assistance in maintaining the situation created by these illegal acts. Furthermore, all States Parties to the Fourth Geneva Convention are obliged, with due respect for the Charter of the UN and international law, to ensure that Israel complies with international humanitarian law as enshrined in that Convention, including with regard to the forcible transfer of Palestinians and the transfer of Israeli citizens to the OPT.

Notably, UN General Assembly resolution 77/25 calls upon “all States, consistent with their obligations under the Charter and relevant Security Council resolutions, inter alia: (a) **Not to recognize any changes to the pre-1967 borders**, including with regard to Jerusalem, other than those agreed by the parties through negotiations, including by ensuring that agreements with Israel do not imply recognition of Israeli sovereignty over the territories occupied by Israel in 1967; (b) **To distinguish**, in their relevant dealings, **between the territory of the State of Israel and the territories occupied since 1967**; (c) **Not to render aid or assistance** to illegal settlement activities, including not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories, in line with Security Council resolution 465 (1980) of 1 March 1980; (d) **To respect and ensure respect for international law**, in all circumstances, including through measures of accountability, consistent with international law”.





Third States must immediately work to put an end to the system of racial segregation and discrimination enshrining Israeli apartheid imposed on the Palestinian people as a whole, and must not recognise this unlawful state of affairs, nor provide any form of aid or assistance in maintaining it.

### C. Legal Consequences for the UN

The United Nations, and in particular the General Assembly and the Security Council, should consider what further measures are necessary to remove without delay any obstacle to the realisation of the Palestinian people's right to self-determination and to take the necessary measures to ensure the implementation of its relevant resolutions without further delay.

The United Nations, in particular the General Assembly and the Security Council, should consider what further action is required to bring the illegal occupation to an immediate end and take the necessary measures to ensure the implementation of its relevant resolutions without further delay.

The United Nations, in particular the General Assembly and the Security Council, should consider what further measures are necessary to put an immediate end to the system of racial segregation and discrimination amounting to apartheid established by Israel and take the necessary measures to ensure the implementation of its relevant resolutions without further delay, including considering the reconstitution of the UN Special Committee on the Policies of Apartheid and the UN Centre against Apartheid.

### 4. Conclusion

**The Israeli occupation is illegal at the outset and constitutes an act of aggression. The illegality of Israel's occupation rests in the first instance on the *jus ad bellum* violation that brought it into occupation. As a result of that violation, the occupation became unlawful the day it began, as there was no imminent threat that would justify Israel's use of force.** Furthermore, Israel even failed in its attempt to feign a threat, and then failed to provoke Egypt into starting the war and failed to convince the US, its closest ally, of the existence of an imminent threat and the necessity of its attack. As a result of the *jus ad bellum* violation, Israel's occupation became unlawful the day it began. Consequently, there is no legal basis for Israel to maintain the occupation or, *i.e.* to lawfully impede the Palestinian right to self-determination by maintaining the occupation. It follows that the occupation is existentially illegal as a violation of international law on the use of force and the right to self-determination and that Israel must end it immediately. Every day that this does not happen constitutes an illegal situation.

Therefore, the Court has to address the question of the illegality of the Israeli occupation itself, *i.e.* the law governing the use of force (*jus ad bellum*), which constitutes an act of aggression. The Court would error in law if it only addresses the illegality of Israel's practices as an occupying power, *i.e.* only the law governing the conduct of the state during the use of force (*jus in bello*). States must reaffirm this point in their submissions to the Court and call on it to

address the illegality of Israel’s occupation at the outset considering the law governing the use of force (*jus ad bellum*).

The conduct and practises of the occupying power are strictly regulated by international law. The obligations and prohibitions applicable to the occupying power under IHL aim not only to protect the civilian population from arbitrary acts of the enemy but also to prevent it from using its occupation of appropriate territory by force. As noted above, the prohibition in Article 49(6) of the Fourth Geneva Convention, which states that “the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”, was intended to prevent “a practise adopted during the Second World War by some Powers which transferred parts of their own populations into occupied territories for political and racial reasons or, as they claimed, in order to colonise those territories”. Under international law, there is neither “permanent occupation” nor “settler-occupation”. Therefore, Israel’s policies and practises are more akin to those of colonial powers than those of an occupying power.

**Israel’s occupation, both as to its means and its ends, fails the test of legality. While the occupation is intended to be temporary by nature,<sup>44</sup> Israeli occupation aims to ensure a permanent presence and control over Palestinian land and resources through its settlements, legal and *de facto* annexation of territories, restriction of housing and travel for Palestinians, and the imposition of a racially discriminatory legal and administrative system that favours Israeli settlers and deprives Palestinians of their fundamental rights.** While the occupying power is obliged under international law to administer the territory for the benefit of the population it occupies, Israel administers the territory solely for the benefit of its own citizens, whom it has brought into the territory for the purpose of permanent colonisation, to the detriment of the occupied population. While an occupying power is vested with temporary and provisional administrative powers and annexation or claiming sovereignty over the territory is absolutely prohibited, Israel has attempted to exercise actual sovereignty over Jerusalem and the entire occupied Palestinian territory by annexing some parts of it *de jure* and others *de facto*. The conclusion is therefore inescapable that Israel has used its continued occupation as a pretext to pursue its illegitimate goal of annexing OPT, in violation of the Charter UN, and that consequently the Israeli occupation as a whole must be considered illegal.

In addition, Israel’s occupation policies and practices are designed to impose an apartheid regime over the Palestinian people as a whole, strategically fragmenting them into at least four separate geographic, legal, political, and administrative domains as a tool to maintain its apartheid regime. Israeli apartheid strategic fragmentation ensures that Palestinians cannot meet, group, live together, or exercise any collective rights, particularly their right to self-determination and permanent sovereignty, including over natural resources. Moreover, Israeli laws, policies and practices are designed to repress the ability of Palestinians to effectively oppose and challenge Israel’s apartheid regime and ensure its maintenance.

The legal consequence of the Court’s finding that the Israeli occupation of the Palestinian territories is unlawful in both its conduct and its purpose is the obligation on Israel to **immediately and unconditionally end the unlawful situation for which it is internationally responsible, *i.e.* end its occupation of the OPT and its apartheid regime imposed on the**

<sup>44</sup> ICRC, Commentary of the Fourth, 1958, [Article 47](#), p. 275



**Palestinian people as a while, and to make reparations.** As for third states and international organisations, the legal consequences constitute the obligation to support efforts to end the unlawful occupation and apartheid without delay and to refrain from doing anything that contributes to the perpetuation of the unlawful situation. They are obliged to uphold the Charter UN and the rules of international law. The legal consequence of the Court's finding on the United Nations, in particular the General Assembly and the Security Council, is that they should consider what further action is required to bring an immediate and unconditional end to the Israeli occupation of OPT and take the necessary measures to ensure the implementation of its relevant resolutions without further delay, including considering the reconstitution of the UN Special Committee on the Policies of Apartheid and the UN Centre against Apartheid.

**Finally, we must stress that the withdrawal of Israeli forces and the dismantling of the occupying administration, cannot be made the subject of political negotiation.** In the Chagos Islands advisory opinion, the British administration of the Chagos Archipelago was ordered to end “as rapidly as possible”- and was not subject to political negotiation. Similarly, the ICJ in the South West Africa advisory opinion held that South Africa had an obligation to “withdraw its administration from the Territory of Namibia”. **Withdrawal, as the termination of an internationally wrongful act, including of a *jus cogens* nature, must be immediate and unconditional. We ask that States make this clear in their written submissions.**

Signed:

Mr Shawan Jabarin

General Director, Al-Haq

Ramallah, Palestine

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For further information contact:

Dr Susan Power

Head of Legal Research and Advocacy, Al-Haq

susan.alhaq@gmail.com





• **List of Relevant Resources:**

- John Quigley, [“Israel’s Unlawful invasion of 1967 Palestine”](#)
- Ardi Imseis, [“Negotiating the Illegal”](#)
- Ralph Wilde, [“Using the Master’s Tools to Dismantle the Master’s House: International Law and Palestinian Liberation”](#)
- Ralph Wilde, [“The existential illegality of the Israeli occupation of the Palestinian West Bank \(including East Jerusalem\) and Gaza”](#)
- Ralph Wilde, [“Is the Israeli occupation of the Palestinian West Bank \(including East Jerusalem\) and Gaza ‘legal’ or ‘illegal’ in international law?”](#)
- Ralph Wilde, [“The international law of self-determination and the use of force requires an immediate end to the occupation of the Palestinian West Bank and Gaza”](#)
- Susan Power, [“Prolonged Occupation and Self-Determination”](#)
- Susan Akram, [“Self Determination, Statehood and the Refugee Question”](#)
- OHCHR, [“Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk \(A/HRC/49/87\)”](#)
- Susan Akram and Michael Lynk, [“The Wall And The Law: A Tale Of Two Judgements”](#)
- Giulia Pinzauti, [“Belligerent Occupation or Creeping Annexation? Identifying the Red Flags”](#)
- Al-Haq, [“Establishing Guidelines to Determine whether the Legal Status of ‘Area C’ in the Occupied Palestinian Territory represents Annexed Territory under International Law”](#)
- B’Tselem, [“The Annexation That Was And Still Is”](#)
- B’Tselem, [“Conquer and Divide interactive map project: an opportunity to visualize how Palestinian land was, and still is, overtaken and an explanation of the various mechanism at play over the decades”](#)
- Ralph Wilde, [“Expert opinion on the applicability of human rights law to the Palestinian Territories with a specific focus on the respective responsibilities of Israel, as the extraterritorial state, and Palestine, as the territorial state”](#)
- B’Tselem, [“A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid”](#)
- Al-Haq, [“Israeli Apartheid – Tool of Zionist Settler Colonialism”](#)
- Al Mezan, [“The Gaza Bantustan — Israeli Apartheid in the Gaza Strip”](#)
- Human Rights Watch, [“A Threshold Crossed – Israeli Authorities and the Crimes of Apartheid and Persecution”](#)
- Amnesty International, [“Israel’s Apartheid Against Palestinians – A Cruel System of Domination and Crime Against Humanity”](#)
- Susan Power, [“The Legal Architecture of Apartheid”](#)
- Susan Akram, [“Palestinian Nationality and “Jewish” Nationality: From the Lausanne Treaty to Today”](#)
- Ahmed Abofoul, [“Sound but Insufficient: The Mainstream Discussion on the Question of the Applicability of Apartheid in the Occupied Palestinian Territory”](#)



- The Advisory Committee on Public International Law, “[Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression](#)”
- Michael Lynk, “[Accountability, International Law, and the OPT, \(April 18th Panel Presentation\)](#)”
- Michael Lynk, “[Proposed Issues to Address, \(April 18th Panel\)](#)”
- Federica Paddeu, “[Proposed Issues to Address, \(April 18th Panel\)](#)”
- Al-Haq, “[Submission to the United Nations Special Rapporteur on the Palestinian Territories Occupied since 1967, Ms. Francesca Albanese, on the Right to Self-determination](#)”
- Al-Haq *et al*, “[Joint Submission to the Human Rights Committee on Israel’s Fifth Periodic Review](#)”
- Al-Haq *et al*, “[Entrenching and Maintaining an Apartheid Regime over the Palestinian People as a Whole](#)”
- Al-Haq *et al*, “[Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel’s Seventeenth to Nineteenth Periodic Reports 100th session](#)”
- Al-Haq, “[Finding David: Unlawful Settlement Tourism in Jerusalem’s so-called ‘City of David’](#)”
- Al-Haq, “[Cultural Apartheid, Israel’s Erasure of Palestinian Heritage in Gaza](#)”
- Al-Haq, “[Questions and Answers: Israel’s De Facto Annexation of Palestinian Territory](#)”
- Al-Haq, “[Annexing A City: Israel’s Illegal Measures to Annex Jerusalem Since 1948](#)”
- Al-Haq, “[Occupying Jerusalem’s Old City: Israeli Policies of Isolation, Intimidation, and Transformation](#)”
- Al-Haq, “[House Demolitions and Forced Evictions in Silwan: Israel’s Transfer of Palestinians from Jerusalem](#)”
- Al-Haq, “[Engineering Community: Family Unification, Entry Restrictions and Other Israeli Policies of Fragmenting Palestinians](#)”
- Al-Haq, “[Settling Area C](#)”
- Al-Haq, “[Water for One People Only, Discriminatory Access and Water Apartheid in the Occupied Palestinian Territory](#)”
- Al-Haq, “[The Right to Water and the War Crime of Pillage](#)”
- [Joint Submission](#) to the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel