ARTICLE

"Fatally Flawed": How the one-sided UNGA Resolution 77/247 has led to the one-sided Advisory Opinion of the International Court of Justice on the Occupied Palestinian Territory

"Fatalmente defectuoso": Cómo la unilateral Resolución 77/247 de la AGNU ha conducido a la unilateral Opinión Consultiva de la Corte Internacional de Justicia sobre los Territorios Palestinos Ocupados

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Abstract
On July 19, 2024, the International Court of Justice (ICJ) issued an Advisory Opinion to the UN General Assembly, concluding that Israel's military presence in the "Occupied Palestinian Territory" is unlawful and urging the evacuation of settlers. This Opinion stems from a one-sided UNGA resolution and proceedings driven by states hostile to Israel. The ICJ's findings adopt a biased historical and legal narrative that undermines Israel's sovereignty and disregards key principles of international law, including uti possidetis juris. The Court's conclusions on sovereignty, self-determination, and security lack sufficient evidence and ignore Israel's legitimate claims to East Jerusalem and the West Bank, as well as its security concerns. Additionally, the Opinion undermines UNSC Resolution 242 and the Oslo Accords, which advocate for negotiated resolutions. The non-binding Opinion should not be implemented, as it risks prejudicing peace negotiations and escalating tensions in the Middle East.

Keywords: ICJ Advisory Opinion, Israeli sovereignty, Palestinian territories, Oslo Accords, international law.

Resumen
El 19 de julio de 2024, la Corte Internacional de Justicia (CIJ) emitió una Opinión Consultiva para la Asamblea General de la ONU, concluyendo que la presencia militar de Israel en el "Territorio Palestino Ocupado" es ilegal y exhortando a la evacuación de los colonos. Esta Opinión se deriva de una resolución unilateral de la Asamblea General y de procedimientos sesgados impulsados por estados hostiles hacia Israel. Las conclusiones de la CIJ adoptan una narrativa histórica y legal parcial que socava la soberanía de Israel e ignora principios clave del derecho internacional, incluido el uti possidetis juris. Las conclusiones sobre soberanía, autodeterminación y seguridad carecen de pruebas suficientes y desestiman las legítimas reivindicaciones de Israel sobre Jerusalén Este y Cisjordania, así como sus preocupaciones de seguridad. Además, la Opinión debilita la Resolución 242 del Consejo de Seguridad de la ONU y los Acuerdos de Oslo, que promueven resoluciones negociadas. Dado que la Opinión no es vinculante, no debe implementarse, ya que podría perjudicar las negociaciones de paz y aumentar las tensiones en Oriente Medio.

Palabras clave: Opinión Consultiva CIJ, soberanía israelí, territorios palestinos, Acuerdos de Oslo, derecho internacional.

Introduction: a one-sided Advisory Opinion resulting from a one-sided UNGA Resolution

The ICJ Advisory Opinion

In its July 19, 2024 Advisory Opinion[5] , the ICJ has opined that Israel's "continued presence" in Judea, Samaria, East Jerusalem, and Gaza (referred to as the "Occupied Palestinian Territory" [OPT]) is unlawful and that Israel must unconditionally end its presence in said territory. In addition, the UN and all states must cooperate to implement measures to ensure that Israel brings its presence in these territories to an end "as rapidly as possible".

This opinion was supported by eleven of the Court's fifteen judges. Their reasoning is that Israel's presence in the territories is unlawful because Israel's policies and practices in the OPT violate two fundamental principles of international law: the prohibition of the acquisition of territory by force, and the Palestinian people's right to self-determination:

> "The Court considers that the violations[6] by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the Occupied Palestinian Territory. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful."[7]

> "This illegality relates to the entirety of the Palestinian territory occupied by Israel in 1967. This is the territorial unit across which Israel has imposed policies and practices to fragment and frustrate the ability of the Palestinian people to exercise its right to self-determination, and over large swathes of which it has extended Israeli sovereignty in violation of international law. The entirety of the Occupied Palestinian Territory is also the territory in relation to which the Palestinian people should be able to exercise its right to self-determination, the integrity of which must be respected."[8]

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[5] ICJ Advisory Opinion "Legal Consequences Arising from the Policies and Practices of Israel in the Palestinian Occupied Territories, Including East Jerusalem," July 19, 2014 (hereafter "ICJ Advisory Opinion").

[6] In assessing the conformity of Israel's policies and practices in the territories, as outlined in question (a), with its obligations under international law, the Court's analysis focused on prolonged occupation, Israel's settlement policy, the annexation of Palestinian territories since 1967, the exploitation of natural resources to the detriment of Palestinian residents, and the adoption of related legislation and measures that are alleged to be discriminatory. With the exception of prolonged occupation – which, according to the Court, alone does change the status of occupation– the Court found that Israel violated international law with respect to the other policies, practices, and measures.

Dissenting and separate opinions

This opinion faced significant criticism by other members of the Court. Four judges offered a fundamentally different perspective, arguing that Israel's presence in the territories is not unlawful, and that Israel is therefore not obliged to bring its presence in these territories to an end. Their criticism is so fundamental that the Opinion's legitimacy is in question.
The Court's Vice President, Julia Sebutinde, rendered a powerful dissenting opinion, exposing what she saw as numerous factual and legal flaws in the majority's reasoning, stating:

> "The Advisory Opinion does not reflect a balanced and impartial examination of the pertinent legal and factual questions. It is imperative to grasp the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine."[9]

Judges Tomka, Abraham and Aurescu stated that this opinion is based on "a legally wrong path". In their view, there is no basis for concluding that Israel's violations of international law lead to the illegality of the occupation itself; in doing so, the majority has misapplied the law of occupation, and failed to take proper account of the Oslo Accords and relevant Security Council resolutions since 1967.

Furthermore, in his separate opinion, Judge Nolte expressed regret with the Court's lack of engagement with Israel's security concerns, which further illustrates the one-sided nature of the Opinion. Judge Nolte conceded that the Court could have "better demonstrated that it has considered Israel's arguments to the extent that they are publicly available, including by drawing on decisions of the Supreme Court of Israel and the arguments put forward by the Israeli authorities in the respective proceedings, as well as Israel's submissions in other international fora". Given security guarantees have been a key aspect of Israel's negotiating position throughout the conflict, it is striking that the Court did not address Israel's legitimate concerns. This would also have provided critical context for the "prolonged occupation" which the Court takes issue with.

[7] ICJ Advisory Opinion, para. 261.
[8] ICJ Advisory Opinion, para. 262.
[9] Advisory Opinion, Dissenting Opinion Judge Sebutinde, para. 6.

Judge Cleveland was also highly critical of the Court's sole focus on the actions of Israel, and not the policies and practices of all actors involved in the conflict. This further reinforces the biased nature of the proceedings. [11]

Six of the Court's fifteen judges are therefore united in their view that, as a result of the one-sided UNGA Resolution 77/247 and the biased proceedings, the Opinion has failed to consider the whole legal and historical context of the dispute, thus undermining the credibility of the Opinion's conclusion that Israel must bring its presence in the territories to an end. In the view of four judges, the Court's conclusions have "no proper basis in international law".

While the Court should be treated with the utmost respect, and its Opinions should not be lightly criticised, the biased and one-sided character of the process leading to this Opinion calls into question the legitimacy of the Advisory Opinion itself.

The Court's approach undermines the fundamental legal principle of equality before the law, and further serves to illustrate that it did not have sufficient reliable evidence to reach a sound conclusion. It would be a grave injustice if the international community were to accept on face value an Opinion which is so fundamentally biased. This should be particularly concerning for democratic states which value and seek to promote the rule of law.

Given the extreme urgency of the criticisms expressed by 40% of the Court's judges, and the far-reaching implications of the majority Opinion's conclusion that Israel must vacate the OPT as rapidly as possible, the purpose of this legal Briefing is to highlight the main concerns expressed by these judges. These concerns focus on four main themes:

(1) Occupation, annexation and sovereignty: The Court's failure to properly analyse the territorial sovereignty of this territory has led to an incorrect legal analysis;
(2) Self-determination and security: The Court's failure to properly consider the security aspects of the occupied territories, including the correct interdependence between the Palestinian and Jewish rights to self-determination and their respective rights to security;
(3) UNSC Res 242, Oslo Accords and negotiations: The Court's failure to take account of the Oslo Accords and the peace process sanctioned by the Security Council based on negotiated settlement of the conflict;
(4) Illegality of Israel's practices and policies vs. illegality of Israel's presence: the Court makes a mistake by concluding that Israel's presence in the territories is illegal.

[10] Separate Opinion, Judge Nolte, para. 7.
[11] Separate Opinion, Judge Cleveland,

We conclude with some recommendations on how, in light of the foregoing, UN member states should treat the Advisory Opinion.

One-sided questions and proceedings have led to a one-sided Opinion

Resolution 77/247 of December 30, 2022, was adopted by a vote of 87 to 26, with 53 abstentions and 27 absent. This means that less than half of the UN's 193 member states supported this resolution. Moreover, it received significantly less support than Resolution 75/98 adopted in 2020, by a vote of 147 to 10, with 16 abstentions and 20 non-voting.[12] Significantly, a number of countries changed their votes from Yes or Abstain in 2020 to No in 2022, including Austria, Czech Republic, Estonia, Germany, Italy, Romania, and the United Kingdom. Several EU countries also changed their votes from Yes (in 2020) to Abstain (in 2022).[13] Most of the states that supported Resolution 77/247 were Arab/Muslim countries.

In operative paragraph 18 of Resolution 77/247 of December 30, 2022, the UNGA posed the following questions to the Court:

> "… 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 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?"

From the outset, it was clear that the process would be one-sided, given the one-sided voting and

[12] General Assembly Resolution 75/98 of December 10, 2022. Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem.

[13] Details of the vote on Res 77/247:
Yes: 87, including China, Cuba, Iran, Iraq, Libya, North Korea, Pakistan, Russia, Saudi Arabia, Syria, Turkey, Vietnam, Yemen, and Zimbabwe. Belgium, Ireland, and Luxembourg also voted yes.
No: 26, including the United States, United Kingdom, Germany, Italy, Australia, Canada, Austria, Czech Republic, Costa Rica, Croatia, Estonia, Guatemala, Kenya, Liberia, Lithuania, and Romania.
Abstain: 53, including 11 EU countries.

the inherently biased nature of the questions posed in UNGA Resolution 77/247. Only fifty-three UN member states accepted the Court's invitation to make written and oral submissions. Most of those states had voted in favour of Resolution 77/247, and most are alsomembers of the only three international organisations to which the Court gave permission to participate in the Advisory proceedings: the League of Arab States (LAS), the Organisation of Islamic Cooperation (OIC) and the African Union — each of which is well-known for its outspoken policies challenging the legitimacy of the existence of the Jewish State of Israel.

Judge Sebutinde articulated this concern in her dissenting opinion, stating:

> "Due to the one-sided formulation of the questions posed in resolution 77/247, coupled with the one-sided narrative in the statements of many participants in these proceedings, some of whom do not even recognize the existence or legitimacy of the State of Israel, the Court does not have before it the accurate and reliable information that it needs to render a balanced opinion on those questions. Most of the participants in these advisory proceedings have, regrettably, presented the Court with a one-sided narrative that fails to take account of the complexity of the conflict and that misrepresents its legal, cultural, historical, and political context. By asking the Court to look only at the "policies and practices of Israel", the General Assembly shields from the purview of the Court, the policies and practices of the Palestinian Arabs and their representatives (including non-state actors), as well as those of other Arab States in the Middle East whose interests are intertwined with those of the Palestinian Arabs. As pointed out in Part II of this dissenting opinion (Historical Context to the Israeli-Palestinian Conflict), these other States have historically played a significant role in the success or failure of efforts at finding a lasting solution to peace in the Middle East, including by either fostering peace agreements between Israel and representatives of the Arab Palestinians (such as the Palestinian Liberation Organization [PLO]); or by sponsoring or engaging in several wars against Israel, including by simply calling for its annihilation. Without information regarding the policies and practices of Israel's adversaries, the Court is limited in its opinion regarding the various complex issues behind the Israeli-Palestinian conflict and has, as feared, resorted to imposing obligations on Israel, whilst disregarding her legitimate security concerns and the obligations of Israel's Arab neighbours. In my respectful view, this approach is likely to exacerbate rather than de-escalate tensions in the Middle East."[14]

The joint opinion of judges Tomka, Abrahams, and Aurescu spoke of a "biased and one-sided" approach by the Court to the process and outcome:

[14] Judge Sebutinde, para. 42.
[15] Judges Tomka, Abraham and Aurescu, para. 6.

> "The Court chose to portray the Israeli-Palestinian conflict in a biased and one-sided manner, which disregards its legal and historical complexity. It gives little weight to the successive resolutions by which, from 1967 to present, the Security Council established and endorsed the legal framework for resolving the conflict based on the coexistence of two States and on the right of each of the two peoples to live in peace and security. When it does not ignore these resolutions, it makes a selective reading of them."15

The Court's failure to properly exercise its judicial responsibilities
Judge Sebutinde maintained that this was not a judicially manageable case and that the Court should have refrained from rendering the advisory opinion to preserve "the integrity of its judicial role" [bold added].[16]

a) Lack of information before the Court: Judge Sebutinde stated: "The Court does not have before it accurate, balanced, and reliable information to enable it to judiciously arrive at a fair conclusion upon disputed questions of fact, in a manner compatible with its judicial character." [17] As shown in the quotation above, this was a result of the fact that the General Assembly posed "one-sided" questions to the Court, as well as the one-sided narrative in the statements of many participants in the Advisory Opinion proceedings [18]

b) The opinion circumvents the Oslo Accords and international negotiation-based process: According to several judges, the Advisory Opinion circumvented the existing international legal framework, including the Oslo Accords and Road Map, both of which implement the principles expressed in UNSC 242/1967, and exclude recourse to judicial courts. [19] "The thrust of the Oslo Accords and Roadmap is mutual performance and good faith negotiations, leading to a consensual outcome." [20]

c) The opinion circumvents state consent: The Advisory Opinion also circumvents the principle of state consent. Unlike in contentious cases where state consent is required, advisory opinions do not necessitate such consent. This lack of requirement could potentially lead to the misuse of the ICJ, as appears to be the case here. She cited a case where the Permanent Court of International Justice (PCIJ), predecessor of the ICJ, held "[a]nswering the question would be substantially equivalent to deciding the dispute between the parties", and thus, declined to give an opinion. [21]

d) Conclusion about the impropriety to render the Advisory Opinion: Judge Sebutinde concluded: "For all the above reasons, I am strongly of the view that the Court should have declined to give its

[16] Judge Sebutinde, Introduction – Summary.
[17] Judge Sebutinde, para. 42.
[18] Ibid.
[19] Judge Sebutinde, para. 43.
[20] Judge Sebutinde, para. 44.
[21] Judge Sebutinde, para. 46.
[22] Judge Sebutinde, para. 48.

Advisory Opinion in the present case. Instead, Israel and Palestine, the two parties to the conflict, should be encouraged to return to the negotiating table and to find a lasting solution jointly and consensually. The United Nations and international community at large, should do all in their power to support such negotiations. Regrettably, the advisory opinion has downplayed the importance of the negotiation framework, including the role of the United Nations and international community in that regard." [22]

e) Misapplication of general principles of international law: Judge Sebutinde also criticised the majority for misapplying general principles of international law and adopting presumptions implicit in the questions posed by the General Assembly without a due critical analysis:

"The Court has misapplied the law of belligerent occupation and has adopted presumptions implicit in the question of the General Assembly without a prior critical analysis of relevant issues, including **the application of the principle of uti possidetis juris to the territory of the former British Mandate, the question of Israel's borders and its competing sovereignty claims, the nature of the Palestinian right of self-determination and its relationship to Israel's own rights and security concerns"** [bold added].[23]

Occupation, Annexation and Territorial Sovereignty

The Court noted that question (a) refers to "the Palestinian territory occupied since 1967", which includes the West Bank, East Jerusalem, and the Gaza Strip (the Occupied Palestinian Territory). The Court observed that various United Nations organs and bodies often refer specifically to these different parts of the Occupied Palestinian Territory.[24] The Court adopted a similar approach, referencing these areas as appropriate.[25] It emphasised that, from a legal standpoint, the Occupied Palestinian Territory constitutes a single territorial unit, the unity, contiguity, and integrity of which must be preserved and respected.

Israel's territorial integrity and borders

Judge Sebutinde did not accept the territorial criteria adopted by the Court; the Court had no basis inlaw or fact for concluding that: (1) all the territories held during the Jordanian and Egyptian occupation within the 1949 Armistice Lines are automatically the sovereign territories of Palestine, and thus not of Israel; (2) Israel's presence in the West Bank, Gaza Strip, and Jerusalem is without any legal justification; (3) Israel's presence in these areas violates Palestinian rights; and (4) Israel is annexing territory that is "Palestinian". [26]

[23] Judge Sebutine, Introduction-Summary.
[24] Advisory Opinion, para. 78.
[25] Ibid.
[26] Judge Sebutinde, para. 68.

When considering the law of occupation, the Court neglected Israel's legitimate sovereign claims over the West Bank. In fact, it is impossible to determine the issues of occupation, annexation and self-determination — on which the Palestinian claims are based — without first determining the territorial scope of the State of Israel:

> "In the context of the questions put to the Court, determination of territorial sovereignty is critical because without clarifying the respective claims of both parties to the conflict, it would be impossible to answer the question of territorial scope of the Palestinian self-determination claim or of Israel's withdrawal from territory considered occupied. Furthermore, the Court would need to determine the territory over which Palestinians claim sovereignty and whether Palestine has historically made different assertions before different fora. Regrettably, the Court, which evidently adopted the above presumptions without question, does not address any of the above issues and frankly does not have before it sufficient information to even make an educated guess." [27]

Judge Sebutinde continued:

> "… the approach taken by the majority in rendering the Advisory Opinion is fundamentally flawed as it fails to consider important legal principles and propositions in international law, governing the Israeli-Palestinian question". She underscored that the Court failed to "grasp the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine" [bold added].
>
> Even if one were to concede that Israel's military administration of these territories after the 1967 war constitute occupation under the law of belligerent occupation, this occupation does not negate Israel's pre-existing sovereign claims. Additionally, the 1949 Armistice Lines were never intended as definitive international borders.

She further noted:

"To determine the competing sovereignty claims, the Court would need to shift its focus from a review of "Israel's policies and practices in the OPTs" to a review of Israel and Palestine's competing sovereignty claims over different parts of the OPTs."

It is essential to observe that the majority opinion fleetingly mentioned British Mandatory Palestine

[27] Idem.
[28] Judge Sebutinde, Introduction-Summary.
[29] Judge Sebutinde, para. 76.

but notably omitted to specify that this mandate sanctioned "the historical connection of the Jewish people with Palestine," and that its primary objective was "the reconstitution of their national home in that country". As Judge Sebutinde notes, the fact is that, as the League of Nations acknowledged, the Jewish people are not settlers or colonisers on their ancestral land; they are, in fact, indigenous people in that land.

Judge Sebutinde noted that the Jewish people have a connection to the land predating Roman, Arab, and Ottoman conquests amongst others. Their claim to this territory dates back to the ancient Kingdom of Israel 3,000 years ago. This context was an important factor to consider, as Judge Sebutinde points out in her dissenting opinion:

> "Contrary to popular opinion, available evidence shows that as early as 1200 BCE, the Jewish people existed in the territory known as present-day Israel (also known during the British Mandate of 1922-1947 as "British Mandatory Palestine") as a cohesive national group with a well-established and formed culture, religion, and national identity as well as a physical presence which has been maintained through the centuries despite the devastating impacts of conquests and their dispersion into exile. Ancient Israel existed between 1000-586 BCE with current archaeological evidence." [30]

The Mandate clearly stated in its preamble that –

> "[…] recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home for the Jewish people."

The Mandate acknowledged the existence of the non-Jewish communities in the land. Judge Sebutinde points out that "The Balfour Declaration stated that the British Government "favoured the establishment in Palestine of a national home for the Jewish people" and agreed to use Britain's "best endeavours" to facilitate this, without prejudicing the "civil and religious rights of existing non-Jewish communities in Palestine". [31]

Judge Sebutinde explained the effect "By incorporating the Balfour Declaration in the Preamble to the Mandate… the Mandate clearly confirmed the right of the Jewish people to settle, self-determine and live peacefully in the Mandate territory (or at least in the part that remained after Britain transferred 70 per cent of the Mandate Territory to Jordan). The Mandate of Palestine did not provide for any other partition, other than the separation of Transjordan. It has been argued that the Palestinian Arab population living within the Mandate also had and continue to have a

[30] Judge Sebutinde, para. 8.
[31] Judge Sebutinde, para.10.
[32] Judge Sebutinde, para.79.

right to self-determination. However, the founding documents of the Mandate (including General Assembly resolution 181 (1947)) are silent on the issue of the self-determination of Palestinian Arabs living within the Mandatory territory, implying that the question of their self-determination was perceived as one of "internal self-determination" that would require negotiation and mutual agreement. Be that as it may, the rights of multiple nations in self-determination on a given territory should not disturb the application of the principle of uti possidetis juris." [32]

The Court is mistaken to categorise, without further analysis, the territories of the West Bank (and Gaza) as "Occupied Palestinian Territories" since 1967, and to insist that Israel should unilaterally and unconditionally withdraw from those territories and return to the 1949 Armistice Lines.

On the contrary, under the principle of uti possidetis juris, the entire territory of the former British Mandatory Palestine should form Israel's borders, unless and until the parties to the conflict agree otherwise. She stated:

> "While considerable efforts have been made to create and advance proposals for altering the borders of the Jewish State of Israel and a contemplated companion Arab State (the two-state solution), no such efforts have, so far, succeeded in being implemented. Thus, uti possidetis juris dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948, rather than the '1967 borders,' unless and until the parties to the conflict agree otherwise." [33]

This statement may be striking to many, but this would be the result of years of distorted anti-Israel narratives and a correct interpretation of the general principle of international law, uti possidetis juris.

We note that the so-called "1967 borders" are, in fact, the armistice line that the military commanders of the warring parties, Israel and Jordan, drew on the map with a green marker, and that it is expressly stated in the Armistice Agreement that this "green line" was not intended to define a future national border of the land of either party.

The consequence of this approach is that (a) Israel did not acquire the territories by force in June 1967 (as, pursuant to the Mandate, the territory already belonged to Israel), and (b) Israel's assertions of sovereignty and permanent control over territory after June 1967 does not constitute "annexation" (because the territories did not belong to another).

Without prejudice to our earlier discussions, we reiterate our firm rejection of the Advisory Opinion's assertion that Israel acquired the territories by force after the 1967 war. It is indisputable that the League of Nations, the precursor to the United Nations, granted sovereign title over these territories to Israel through the mandate system in 1921. This implies that Israel had pre-existing

sovereign rights over the territories prior to their seizure in 1967.

Regarding the Court's dismissal of Israel's rights in relation to the territory of Mandate Palestine, Judges Tomka, Abraham and Aurescu expressed this as follows:

> "The Court chose to portray the Israeli-Palestinian conflict in a biased and one-sided manner, which disregards its legal and historical complexity. It gives little weight to the successive resolutions by which, from 1967 to present, the Security Council established and endorsed the legal framework for resolving the conflict based on the coexistence of two States and on the right of each of the two peoples to live in peace and security. When it does not ignore these resolutions, it makes a selective reading of them."
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> "The Israeli-Palestinian conflict… must be approached in a balanced, nuanced and comprehensive manner that is entirely absent from the Opinion rendered. For many decades, the Israeli and the Palestinian peoples have been in conflict — a conflict with many complex legal, political and historical aspects — related to the territory of Palestine, entrusted by mandate of the League of Nations to the United Kingdom in 1922. The rights of one cannot be exercised to the detriment of the rights of the other. The "two-State solution", required by successive Security Council resolutions, which we will analyse below, is the only one that can respond to the legitimate need for security of both Israel and Palestine." [34]
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> "The "two-State solution", required by successive Security Council resolutions… is the only one that can respond to the legitimate need for security of both Israel and Palestine. This solution can only arise from a comprehensive understanding reached through negotiations, which must take into account all rights and interests involved: the right of the Palestinian people to self-determination is not incompatible with that of Israel to exist in security, while Palestine's right to security must also be taken into account. The right to self-determination and the right to security must be implemented simultaneously in order to achieve the coexistence of the two States, which will also mark the end of Israel's presence as an occupying Power in the Palestinian territory." [35]
>
> "It is regrettable that the Opinion, instead of taking into account the legitimate rights and interests of all parties involved, chose to portray the facts in an incomplete and one-sided manner, drawing an implicit parallel between the Israeli-Palestinian conflict and the two situations on which the Court has previously been asked to provide an opinion (Namibia and Chagos), from which it, however, radically differs." [36]

[35] Idem.
[36] Judges Tomka, Abraham and Aurescu, para. 38.

The Gaza Strip

As Judges Tomka, Abraham, Aurescu and Cleveland have noted, the Court's conclusion that Israel's presence in the Gaza Strip is unlawful is illogical and inconsistent. The Court includes the Gaza Strip in its conclusion that Israel's presence in "the Occupied Palestinian Territory" is illegal. However, reflecting the fact that has Israel has withdrawn its military and civilians since 2007 and made no claims to annex the Gaza Strip, the Court makes no finding that Israel has acquired the territory of Gaza unlawfully. Moreover the Court also does not explain how a violation of the right to self-determination – in the absence of a violation of the prohibition of acquiring territory by force – renders an occupying Power's force unlawful, nor does it explain how such a violation could override any legitimate exercise of the right to self-defence that Israel may have with respect to the Gaza Strip. There is, therefore, no basis for the Court's inclusion of Gaza in its conclusion that Israel's presence in the Occupied Palestinian Territory is unlawful.

The interdependence between self-determination and security

The ICJ majority decided that the Palestinian people have almost an unlimited and absolute right to self-determination, elevating it to the status of a peremptory norm (or ius cogens), conferring on the Palestinians a right to territorial sovereignty over all of the territories captured from Jordan and Egypt in June 1967. In the view of the majority, Israel's security concerns cannot be a justification for limiting the Palestinians' right to self-determination.
While the Palestinian people's right to self-determination is undisputed, this broad interpretation is far from being accepted as a rule of customary international law or state practice.

The Palestinian people's right to self-determination is undisputed. However, like any other right, it is not absolute or unlimited. Given the chronic situation of protracted violence in the area, which poses an existential threat to Israel, that right must be balanced with Israel's right to security and secure borders. This existential threat has been exacerbated following Hamas's horrific attack on October 7, 2023. Judge Sebutinde stated:

> "Whilst there is no doubt that the right to self-determination is a right erga omnes, to which the Palestinian people are entitled, in the present context, that question raises issues of the territorial borders and the safety and security of both the prospective independent Palestinian State and the Israeli State coexisting side by side. These issues, including the proposed frontiers of the two States, territorial inviolability, and legitimate security concerns of both peoples, have not been addressed by the Advisory Opinion."

The joint opinion of Tomka, Abrahams, and Aurescu also underscores the limitation to self-determination in the present context. They spoke of a "package" consisting of [Palestine's] right to self-determination and [Israel's] right to security, both being intrinsically interconnected. [37]

A most crucial issue of the advisory opinion is that it exacerbates Israel's existential risks. Even if Israel were to relinquish the territories, evacuating them without proper security arrangements as proposed by the Court, it would be left so vulnerable that its very existence could be jeopardised. Hamas and Palestinian Islamic Jihad (PIJ), both supported by Iran, would quickly fill the vacuum left by Israel in the West Bank, undermine the crumbling Palestinian Authority (PA), and immediately begin to launch missile and drone attacks from the Samarian Heights on Tel Aviv and critical infrastructure, such as Ben Gurion Airport, rendering them indefensible, even against short-range weapons. This would lead to the collapse of Israel, a scenario long desired by its enemies.

The advisory opinion, however, failed to assess Israel's security risks and the meaning of "secure boundaries" under UNSC Res. 242/1967. Judge Sebutinde criticised the majority for this failure:

> "The questions ask the Court to presuppose that all the territories held during the Jordanian and Egyptian occupation within the 1949 Armistice Lines are automatically the sovereign territories of Palestine, and thus not of Israel. I am not sure that this issue is as simple as it appears. At the very least, the Court would need to examine and evaluate evidence concerning **whether the 1949 Armistice Lines are "secure boundaries" within the meaning of Security Council resolutions 242 and 338. This, in turn, would require examination of the threats facing Israel emanating from the OPTs and the broader region"** [bold added]. [38]

Judge Sebutinde also warned about state and non-state actors "who have openly expressed a desire to see the State of Israel not just withdraw from the OPTs but also wiped off the face of the earth, including from its own territory". These assertions must also be factored into any assessment of Israel's security risks, particularly in light of Hamas's attack on October 7, 2023.

Judges Aurescu, Tomka and Abraham acknowledge that a withdrawal from the territories would expose Israel to substantial threats, especially given Hamas denies Israel's right to exist:

> "The Hamas movement, which has gained control and subsequent administration of the Gaza Strip shortly after the withdrawal of the occupying forces on the ground, and which positions itself as a competitor to the Palestinian Authority for the political leadership of Palestinians in the Occupied Palestinian Territory as a whole, denies the very legitimacy of the existence of the State of Israel; it thus opposes the "two-State solution". From this perspective, the fact that "the existence of the Palestinian people's right to self-determination cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right" (para. 257) cannot limit Israel's right to security."

[37] Joint Opinion, Judges Tomka, Abraham, and Aurescu, para. 42.
[38] Judge Sebutinde, para. 78.

The judges also admit "it is simply fair to also acknowledge that this State faces serious security threats, and that the persistence of these threats could justify maintaining a certain degree of control on the occupied territory until sufficient security guarantees, which are currently lacking, are provided. It is difficult to see how such guarantees could be provided outside the conclusion of a comprehensive settlement, which Israelis and Palestinians have indeed approached at times in their conflicted history."[41]

The judges are correct to highlight that Hamas is a legitimate competitor for Palestinian leadership, as shown in their ability to gain control of the Gaza Strip so rapidly after Israel's withdrawal in 2005. The radical Islamist groups that are gaining the upper hand in the West Bank do not seek the establishment of a democratic, peace-loving state adjacent to Israel; their goal is the eradication of Israel and its replacement with an Arab/Islamic state "from the River to the sea".

The Hamas Charter, developed in 1988, explicitly rejects peaceful settlement to the question of Israel-Palestine and calls for Islamic jihad to prevail over Palestine. This character is based on Islamic principles, seeks to establish Sharia law, and centres on the fundamental idea that the endowment of Islam is to be established across the region, not only limited to the Occupied Palestinian Territory. [42] This ideology prioritises confrontation over coexistence "from the river to the sea". According to the Charter: "Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it".[43] The advisory opinion thus, ultimately, allows the international community to exert pressure on Israel which advocates for Hamas' capacity to utilise Gaza and the West Bank as hubs of terror with the interest of using this space to continue on its path of obliterating Israel.

Hamas' aims regarding Israel threaten global peace and order. As Hamas 'success' in Gaza on October 7 fuelled violent attacks in the West Bank, so too did it spark violence and propel recruitment across the world in other regions including the United States and Europe.[44] [45] This destabilising effect would be set to grow in the case that Hamas grows in the occupied territories, explaining to a great extent Israel's cautious approach to its security oversight. Furthermore, the advisory opinion implies that Hamas' political struggle speaks on behalf of the Palestinians and that is in the best interest of Palestinians to reward acts of terror which bring conflict not only to Israel's door but to the doors of Palestinians who have experienced victimhood at the hands of Hamas' actions and their outcomes. Rewarding these techniques, which utilise terror, will establish a new and dangerous precedent in which terrorism becomes increasingly viewed as a viable and legitimised tool for state crafting.

[39] Judge Sebutinde, para. 56
[40] Judges Tomka, Abraham and Aurescu, para. 36.
[41] Joint Opinion, Judges Tomka, Abraham and Aurescu, para. 37.
[42] Wilson Center, "The Doctrine of Hamas", 20 October 2023, available at https://www.wilsoncenter.org/article/doctrine-hamas

A similar situation would likely arise from a withdrawal from the West Bank, given the notorious weakness of the Palestinian Authority and the already increasing Iranian encroachment. A withdrawal based on pre-1967 borders, without security guarantees, would thus risk Israel living with an Iranian proxy on its borders. If hostile forces were to gain control of this strategic territory, notably the Samarian Highlands, they could easily launch rockets and artillery into Israel's densely populated areas and critical infrastructure, making Israel extremely vulnerable to devastating attacks. Such a situation would only lead to more violence and loss of life on both sides. At a minimum, any lasting resolution to the conflict would require security guarantees and carefully negotiated territorial swaps that would allow Israel to maintain its strategic depth.

Under UNSC Res. 242, the Palestinian right to self-determination is contingent upon Israel's right to secure borders. The joint opinion of Tomka, Abrahams and Aurescu speaks of a "package" consisting of [Palestine's] right to self-determination and [Israel's] right to security, both being intrinsically interconnected.[46]

The practical implementation of the advisory opinion would exacerbate Israel's existential threats and vulnerability to annihilation by its enemies, creating a situation that undermines the Jewish people's right to live within secure borders. This situation also undermines the Jewish people's right to self-determination. While the advisory opinion grants Palestinians an absolute and unfettered right to self-determination, the Jewish people's right is effectively conditional and limited, constrained by the ongoing threats and attacks aimed at their annihilation.[47] Consequently, they are prevented from fully exercising their right to self-determination on land to which they have a valid territorial claim, while, according to the Court, the Palestinians have an absolute (inalienable) right to self-determination on the whole of the land to which they claim sovereign rights.

The enemies of Israel will view the advisory opinion as another step forward toward the realisation of an Arab-Palestinian state "from the river to the sea", which inherently calls for the annihilation of the Jewish State of Israel.

Iran's influence on terrorist groups in the West Bank

Judge Sebutinde rightly underscored that Israel faces security threats "emanating from the OTPs

[43] Jewish Virtual Library, Hamas Covenant (Full Text), available at https://www.jewishvirtuallibrary.org/hamas-covenant-full-text.
[44] Jerusalem Center for Public Affairs, "From the West Bank to U.S. Campuses: Iran's Psychological Influence Is Spreading", 28 July 2024, available at https://jcpa.org/from-the-west-bank-to-u-s-campuses-irans-psychological-influence-is-spreading/.
[45] International Centre for Counter-Terrorism, "The Israel-Hamas War Is Spilling Over into Europe", 19 December 2023, available at https://www.icct.nl/publication/israel-hamas-war-spilling-over-europe.
[46] Joint Opinion, Judges Tomka, Abraham and Aurescu, para. 42.

and the broader region". [48] Beyond Hamas, the more visible security threat comes from the Iranian Islamic regime. Iran has traditionally supported Hamas's terrorist activities in the Gaza Strip, but has recently extended its support to Hamas and other terrorist groups in the West Bank, especially since October 7, 2023.

It is well known that Iran, through the Islamic Revolutionary Guard Corps (IRGC), supports terrorism in the Middle East and worldwide. In 2019, the United States designated the IRGC as a foreign terrorist organisation (FTO). [49] Canada recently followed suit..[50] Authorities in both countries found that the IRGC provided material support and finance to Hamas and the Palestinian Islamic Jihad (PIJ).

The IRGC's support of Palestinian terror groups Hamas and PIJ dates back to the early days of the Islamic revolutionary regime in Tehran. Their strategic links strengthened with the emergence of the "Axes of Resistance" in the 1990s and the tumultuous events of the 2000 Intifada. Despite the Iranians being predominantly Shia and the Palestinians Sunni, pragmatism prevailed, and they recognised the need to unite to fight their two common archenemies — Zionism and the United States.

In 2017, Iran facilitated a reconciliation between Syria's Bashar al-Assad and Hamas. Since then, the IRGC's cooperation with Hamas and the PIJ in Gaza has been reinvigorated. The consistent flow of funding, material assistance, and training from the IRGC to Hamas has been well documented. Intercepted documents, corroborated and shown by reliable media sources, revealed that Tehran's regime has provided Hamas with over USD 220 million between 2014 and 2020.[51]

The IRGC provides funds and assistance to Hamas with knowledge that these resources would fuel terror and violence against Israel. Given the circumstances, while the IRGC might not have directly ordered and planned Hamas's horrific attack on Israel on October 7, 2023, its conduct, by providing those resources to Hamas, enabled, abetted, and facilitated the attack.

More concerning, open sources have reported that the IRGC is significantly increasing its support to Palestinian terrorist groups in the West Bank, including the PIJ, Al Aqsa Martyrs' Brigades and Hamas. There are clear indications that the terrorist capabilities of these groups in the area,

[47] https://www.fdd.org/analysis/op_eds/2024/06/14/the-west-bank-a-3-year-crisis-led-by-palestinian-terrorist-groups/
[48] Dissenting Opinion, Judge Sebutinde, para. 68.
[49] United States designation of the Islamic Revolutionary Guard Corps (IRGC), Department of State, April 8, 2019.
[50] Canada designation of the Islamic Revolutionary Guard Corps (IRGC), June 2024.
[51] "Revealed: secret letters that show Iran's £200m payments to Hamas – Israel has recovered correspondence that shows the extent of Iran's support for the militant group behind the October 7 attacks," The Times, London, April 11, 2024.

including access to automatic weapons and explosives, have been improving since October 7.[53] The growing integration between Hamas and Fatah in the West Bank, as signalled by the recent unity deal signed in Beijing on 23rd July 2024, represents a shift in the territory's political and security dynamics.[54] This convergence, which naturally follows from shared nationalist aspirations and from a strategic realisation that the unification of forces could advance Palestine's broader aspirations of achieving fully independent statehood, challenges the Oslo Accords foundations. Given its concerns about the impacts of Hamas's influence in the region, which should be of equal concern to the international community from a counterterrorist perspective, Israel has rejected the possibility of a Palestine in which Fatah holds governing authority due to its previous implications in armed resistance.[55] [56] The merging of these two factions and the presence of multiple terror groups in the West Bank, including PIJ and Lions' Den, contribute to a detrimental impact on peace negotiations between Israelis and Palestinians regarding the West Bank areas A, B and C. [57] With these dynamics, as a result of radical propaganda imbued with hatred, the motivations of Hamas and any affiliates should be heavily examined for their harm toward the achievability of peace.[58]

Armed cells in the area are on the rise, in comparison to previous years when only a very few militant groups were known to be active. It is estimated that at least 15 terrorist groups and factions are currently active in the West Bank. Iran has advocated for arming Palestinian terrorist groups in the area since 2014. In August 2022, IRGC-Quds Force Chief Hossein Salami stated that the West Bank was "being armed" against Israel. [58] He repeated the claim less than a year later, hinting that the Iranian regime was involved in the surge of West Bank violence. The crumbling PA proved itself unable to counteract this escalation of terrorism in the area.

Other open sources report that Iran has been pouring money into the Islamic Jihad organisation, which began to establish new armed groups under the name of "Battalions," which also include terrorists from other organisations such as Fatah, Hamas and the Popular Front for the Liberation

[52] "The West Bank: A 3-Year Crisis led by Palestinian Terrorist Groups," Foundation for Defense of Democracies, June 14, 2024.
[53] Idem.
[54] United Nations News, "UN chief welcomes agreement between Palestinian factions Fatah and Hamas", 17 July 2024, available at https://news.un.org/en/story/2024/07/1152431.
[55] al-Awar, A., & Tzoreff, Y. (2022). The Rift in Fatah, which Threatens Security Stability, is a Challenge – and Not Only for Israel, INSS Insight No. 1631, August 15, 2022.
[56] Council on Foreign Relations, "What Is Hamas?", 19 August 2024, available at https://www.cfr.org/backgrounder/what-hamas.
[57] FDD, "Mapping the West Bank Insurgency", 14 December 2022, available at https://www.fdd.org/analysis/2022/12/14/mapping-west-bank-insurgency/.
[58] Center for Strategic and International Studies, "Understanding Hamas's and Hezbollah's Uses of Information Technology", 31 July 2023, available at https://www.csis.org/analysis/understanding-hamass-and-hezbollahs-uses-information-technology.
[59] Idem.

of Palestine. The first "Jenin Battalion" was established in the city of Jenin, followed by the "Nablus Battalion." [61]

On August 28, 2024, in an antiterrorist operation, Israeli troops killed a local commander of the Iranian-backed Islamic Jihad movement in the city of Tulkarm. [62] The UN Secretary General, Antonio Guterres, called for the "immediate cessation" of IDF anti-terrorist operations in the West Bank. [63] According to the UN, Israel should remain idle and wait for its annihilation by the terrorists.

If Israeli surveillance comes to an end in the West Bank, these terrorist groups, backed by Iran, would quickly topple the PA and begin attacking Israel from the Samaria Heights, with the consequences we have discussed above.

Implications of a Complete Israeli Withdrawal from Gaza

The October 7 attack, which ignited the war between Israel and Hamas, was a direct result of Hamas exploiting the absence of Israeli military forces to plan and execute a large-scale offensive. Similar incidents, including rocket barrages and tunnel incursions, further illustrate the security vacuum left by the withdrawal and the challenges Israel faces in defending its borders from external threats without an on-the-ground presence. For the foreseeable future, full withdrawal by Israel from Gaza, as the Advisory Opinion promotes, would present an unacceptable risk to Israel, and a high risk of further destabilisation in the region. In all likelihood, rapid escalation of violence from Hamas and allied Islamist jihad groups intent on the killing of Jews and destruction of Israel would be highly expected, leading to further Israeli military response, therefore not furthering peace but obstructing Israel's legitimate self-defence and the international community's collective counterterrorism objectives in Gaza.

Justices Aurescu, Tomka and Abraham contend in their separate Joint Opinion that the Court should have limited its Opinion to the West Bank, including East Jerusalem, and should not have included Gaza in its findings, given the distinct set of circumstances in that territory: [64]

> "[...] Since 2005 the Gaza Strip has been in a fundamentally different situation than that of the West Bank. In 2005, Israel withdrew from the territory of the Gaza Strip and dismantled the settlements which it had established while maintaining control over the airspace and maritime

[60] Idem.
[61] Idem.
[62] "Israel Launches Deadly West Bank Operation as Gaza War Rages On," CAN, August 28, 2024.
[63] "West Bank Crisis: UN Chief Calls for Immediate halt to Israeli Strikes," UN News-Global Perspective Human Histories, August 29, 2024.
[64] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), 2024, ICJ Reports.

zones, and land borders. Shortly after the Israeli army's withdrawal, the Hamas movement gained control of the administration of Gaza's territory. [65]

"[...] The Court did not have evidence before it which would allow it to assert whether and to which extent the control Israel continued exercising over the Gaza Strip after the 2005 withdrawal was justified by security motives, considering, in particular, the military actions conducted by Hamas directed at Israeli territory, even before 7 October 2023. Moreover, nearly all of Israel's "policies and practices" mentioned in the Opinion refer to the situation in the West Bank.[66]

"[...] Due to insufficient information presented to it, the Court should have concluded that it was unable to properly pronounce itself on the situation in Gaza prior to 7 October 2023." [67]

In these circumstances, the judges note, we can only regret that, in its conclusions, according to which "Israel's continued presence in the Occupied Palestinian Territory", which includes Gaza, "is illegal" (para. 267) and that "Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible" (para. 285), the Opinion makes no distinction whatsoever between the West Bank, including East Jerusalem, and Gaza, referring to the "Occupied Palestinian Territory" as a whole.

Palestinian violations of international law

The Court held that Israel must wipe out, as rapidly as possible, all the consequences of the international wrongs committed, as identified in the Advisory Opinion, and re-establish the situation which would, in all probability, have existed if those wrongs had not been committed.[68] Judge Sebutinde disagreed with the Court, as it only condemned Israel to reparation, ignoring the international wrongdoings committed by Arab Palestinians. She stated:

"This is clearly a situation where there is enough blame to go round, not just of Israel but also of Arab Palestinians (for the failure of prior peace negotiations and for resorting to war) and, to some extent, the international community, for taking so long to find a lasting solution to the Israeli-Palestine conflict."

[65] Joint Opinion, Judges Tomka, Abraham and Aurescu, para.15. The Opinion's application of its conclusion to Gaza was also criticized by Judge Cleveland in her Separate Opinion: the Court makes no finding that Israel violated the prohibition on acquisition of territory by force with respect to the Gaza Strip, nor does it explain how a violaiton of the right to self-determination – in the absence of a violation of the prohibition of acquiring territory by force – renders an occupying Power's force unlawful (see paras 7-21).
[66] Joint Opinion, Judges Tomka, Abraham and Aurescu, para.16.
[67] Joint Opinion, Judges Tomka, Abraham and Aurescu, para.17.
[68] Advisory Opinion, para. 296.
[69] Dissenting Opinion, Judge Sebutinde, para. 61.

As Judge Cleveland stated, "[t]he people of Israel, too, have the right to self-determination, including the right to political independence, to territorial integrity, and to live in peace and security within recognized borders. Violant attacks against the State of Israel and its people, and the refusal of other States to recognize the legitimate existence of Israel – including a number of States participating in these advisory proceedings – also violate this right… Regrettably, the Court makes no meaningful effort to grapple with the assaults on the right to self-determination that have confronted the people of Israel since the State's inception." [70]

The broader geopolitical context

As Judge Sebutinde noted, the Israeli-Hamas war in Gaza involves multiple state and non-state actors. It is crucial to position the ICJ Advisory Opinion within a broader geopolitical context. As discussed above, if Israel were to withdraw from Samaria and Judea, Iran and the IRGC would inevitably expand their influence over Hamas and the PIJ in this area, further eroding the PA's legitimacy among Palestinians. Meanwhile, the Iran-Russia partnership continues to grow stronger, with Iran now serving as a key supplier of suicide drones essential to Russia's war effort in Ukraine.

Russia's close relations with Hamas were underscored by Russian Deputy Foreign Minister, Mikhail Bogdanov's meeting with Hamas leaders on October 22, 2023, in Moscow, only two weeks after October 7, signalling deepening ties between Russia, Iran and Hamas.[71]

This partnership illustrates the complex geopolitical landscape, where Russia and Iran are collaborating to challenge Western influence, and support groups like Hamas. The repercussions of this cooperation are evident in both the Gaza war and the Ukraine-Russia War.

The risk of the Israeli-Palestinian conflict escalating into a full-scale regional war is higher than ever, with the potential to destabilise the entire Middle East and, consequently, the world.

UNSC Res 242, Oslo and negotiations

Building on the Madrid Conference (1991) the Oslo Accords represented a dramatic breakthrough in relations between Israel and the Palestine Liberation Organization. Following months of intensive,

[70] Separate Opinion, Judge Cleveland, paras 2-3.
[71] "Moscow Hosts Hamas Delegation and Iran's Deputy FM, Prompting Israel Outrage," The Times of Israel, October 26, 2023.
[72] M. Abbas, Through Secret Channels (Garnet 1995) at 161-62 (the Palestinian delegation gave "attention to every word, sentence and expression. It was even necessary to scrutinize every comma and full stop so that we could eliminate the likelihood of fatal pitfalls occurring in the future . . . the DOP documents were reviewed by our legal consultant, Taher Shash, whom we had sent to Oslo for this purpose

arms-length negotiations, in which the Palestinian delegation literally argued over every word and every punctuation mark,[72] Israel and the PLO solemnly agreed in writing, witnessed by the United States and the Russian Federation, "to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process." [73]

Israel agreed to recognize the PLO as the representative of the Palestinian people, to withdraw its military forces from Gaza and the main Palestinian towns in the West Bank, beginning with Jericho, and to accord the Palestinians a large measure of autonomy in the Palestinian populated areas of the West Bank and Gaza Strip though the establishment of the Palestinian Authority as a transitional self-governing entity. The PLO agreed to recognize Israel's existence and its right to live in peace and security, to renounce terrorism, and to amend its Charter to remove the language calling for Israel's destruction.

Despite these robustly negotiated, arms-length agreements between the parties, the Advisory Opinion devotes barely half a page to the Oslo Accords, and shrugs off the Accords as having no binding legal impact. In one paragraph, for example, the court construed the Oslo Accords to deny Israel the very rights for which it negotiated and to which the Palestinians agreed:

"The parties to the Oslo Accords agreed to 'exercise their powers and responsibilities pursuant to' the Accords 'with due regard to internationally-accepted norms and principles of human rights and the rule of law' . . . The Court observes that, in interpreting the Oslo Accords, it is necessary to take into account Article 47 of the Fourth Geneva Convention, which provides that the protected population 'shall not be deprived' of the benefits of the Convention 'by any agreement concluded between the authorities of the occupied territories and the Occupying Power.' For all these reasons, the Court considers that the Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory." [74]
Judges Sebutinde, Tomka, Abraham and Aurescu are highly critical of this approach. Sebutinde points out:

> "The Advisory Opinion ignores the lex lata international legal framework and has the effect of undermining the international "land for peace" formula set out in UN Security Council resolutions 242 and 338, and of invalidating the bilateral Oslo Accords. I am thus unable to join the majority in that Opinion. The historic peace processes between Israel and its

purpose just before they were initialed on 20 August 1993.").

[73] Declaration of Principles on Interim Self-Government Arrangements, Israel-Palestine Liberation Organization, 13 September 1993, 32 I.L.M. 1525 (1993).

[74] Legal Consequences Arising From The Policies And Practices Of Israel In The Occupied Palestinian Territory, Including East Jerusalem, ICJ 19 July 2024, para. 102 (hereafter "ICJ 19 July 2024 Advisory Opinion")

neighbours show that, in this context, one-time enemies can set aside their differences and resolve their disputes without resorting to force and compulsion. As I have stated before in a previous opinion, "a permanent solution to the Israeli-Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement. [75]

"The Oslo Accords being agreements between subjects of international law (namely Israel and the PLO), bind any successor to the PLO. The Security Council, the General Assembly, the Quartet, the Secretary-General's special envoy, and the subsequent agreements between the parties have all referred to the Oslo Accords and their consistency with applicable UN resolutions. The international and bilateral framework for the resolution of the conflict, establishes a legal basis for Israel's continuing exercise of certain powers and responsibilities in the West Bank which the majority has characterised as 'illegal'. " [76]

Tomka, Abraham and Aurescu:

"Actually, a correct combined interpretation of the Oslo Accords and of the relevant Security Council resolutions clearly illustrates their legal effects, which continue to be valid at present. These legal effects relate to the close relationship between, on one hand, the package "right to self-determination — right to security" (these two rights being intrinsically interconnected) and, on the other hand, (1) the issue of the legality of occupation, as well as (2) the way this package needs to be implemented within the negotiation framework agreed between Israel and Palestine and supported by the relevant Security Council resolutions. Naturally, these legal effects impact the obligations of both Israel and Palestine related to the issue of the legality of occupation and to the implementation of the parameters established within the negotiation framework. [77]

"Thus, it is regrettable that the Opinion dismissed the Oslo Accords as being quasi-irrelevant. This approach is wrong for several reasons. First, the Oslo Accords, the relevance of which was emphasised by many participants to these proceedings, are the main instruments of the Israeli-Palestinian relationship. They have not ceased to be in force. Second, from a legal standpoint, the two Oslo Accords, in particular Oslo II, continue to be applicable to almost all aspects of daily life in Palestine, and are intended to govern the multidimensional relationship between Israel and Palestine. Despite their initial temporary purpose, they created a certain sense of stability. This stability based on having a clear set of rules in place may explain why neither of the parties has denounced the Accords."[78]

[75] Dissenting Opinion, Judge Sebutinde, para. 28.
[76] Dissenting Opinion, Judge Sebutinde, para. 27.
[77] Joint Opinion, Judges Tomka, Abraham, and Aurescu, para. 42.
[78] Joint Opinion, Judges Tomka, Abraham and Aurescu, para. 43.

Illegality of Israel's practices and policies vs. illegality of Israel's presence

Judges Tomka, Abraham and Aurescu disagreed with the Court's conclusion that "Israel's presence in the Occupied Palestinian Territory is unlawful," although on very different grounds. These judges agree that Israeli settlements are illegal, and that Israel unlawfully intends to proceed to a gradual annexation of the territories that form Area C under the Oslo Accords. [79] They also agreed that Israel violates the Palestinian people's right to self-determination, has illegally transferred population, and adopted discriminatory measures against Palestinians, all of which constitute violations of international humanitarian law. [80]

However, they asserted, it cannot be concluded from the above that the occupation itself is illegal, which is a question of a fundamentally different nature. [81] For them, the occupation itself must be examined under a different set of rules — those that govern the use of force. [82] The legality of the occupation ab initio is a matter of ius ad bellum. The Court does not have elements and information to pass judgement on whether the military action that gave to the occupation in 1967 was justified, and whether it remains justified by Israel's legitimate security needs. While an occupation that is legal ab initio may become illegal over time, the mere passage of time does render the occupation illegal. [83] They then affirmed:

> "In fact, the relevant question is whether the occupying Power — Israel — could today completely withdraw from the occupied territories "as rapidly as possible", in the absence of any guarantee, without exposing its security to substantial threats. In the current context, we find it quite difficult to answer this question in the affirmative. Israel's full withdrawal from the occupied territories and the implementation of the right to self-determination by the Palestinian people is intrinsically linked to Israel's (and Palestine's) right to security. The Hamas movement, which has gained control and subsequent administration of the Gaza Strip shortly after the withdrawal of the occupying forces on the ground, and which positions itself as a competitor to the Palestinian Authority for the political leadership of Palestinians in the Occupied Palestinian Territory as a whole, denies the very legitimacy of the existence of the State of Israel; it thus opposes the 'two-State solution'. " [84]

This statement unreservedly acknowledges the substantial security threats facing Israel under present circumstances.

[79] Joint Opinion, Judges Tomka, Abraham and Aurescu, para. 25.
[80] Idem.
[81] Joint Opinion, Judges Tomka, Abraham and Aurescu, para. 15.
[82] Joint Opinion, Judges Tomka, Abraham and Aurescu, para. 23.
[83] Joint Opinion, Judges Tomka, Abraham and Aurescu para. 33.
[84] Joint Opinion, Judges Tomka, Abraham and Aurescu para. 36.

Conclusions and Recommendations

Legal effect of the Advisory Opinion

Advisory opinions issued by the International Court of Justice (ICJ) are not legally binding like the Court's judgments in contentious cases. However, they still carry substantial legal weight and can have significant legal effects.

Unfortunately, the distinction between advisory opinions and contentious cases has become blurred due to the misuse of advisory proceedings as a means to bypass states' lack of consent to the Court's contentious proceedings. That is clearly the case here, where the observer State of Palestine has overtly used the Advisory Opinion proceedings to achieve a judicial determination of its legal claims, avoiding the negotiations and other dispute resolution mechanisms intended to result in a consensual resolution of issues in dispute.

Advisory opinions are not binding on states directly connected to the subject matter of the dispute; therefore, they are even less likely to bind third states, even in cases involving erga omnes obligations.

Consequently, non-compliance with an advisory opinion by third states does not result in international liability under Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Pro-Palestinian legal groups often attempt to intertwine the concepts of erga omnes and jus cogens to compel third states and their nationals (whether natural or juridical persons) to distance themselves from Israel. Judge Tladi, in his declaration, stressed that "[t]he erga omnes character of the obligations does not itself create obligations on third States."[85]

The most significant practical effect sought by pro-Palestinian activists is to deter international corporations from engaging in business related to settlement activities in the disputed territories. Such attempts at restrictions are not new and have been part of UNHRC resolutions aimed at blacklisting these businesses. While these resolutions cannot typically be enforced by national courts, they can cause potential reputational damage to the blacklisted corporations. Although private corporations cannot be sued in the ICJ, their home states, in theory, can be (whether in contentious or advisory proceedings).

Factual and legal deficiencies of the one-sided Advisory Opinion

As a result of a one-sided set of questions posed by the General Assembly, and one-sided Advisory Opinion proceedings dominated by States hostile towards the Jewish State of Israel, the Court has

[85] Declaration, Judge Tladi, para. 31.
[86] Judge Sebutinde, para. 42.

focused exclusively on Israel's alleged misconduct, and been asked to assume matters of both law and fact that are in contention between the parties. It has thereby ignored crucial issues such as the legal and political history of the territory of Mandate palestine prior to 1967, and the policies and practices of the Palestinian Arabs and their representatives (including non-state actors), as well as those of other Arab States in the Middle East whose interests are intertwined with those of the Palestinian Arabs.

The result is a is a fundamental breach of the Court's responsibility to ensure that it has before it "accurate, balanced, and reliable information to enable it to judiciously arrive at a fair conclusion upon disputed questions of fact, in a manner compatible with its judicial character."[86] The one-sided quesitons and proceedings led the Court to make a number of fundamental errors in factual and legal analysis. In particular -

> (1) Occupation, annexation and sovereignty. The Court has failed to properly analyse the sovereign status of this territory. This has led to an incorrect legal analysis. The Court has ignored Israel's legitimate sovereign claims to East Jerusalem and the West Bank (Judea and Samaria) grounded in the principle of uti possidetis juris, based on the territorial borders of the former British Mandate of Palestine in 1922, rather than on the seizure of the territory by force during and after the 1967 war.[87] Consequently, the Court did not have sufficient evidence or arguments before it to conclude that all of the territory captured in June 1967 is "Palestinian", or that Israel has acquired foreign territory, or attempted to acquire such territory, by force during or after the June 1967 war.
> (2) Self-determination and security. The Court has failed to properly consider the security aspects of the occupied territories, including the correct interdependence between the Palestinian and Jewish rights to self-determination and their respective rights to security.
> (3) UNSC Res 242, Oslo Accords and negotiations. The Court's approach undermines the Oslo Accords and the peace process sanctioned by the Security Council based on negotiated resolution of all outstanding issues in the conflict, including: security, borders, Jerusalem, and settlements.
> (4) Illegality of Israel's practices and policies vs. illegality of Israel's presence. The Court provides insufficient reasons for concluding that Israel's presence in the territories is illegal.

Recommendations

The ICJ President, Nawaf Salam, wrote a separate declaration calling on the Security Council and General Assemblyto set a "well defined timeframe" for adopting concrete measures to implement the Advisory Opinion. We believe that this call is inappropriate coming from the president of the ICJ.

[87] Judge Sebutinde, para. 77.

Under the circumstances, we recommend peace-loving nations worldwide work to prevent the adoption of any resolution which declares Israel's presence in the territories to be illegal or that calls for its withdrawal in the absence of a comprehensive peace agreement guaranteeing Israel's security. Israel's enemies have already stretched tensions too far and strained the cord too much. Any such resolution would contradict one of the UN's primary objectives of maintaining world peace and security.

The task of the General Assembly is not to make pronouncements about the legal compliance of only one of the parties in the conflict with international law. Rather, reflecting the complex interdependence of the many unresolved issues on the table, the Assembly should undertake a "balanced and impartial examination of the pertinent legal and factual questions" that "grasps the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine."

Furthermore, the General Assembly should encourage and facilitate the parties to enter into good faith negotiations, as reflected in the Oslo Accords and the performance-based, goal-driven Roadmap for Peace, to which the United Nations is a party.
Accordingly, we recommend that states consider the Advisory Opinion as non-binding for both the states involved and third states. This is because, in advisory proceedings, the International Court of Justice (ICJ) does not have the authority to adjudicate disputes with the status of res judicata, an authority it holds only in contentious proceedings with the consent of the parties involved. As the name suggests, an advisory opinion is merely an opinion.

On this basis, third states should not take any steps that may impede or prejudice the existing competing claims between the parties being resolved through negotiations between them, as mandated by UNSC Resolution 242 (1967) and the Oslo Accords. These are binding instruments of international law that remain valid and enforceable to date. The same solution is provided for in the Roadmap for Peace, which was endorsed and embodied in UNSC Resolution 1515 (2003) and is also a binding instrument under international law.