International court of justice

Intervention of norway

23 February 2024

On the legal consequences arising from the policies and practices of israel in the occupied palestinian territory, including east jerusalem

PART I

Israel's occupation of the Occupied Palestinian Territory
and the question of *de facto* annexation

Part I

I. Introduction

1. Mr President, distinguished Members of the Court, I have the honour to appear before you on behalf of the Government of Norway in the present proceedings. Norway is responding to the invitation to provide information that may be helpful to the Court in its consideration of the General Assembly's request for an Advisory Opinion.

2. Israel's occupation of Palestinian Territory has continued since 1967. Recent developments give rise to the utmost concern. They include on-going indiscriminate and disproportionate use of force and other measures in the Gaza Strip, as well as illegal settlements in the West Bank, including East Jerusalem. House evictions, demolitions, forced displacement and settler violence against the Palestinian population are aspects of the Israeli occupation.

3. Such acts run counter to fundamental human rights, international humanitarian law and the right to self-determination of the Palestinian people. They threaten the foundations under international law for the vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders. Against this background, an Advisory Opinion will provide essential and timely guidance to the international community.

4. The atrocities committed by Hamas and directed from the Gaza Strip on 7 October 2023 constituted heinous and massive terrorist attacks. Repeated rocket attacks launched from Hamas and other groups in Gaza against Israel constitute violations of international humanitarian law, due to their obvious indiscriminate nature. Individuals responsible for atrocities and other crimes must be held accountable. Those constituting real and imminent threats to the Israeli population and territory expose themselves as lawful military targets, within the constraints of international law.

5. This does, however, not justify any breaches of international humanitarian law, including by inciting or taking measures directed against the civilian population. Norway takes due note of

the Provisional Measures indicated by this Court on 26 January this year.

Mr President,

6. The Israeli settlements in the West Bank and East Jerusalem constitute a chief obstacle to any prospect of settlement and peace in the area. In its Advisory Opinion of 2004 on the legality of the construction of a wall, this Court stated that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law".[1] The Security Council has in numerous resolutions, including 2334 of 2016, restated its determination that the settlements constitute "a flagrant violation of international law"[2] and stressed the need to reverse negative trends on the ground, which are steadily eroding the two-State solution and entrenching a one-State reality.

7. Against this background, I will first address administration and annexation of territory under occupation. I will then ask whether Israel's continued occupation may still be seen as temporary administration of territory in accordance with international law of military occupation or whether the Occupied Palestinian Territory is being gradually subject to illegal annexation. Drawing on the Court's Advisory Opinion in *Namibia*, I will pose the question whether Israel must end its occupation of the territory. Ambassador Fife will thereafter address specific elements which are part of the legal framework applicable, under international law, to the occupied Palestinian territory.

II. The notion of "the Palestinian territory occupied since 1967"

8. At the outset, we recall that the definition of "occupied territory" in Article 42 of the 1907 Hague Regulations relies on a factual assessment. A territory is considered occupied when it is "actually placed under the authority" of the hostile army. This triggers key legal rules, in particular out of humanitarian considerations, notably pursuant to the Fourth Geneva Convention.

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[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, ("*the Wall*"), para. 120

[2] *UN SC Resolution 2334 (2016),* para. 1

9. The factual assessment made by this Court at the time of *the Wall* opinion, remains in our view entirely true today: both the Gaza Strip and the West Bank are integral parts of the territory occupied by Israel in 1967, irrespective of the Israeli military withdrawal from Gaza in 2005. The Security Council recently stressed in its Resolution 2720 of 2023 "that the Gaza Strip constitutes an integral part of the territory occupied in 1967" and reiterated "the vision of the two-State solution, with the Gaza Strip as part of the Palestinian State", echoing its Resolution 1860 of 2009.

III. Legal consequences arising from the prolonged Israeli occupation

10. The protections given to the civilian population by the laws of occupation continue to apply. This does, however, not impede a consideration of the legality of the occupation as such. The occupation has now lasted for more than half a century. While international law does not set any specific time limit, military occupation is, in essence, *temporary*.[3] This is evident from provisions such as Articles 6 (3) and 47 of the Fourth Geneva Convention and was recalled by the General Assembly in its resolution 77/126 in 2022 emphasizing "that the occupation of a territory is to be a temporary, *de facto* situation, whereby the occupying Power can neither claim possession nor exert its sovereignty over the territory it occupies". Recognized authorities have reminded us that "the law on belligerent occupation is based on the assumption that occupation of foreign territory, being an extraordinary measure, may be justified for a limited time only".[4]

11. A military occupation cannot be permanent. If an occupation is allowed to be indefinite, then the distinction, under *jus ad bellum*, between occupation and annexation dissolves. Furthermore, risks are patent with regard to "deportations, transfers and evacuations" in breach of Article 49 of the Fourth Geneva Convention. Both this Court and the Security Council have found Israel to have violated this provision. Such developments give reason to ask whether the situation is turning into a *de facto* annexation.

IV. The legal consequences arising from the prolonged occupation

[3] C. Rousseau, *Le droit des conflits armés* (Pedone 1983) p. 134; E. Liebich & E. Benvenisti, *Occupation in International Law* (OUP 2022) p. 110.

[4] H. P. Gasser, *Notes on the Law on Belligerent Occupations* (2006) 45 Military Law and Law of War Review pp. 231–232.

with regard to the principle of self-determination of peoples.

12. I now turn to the possible legal consequences arising from such prolonged occupation with regard to the Palestinian people's right to self-determination.

13. In its advisory opinion on *the Wall*, the Court noted, that *"the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) (...), pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to (...) of their right to self-determination."*[5] The Court notes in para 149 that Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination.

14. It added that there was a risk of further alterations to the demographic composition of the territory, contributing to the departure of Palestinian populations from certain areas. On this basis, the Court concluded that the construction of the wall, along with measures taken previously, severely impeded the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel's obligation to respect that right.

15. In its 2019 advisory opinion on *Chagos*[6], para. 160, this Court emphasized the customary law character of the right to territorial integrity of a non-self- governing territory as a corollary of the right to self- determination. (..) It follows that any detachment by the administering Power of part of a non-self- governing territory, unless based on the freely expressed and genuine will of the people of that territory, is contrary to the right to self-determination.

16. Norway believes that permanent or irreversible measures taken by Israel on Occupied Palestinian territory, would likewise be contrary to the Palestinian people's right to self-determination.

V. Annexation in international law

[5] *The Wall* opinion, para. 88.

[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, ("Chagos")*

17. I turn now to annexation. Annexation is a unilateral act by which a State incorporates into its territory all or part of the territory of another. As a concomitant of the prohibition on the threat or use of force in Article 2(4) of the UN Charter, annexation is prohibited under customary international law.

18. This prohibition is reflected in Security Council Resolution 242 of 1967, referring to the "inadmissibility of the acquisition of territory by war", repeated in its Resolution 298 of 1971. It is on this basis that the Security Council in its Resolution 469 of 1980 declared Israel's *de jure* annexation of East Jerusalem to be "invalid".

19. What form annexation takes is irrelevant. To quote the Court: "[w]ith regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements". This is why it must be reiterated that annexation under any form — whether *de jure* or *de facto* — is illegal under international law. The formal characterization is immaterial.

VI. Must indefinite occupation be seen as tantamount to de facto annexation?

20. Nevertheless, there are grounds for asking whether Israel's occupation may be seen as tantamount to *de facto* annexation, as the Court did in *the Wall* opinion, and I quote:

> "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*. [emphasis added]"[7]

21. In its September 2022 report, the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, held that:

> "Israel treats the occupation as permanent and has — for all intents and purposes — annexed parts of the West Bank, while seeking to hide behind a fiction of temporariness. Actions by Israel constituting *de facto* annexation include expropriating land and natural resources, establishing settlements and outposts, maintaining a restrictive and

[7] *The Wall* opinion, para. 121.

> discriminatory planning and building regime for Palestinians and extending Israeli law extraterritorially to Israeli settlers in the West Bank."[8]

22. The Commission considered the situation tantamount to a *de facto* annexation, as alluded to by the Court.[9]

23. The Court may wish to consider the following aspects when determining whether Israel's occupation may be tantamount to a *de facto* annexation.

24. First, the establishment of settlements in the Occupied Palestinian Territory represents a transfer, over decades, of parts of the occupying Power's own civilian population into the territory it occupies, in breach of Article 49(6) of the Fourth Geneva Convention. The Security Council has repeatedly, including in resolution 2334 (2016), condemned all measures aimed at altering the demographic composition, character and status of the territory occupied since 1967.

25. Second, it could be asked whether the duration of the occupation, which has now lasted for more than half a century, in itself renders the occupation tantamount to *de facto* annexation.

26. Third, there are grounds for serious concerns regarding announced plans for further expansion of Israeli settlements in the West Bank, including East Jerusalem.

27. Fourth, Israel has appropriated natural resources of the West Bank, including water resources, and seized control of physical infrastructure in order to bind the area closer to itself and, it seems, to render irreversible its presence on the territory.[10] Of particular concern are the repeated demolitions of the local Palestinian Bedouin communities and plans for infrastructure constructions that will isolate Bethlehem and the southern West Bank from East Jerusalem.

[8] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 14 September 2022, A/77/328, para. 76

[9] *Ibidem.*

[10] ECOSOC resolution 2022/22, 22 July 2022 (referred to in Written Statement of Jordan, Part One, para. 4.22); Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 14 September 2022, A/77/328, para. 77.

28. Fifth, political leaders in Israel have stated that Israel's aim is a *de facto* annexation of the territory. In 2019, Prime Minister Benjamin Netanyahu declared that Israel would "continue to build and develop" the West Bank; he said that "not one resident or community will be uprooted in a political agreement"; and "Israeli military and security forces will continue to rule the entire territory".[11] He later pledged that his government would be "applying Israeli sovereignty over all the communities" to which Israeli settlers had been transferred.[12]

29. Norway looks forward to the determination by the Court whether the occupation may have become tantamount to *de facto* annexation. Moreover, statements legitimizing extension of settlements may constitute direct and public incitements to commit further serious violations of international law. The State of Israel must take all measures within its power to prevent and punish such incitement. Norway believes that it would be useful to clearly set out the illegality of any measures tantamount to *de facto* annexation and underline the clear, continued legal obligations of the Occupying Power as regards protected persons in the territory occupied since 1967.

VII. Possible legal consequences of a de facto annexation for Israel, the occupying power

30. In the case that the Court reaches the conclusion that the situation in the occupied Palestinian territories must be seen as tantamount to *de facto* annexation, the next question is what would be the legal consequences for Israel.

31. In the 1971 *Namibia* opinion[13], this Court referred to an obligation on the part of the occupant to withdraw its administration of the territory immediately or as rapidly as possible. Analogous conclusions were drawn by the Court in the *Chagos* opinion. Furthermore, the Security Council in resolution 476 (1980) "reaffirmed the overriding necessity for ending the prolonged occupation".

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[11] "At West Bank Event, Netanyahu Promises No More Settlers, Arabs Will Be Evicted", *Haaretz*, 10 July 2019.

[12] Israel Prime Minister's Office, "Cabinet Approves PM Netanyahu's Proposal to Establish the Community of Mevo'ot Yeriho & PM's Remarks at the Start of the Cabinet Meeting", 15 September 2019.

[13] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, ("Namibia")*

Mr. President,

32. In the *Namibia* opinion the Court was mindful of the fundamental consideration that it should not make any determination that would result in *adversely affecting the population of the territory in question*.[14] This principle is codified in Article 47 of the Fourth Geneva Convention, as a cardinal safeguard.

33. The provision clearly expresses the general principle that the Fourth Geneva Convention protects civilians "regardless of the status" of the territory in question.[15] Moreover, the formal characterization of occupied territory cannot relieve the occupying power of the obligations it owes to the population of the territory.

34. Clear legal obligations incumbent on Israel include access of humanitarian actors to the occupied Palestinian territory, including the Gaza Strip. In resolution 2720 of 2023, the Security Council *reiterated* its demand that all parties to the conflict, including Israel, comply with their obligations including with regard to humanitarian access and the protection of humanitarian personnel and their freedom of movement.[16]

35. I thank you for your attention. I will now ask Ambassador Fife to come to the podium.

Part II

VIII. Certain issues related to the legal basis for the two-State solution

1. Mr. President, distinguished Members of the Court, it is an honour for me to again appear before this Court on behalf of the Kingdom of Norway.

2. For completeness, I will now address certain elements which Norway considers to be part of the legal framework applicable to the occupied Palestinian territory. They

[14] *Namibia* opinion, para. 122.

[15] *The Wall* opinion, para. 95.

[16] *UN SC Resolution 2720 (2023),* para. 1

constitute solid foundations under international law for the “two-State solution”, to which Norway is fully committed.

3. I would like to start by noting the statement made before this Court on 12 January by the co-agent of Israel in a contentious case, when he recalled:

> *“the commitments made at the time the State was established, as reflected in our Declaration of Independence”*[1]

4. This reminder of “*the commitments*” made in the Declaration of Independence of the State of Israel of 14 May 1948 is indeed important.

5. The Declaration is the key constitutive document for the establishment of the State of Israel. It is based – and I quote - on “*the strength of*” resolution 181 (II) of 1947 of the UN General Assembly, concerning “the Plan of Partition with Economic union”.[2] It is indeed rare to find similar constitutional documents that are explicitly based on a specific United Nations resolution, as was done here. The Declaration added that the State of Israel was “*prepared to cooperate with the agencies and representatives of the United Nations in implementing the resolution*”.[3]

6. Furthermore, the resolution was considered in the Declaration to constitute an “*irrevocable*“ recognition by the United Nations of the right to establish a State. This ought to imply that the same applies to the Palestinian side.

7. An international legal framework has since been built - in a figurative sense, brick by brick - under the auspices of the United Nations with a view to achieving a two-State-solution. And a point of departure here are “*the commitments*” made at the time the State of Israel was established – and their subsequent legal relevance.

8. On 15 May 1948, the Foreign Minister of the Provisional Government of Israel, Mr. Moshe Sharett,[4] transmitted the contents of the Declaration of Independence to the Secretary-General of the UN, Mr. Trygve Lie.[5]

9. On the day independence was declared, Arab neighboring States attacked Israel. On 16 November 1948, the Security Council demanded in resolution 62 the establishment of an

armistice "*in all sectors of Palestine*". The armistice demarcation lines later established, and since referred to as "the green line", were without prejudice to future territorial settlements or boundary lines.

10. On 29 November the same year, Foreign Minister Sharett sent a formal application for membership in the United Nations to the Secretary-General. The letter stated that independence had been proclaimed "*in pursuance of*" resolution 181 (II) of the General Assembly. It added that Israel "*unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of the United Nations*".[6]

11. Mr President - The subsequent decision-making process concerning UN membership in accordance with Article 4 of the Charter is significant.

12. Pursuant to Article 22 of the Covenant for the League of Nations and the adoption of a class A mandate, Palestine had been provisionally recognized in 1922, as "an independent nation", subject to the rendering of administrative advice and assistance by a Mandatory until such time as it was able to stand alone. By virtue of Article 80 of the Charter, rights of self-determination were not altered in 1945, but continued. The announced notice of termination of the Palestine mandate by the United Kingdom in 1947 provided the background for the adoption of resolution 181 (II) already referred to.

13. Norway voted in favour of that resolution. The two-State solution formed the context of the vote on admission of Israel to UN membership. On 4 March 1949, as a member of the Security Council, Norway voted in favour of such admission, stating, in its explanation of vote, that it was *"confident that Israel will cooperate fully and loyally with all decisions by organs of the United Nations".* On 11 May 1949, Norway also voted in favour of resolution 273 (III) in the General Assembly.

14. This decisive resolution referred to resolution 181 of 1947, but also to "*the declarations and explanations made by the representatives of the Government of Israel before the Ad Hoc Political Committee in respect of the implementation of the said resolutions*".[7]

15. From 5 to 9 May 1949, Israel's representative in the Committee, Mr Abba Eban, had fielded questions from member States.[8] His assurances became an integral part of assessments made by the relevant UN organs as regards membership.

16. On 5 May 1949, Mr. Eban recalled that resolution 181 (II) recommended that "*when either State envisaged by that Resolution had made its independence effective*", sympathetic consideration should be given to membership in the UN.[9] He added that "*(t)he time had come for the United Nations, if it wished Israel to bear the heavy burden of Charter obligations, to confer upon Israel the protection and status of the Charter."*[10]

17. After the decisive vote in the General Assembly, Foreign Minister Sharett stated that the aftermath of the war had "*changed some elements*" in the pattern envisaged in the 1947 Resolution, and that "*modifications*" were therefore called for. However, these do not vacate the continued relevance of the framework.[11] The Foreign Minister noted that "*Israel's organic connection with the United Nations had combined with its own compelling interest in dictating its course of action in international affairs – a course of undivided loyalty to the Charter of the United Nations and of consecration of the cause of peace."*

18. Such declarations and explanations were instrumental in securing a majority of votes in the relevant organs of the United Nations. To a Norwegian, they may moreover invite a recollection of the so-called Ihlen declaration. Assurances given by a foreign minister may under certain circumstances give rise to legal consequences as unilateral acts.[12]

19. After exercise of the right of self-determination had led to the establishment of the States of Jordan and Israel, the legal framework continues to be applicable today.

20. Returning to the current situation, the illegality, under international law, of certain measures described has already been, authoritatively and abundantly, made clear. As an example, the unanimously adopted Security Council resolution 465 of 1980 determined that all measures taken by Israel to change the character, composition, structure or status of Arab occupied territories since 1967 have no legal validity.[13]

21. For the sake of good order, it should be noted that nothing in the later peace process, including instruments often collectively referred to as the “Oslo accords”, impairs this assessment. These are based on an explicit recognition of the «*legitimate rights of the Palestinian people and their just requirements*».[14] Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.[15]

22. It is the view of Norway that a permanent settlement based on Security Council Resolutions 242 and 338 must build on a confirmation of the role of international law and of the international legal framework that we have attempted to briefly describe.

23. Our observations do not imply any lack of legitimacy of the establishment or of the rights of the State of Israel. On the contrary, they build on it. However, they also recall the clear obligations, of a legal and not merely of a political nature, incumbent on Israel. These rights and obligations correlate. They require fully contributing to the realization of a viable State of Palestine. The permanent and irreversible nature of measures described under the prolonged occupation, with illegal settlements and conduct in relation to the Gaza Strip, run counter to the Charter, and also to the very commitments made by Israel.

IX. Concluding remarks

24. It is against this background that we invite the Court to pronounce itself on the legality of the measures described and of the continued occupation.

25. I have come to the end of the presentation of Norway’s Oral Statements. I thank you for your attention.