Cambridge Law Journal, **84(1)**, March 2025, pp. 1–6
doi:10.1017/S0008197325000212

THE
CAMBRIDGE LAW JOURNAL

VOLUME 84, PART 1 MARCH 2025

CASE AND COMMENT

INHERENT ILLEGALITY: ISRAEL'S PRESENCE IN OCCUPIED PALESTINIAN TERRITORY VIOLATES FUNDAMENTAL RULES OF INTERNATIONAL LAW

IN *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion of 19 July 2024) (the "*Opinion*"), the International Court of Justice concluded 11-4 that "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 [OPT] 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 [OPT] unlawful" (at [261]). Although not in the majority, Judges Tomka, Abraham and Aurescu nevertheless agreed that Israel's policies and practices were in breach of international law, but did not accept that this rendered Israel's presence in the OPT unlawful. Judge Sebutinde, who was deeply critical of the Court's decision to give the advisory opinion in the first place, considered that a lawfully created occupation will not become illegal through the passage of time.

The Court also advised that Israel must withdraw from the OPT as rapidly as possible (11-4), cease all new settlement activity and evacuate existing settlers (14-1) and make full reparation (14-1). As Israel's violations included *erga omnes* obligations (i.e. obligations owed to the international community as a whole), states and international organisations are under an obligation not to recognise any changes in the OPT since Israel's occupation on 5 June 1967, except as agreed by the parties, and they are required to distinguish in their dealings with Israel between the territory of the state of Israel and the OPT (at [278]).

This includes abstaining from treaty relations where Israel purports to act on behalf of the OPT, or where such relations would entrench its unlawful presence in the territory; abstaining from any recognition of Israel's illegal presence in the OPT in diplomatic relations; and taking steps to prevent trade and investment that may assist in maintaining the illegal situation (12-3). States must not recognise as legal the situation arising from Israel's unlawful presence and must not render aid or assistance in maintaining it (at [279]) (12-3). Finally, the United Nations should consider the "precise modalities and further action" required to bring Israel's unlawful presence to an end as rapidly as possible (12-3).

The *Opinion* deals with several important points of international law (and, although the Court took the view that the policies and practices contemplated by the request for an advisory opinion (of December 2022) did not include those pursued by Israel in the Gaza Strip after the attack of October 2023 (at [81]), some of these points are relevant to assessment of the ongoing situation in the Strip). First, the Court clarified that, in determining whether territory is occupied, what matters is whether a foreign state's authority "has been established and can be exercised". Territory is occupied "when, and to the extent that" a foreign state exercises effective control over territory that is not its own (at [90]). Crucially, this need not involve a physical military presence on the ground, provided the foreign state "has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time" (at [91]). According to the Court, this means that, if a state exercises or is capable of exercising elements of its authority *in place* of the local government, then it will bear obligations under the law of occupation. This is important in the context of the Gaza Strip: given that Israel has continued to exercise "key elements of authority over the Gaza Strip", its purported "disengagement" has not released it from its obligations under the law of occupation, which remain "commensurate with the degree of its effective control" over the Gaza Strip (at [94]). The Court's conclusion that occupation and the obligations incurred by an Occupying Power is a matter of degree – namely that a foreign state has a range of obligations "commensurate" with its control – is relatively novel, albeit reflecting a position that has long been advanced in academic debates.

Second, the Court confirmed that the law of occupation does not determine whether the presence of a state on foreign territory is lawful or not. Occupations are designed to be a temporary status and cannot be the basis for acquiring sovereignty over territory. However, the prolonged nature of an occupation does not change its status under international law and does not confer any greater powers on the occupying state. Rather,

and in what is perhaps the most important part of the *Opinion*, whether the presence of an Occupying Power is lawful must be assessed against other rules of international law – in particular, those on the use of force and the right to self-determination.

In its assessments of Israel's policies and practices in relation to the OPT, the Court concluded that Israeli settlements in the West Bank and East Jerusalem, and the regime associated with them, as well as the exploitation of natural resources, and the application of Israeli domestic law to the West Bank and East Jerusalem, violate rules of international law, including international humanitarian and human rights law, and/or "entrenched Israel's control of the [OPT]" (at [173]). As the policies and practices "are designed to remain in place indefinitely and to create irreversible effects on the ground", they amounted to annexation of "large parts of the [OPT]" (ibid.). In reaching this conclusion, the Court appeared to elide the traditional doctrinal separation between rules that determine when force may be used (*ius ad bellum*) and rules that govern such hostilities (*ius in bello*), albeit not in a straightforward way. On the one hand, occupation is said to involve "by its very nature, a continued use of force in foreign territory" (at [253]), with some judges, in particular Nolte and Cleveland, of the view that when the presence of an Occupying Power becomes a vehicle for annexation, it "loses any possible justification for the presence of its forces, including on the basis of the right of self-defence". On the other hand, the Court distinguished between the legality of the Occupying Power's conduct under the law of occupation (which applies regardless of the lawfulness of its presence in the foreign territory) and whether, through its presence in that territory as an Occupying Power, the foreign state has breached the prohibition on the use of force and right to self-determination (e.g. at [251]). The latter may render the occupation unlawful, but in a transitive way: that is, because the presence of the foreign state in the territory of another state breaches fundamental rules of international law, the occupation is unlawful. This was a controversial jump in reasoning for some members of the Court: for example, Tomka, Abraham and Aurescu did not "see how we can go from the finding that the annexation policy pursued by the Occupying Power is illegal to the assertion that the occupation itself is illegal", which, for them, requires factoring in security concerns. They noted that, "by its very nature, any military occupation hinders the full exercise by the population of the occupied territory of its right to self-determination. This alone cannot render the occupation unlawful". This is correct in one sense, but it is also true that there is a distinction between a temporary interference with the right and interference designed to prevent the exercise of self-determination in the future (permanently) or interference that is likely to have this effect.

Third, the Court concluded that Israel's legislation and measures that separate the Palestinian and settler communities – such as its residence permit policy, restrictions on the movement of Palestinians in the OPT and demolition of Palestinian properties – are discriminatory and in breach of Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (which requires states parties to prevent, prohibit and eradicate practices of racial segregation and apartheid) (at [299]). The Court did not define apartheid or confirm explicitly whether Israel's measures constituted apartheid, although this is certainly a plausible, if not the most compelling, interpretation of the *Opinion*. The individual opinions reveal disparate views on this point (Tladi, at [36], [41]; Salam, at [15]–[17], in contrast to Iwasawa, at [13], while Nolte thought that the Court left the question open, at [8]). Given this, and that the Court reached relatively clear conclusions on other issues, it is difficult not to read at least some hesitation – or a compromise – into its decision not to confirm whether Israel's policies and practices constituted apartheid. On the other hand, the Court's findings on measures and legislation adopted by Israel suggest that they clearly reflect practices of apartheid. As Tladi observed, "if we compare the policies of the South African apartheid regime with the practices of Israel in the OPT it is impossible not to come to the conclusion that they are similar" and "involve widespread discrimination against Palestinians in nearly all aspects of life much like the case in apartheid South Africa" (at [37]).

The Court showed a novel and notable sensitivity to intersectionality in human rights violations. In assessing Israel's response to violence by settlers and security forces against Palestinians, it referred to reports that "Palestinian women and girls are subjected to gender-based violence … including physical, psychological and verbal abuse and sexual harassment" (at [153]) and it noted the effects of the residence permit policy on the reunification of families whose members are in different parts of the OPT (at [195]). In her Separate Opinion, Charlesworth elaborated on the intersectional nature of discrimination and the effect of Israel's policies and measures on women and children (at [2]–[10]) – observing, for example, the impact of water shortages and residence permits on women, and the way in which the residence permit system prevents thousands of children from living with both of their parents (at [9]). She cautioned that, while the Court was correct to treat Palestinians as a group sharing a common race, religion or ethnic origin, "this focus overshadows other types of discrimination that affect the daily lives of Palestinians" (at [10]).

Finally, although the Court "took note" of Israel's security concerns (at [205]), it was clear that such concerns could not justify Israel's breaches of international law. In particular, restrictions on the movement of Palestinians on account of their Palestinian identity could not be justified by reference to security (at [205]); "Israel's security concerns cannot override the prohibition of the acquisition of territory by force" (at [254]); Israel could not claim to be protecting its security interests arising from its unlawful settlements; and the Oslo Accords "do not permit Israel to annex parts of the [OPT] in order to meet its security needs. Nor do they authorise Israel to maintain a permanent presence in the [OPT] for security needs" (at [263]). Although the Court did not develop its reasoning, several judges did so in their opinions. Charlesworth explained that security concerns are "not a legal ground for the maintenance of an occupation" and must be "translated into the currency of the accepted grounds for the use of force – for example, self-defence" (which is much narrower) to have legal effect (Charlesworth, at [16]; see also Yusuf, at [13]). This is consistent with decisions in contentious cases: for example, in *Oil Platforms*, the Court considered a treaty provision permitting states parties to take action to protect "essential security interests" and concluded that, where a state has used force to do so, its conduct must be judged in light of the law on the use of force, including self-defence (*Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ Reports 2003, 161, at [43]–[49]). Tladi explained that "the notion of security interests does not constitute an independent legal rule, or exception, permitting a State to depart from fundamental rules of the system" (at [45]).

In contrast, Aurescu, Abraham and Tomka considered that, once a foreign power has occupied territory in an exercise of self-defence, "a reasonable period should be available for an occupying State to assess … the extent to which its continued presence is necessary to ensure that remaining threats warranting the ongoing use of force in self-defence are not revived" (at [6]), appearing to take quite a broad view of when states may use force in self-defence (i.e. that it permits force in response to possible threats, as opposed to imminent armed attacks). They stated that threats emanating from Hamas "could justify maintaining a certain degree of control on the occupied territory, until sufficient security guarantees, which are currently lacking, are provided" (at [37]) and "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" (ibid.).

There is little doubt that the *Opinion* is of far-reaching impact for Israel and for the way in which states and international organisations interact with Israel. Efforts in recent decades to expand settlements in the OPT and to integrate these into the Israeli economy may exacerbate the impact on Israel of any measures taken by other states to prevent trade or investment that assists in maintaining the illegal situation. It also provides helpful guidance on the relationship between the law of occupation, the use of force and self-determination in international law. In a resolution proposed by Palestine for the first time in its own capacity, the General Assembly not only endorsed the Court's conclusions but went further in calling for Israel to withdraw from the West Bank and Gaza Strip by September 2025 (ES-10/24: 124-14, with 43 abstentions). The *Opinion* has also already been relied upon by governments, as well as by international organisations, NGOs and legal advisers.

In the end, perhaps what is most striking about the *Opinion* is not the Court's view on specific legal issues – while these are important, they tend to reflect dominant positions in long-standing debates – but the sharp and unambiguous language employed in reaching the overarching conclusion that Israel's presence in the OPT is inherently unlawful. This clarity is significant in that it makes it clear both to third states, which are under an obligation not to recognise as legal the situation arising from Israel's unlawful presence in the OPT and not to render aid or assistance in maintaining the situation created by Israel's presence in the OPT, and to international organisations, that the international rule of law must be respected and that they too have an important role to play.

Andrew Sanger

Address for Correspondence: Corpus Christi College, Cambridge, CB2 1RH, UK. Email: as662@cam.ac.uk