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ARTICLE

The Notion of an Illegal Occupation in the ICJ's *Palestine* Advisory Opinion

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Abstract

In its Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the International Court of Justice (ICJ) ruled not only that Israeli policies and practices in the occupied territory systematically violated international law, but also that Israel's 'continued presence' (i.e. occupation) as such had become illegal, so that Israel was required to withdraw from the Occupied Palestinian Territories as rapidly as possible. The ICJ's finding that Israel engaged in a sustained abuse of its position as an occupying power, through annexation of territory and frustration of Palestinian self-determination, was central to its reasoning, as was its holding that the legality of the occupation was to be judged against the *jus ad bellum*. This article unpacks the concept of an illegal occupation. It argues that, as matter of the *jus ad bellum*, it is only the right to self-defence that could, in theory, justify Israel's continued occupation. Curiously, however, the Opinion does not mention self-defence, although it preoccupied many of the judges writing separately. The article argues that two approaches to the occupation's *ad bellum* illegality are most persuasive: first, that the occupation could not meet the necessity and proportionality criteria of lawful self-defence; and, second, that even a valid self-defence claim can be vitiated by a predominant ulterior purpose.

Keywords: Public international law; international humanitarian law; International Court of Justice; Israel; Palestine; occupation; illegal occupation; advisory opinion; self-defence

1. Introduction

The advisory opinion of the International Court of Justice (ICJ, the Court) on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (*Palestine* AO, the AO), will undoubtedly prove to be one of the Court's most important decisions.[1] Along with the 14 (individual and joint) separate opinions of the Court's judges, the AO deals with many questions of law and

[1] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) (General List No 186, 19 July 2024, unreported) (*Palestine* AO).

fact. This article is thus not meant to be a comprehensive examination of the AO, nor does it provide a general summary thereof.[2] Rather, it will scrutinise the AO's key holding: that Israel's continued presence in the Occupied Palestinian Territory (OPT), i.e. its occupation, is unlawful as such and must be terminated.

It was this holding that divided the Court's judges. All but one of them[3] were in complete agreement that Israel's policies and practices in the OPT systematically violated international law, including international humanitarian law (IHL) and international human rights law. In particular, 14 of the 15 judges agreed that Israel had violated the right to self-determination of the Palestinian people, which includes their right to an independent and sovereign State,[4] and that Israel had been implementing a policy of annexing at least some parts of the OPT, thereby violating the prohibition of the use of force and the related rule prohibiting the acquisition of territory through force.[5]

For a strong majority of 11 judges, these violations meant that the occupation had as such become unlawful and had to be terminated as rapidly as possible.[6] For Judges Tomka, Abraham and Aurescu, however, it was not the occupation that was the wrongful act, but the various Israeli policies and practices that the Court had examined. It was these policies and practices, rather than the occupation as such, that had to be terminated.[7]

This article will discuss this 'leap' that the Court made: from establishing that, during its occupation of the OPT, Israel systematically violated international law, to finding that the occupation as such had become internationally wrongful. In other words, the article seeks to assess how the Court's judges understood the notion of an illegal occupation (and how those reading the AO should do so), not simply as applied to the OPT but as a general matter.

It is important to underscore in that regard that the Court does not use the term illegal or unlawful 'occupation'. Rather, it prefers to speak of the illegality of Israel's 'continued presence' in the OPT. But this is a distinction without a difference, since occupation, by definition, *is* the non-consensual continued presence of one State in a territory in which it is not the rightful sovereign.[8] Thus, if Israel's continued presence is

[2] See further M Milanovic, 'ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories' (*EJIL:Talk!*, 20 July 2024) <https://www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories/>; Y Shany and A Cohen, 'Another Brick in the Wall? The ICJ Advisory Opinion on Israeli Policies and Practices in the Occupied Palestinian Territory' (*Lawfare*, 24 July 2024) <https://www.lawfaremedia.org/article/another-brick-in-the-wall--the-icj-advisory-opinion-on-israeli-policies-and-practices-in-the-occupied-palestinian-territory>. See also the various contributions in the *Verfassungsblog* symposium on the *Palestine* AO: 'Debate: The 2024 ICJ Advisory Opinion on the Occupied Palestinian Territory' <https://verfassungsblog.de/category/debates/the-icj-advisory-opinion-on-the-occupied-palestinian-territory-debates/>.

[3] See *Palestine* AO (n 1) (Dissenting Opinion of Judge Sebutinde).

[4] See *Palestine* AO (n 1) para 237. The Court avoided the question whether, as a matter of law, Palestine already exists as a State.

[5] See also I Brunk and M Hakimi, 'The Prohibition of Annexations and ICJ's Advisory Opinion on the Occupied Palestinian Territory' (*EJIL:Talk!*, 22 July 2024) <https://www.ejiltalk.org/the-prohibition-of-annexations-and-icjs-advisory-opinion-on-the-occupied-palestinian-territory/>; I Brunk and M Hakimi, 'The Prohibition of Annexations and the Foundations of Modern International Law' (2024) 118 AJIL 417.

[6] See *Palestine* AO (n 1) paras 261–267.

[7] See also ibid paras 3–6 (Joint Opinion of Judges Tomka, Abraham and Aurescu).

[8] See T Ferraro, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory' (International Committee of the Red Cross, 2012) 10.

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illegal, then so too is the occupation—the distinction is merely terminological. The Court's preference for the term 'continued presence' is likely due to its desire to avoid being criticised for conflating the *jus ad bellum* and the *jus in bello* (which it does not do)—its holding is quite rightly that the occupation simply exists as an *in bello* matter, but that it (i.e. the continued presence) is unlawful as an *ad bellum* matter.[9] Again, however, there is no meaningful difference between Israel's occupation and its continued presence in the OPT—these are one and the same thing.[10]

Section 2 of this article explains the Court's holding on the occupation's illegality. Section 3 considers the paradigmatic examples of illegal and legal occupation, best understood today by looking at the war in Ukraine. Section 4 returns to the *Palestine* AO, by analysing the judges' separate opinions in detail, and showing that there are at least five different ways in which the AO could be read when holding that the occupation was illegal. The most important issue here is the relevance of the right to self-defence as a possible justification for Israel's occupation. Remarkably, the AO itself does not mention self-defence once, but it is this *jus ad bellum* rule that has to be applied together with the notion of an 'abusive' occupation that the Court adopts. One approach in this regard, which is doctrinally the most orthodox, is that Israel's occupation of the OPT is no longer necessary and proportionate. An alternative approach—less orthodox but more interesting—is that even a valid self-defence claim could be vitiated by a predominant ulterior purpose; this model is further examined and developed in Section 5. Section 6 concludes.

2. The ICJ's holding on the occupation's illegality

The Court's holding on the occupation's illegality is contained in two crucial paragraphs. First, the Court explains against which rules the legality of the Israeli occupation is to be assessed:

> The Court considers that the rules and principles of general international law and of the Charter of the United Nations on the use of force in foreign territory (*jus ad bellum*) have to be distinguished from the rules and principles that apply to the conduct of the occupying Power under international humanitarian law (*jus in bello*) and international human rights law. The former rules determine the legality of the continued presence of the occupying Power in the occupied territory; while the latter continue to apply to the occupying Power, regardless of the legality or illegality of its presence. It is the former category of rules and principles regarding the use of force, together with the right of peoples to self-determination, that the Court considers to be applicable to its reply to the [relevant part of] the request for an advisory opinion by the General Assembly.[11]

[9] The 'continued presence' language probably comes from *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, which itself employed that terminology because it was used by the United Nations (UN) Security Council (UNSC) in SC Res 276 (1970) UN Doc S/RES/276, para 2, in which the UNSC declared that the 'continued presence of South African authorities in Namibia is illegal'.

[10] See also *Palestine* AO (n 1) para 30 (Joint Opinion of Judges Tomka, Abraham and Aurescu): 'The "occupation" and the "continued presence" of a State "as an occupying Power" in a territory which is not under its sovereignty are perfectly identical notions.'

[11] *Palestine* AO (n 1) para 251.

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Thus, the Court held that the legality of Israel's continued presence is to be assessed not against IHL, which contains no rules on the matter, but against the *jus ad bellum* and the right to self-determination. Similarly, earlier in the AO the Court held that the 'fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law … the legality of the occupying Power's presence in the occupied territory must be assessed in light of other rules',[12] such as those of the *jus ad bellum*, and the occupation's duration may be taken into account in the application of these other rules.[13]

The Court then reiterates its finding that Israel's annexationist policies violate the prohibition of the acquisition of territory through force and that these and other practices violate the rights of the Palestinian people to self-determination.[14] It concludes as follows, in the AO's most important paragraph (261):

> The Court considers that the violations 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.[15]

It is here that the violations of the law of occupation and of other rules of international law are transformed into a finding that the occupation as such has become unlawful, and it is this approach that the dissenting Judges Tomka, Abraham and Aurescu criticise as the Court embarking 'on a legally wrong path,' reaching 'conclusions that are not legally correct'[16] based on a 'missing link' in reasoning.[17] The notion of 'sustained abuse' of the occupying power's position plays a central role here. It has two prongs—the unlawful annexation of territory and the frustration of Palestinian self-determination—which render Israel's continued presence, i.e. its *abusive* occupation, unlawful.

Whether one supports the Court's ultimate conclusion or not (I do), it cannot be denied that the Court's reasoning on this point is somewhat opaque and undeveloped. In particular, even though it had earlier said that the legality of the occupation is primarily to be judged against the *jus ad bellum*, the Court ignores the only justification that Israel could have for its continued presence in the OPT—its reliance on self-defence when the occupation was established, in the 1967 Six-Day War, and its putative reliance on the right to self-defence against armed attacks emanating from the OPT, such as the 7 October 2023 assault by Hamas.[18] The Court does not mention self-defence or

[12] ibid para 109.
[13] ibid.
[14] ibid paras 252–257.
[15] ibid para 261 (emphasis added).
[16] ibid para 5 (Joint Opinion of Judges Tomka, Abraham and Aurescu).
[17] ibid para 6 (Joint Opinion of Judges Tomka, Abraham and Aurescu).
[18] Successive Israeli Governments have formally denied that the West Bank is occupied, preferring to call it a 'disputed territory', on the basis of Israel's claim to sovereignty over some or all of the territory and the argument that there is no 'missing sovereign' in the territory (this argument obviously assumes that Palestine does not legally exist as a State). Israel has, however, applied the law of occupation in the West Bank. Israel has

its criteria—the existence of an armed attack, necessity and proportionality—at all.[19] Rather, it simply observes (entirely correctly) that an occupation is a continuing use of force that is subject to the *jus ad bellum*[20] and can under no circumstances transfer title over territory, and then remarks laconically that 'Israel's security concerns [cannot] override the principle of the prohibition of the acquisition of territory by force'.[21]

The somewhat opaque nature of the Court's reasoning can be contrasted with its more explicit engagement with, and rejection of, Israel's self-defence argument in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (*Wall* AO) 20 years earlier.[22] In the *Wall* AO, the Court held that:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

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also justified its construction of the wall (separation barrier) on the basis of self-defence, which it has also relied on to justify its periodic uses of force in Gaza. See UN Committee on the Exercise of the Inalienable Rights of Palestinian People (CEIRPP), 'Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem' (20 September 2023) UN Doc A/78/378, 25–27 (outlining Israel's positions); Israeli Ministry of Foreign Affairs, 'Letter dated 29 January 2004 from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel' (ICJ, 29 January 2004) <https://www.icj-cij.org/case/131/written-proceedings> para 2.27; State of Israel, 'The 2014 Gaza Conflict (7 July–26 August 2014): Factual and Legal Aspects' (May 2015) <https://www.gov.il/BlobFolder/generalpage/operation-protective-edge-full-report/en/English_Terrorism_DOCS_2014GazaConflictFullReport.pdf> paras 65–70. A further question, which arises only if there is no State of Palestine, is whether Palestinian Territories are protected under the prohibition of the use of force in art 2(4) of the UN Charter; the *Palestine* AO (n 1) does not address this question and also avoids the issue of Palestinian Statehood. See M Milanovic, 'Does Israel Have the Right to Defend Itself?' (*EJIL:Talk!*, 14 November 2023) <https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/>.

[19] The armed attack requirement is explicit in art 51 of the UN Charter, although the notion of an 'armed attack' is not defined in the UN Charter and must be interpreted in light of customary international law. There is disagreement among States and scholars as to whether self-defence is also available against armed attacks that are yet to occur, especially those that are considered imminent. The further requirements that any response in self-defence must be necessary and proportionate are customary; these criteria are universally accepted, but there are different approaches as to what they mean. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, paras 176, 194, 237. See also T Ruys, *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010); C Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 120–99; Y Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017) 195–260; D Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*' (2013) 24 EJIL 235; D Akande and T Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563.

[20] The mainstream position today is that the necessity and proportionality criteria of self-defence apply continuously so long as force is being used that requires justification, and not simply at the initial moment in which the attacked party chooses to respond forcibly. See C Greenwood, 'The Relationship between Ius ad Bellum and Ius in Bello' (1983) 9 RevInt'lStud 221; E Lieblich, 'On the Continuous and Concurrent Application of ad Bellum and in Bello Proportionality' in C Kress and R Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (OUP 2021) 41. For the contrary view, see Dinstein (n 19) 281–87.

[21] *Palestine* AO (n 1) paras 253–254.

[22] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Wall* AO) paras 138–139.

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> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[23]

The *Wall* AO's holding that self-defence was of 'no relevance' could be interpreted as having two different legal bases: first, that the right to self-defence is not available at all in response to attacks by non-State actors; or, second, that the right to self-defence is not engaged when an occupying power uses force within the occupied territory. Both points provoked controversy within the Court itself[24] and have been heavily debated since.[25]

The ambiguity in the Court's *Palestine* AO is easily explained once the judges' separate opinions are examined, which is done in Section 4. Different judges in the majority had substantially different views about the interaction between the *jus ad bellum* and the occupation's status as legal or illegal. The text of the AO is ultimately best understood as a compromise, by which the Court's judges presented as united a front as possible in the most politically explosive case imaginable.

To sum up, the AO is clear on some points, less so on others. In particular, it is entirely clear that the Court rejected the position that IHL itself governs the legality or illegality of an occupation, as well as the position that a prolonged occupation can, simply due to passage of time, become unlawful under IHL. Rather, the Court has expressly framed the question of the occupation's legality as one of the *jus ad bellum* and the right to self-determination. This approach has been criticised as artificial.[26] But it is no more artificial than the whole idea of separating the *jus ad bellum* from the *jus in bello* in the first place, on various wholly justified practical and normative grounds.[27] Thus, for the Court, saying that an occupation is illegal under IHL is a category error, much as most scholars would accept that 'illegal international armed conflict' or 'illegal non-international armed conflict' are category errors. These are simply thresholds governing the applicability of various substantive rules of IHL, which are either met or not met.

[23] ibid para 139.

[24] See *Wall* AO (n 22) (Declaration of Judge Buergenthal and Separate Opinion of Judge Higgins).

[25] See, e.g. SD Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99 AJIL 62; K Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 ICLQ 141; C Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359; J Brunnée and S Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 ICLQ 263; M Longobardo, *The Use of Armed Force in Occupied Territory* (CUP 2018).

[26] See A Gross, 'Transcending the Jus ad Bellum/Jus in Bello Divide: "Illegal Occupation" and "Unlawful Presence" in the ICJ Advisory Opinion on the Occupied Palestinian Territory'(*EJIL:Talk!*, 23 August 2024) <https://www.ejiltalk.org/transcending-the-jus-ad-bellum-jus-in-bello-divide-illegal-occupation-and-unlawful-presence-in-the-icj-advisory-opinion-on-the-occupied-palestinian-territory/>. See also A Imseis, 'Prolonged Occupation: At the Vanishing Point of the *Jus ad Bellum/Jus in Bello* Distinction' (2023) 58 TexInt'lLJ 33.

[27] See generally RD Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War' (2009) 34 YaleJIL 47; Greenwood (n 20); Lieblich (n 20); K Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart 2011).

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Where the Court's opinion is far less clear is in how the occupation became *ad bellum* illegal. There are several possible understandings of what the Court has said on this, particularly in paragraph 261 of the AO, bearing in mind the separate opinions of the judges. Before exploring these different conceptions of the occupation's illegality, however, it is helpful to take a brief detour to a situation that is doctrinally straightforward—that of Russia and Ukraine. Because the Israeli/Palestinian context is so complicated legally and factually, along multiple axes, discussing an easier example first can help to avoid confusion.

3. Paradigmatic illegal occupation: Russia and Ukraine

Since 2014, Russia has used force to obtain control over portions of Ukrainian territory in Crimea and Eastern Ukraine. It has put forward various justifications for using force against Ukraine, including the consent of supposedly newly established States on Ukrainian territory, the prevention of alleged atrocities against Russians or Russian speakers in Ukraine, and self-defence against some future attack by Ukraine. None of these justifications has any validity under the *jus ad bellum*.[28] Similarly, Russia has purported to annex several regions of Ukraine, but there can be no change in sovereign title due to its unlawful use of force.[29]

Therefore, Russia has been the occupying power in Crimea and portions of Eastern Ukraine. The existence of belligerent occupation is one of fact. That Russia regards these territories as its own does not change this assessment. As a matter of IHL, the occupation simply exists.

As a matter of the *jus ad bellum*, the situation is similarly clear. From the very beginning of its use of force against Ukraine, whether directly or through its proxies, every second of Russia's control of Ukrainian territory has been unlawful, as a violation of the prohibition of the use of force in Article 2(4) of the United Nations (UN) Charter. In other words, Russia's occupation—its continued, non-consensual presence in Ukrainian territory—has been illegal ab initio, and has remained so.[30]

This is the simplest, paradigmatic example of an illegal occupation. The fact that Russia purported to annex the Ukrainian territories it had occupied just piles illegality upon illegality; its occupation, and its use of force against Ukraine more generally, would have been *ad bellum* unlawful even were it not for the attempted annexation.

[28] See generally J Green, C Henderson and T Ruys, 'Russia's Attack on Ukraine and the *Jus ad Bellum*' (2022) 9 Journal on the Use of Force and International Law 4; O Corten and V Koutroulis, 'The 2022 Russian Intervention in Ukraine: What Is Its Impact on the Interpretation of *Jus contra Bellum*?' (2023) 36 LJIL 997.

[29] See UNGA Res ES-11/4 (12 October 2022) UN Doc A/RES/ES-11/4, para 3 (declaring that 'attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine').

[30] See, e.g. Rome Statute of International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, arts 8*bis*(1), 8*bis*(2)(a) (defining the crime of aggression as an act of aggression that manifestly violates the UN Charter. An act of aggression is an unlawful use of force, which includes 'invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack'). See also A Zemach, 'Can Occupation Resulting from a War of Self-Defense Become Illegal?' (2015) 24 MinnJIL 313, 315 ('International law has long recognized the illegality of occupation resulting from an unlawful use of force by the occupying state').

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The Russo-Ukrainian war also gives us a paradigmatic example of a *legal* occupation. In August 2024, Ukrainian armed forces conducted a surprise incursion into Russia's Kursk region, obtaining control over a substantial part thereof.[31] At least some part of that territory, outside the areas of active fighting, can reasonably be said to have been under Ukraine's effective control and thus occupation.[32] This occupation ended in March 2025, as Ukrainian forces retreated.[33]

While it lasted, Ukraine's occupation of parts of the Kursk region was perfectly lawful as an *ad bellum* matter. This is because Ukraine's right to self-defence against Russia's aggression is not confined to repelling Russian attacks exclusively on Ukraine's territory. On the contrary, taking the fight to Russia's territory may be militarily advantageous for a number of reasons (regardless of whether it is ultimately fruitful or not). It can thus relatively easily meet the necessity and proportionality criteria of self-defence.[34]

These, then, are paradigmatic examples of illegal and legal occupation, as judged against the *jus ad bellum*.[35] Again, while arguments have been made in the literature that an occupation's legality can be judged against criteria internal to the law of occupation,[36] this is not what the ICJ did in the *Palestine* AO. Rather, it held that an occupation's legality can be judged only against external criteria, specifically the *jus ad bellum*, without affecting the continuing applicability of the *jus in bello*. The Russia/Ukraine situation shows us how this can be done, with relative ease.

A further question is whether the legality of the occupation in these examples can shift with changing facts over time. First, it is clear that the passage of time alone cannot cure the illegality of an occupation that was illegal ab initio.[37] Such illegality can, perhaps, be cured ex post facto if the occupier receives a UN Security Council

[31] See M Kofman and R Lee, 'Ukraine's Gamble: The Risks and Rewards of the Offensive into Russia's Kursk Region' (*Foreign Affairs*, 2 September 2024) <https://www.foreignaffairs.com/ukraine/ukraines-gamble>.

[32] But see M Meier, 'Is Ukraine Occupying Territory in Russia?' (*Articles of War*, 26 August 2024) <https://lieber.westpoint.edu/is-ukraine-occupying-territory-russia/> (arguing that because fighting in the area was ongoing, the relevant part of the Kursk region was not under Ukraine's effective control to the required level of stability). It should be noted, however, that Ukraine itself had admitted to controlling parts of Kursk by appointing a military administration for the area. See M Fornusek, 'Ukraine Forms Military Administration in Russia's Kursk Oblast, Syrskyi Says' *Kyiv Independent* (15 August 2024) <https://kyivindependent.com/ukraine-established-military-administration-in-russias-kursk-oblast/>.

[33] See S Walker, 'Ukraine's Retreat from Kursk Appears to Mark End of Audacious Operation' *The Guardian* (14 March 2025) <https://www.theguardian.com/world/2025/mar/14/ukraine-kursk-retreat-russia-incursion-peace-negotiations>.

[34] See also C O'Meara, 'Ukraine's Incursion into Kursk Oblast: A Lawful Case of Defensive Invasion' (*Just Security*, 23 August 2024) <https://www.justsecurity.org/98847/kursk-incursion-international-law/>.

[35] See also Imseis (n 26) 41–42.

[36] See especially O Ben-Naftali, A Gross and K Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 BerkeleyJIL 551. The question of whether framing Israel's control over Palestinian Territories as occupation, whether legal or illegal, is itself harmful to the Palestinian people's right to self-determination, will be left aside here—for this argument, see H Sayed, 'The Fictions of the "Illegal" Occupation in the West Bank and Gaza' (2014) 16 Oregon Review of International Law 79.

[37] The argument is confined to this scenario of objective ab initio illegality. In particular, the article will not discuss a scenario in which sovereign title and control over a territory are contested between two States and, over time, the claim of one State gradually becomes more accepted by the international community.

(UNSC) mandate under Chapter VII UN Charter (which is hardly a likely outcome in the Ukrainian scenario). Even in such cases, a new UNSC mandate is likely to have only prospective effect. This was, for example, the case with mandates regarding Iraq, which did not retrospectively validate the 2003 invasion.[38]

Alternatively, the displaced sovereign could provide consent to the continued presence of the occupying power—for example, if by (a valid) armistice or peace treaty Ukraine consented to Russia's continuing presence, if not the transfer of title. This scenario raises the difficult question (which will not be examined in this article) of whether any consent by Ukraine that results from Russia's unlawful use of force against it could be valid, per the rule codified in Article 52 of the Vienna Convention on the Law Treaties.[39] Even if it were valid, consent would not so much cure the occupation's illegality (unless the consent provided waived any claims, i.e. was retrospective in effect), but would rather terminate the occupation as a matter of IHL.[40] The reverse scenario is also entirely possible—an occupation can *start* because consent to previously consented-to presence is withdrawn, or the scope of that consent is exceeded. In most such cases the occupation would be *ad bellum* illegal ab initio[41]—a good example here is the start of Russia's occupation of Crimea in 2014.[42]

Second, an argument has been made in the literature that, even in the case of an illegal occupation, once hostilities cease and the situation stabilises, the displaced sovereign would lose the right to use force by means of self-defence to attempt to recover the occupied territory.[43] This argument has been vigorously disputed.[44] But

[38] See UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511 and UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546. In particular, Resolution 1546 authorised the use of all necessary measures in accordance with the letters annexed to it, noting also that the process of the formation of a new, sovereign Iraqi Government was coming to an end, that the deployment of foreign forces on Iraqi soil was continuing on the basis of the consent of that new Government and that the occupation of Iraq would end by 30 June 2004 (paras 1, 2, 9, 10). The Resolution cannot reasonably be interpreted as retrospectively making the occupation of Iraq *ad bellum* lawful.

[39] See further G Fox, 'A Legal Framework for a Russia-Ukraine Peace Agreement' (*EJIL:Talk!*, 19 December 2024) <https://www.ejiltalk.org/a-legal-framework-for-a-russia-ukraine-peace-agreement/>.

[40] See also Ferraro (n 8) 29–30.

[41] See UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX), annex, art 3(e) ("The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement' is an act of aggression).

[42] Notably, Ukraine had consented to the presence of the Russian Black Sea Fleet and the lease of naval facilities in Crimea, with agreements between the two States specifying the number of Russian troops permitted in the territory and various other conditions on their presence, conditions that Russia violated when using these troops in its takeover of Crimea. See further V Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) 75 ZaöRV 27. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, paras 42–54 (discussing withdrawal of the consent that Congo had previously given to Uganda), paras 172–180 (discussing the extent of Uganda's occupation of Congolese territory, but applying a relatively narrow approach on the facts, without connecting it directly to the withdrawal of consent and without specifying the exact moment at which the occupation began).

[43] See T Ruys and F Rodríguez Silvestre, 'Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War' (2021) 32 EJIL 1287.

[44] See D Akande and A Tzanakopoulos, 'Legal: Use of Force in Self-Defence to Recover Occupied Territory' (2021) 32 EJIL 1299.

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even if this argument is right, and the displaced sovereign would be precluded from relying on self-defence, the 'stable' occupation would still be *ad bellum* illegal. Thus, if Russia retained control over Crimea for the next 20 or 50 years, without ever obtaining valid consent from Ukraine to do so, its continued occupation would remain illegal. This illegality would remain even if Ukraine was regarded as having lost the right to use force to take Crimea back, i.e. if Ukraine's right to self-defence had lapsed, for instance because long-standing ceasefires preclude the necessity for an armed response (an issue on which no position is taken here).

Third, it is also clear that armed resistance to an *ad bellum* illegal occupation within the occupied territory cannot, as such, provide the occupying power with a valid self-defence claim that could justify its continued presence in the territory.[45] For example, if pro-Ukrainian partisans in the Donbas or in Crimea attacked Russian armed forces in those territories, with the purpose of compelling them to abandon their occupation, Russia would have no *ad bellum* right to defend itself from these attacks, since its presence in those territories was unlawful in the first place. (This would even more obviously be the case if the attacks were organised by the Ukrainian armed forces.) Russia would, of course, have all the rights that IHL grants to occupiers to maintain their security. But, while any such actions, for example internment for imperative reasons of security,[46] would be lawful under IHL, the occupation as a whole and any action done to maintain it would still be *ad bellum* unlawful. A more complex version of this scenario, discussed in Section 4.3, is if an insurgency developed in the occupied territory that does not purport to fight on behalf of the displaced sovereign, or which has goals that go beyond resistance to the occupation—this is at least arguably the case in the Israel/Palestine situation with entities such as Hamas.

Fourth, turning to the example of Ukraine's occupation of Russia's territory in the Kursk region, an occupation that is ab initio lawful can, due to changing circumstances, eventually become unlawful. For instance, if Russia ceased its aggression against Ukraine, formally renounced any of its claims to Ukrainian territories and withdrew from them, Ukraine would at some point thereafter also have to withdraw from any Russian territory that it had occupied while exercising its right to self-defence. This is simply because the armed attack would have ceased and would not be renewed, and there would be no necessity for Ukraine's continued non-consensual presence in Russia's territory to repel any such attack.[47] Similarly, even if for the sake of argument, one accepted Israel's position that its acquisition of control over the Syrian Golan Heights in 1967 was justified by self-defence, this does not mean that such continued presence (i.e. occupation), let alone annexation, could be justified in 2025, when Syria is not attacking Israel and has not expressed an intention to do so.

Despite historical controversies, the position that the *jus ad bellum*, and self-defence in particular, applies continuously, for as long as force is used and not just at the

[45] See also Y Ronen, 'Illegal Occupation and Its Consequences' (2008) 41 IsLR 201, 241–43.

[46] See Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 78.

[47] See Ruys (n 19) 117 ('Occupation must end as soon as the direct source of the attacks has been neutralized'). For the opposing view, see Zemach (n 30).

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commencement of a conflict, is today undoubtedly correct.[48] This means that an occupation initially justified by self-defence must remain justified under self-defence to be regarded as lawful.[49] That is, the occupation's necessity and proportionality have to be continuously assessed. As argued by Benvenisti, 'the subjection of the right to self-defense to the necessity requirement, to the extent that it is in fact justified, could imply that the occupation becomes an act of aggression when it no longer serves the initial purpose of defending against the aggressor who has been defeated'.[50] Crucially, in the *Palestine* AO the Court appears to have endorsed this position (although it could have done so more clearly), when it held that 'an occupation involves, by its very nature, a continued use of force in foreign territory. Such use of force is, however, subject to the rules of international law governing the legality of the use of force or *jus ad bellum*'.[51] This pronouncement would make little sense if an occupation's legality should only be assessed at the moment of its establishment.

Fifth, and finally, if Ukraine purported to annex any Russian territory that it had occupied, such annexation would be devoid of legal effect. That is, territorial title cannot be lawfully acquired by force even in a war of self-defence. It is unclear, however, how the ICJ's holding on the abuse of the occupying power's position in paragraph 261 of its *Palestine* AO would affect the validity of Ukraine's claim to self-defence. Would, for example, any attempt at annexation have immediately vitiated Ukraine's self-defence claim, or would it have done so only if other conditions were met? This question is examined in Section 4.2.

To summarise, the following conclusions can be drawn from the Russia/Ukraine case study:

(i) An occupation is neither legal nor illegal as a matter of IHL (*jus in bello*); it simply exists or not. But an occupation as such can still be legal or illegal as a matter of the *jus ad bellum*, since it entails a continuing use of force to exercise control over another State's territory without its consent.

(ii) An occupation resulting from a use of force contrary to the UN Charter is illegal ab initio.

(iii) An occupation resulting from a use of force compliant with the UN Charter is legal ab initio, for example if it is done on the basis of self-defence or pursuant to UNSC authorisation.

(iv) An occupation that is ab initio illegal can only become legal (and, even then, only arguably so) if the displaced sovereign provided valid consent, which would terminate the occupation *pro futuro* and could waive any past illegality, or if the UNSC provided an authorisation ex post facto.

[48] See discussion and sources cited in n 20. See also Ruys (n 19) 183–84; C O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (OUP 2021) 166–70; M Schmitt, 'Israel-Hamas 2024 Symposium—Israel's *Jus ad Bellum* and LOAC Obligations and the Evolving Nature of the Conflict' (*Articles of War*, 19 August 2024) <https://lieber.westpoint.edu/israels-jus-ad-bellum-loac-obligations-evolving-nature-conflict/>.

[49] See also A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 99 (arguing that an occupation would violate self-determination unless it is 'solely intended as a means of repelling, under Article 51 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protracted').

[50] E Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 17.

[51] *Palestine* AO (n 1) para 253.

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(v) Armed resistance to an illegal occupation cannot, by itself, provide an *ad bellum* justification for the occupation's continuation.
(vi) An occupation that is legal ab initio can become illegal if the requirements for the continued justified use of force are no longer met; for example, if the attack is over or the necessity to repel it no longer exists with regard to self-defence, or if a UNSC mandate lapses or is modified.
(vii) Territorial title cannot be acquired through the use of force regardless of whether the occupation is *ad bellum* legal or illegal.

Bearing this framework in mind, the analysis now returns to the *Palestine* AO, and paragraph 261 in particular. However, there are two sets of problems in shifting from the 'easy' case of Russia and Ukraine to the 'hard' case of Israel and the OPT.

The first is that, legally and factually, the Israeli/Palestinian conflict is much messier. For example, the occupation of the OPT initially resulted from an armed conflict between Israel and Egypt and Jordan—the 1967 Six-Day War—that is long over. Egypt and Jordan today do not claim sovereignty over the OPT. Another State—Palestine—may have emerged, at some point, in that territory, but it is unclear exactly when (again, note that the Court avoids the Statehood issue entirely in the AO). Attacks from which Israel claims to want to defend itself do not emanate from the authorities of any State, including Palestine (whose Statehood Israel does not recognise), but from armed non-State actors such as Hamas, whose stated goal is not simply resistance to the occupation, but also the destruction of Israel as such.[52]

The second set of problems is that the AO itself leaves many things unsaid or uncertain regarding the operation of the *jus ad bellum* on the facts of Israel/Palestine and the occupation's illegality.

4. Five readings of the Israeli occupation's illegality

None of the eleven judges in the majority thought that any Israeli reliance on self-defence within the meaning of Article 51 UN Charter against ongoing or imminent armed attacks by Palestinian armed groups—or more nebulously defined 'security concerns'—could justify Israel's continued occupation of the OPT. Indeed, as noted in Section 2 the term 'self-defence' does not appear in the AO at all. But when the AO is assessed together with the judges' separate opinions, there are at least five plausible readings of the opinion and of how the *jus ad bellum* affects the occupation's illegality. That is, there are at least five possible reasons, or sets of reasons, which explain why the judges concerned thought that the occupation was *ad bellum* unlawful.

These five understandings emerge even if the analysis is confined to the judges in the majority, because the lack of clarity arises from their disagreement. There is both conflict and overlap between some of these five readings. Not all these readings are equally plausible, but all have some level of support. These understandings of the relevance of the *jus ad bellum* and self-defence to the legality of Israel's occupation are as follows—each is then explored in turn:

(i) Israel never had a valid self-defence claim that could justify its occupation of the OPT, i.e. its presence (occupation) was unlawful ab initio, and over time nothing could have cured that illegality.

[52] See also nn 18 and 25 and accompanying text.

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(ii) Self-defence is irrelevant as a legal matter. The only relevant norm of the *jus ad bellum* for assessing the occupation's legality is the prohibition of forcible annexation of territory.

(iii) Israel might still have a valid self-defence claim today, which could, in substantial parts, be different from its initial *ad bellum* justification for the occupation. However, its occupation cannot continue because it is not (or is no longer) necessary and proportionate.

(iv) On the facts, Israel does not have a self-defence claim today, whatever the position may have been in the past. Its invocations of self-defence are purely pretextual.

(v) Israel might have a valid self-defence claim today. However, there are other reasons why Israel is present on the OPT—such as annexation and subjugation—and these reasons (purposes) taint the self-defence claim and render it invalid. This is legally the most interesting and novel approach, but it is, at best, undertheorised as things stand and is not necessarily optimal in all circumstances de lege ferenda.

4.1. The occupation was illegal ab initio

The AO says nothing about the legality of Israel's initial seizure of the OPT during the 1967 Six-Day War, but some of the judges comment on this point separately. Most prominent here is the opinion of President Salam, who notes that the question put to the Court by the UN General Assembly (UNGA) related to Israel's '*continued* presence' in the OPT (quoting approvingly the formulation used in paragraph 261 of the AO), and that the Court was therefore not called upon to pronounce on the 'circumstances in which [Israel's] occupation of Palestinian territory occurred … that is on the legality *ab initio* of the occupation'.[53] President Salam nonetheless recalls that the UNGA condemned Israel's occupation as being ab initio illegal, saying that this 'can only reinforce the Court's findings in this Opinion on the illegality of Israel's continued presence in the Occupied Palestinian Territory'.[54]

Judge Tomka, one of the three judges who jointly dissented, also wrote individually. In his view, the Court went too far in holding that Israel's occupation of the OPT was unlawful as such. For him:

> The unlawfulness depends on the manner in which occupation has been established. This has to be determined under the rules governing the use of force … The Court was not asked, nor was it in a position, to determine whether the recourse to force by Israel in 1967, which resulted in the occupation of the West Bank (including East Jerusalem) and the Gaza Strip, was unlawful or not. Despite that, the Court opines that certain subsequent actions by Israel "*render[ed]*" Israel's presence in the Occupied Palestinian Territory unlawful (Advisory Opinion, para. 261), a formula which would seem to imply that the occupation resulted from an act that was not unlawful.[55]

Judges Salam and Tomka both take as their starting point something like the paradigmatic example of illegal occupation examined in Section 3—an inquiry as to whether the initial use of force, through which the occupation was established, was *ad*

[53] *Palestine* AO (n 1) para 35 (Declaration of President Salam) (emphasis added).
[54] ibid para 36 (Declaration of President Salam).
[55] ibid para 7 (Declaration of Judge Tomka) (emphasis in original).

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bellum unlawful. Neither expressly considers the possibility that an occupation that is ab initio legal can become illegal due to a change in circumstances, although the last sentence of the above paragraph from Judge Tomka's opinion implicitly considers that possibility.

The joint opinion of judges Tomka, Abraham and Aurescu, dissenting from the finding that the occupation became illegal, similarly noted that '[t]he legality *ab initio* of a situation of military occupation *mainly* depends on the question of whether the military action which gave rise to the occupation can be considered lawful or unlawful in terms of *jus ad bellum*'.[56] The judges thought that the Court rightly avoided this question of ab initio legality.[57] Consider, however, the unexplained qualifier in '*mainly* depends'. They then (accurately) noted that, '[o]bviously, it is not impossible that, even if an occupation is initially lawful, it ceases to be so at a certain point in time'.[58] But, short of saying that the passage of time alone cannot transform a legal occupation into an illegal one,[59] they do not explain how this transformative process could occur. In particular, they no longer examine the occupation's legality in terms of the continued relevance of self-defence and its requirements (the existence of an armed attack, necessity and proportionality), but choose instead to speak of Israel's right to security or survival.[60]

Finally, dissenting from the AO as a whole, Judge Sebutinde regards the occupation to have been legal ab initio, as it was in her view constituted in the 1967 Six-Day War through a use of force justified by self-defence.[61] She rejects the possibility—apparently as a matter of legal principle—that subsequent developments could have rendered illegal an initially lawful occupation.[62]

In sum, only two judges of the Court thought it necessary to comment directly on the occupation's legality ab initio—President Salam, who thought it was illegal, and Judge Sebutinde, who thought it was legal. The other judges, for various reasons, avoid this question altogether—and this is interesting in itself, bearing in mind how, in the paradigmatic examples looked at in Section 3, the dominant question was precisely the legality or illegality ab initio, as judged against the *jus ad bellum*.[63]

4.2. Self-defence is irrelevant or inadmissible

On this reading, self-defence plays no role in the AO itself—recall that the term is not mentioned even once—because, to echo the *Wall* AO, it is of 'no relevance in this case'.[64] This approach is most clearly articulated by Judge Tladi, who notes that Israel's 'security concerns' could form the legal basis for the continuation of the occupation only

[56] ibid para 33 (Joint Opinion of Judges Tomka, Abraham and Aurescu) (emphasis added).
[57] ibid.
[58] ibid para 34 (Joint Opinion of Judges Tomka, Abraham and Aurescu).
[59] ibid para 35 (Joint Opinion of Judges Tomka, Abraham and Aurescu).
[60] ibid paras 36–37 (Joint Opinion of Judges Tomka, Abraham and Aurescu).
[61] ibid paras 86–87 (Dissenting Opinion of Judge Sebutinde).
[62] ibid para 88 (Dissenting Opinion of Judge Sebutinde).
[63] See also CEIRPP (n 18) 29–30 (discussing ab initio illegality).
[64] *Wall* AO (n 22) para 139.

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if they somehow fell within the scope of a legal rule that takes such concerns into account,[65] and then discounts the possibility that *ad bellum* self-defence could do so:

> In relation to the situation in the Occupied Palestinian Territory, the self-defence argument is multifaceted and raises different issues depending on the context in which it is raised. It may be raised in the context of Israeli occupation as such, i.e. the occupation itself is an act of self-defence (or was established pursuant to an act of self-defence), or it may be raised in the context of particular practice, policies or acts, such as the construction of the wall or various military operations launched against the Palestinian territory. In whatever context it is raised, it is important to emphasize that self-defence is subject to strict requirements, including that of an armed attack from a State, proportionality and necessity. Moreover, given the overall situation of occupation, the self-defence argument (in the context of particular acts or practices, such as military operations) will run up against the Court's finding in the *Wall* Advisory Opinion to the effect that self-defence does not apply (or "has no relevance") because Israel "exercises control in the Occupied Palestinian Territory and that … the threat which it regards as justifying [forcible measures] originates within, and not outside, that territory". For present purposes, I can say only that any one of these provides insurmountable hurdles for anyone seeking to justify Israeli practices and policies as acts of self-defence.[66]

On the final point in this paragraph, the key question is not whether the most objectionable Israeli policies and practices (e.g. the annexation, frustration of Palestinian self-determination or racial discrimination) could be justified by self-defence. Rather, the key question is whether the occupation as such could be justified by self-defence, and there, at least, the situation is not as obvious as Judge Tladi makes it seem. Some of the requirements he sets out, such as the one that the armed attack must emanate from a State, or the reading of the *Wall* AO that appears to exclude any relevance of self-defence in response to attacks emanating from an occupied territory, are at the very least controversial among both States and scholars.[67] Other points, in particular the necessity and proportionality of occupation as a response to attacks emanating from the territory, at a minimum require more analysis.

The key point here is that, for Judge Tladi, self-defence has no role to play in assessing the legality of Israel's occupation of the OPT. A further question is how many other judges shared his position and whether they did so for similar reasons. This question is especially important with regard to the 'silent' judges in the majority, who either did not write separately (only Judge Bhandari), or who did so but said nothing about self-defence. In other words, is their silence implicit evidence that they regarded self-defence as having 'no relevance' in the case before them?

While Judge Xue does not mention self-defence as such in her declaration, she agrees with the Court that the *jus ad bellum* determines the legality of Israel's continued presence in the OPT.[68] She also expresses her agreement with the Court 'that Israel's policies and practices, as they have presented themselves, are not justified by its security

[65] See *Palestine* AO (n 1) paras 42–47 (Declaration of Judge Tladi).
[66] ibid para 48.
[67] See n 25 and accompanying text.
[68] *Palestine* AO (n 1) para 7 (Declaration of Judge Xue).

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concerns … Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people'.[69]

In his opinion, Judge Brant says nothing about self-defence or the *jus ad bellum*, but emphasises that both Israelis and Palestinians have legitimate security interests.[70] Judge Gómez Robledo likewise says nothing about self-defence or the *jus ad bellum*, focusing instead on arguing that the Court should have expressly affirmed that Palestine already exists as a State.[71]

Judge Iwasawa does not refer to self-defence. He only discusses the prohibition of the acquisition of territory by force 'regardless of whether that force is unlawful or otherwise permitted under international law'—perhaps an oblique reference to the possibility that some of Israel's use of force in the OPT is *ad bellum* justified.[72] He then briefly notes that, even though the occupation is a wrongful act that has to be terminated, '[g]iven its legitimate security concerns, Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally, particularly from the Gaza Strip in view of the ongoing hostilities since 7 October 2023'.[73] Again, this reasoning is not explicitly based on Article 51 self-defence.

Caution should be exercised in drawing inferences from silence. However, these judges could be expected to say *something* if they thought that *ad bellum* self-defence was relevant for assessing the legality of the occupation, especially bearing in mind that the AO itself does not use the term. Thus at least one of the eleven judges in the majority (Tladi) thought self-defence was irrelevant, and perhaps up to five other judges (Bhandari, Brant, Gómez Robledo, Iwasawa and Xue) thought so too.

This is surprising for four reasons. First, because self-defence generally plays such a central role in the paradigmatic examples of legal and illegal occupation as judged against the *jus ad bellum.* Thus, as seen in Section 3, Russia's occupation of parts of Ukraine is illegal because Russia has no valid self-defence claim to justify its use of force, while Ukraine's occupation of parts of the Russian Kursk region is legal precisely because it is based on self-defence. Second, because some of the other judges, both in the majority and the minority, did think that self-defence was relevant, and presumably raised this issue with their colleagues during deliberations. Third, because *ad bellum* self-defence was an issue addressed by some of the participants in the proceedings before the Court, even if (it is fair to say) it was not one of pivotal importance in their arguments.[74] Fourth, while self-defence could not preclude the wrongfulness of Israel's violation of the rule prohibiting the forcible annexation of territory, the Court's holding

[69] ibid para 9 (Declaration of Judge Xue).
[70] ibid para 13 (Declaration of Judge Brant).
[71] ibid paras 13–17 (Separate Opinion of Judge Gómez Robledo).
[72] ibid para 15 (Separate Opinion of Judge Iwasawa).
[73] ibid para 20 (Separate Opinion of Judge Iwasawa).
[74] This article will not conduct a systematic analysis of the written and oral pleadings in the case: see ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem: Written Proceedings* <https://www.icj-cij.org/case/186/written-proceedings>. For some examples of participants in the proceedings discussing self-defence, see, e.g. Written Statement of the African Union, paras 121–122; Written Statement of Ireland, para 45; Written Statement of Fiji, 5–6; Written Comments of Pakistan, para 11; Written Comments of the League of Arab States, paras 106–108; Written Comments of the State of Palestine, paras 2.36–2.52.

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was that Israel's very presence in the OPT, and not just its annexationist policies, was unlawful—and it is not immediately obvious why the legality of Israel's presence would not depend on self-defence.

4.3. The continued occupation is not necessary or proportionate

On the third view, even if Israel at some point had a valid self-defence claim, its continued occupation of the OPT fails the necessity and proportionality criteria of self-defence. This reading is set out most clearly by Judges Yusuf and Charlesworth in their separate opinions. Thus, self-defence *is* relevant, but Israel's possible justification for its presence in the OPT fails requirements internal to that rule.[75]

Judge Yusuf's main argument—one that the Court did not adopt—is that a prolonged occupation is unlawful as a matter of the *jus in bello*.[76] However, he also considers that the occupation violates the rules of the *jus ad bellum*:

> A prolonged occupation cannot be justified on the basis of those rules unless the conditions for lawful self-defence continue to exist throughout the period of occupation. In other words, the occupying Power must be able to show, at all times, that the maintenance of its prolonged occupation is due to military necessity, which has to be proportionate to legitimate military objectives. However, the self-defence rationale cannot be invoked against a potential or future threat that might emanate from the occupied territory … Israel's maintenance of its excessively prolonged occupation of the Occupied Palestinian Territory does not meet these standards. It does not satisfy the criteria of necessity and proportionality for self-defence under Article 51 of the United Nations Charter.[77]

Judge Yusuf thus correctly takes the view that self-defence is not relevant only at the moment of the initial use of force, when a conflict began, but that it applies continuously and its conditions need to be met over time for any occupation to remain justified.[78] There is some terminological confusion here because he uses terms that have an *in bello* connotation (military necessity, military objectives), but he clearly regards the occupation to be illegal because it fails to meet the necessity and proportionality criteria of self-defence as applied to the facts as they exist today. He then continues:

> Although the law of occupation (*jus in bello*) does not impose, as pointed out above, a precise time-limit for the termination of belligerent occupation, the issue of the legality of the continued use of force, in the form of belligerent occupation, is determined by the law on the use of force (*jus ad bellum*). It is under this law that whether the conditions for self-defence still exist must be established. Indeed, the duration of a belligerent occupation is subject to an *ad bellum* test whereby, if the continued use of force can no longer be justified on grounds of self-defence against an imminent threat or use of force, it must be terminated.
>
> In light of the above, a prolonged and indefinite use of force against an occupied population constitutes a breach of the law on the use of force. It cannot be justified for more than half a

[75] On necessity and proportionality, see the works cited in n 19.
[76] See *Palestine* AO (n 1) paras 5–12 (Separate Opinion of Judge Yusuf).
[77] ibid paras 13–14 (Separate Opinion of Judge Yusuf).
[78] On the continuing application of the self-defence criteria, see the works cited in nn 20 and 48.

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> century on military necessity. It goes beyond the specific defensive needs which might have originally justified it, if they ever existed, and turns it into alien subjugation and domination of a people which is contrary to the principles and purposes of the United Nations Charter. Thus, Israel's prolonged occupation is also to be considered unlawful in view of its continued violation of the law on the use of force (*jus ad bellum*).[79]

While Judge Yusuf briefly considers the argument that the occupation was illegal ab initio ('if they ever existed'), his core point is the need to assess the occupation against the necessity and proportionality criteria of self-defence as applied to the facts as they exist today.

For Judge Charlesworth, an 'occupation must at all times be based on a ground for the use of force that is accepted under the *jus ad bellum*'.[80] Therefore:

> no other legal bases may be invoked for an occupation except for those that are available for the use of force under the *jus ad bellum*. The establishment of the occupation is a question of fact and, for this reason, it does not furnish the occupying Power with an additional legal basis for its maintenance beyond the established exceptions to the prohibition of the use of force. So, the existence of "security concerns" is not a legal ground for the maintenance of an occupation, nor indeed for its establishment, unless it can be translated into the currency of the accepted grounds for the use of force—for example, self-defence.[81]

This is surely right and corresponds to the paradigmatic examples of legal and illegal occupation examined in Section 3—only self-defence, or some other basis for lawful force in the *jus ad bellum*, such as UNSC authorisation, can make an occupation legal. That legality must be assessed continuously. That may, of course, be objectively difficult to do in some situations—e.g. both sides to a conflict may have plausible arguments—but the core principle is sound, as is the point that security concerns alone do not provide an *ad bellum* justification.

Judge Charlesworth then notes that 'it is neither necessary nor sufficient to determine whether the use of force that brought about the occupation was lawful. What matters is whether the legal basis for the use of force—in the present context, the legal basis for the occupation—is valid today'.[82] She thus avoids the question of ab initio illegality, and then proceeds to conclude that the only viable justification that Israel could have for its occupation is self-defence.[83] While noting that there are some doubts as to whether self-defence is legally possible in the specific circumstances of this occupation,[84] she assumes these away and moves to the question of whether Israel has been the victim of an (imminent) armed attack.

On this point Judge Charlesworth rightly notes that:

> the fact that the population in the Occupied Palestinian Territory resorts to force to resist the occupation does not *in itself* justify the maintenance by Israel of its occupation. Further, the continuation of Israel's effective control in the Occupied Palestinian Territory cannot be

[79] *Palestine* AO (n 1) paras 16–17 (Separate Opinion of Judge Yusuf).
[80] ibid para 15 (Declaration of Judge Charlesworth).
[81] ibid para 16 (Declaration of Judge Charlesworth).
[82] ibid para 17 (Declaration of Judge Charlesworth).
[83] ibid paras 17–20 (Declaration of Judge Charlesworth).
[84] ibid para 21. See also nn 23–25 and accompanying text.

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> justified with reference to policies and practices that the Advisory Opinion considers to be in breach of international law—for instance, the maintenance of settlements.[85]

This, again, must be correct. On no reasonable conception of the *jus ad bellum* could defending illegal Israeli settlements in the OPT—which the Court nearly unanimously views as such—be justified by relying on self-defence, just as Russia could not rely on self-defence with regard to attacks against its troops or civilian authorities unlawfully present in occupied parts of Ukraine.[86]

The importance of the words 'in itself' is notable when the Judge says that armed resistance against an occupation is not an 'armed attack' for the purposes of Article 51 UN Charter, which could justify the occupation by means of self-defence. *In itself*, resisting the occupation is not an 'armed attack', but with more it could be. In particular, the difficult scenario, as noted in Section 3 when discussing the paradigmatic example, is that of an organised armed group that is not affiliated with the displaced sovereign, which attacks the occupying power, including within the occupying power's own territory and whose goals go beyond the termination of the occupation. This is, in brief, the position of armed groups such as Hamas.[87] Thus, while noting that 'in itself' armed resistance against an occupation does not give rise to self-defence that could justify the occupation's continuation—consider, for example, attacks by individual Palestinians or by Palestinian armed groups against Israeli military and other security forces in the OPT—Judge Charlesworth does not say directly whether, in her view, the actions of Hamas, including missile barrages against targets within Israel and attacks on Israeli civilians within Israel, such as on 7 October 2023, would qualify as armed attacks giving rise to self-defence.

Instead, Judge Charlesworth proceeds on the assumption that some such uses of force by Palestinian armed groups qualify as armed attacks in the sense of Article 51 UN Charter, and notes that the purpose of self-defence must be to 'halt or repel an armed attack until the Security Council takes action … This purpose distinguishes lawful self-defence from measures that aim to punish the aggressor for the harm inflicted [i.e. reprisals]'.[88] The necessity and proportionality of self-defence are linked to this defensive purpose; for Judge Charlesworth, 'three dimensions of Israel's policies and practices illustrate that the maintenance by Israel of its occupation does not qualify as an act of self-defence: their intensity, their territorial scope and

[85] ibid para 23 (Declaration of Judge Charlesworth) (emphasis in original).

[86] See also n 45 and accompanying text.

[87] There have been arguments that Hamas is an organised resistance movement belonging to the State of Palestine, in the sense of Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1959) 75 UNTS 135, art 4. See Rule of Law in Armed Conflicts, *Military Occupation of Palestine by Israel* <https://www.rulac.org/browse/conflicts/military-occupation-of-palestine-by-israel>: this argument rests on the assumption that State authorities have to actively distance themselves from an organised group purporting to fight on the State's behalf. But, even if this is taken as granted, this is relevant only for conflict classification under IHL, not for issues of the *jus ad bellum* or State responsibility ('the fact that an armed group belongs to a party to an international armed conflict does not necessarily mean that the group is under the effective/overall control of that party, for the purpose of attribution under the rules of State responsibility').

[88] *Palestine* AO (n 1) para 24 (Declaration of Judge Charlesworth).

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their temporal scope'.[89] Not only does Israel's policy of annexation indicate that it wishes to remain in the OPT permanently,[90] but:

> Under those requirements [of necessity and proportionality], targeted operations, including occupation, may be expected in the territory from which the armed attack originates, and for as long as the armed attack occurs. Yet, the longer time passes, the less plausible it is that an armed attack is, or indeed continues to be, occurring; and the less plausible it is that the continued occupation of an entire foreign territory is a necessary and proportionate measure in response under the right to self-defence. This is especially the case where this occupation extends to the entire territory over which a population exercises its right to self-determination.[91]

Judge Charlesworth's opinion does not analytically distinguish between necessity and proportionality. In particular, it is unclear whether she implicitly applies some kind of balancing notion of proportionality, weighing harms to its own people that Israel prevents against the harms it causes to Palestinians, especially their right to self-determination.[92] Her position is simply this: Israel's continued occupation, even if lawful ab initio and if compliant with other criteria, is no longer necessary, because Israel has other means at its disposal through which it could repel any armed attacks against its territory that do not involve indefinitely occupying all of Palestine. Her opinion leaves open the possibility, both as a matter of law and as a matter of fact, that Israel might be *ad bellum* justified in temporarily occupying *some* territory of Palestine in response to a specific attack, such as that of Hamas on 7 October 2023.

4.4. On the facts, Israel's invocation of self-defence is purely pretextual

On the fourth approach, self-defence is irrelevant primarily factually—any reliance on self-defence to justify the occupation is pretextual, manifestly at odds with the facts and the real reasons for Israel's presence in the OPT. This approach is again most evident in the opinion of Judge Tladi, who begins his opinion as follows:

> It is true that the mere fact of violation of certain rules of international law would not always lead to the unlawfulness of the presence itself. What the Opinion illustrates however, is that, the seriousness and magnitude of Israel's violations, as well as the nature of the rules breached, are such as to remove any pretences concerning the purpose of Israel's presence—transforming what *may have been* lawful presence based on occupation, to unlawful presence because such presence clearly amounts to a manifest violation of fundamental rules of international law prohibiting the acquisition of territory by force and the denial of the right of self-determination.
>
> It is not just the fundamental character of the rules breached, or the egregiousness of the breaches, but also the fact that the breaches have continued, and indeed worsened, notwithstanding repeated calls for their cessation from multiple organs and entities that leads to the Court's conclusion. The seriousness and magnitude of the violations, in effect,

[89] ibid para 25 (Declaration of Judge Charlesworth).
[90] ibid para 26 (Declaration of Judge Charlesworth).
[91] ibid para 27 (Declaration of Judge Charlesworth).
[92] On the different possible conceptions of proportionality in *ad bellum* self-defence, see especially Kretzmer (n 19).

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> unrobe the emperor, leaving the truth bare; it reveals that there is nothing about the enterprise in question that justifies it as a temporary occupation. It is simply annexation, which breaches the right of self-determination of the Palestinian people and the prohibition of acquisition of territory by force. Put differently, from the facts presented to the Court, it is clear that Israel has used occupation as a front to cover up its breaches of some of the most fundamental principles of international law. This is what I understand by the Court's reference to "sustained abuse by Israel of its position as an Occupying Power". Under these circumstances, any lingering suggestion that Israel's unlawful conduct somehow does not affect the lawfulness of its presence would have the effect of shrouding Israel's presence in the OPT with a cloak of legality—something which I find simply incomprehensible.[93]

Towards the end of his opinion, Judge Tladi adds that the Court concluded that Israel's continued presence in the OPT is unlawful 'because policies and practices on the Occupied Palestinian Territory have revealed *the true purpose of Israel* as being the forceful acquisition of the Palestinian territory in violation of fundamental rules of international law, some of which are peremptory norms of international law'.[94]

Thus, for Judge Tladi, there is only one, true purpose of Israel's presence in the OPT—conquest—and everything else, including self-defence, is just a pretext. To put this differently, for Judge Tladi, the Israeli occupation is not meaningfully different from Russia's invasion of Ukraine and its occupation of Crimea and the Donbas. Just like self-defence was a mere pretext that Russia relied upon to attack Ukraine, so too is self-defence a pretext for Israel in the OPT. Indeed, at one point in his opinion he seems to draw precisely this analogy, through a 'hypothetical' scenario that reads as anything but.[95]

This reading substantially overlaps with the one examined in Section 4.2, also evident in Judge Tladi's opinion, that self-defence is irrelevant to assessing the legality of Israel's occupation. But while the former is more focused on points of law, this one focuses on points of fact.

There are several possible objections to this approach. One is that, legally and factually, the Israeli/Palestinian conflict is more complex than the Russia/Ukraine one. But, putting this narrative point aside for the moment, Judge Tladi's approach assumes that Israel has one, true purpose for its presence in the OPT, and that this one purpose is wholly illegitimate. However, it may well be that Israel's presence in the OPT serves several purposes, some of which may be legitimate, some not. It is also fair to say that the purposes that Israel has pursued could have varied over time. In particular, while annexationist agendas have motivated Israeli policies for a long time, it seems

[93] *Palestine* AO (n 1) paras 2–3 (Declaration of Judge Tladi) (emphasis in original).

[94] ibid para 61 (Declaration of Judge Tladi) (emphasis added).

[95] ibid para 44 (Declaration of Judge Tladi): 'Indeed, save where called for by a specific rule, security concerns cannot even serve as a balance against rules of international law and certainly not against peremptory norms. Thus, the notion that the Palestinian right of self-determination must be balanced with, or is even subject to, Israeli security concerns is incongruous as a matter of international law. In fact, such arguments are not only incongruous, they also are dangerous. Allow me to illustrate by means of a "hypothetical" scenario: Imagine that one State believes, legitimately perhaps, that another State joining a defence alliance is a threat to its security interests. Can such a State decide to use military force to prevent the other State from joining the defence alliance? If so, we are moving dangerously into the Athenian paradigm where "the strong do what they can and the weak suffer what they must".'

clear that Israel's current Government pursues a policy of annexation of *all* the OPT to an extent that overshadows Israel's past administrations. Finally, while the self-defence (or security)-as-a-pretext argument is essentially factual, it is difficult to divorce it from the specific legal criteria for self-defence and their factual predicates. That is, the reason it can be said that Russia's reliance on self-defence to invade Ukraine is pretextual is not just because Russia's true purpose can be inferred, but because, on the facts, there was no armed attack by Ukraine against Russia, nor was such an attack imminent, nor was there any necessity to respond to any such attack. In other words, treating self-defence as a pretext would require some analysis on the facts as to why it is not applicable, which neither the Court[96] nor Judge Tladi really do.[97] This is, rather, what Judge Charlesworth does in her opinion.

4.5. Any claim of self-defence is tainted by ulterior purpose

This brings us to the fifth and legally perhaps the most interesting understanding of the AO and paragraph 261. Whereas the fourth reading regards Israel as having no right to self-defence at all, the fifth approach considers that Israel may have this right, but that it can no longer be relied upon because it is vitiated by an ulterior purpose. This approach is found in the opinions of Judges Cleveland and Nolte, who first write jointly and then also separately. In their joint opinion, the two judges agree with the Court that the legality of the occupation is an *ad bellum* matter and consider that:

> an occupation is an ongoing use of force and, thus, the military presence of a State in foreign territory may be unlawful either as a result of an unlawful use of force leading to the occupation, or because the ongoing use of force that an occupation represents can no longer be justified as legitimate self-defence or as authorized by the Security Council.[98]

For them, the inquiry before the Court was not whether the occupation was legal ab initio, but 'whether Israel's continuing presence in the Occupied Palestinian Territory can still be justified under the *jus ad bellum*'.[99] (Note the clear endorsement here of the position that self-defence requires a continuing assessment, rather than just at the moment that force is first used.[100]) While acknowledging that Israel had legitimate security concerns, in the judges' view:

> the presence of occupying forces can only be justified by a credible link to a defensive and temporary purpose; in our view, therefore, any possible justification is necessarily lost if such a presence is abused for the purpose of annexation and suppression of the right to self-determination. An occupying Power may violate certain of its obligations under international humanitarian law or human rights law, including in ways that infringe the right to self-determination, but such conduct does not render its military presence in the

[96] Arguably, the Court is not best equipped to do intensive fact-finding in advisory proceedings, but it was nonetheless able to do so in many other parts of the *Palestine* AO, e.g. those addressing human rights violations.

[97] Except by saying that, in his view, there were insurmountable barriers to any reliance on self-defence: see n 66 and accompanying text.

[98] *Palestine* AO (n 1) para 3 (Joint Declaration of Judges Nolte and Cleveland).

[99] ibid para 4.

[100] See nn 20 and 48 and accompanying text.

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> occupied territory unlawful, provided that the presence is justified by the right of self-defence. However, when the presence of occupying forces becomes a vehicle for achieving annexation, the occupying Power violates the prohibition of the acquisition of territory by force under the *jus ad bellum* and thereby loses any possible justification for the presence of its forces, including on the basis of the right of self-defence.[101]

The judges here appear to regard the norm against annexation as more substantially tainting a self-defence claim than an infringement of self-determination. They then canvass the evidence of Israel's intent to exert permanent control over the West Bank, in a manner that seeks to frustrate the Palestinian people's right to self-determination,[102] and conclude that it is the 'the *comprehensive nature* of Israel's effort to transform the occupation of the Occupied Palestinian Territory into a form of annexation and permanent control' that renders Israel's continued presence in the OPT, rather than individual practices and policies, unlawful as such.[103] However, their conclusion on this point is 'without prejudice to the exclusion from the Court's analysis of conduct by Israel in the Gaza Strip in response to the 7 October 2023 attack'.[104]

Judge Nolte's individual opinion does not discuss these issues further. In her individual opinion, however, Judge Cleveland provides some additional comments on Gaza. In particular, she notes that Israel's annexation policy does not extend to Gaza, since it had unilaterally disengaged from that territory, and that it was therefore the violation of the right to self-determination alone that was relevant to Gaza.[105] Thus, according to Judge Cleveland, the Court:

> 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 presence unlawful. Nor does it explain how such a violation can somehow override any legitimate exercise of the right to self-defence that Israel may have with respect to the Gaza Strip … a use of force that is lawful in one part of a territory may not be lawful in another.[106]

Therefore, in the absence of a finding by the Court that Israel wanted to annex Gaza:

> a determination that Israel's presence in relation to the Gaza Strip violated the *jus ad bellum* would have required a finding that Israel's military presence pertaining to the Gaza Strip prior to 7 October 2023 lacked *any* legitimate self-defence justification. This would have required the Court to grapple with legal and factual considerations regarding the scope of Israel's legitimate right to use force to protect its territory and its people, which the Court does not remotely purport to confront.[107]

Thus, Judges Nolte and Cleveland were uncomfortable with treating Gaza and the West Bank equally. In particular, they seem to imply that Israel could have a

[101] *Palestine* AO (n 1) para 8 (Joint Declaration of Judges Nolte and Cleveland).
[102] ibid paras 9–13 (Joint Declaration of Judges Nolte and Cleveland).
[103] ibid para 15 (Joint Declaration of Judges Nolte and Cleveland) (emphasis added).
[104] ibid (Joint Declaration of Judges Nolte and Cleveland).
[105] ibid paras 9–16 (Separate Opinion of Judge Cleveland). Note that the *Palestine* AO and Judge Cleveland's Separate Opinion were written before senior officials in the Israeli Government (or indeed the Trump Administration) publicly announced plans to annex all or parts of Gaza.
[106] ibid para 17 (Separate Opinion of Judge Cleveland) (emphasis in original).
[107] ibid para 18 (Separate Opinion of Judge Cleveland) (emphasis in original).

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valid self-defence claim that could justify its military presence in Gaza after 7 October 2023, although this issue was outside the scope of the advisory proceedings. Judge Cleveland further thought that Israel may have had a valid self-defence claim with regard to Gaza even before 7 October 2023.

While Judges Nolte and Cleveland do not say so expressly, reading their joint opinion in light of paragraph 261 of the AO and its reference to the abuse of the occupying power's position, one could say that they allow for the possibility that Israel could have acted with more than one purpose in the OPT, with some of these purposes being legitimate and some not. This would mean that Israel could lose an otherwise valid claim to self-defence because it had become tainted by an ulterior purpose.[108]

There is precedent for such an approach in some domestic legal systems, when judges review executive or administrative decisions and find them tainted by an ulterior purpose, even if they otherwise remained within the confines of the lawful authority that the relevant executive officer exercised.[109] Another excellent point of comparison is the maturing jurisprudence of the European Court of Human Rights on predominant ulterior purposes, which is elaborated upon in Section 5.2.

4.6. Conclusion on the Israeli occupation's illegality

To conclude, when it comes to how the Israeli occupation was to be assessed from an *ad bellum* standpoint, the opinions of the judges sit along a spectrum. Most judges did not think that self-defence was relevant or that it had to be examined extensively. Some of these judges (and, in fact, briefly the AO itself, as well as the joint dissent) preferred to speak of Israel's 'security concerns' or its 'right to security'. Other judges, by contrast, thought that Israel's security concerns were only relevant to the occupation's legality if they could fit within a pre-existing *jus ad bellum* category, that is, self-defence, which in their view required more extensive treatment (I agree). This division does not neatly align with how the majority and the minority of the Court were divided on the ultimate outcome of the case.

There are substantial commonalities—but also differences—between the approaches adopted by Judges Nolte and Cleveland, Judge Charlesworth and Judge Tladi. All four judges regard the purpose of Israel's continued presence in the OPT to be of central importance. For Judge Tladi, any reliance by Israel on self-defence is a sham, since its true purpose is annexation. Judge Charlesworth emphasises the importance of a defensive purpose, but her focus then shifts to necessity and proportionality.[110] Judges Nolte and Cleveland do not discuss the necessity and proportionality criteria in any detail (nor does Judge Tladi). Rather, Judges Nolte and Cleveland focus on the loss of an otherwise presumably valid claim to self-defence, which will happen if the link

[108] See also Shany and Cohen (n 2).

[109] See, e.g. C Forsyth and J Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2022) 291 (discussing abuse of discretion and improper purpose in English administrative law).

[110] See nn 80–91 and accompanying text. See also *Palestine* AO (n 1) para 26 (Declaration of Judge Charlesworth): 'The assertion of permanent control over foreign territory is incompatible with the aim of preserving a State's territorial integrity, which is one of the key justifications for the right to self-defence. Rather than preserving the integrity of its territory, a State using force to annex foreign territory seeks to expand it at the expense of the local government.'

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between a State's military presence and the defensive purpose ceases to exist. That legitimate purpose is being overridden by a different, ulterior purpose—that of annexation and frustration of self-determination—which is being *comprehensively* implemented by the occupying power. As noted in Section 4.5, their approach seems to invoke the idea of a predominant ulterior purpose that somehow vitiates an otherwise possibly valid self-defence claim.

This author's view is that the self-defence issue cannot be avoided, even though it is possible to avoid ruling on the *ad bellum* legality of Israel's occupation ab initio. If Israel's continued presence in the OPT, i.e. occupation, is a continuing use of force that engages the prohibition of the use of force in Article 2(4) UN Charter, either because Palestine is already a State or because that prohibition also protects self-determination units,[111] then the occupation as it stands today requires a continuing valid justification. While the decisions of the UNSC on the Israeli/Palestinian conflict are complex, none of them can reasonably be interpreted as authorising Israel to use force against Palestine or the Palestinian self-determination unit, or as authorising the occupation as a measure under Chapter VII UN Charter. Similarly, while the Oslo Accords also add a layer of complexity, they cannot reasonably be interpreted as valid consent by Palestine or the Palestinian people to the Israeli occupation.[112]

That leaves self-defence as the only option. One way of arguing that the occupation is illegal is that, on the law and on the facts, the conditions for self-defence are not met—for example, there is no (imminent) armed attack, it is not necessary to respond to it, or the occupation as such is not a necessary or proportionate response. This is the essence of Judge Charlesworth's opinion. This argument is internal to the self-defence rule. But another possible argument—the one that seems to follow from the Court's reference to 'abuse' in paragraph 261 of the AO and from the joint opinion of Judges Nolte and Cleveland in particular—is that an otherwise valid self-defence claim can be vitiated by abuse and an ulterior purpose. Judge Tladi's analysis of pretextual reliance on self-defence is not distant from this approach either, although it assumes the existence of a single, ulterior State purpose.

Consider, in that regard, the paradigmatic example of an *ad bellum* lawful occupation, Ukraine's incursion into the Kursk region of Russia in August 2024. As explained in Section 3, this occupation was legal because it resulted from Ukraine's continuing exercise of the right to self-defence—there was an ongoing armed attack by Russia on Ukraine,

[111] This is a non-obvious issue: see Milanovic (n 18). But, while neither the Court nor the judges expressly addressed it, they all seemed to proceed from the assumption that the occupation is a use of force that requires justification: see, e.g. *Palestine* AO (n 1) para 253.

[112] Broadly speaking, the majority of the Court considered the UNSC resolutions on Israel/Palestine and the Oslo Accords to have been of little relevance to answering the questions before it. This attracted criticism from the joint dissent: see *Palestine* AO (n 1) paras 40–59 (Joint Opinion of Judges Tomka, Abraham and Aurescu). While the author agrees with the Court's approach, this issue will not be explored further here. The point being made is that none of the UNSC's resolutions can be interpreted as a Chapter VII mandate to use force, since they never use anything even approximating the language that the UNSC habitually employs when authorising force, nor can the occupation be seen as something that Palestine or the Palestinian people have consented to in *ad bellum* or *in bello* terms (if this was the case, there would legally be no occupation, and everyone agrees that the occupation exists).

and it was necessary and proportionate for Ukraine to respond to that attack by conducting military operations on Russia's territory,[113] which may result in occupation.

Imagine if, counterfactually, a few days after establishing the occupation, Ukraine officially proclaimed that it was annexing the Kursk region, as a tit-for-tat response to Russia's annexation of Ukrainian territory. The great majority of States, scholars and judges of the Court would regard such Ukrainian annexation of Russian territory to be illegal. It would transgress the rule against forcible acquisition of territory.[114] It could not be justified by way of self-defence, since such an act could not be regarded as necessary to repel Russia's ongoing aggression. So much is clear. What is not clear is whether the legality of Ukraine's continued occupation of parts of the Kursk region would change due to its abuse of its status as an occupying power by purporting to annex the territory.

In other words, would, in this hypothetical scenario, the principle set out in paragraph 261 of the AO, as variously understood by the Court's judges, have vitiated Ukraine's self-defence claim, in the same way that it vitiated any putative self-defence claim by Israel? Would Ukraine not only have to terminate the attempt at annexation, but also abandon the occupation and withdraw from Russia's territory? Is this because Ukraine's true purpose was annexation, or because it was one of its purposes? Or would this only be the case if Ukraine also systematically violated human rights and the right to self-determination of the Russian people (or some other distinct people) living in the territory?[115]

There is no straightforward answer to these questions. There is a substantial difficulty in moving from the unique features of the Israeli/Palestinian context, including more than half a century of occupation and the overwhelming misery that the conflict has caused, to some generalisable principle. Section 5 attempts to sketch out what such a position of general principle could look like, based on the notion of a predominant ulterior purpose. This is an attempt only, which will hopefully prove instructive. It does not necessarily reflect the law as it stands, or even the law as it should be—only what it could be.

5. Of pretexts and purposes

5.1. Generally on State purposes

As examined in Section 4, the opinions of several judges expressly or implicitly rely on some notion of State purpose. This is especially the case with the opinions of Judges Charlesworth, Tladi, Nolte and Cleveland, but it can also be seen in the AO itself. Thus, on several occasions the Court speaks of the 'the *intent* of the occupying Power to exercise permanent control over the occupied territory'[116] and the '*intention* to create a

[113] One reason—but not the only possible reason—for this might be that there is a possibility that the territory of the Kursk region could be used to mount further attacks against Ukraine.

[114] See *Palestine* AO (n 1) para 253.

[115] There is an inherent tension between the existence of an occupation and the right of the people of an occupied territory to exercise self-determination. Underlying all the separate opinions, however, is a sense that the nature of Israel's continued occupation of the OPT exceeds the bounds of this inevitable infringement, which could somehow be justified by *ad bellum* self-defence.

[116] *Palestine* AO (n 1) para 158 (emphasis added). See also ibid para 159.

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permanent and irreversible Israeli presence in the Occupied Palestinian Territory',[117] while the notion of 'abuse' in paragraph 261 of the AO is inherently evocative of bad faith.

This raises some conceptual difficulties. The first is that international lawyers—and courts—are rarely comfortable with talking about State purposes or intentions. Judges rarely make findings of bad faith, since they raise evidentiary difficulties and are potentially politically provocative. International lawyers thus tend to prefer rules that are on their face objective, and do not explicitly incorporate elements of fault—but it is a serious error to think that States are somehow incapable of acting with fault, e.g. intent or purpose.[118] So, when the Court and its judges speak of Israel's intent, intention or purpose, it is important to be clear what this means. It means simply that certain officials of the State of Israel—in this context those officials who, by virtue of their leadership status, are in the position to decide on the policies and practices at issue in the case—act with certain intentions or purposes. That is, the intent (or purpose) of the State is the mental attitude of individuals who are its organs.[119]

The second difficulty is that, while there will be situations where a State acts with a single purpose, there will be many more situations where the State acts with a plurality of purposes. This is true even if the relevant decision or act is done by one State official. It is even more so the case if the relevant decisions or acts are made by many officials over a long period of time. The Israeli occupation of the OPT, and the various policies and practices that come with it, are undoubtedly one such example. It is perfectly possible, for example, for some high-ranking members of the Israeli military establishment to be concerned mainly with defending the Israeli population from attack, without harbouring any intent to permanently control the Palestinian territories, while the Prime Minister or some members of his cabinet could be driven primarily by an annexationist agenda. To be clear, it is not being argued here that this simplistic distinction fully captures what is going on. The point being made is that different State officials who shape Israeli policies on the ground can do so with different purposes, and that the precise balance between these purposes may have evolved over time. And there may be further background motives behind these different purposes, ranging from monetary or political gain to religious fundamentalism or some other ideology.

The problem here, therefore, is how to legally assess such a multiplicity of purposes. One instructive example in this regard—which is not directly apposite in the *jus ad bellum* context but can nonetheless be learned from—can be found in the jurisprudence of the European Court of Human Rights (ECtHR, the Court).

[117] ibid para 252 (emphasis added).

[118] See International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', UNYBILC, vol II (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (ARSIWA) commentary to art 2, para 3: 'Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective" … In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question.'

[119] See further M Milanovic, 'Intelligence Sharing in Multinational Military Operations and Complicity under International Law' (2021) 97 ILS 1269, 1281–284.

5.2. The jurisprudence on Article 18 ECHR

The structure of qualified human rights, i.e. those which can justifiably be restricted, naturally incorporates some notions of State purpose. Thus, it is black letter law that rights such as freedom of expression, freedom of assembly or the right to respect for private and family life can be justifiably restricted by the State if the restrictive measure is prescribed by law, pursues a legitimate aim and is necessary and proportionate, with both necessity and proportionality being judged against the legitimate aim that the State is pursuing.[120] For instance, a criminal law punishing hate speech can be a justified interference with freedom of expression if it is enacted with the aim of protecting the rights of others and is both necessary and proportionate.[121]

In the human rights context, States—especially authoritarian ones—often restrict human rights while pretextually relying on some legitimate aim, but are really acting with some other, ulterior purpose, such as the suppression of dissent and criticism of the government.[122] For example, during the COVID-19 pandemic, a State may have banned all assemblies on the basis that mass gatherings, even in the open, facilitated the spread of the virus.[123] Ostensibly, the State is acting for a legitimate aim—the protection of public health—but the real reason for the ban is that the State wants to prevent peaceful protests against the government, i.e. there is an underlying ulterior purpose.[124]

One way of dealing with such cases is to simply say that the State has not acted with a legitimate aim. Its true purpose, to echo Judge Tladi, is a categorically illegitimate one, and the restriction on human rights is therefore automatically unjustified. Or, it could be said that any pursuance of an illegitimate purpose would render a restriction unjustified. As the UN Human Rights Committee has put it, '[r]estrictions must be applied *only* for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated'.[125]

The European Convention on Human Rights (ECHR) has a dedicated provision that is relevant to this type of situation. Under Article 18 ECHR, '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied *for any purpose* other than those for which they have been prescribed'.[126] In recent years, the

[120] See, e.g. the limitations clause in art 19(3) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 1057. See also UN Human Rights Committee, 'General Comment No 34' (12 September 2011) UN Doc CCPR/C/GC/34 (General Comment No 34) paras 22, 33.

[121] See generally A Clooney and A Gardoll, 'Hate Speech' in A Clooney and D Neuberger (eds), *Freedom of Speech in International Law* (OUP 2024) 153.

[122] General Comment No 34 (n 120) para 42 ('The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression').

[123] See, e.g. 'COVID-19 Triggers Wave of Free Speech Abuse' *Human Rights Watch* (11 February 2021) <https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>.

[124] On cases currently pending before the ECtHR raising this kind of argument, see ECtHR Press Unit, 'COVID-19 Health Crisis' (Factsheet, updated October 2024) <https://www.echr.coe.int/documents/d/echr/FS_Covid_ENG> 13–14.

[125] General Comment No 34 (n 120) para 22 (emphasis added).

[126] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 18 (emphasis added).

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ECtHR has been developing its jurisprudence on this provision.[127] Three crucial points emerge. First, this jurisprudence recognises that States can act—i.e. justifiably restrict rights—with multiple purposes. Second, the ECtHR has held that the mere presence of any illegitimate purpose, or the absence of a legitimate one, does not automatically violate Article 18 ECHR. Third, the ECtHR also recognises that Article 18 ECHR can be violated even if there is no independent violation of some substantive ECHR right. When, by contrast, a State is unable to articulate a legitimate aim, there will be a violation of the underlying substantive right, but a violation of Article 18 ECHR requires further proof of an ulterior purpose.[128]

It must be emphasised at this point that this jurisprudence is unique even in the context of international human rights law. It rests on a particular textual foundation, which sets up Article 18 as a rule separate from the individual rights enshrined in the ECHR. It also rests on the ECtHR's relatively recent willingness to make factual findings about States' bad faith. Neither of these points would necessarily apply to other human rights treaties or bodies. This jurisprudence is not directly transplantable to the very different *jus ad bellum* context, which certainly contains no text similar to Article 18 ECHR. It is also not argued here that the ECtHR's approach is necessarily the right one, even in its own context or in every respect. It is merely noted that this jurisprudence can be learned from.

The pivotal case here is the 2017 Grand Chamber judgment in *Merabishvili v Georgia*.[129] The case concerned a former Georgian Prime Minister, then leader of the opposition, who was arrested, detained on remand and then convicted on various criminal charges. The Court held that the applicant's arrest and detention on remand were (mostly) compliant with Article 5 ECHR. However, it then found a violation of Article 18 ECHR because, at one point during the detention, it became motivated by an ulterior purpose. In doing so, the Court developed a novel approach to Article 18. According to the Court:

> A right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes. The question in such situations is whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer.[130]

The answer that the Court gave to this question was as follows:

> the mere presence of a purpose which does not fall within the respective restriction clause cannot of itself give rise to a breach of Article 18. There is a considerable difference between

[127] For an overview, see ECtHR Registry, 'Guide on Article 18 of the European Convention on Human Rights: Limitation on Use of Restrictions on Rights' (updated 28 February 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_18_eng>.

[128] For example, failing to prove a legitimate aim for restricting the right to freedom of expression would lead to a violation of art 10 ECHR, but a violation of art 18 ECHR would require evidence of an illegitimate purpose such as suppressing pluralism or dissent.

[129] *Merabishvili v Georgia* [GC] App No 72508/13 (ECtHR, 28 November 2017).

[130] ibid para 292.

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> cases in which the prescribed purpose was the one that truly actuated the authorities, though they also wanted to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a cover enabling the authorities to attain an extraneous purpose, which was the overriding focus of their efforts. Holding that the presence of any other purpose by itself contravenes Article 18 would not do justice to that fundamental difference, and would be inconsistent with the object and purpose of Article 18, which is to prohibit the misuse of power. Indeed, it could mean that each time the Court excludes an aim or a ground pleaded by the Government under a substantive provision of the Convention, it must find a breach of Article 18, because the Government's pleadings would be proof that the authorities pursued not only the purpose that the Court accepted as legitimate, but also another one. …
>
> The Court is therefore of the view that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose.[131]

Thus, for the ECtHR, a predominant ulterior purpose can taint a restriction on human rights that would otherwise be justified. The Court further added that '[i]n continuing situations, it cannot be excluded that the assessment of which purpose was predominant may vary over time'.[132] And this happened on the facts of the case—the applicant's pre-trial detention was initially justified but was later used for a predominantly ulterior purpose, which was to compel him to disclose certain information.[133]

The ECtHR has followed and refined this approach since.[134] For instance, in two cases brought by the late activist Aleksey Navalnyy, the Court found violations of Article 18 by the Russian Federation, finding a series of arrests of the applicant in connection with peaceful assemblies to have been motivated by an ulterior purpose.[135] Crucially, however, the Court found that this purpose—suppressing political pluralism—gradually evolved and intensified:

> in a continuous situation the predominant purpose may vary over time … It may well appear that the predominant purpose of the measures taken against the applicant has indeed changed over the period under examination. What might possibly have seemed a legitimate aim or purpose at the outset appears less plausible over time.[136]

[131] ibid paras 303, 305.

[132] ibid para 308.

[133] ibid paras 333–354.

[134] See further B Çalı, 'Proving Bad Faith in International Law' in G Kajtár, B Çalı and M Milanovic, *Secondary Rules of Primary Importance in International Law* (OUP 2022) 183; T Mortier, 'Reprehensible or Legitimate Aims? A Proposal for a New Approach to Article 18 ECHR in light of its Predominance Test' (2023) 4 European Convention on Human Rights Law Review 133; J Finnerty, 'When Is a State's "Hidden Agenda" Proven? The Role of the Merabishvili's Three-Legged Evidentiary Test in the Article 18 Strasbourg Case Law' (2023) 4 European Convention on Human Rights Law Review 447.

[135] *Navalnyy v Russia* [GC] App No 29580/12 (ECtHR, 15 November 2018) paras 163–176.

[136] ibid para 171. See also *Navalnyy v Russia (No 2)* App No 43734/14 (ECtHR, 9 April 2019) paras 92–99; *Selahattin Demirtaş v Turkey (No 2)* [GC] App No 14305/17 (ECtHR, 22 December 2020) paras 423–438.

In other cases, by contrast, the ulterior purpose may have existed (exclusively or predominantly) ab initio.[137]

5.3. Implications for illegal occupation

This jurisprudence of the ECtHR is not directly applicable to the context of the ICJ *Palestine* AO. It is unique even within human rights law and is relied on here simply as a source of inspiration. It is helpful for conceptualising the notion of an abuse of occupation in the Israeli/Palestinian scenario, as set out by the ICJ in paragraph 261 of its AO.

First, it shows that State authorities can act with multiple purposes. For example, an individual may be arrested because there is a reasonable suspicion that they committed a criminal offence, but also to punish them for their political activism. Or the State may ban protests during a pandemic in order to safeguard public health, but also to suppress dissent. Second, in such plurality of purpose cases, the ECtHR establishes which purpose was the predominant one—this is an evidentiary, contextual inquiry. Third, in a continuing situation—which occupation very much is—the predominant purpose may evolve over time. Fourth, an ulterior purpose can vitiate a restriction on human rights that would otherwise be justified.

If this framework were applied by analogy to the ICJ's notion of an abusive occupation, the following conclusions could be drawn:

(i) It is entirely plausible that Israeli authorities in the OPT are acting with a plurality of purposes. Some of these purposes may be legitimate, such as the purpose to protect the territory of Israel and its people from attack, which is in line with the notion of self-defence. Others are not, such as the purposes to annex the West Bank, promote settlements, discriminate against Palestinians or deny them self-determination. Indeed, the purpose of protecting the lives and property of Israeli settlers in the OPT is also illegitimate, at least in *jus ad bellum* terms, because those settlers live in the OPT as a result of Israel's unlawful policies.[138]

(ii) It could be accepted for the sake of argument that the occupation may have been lawful ab initio, and that even today the objective criteria for self-defence—the existence of an (imminent) armed attack (e.g. by Hamas or other armed groups), necessity and proportionality—could be met.

(iii) However, if the predominant purpose or purposes behind the occupation were the ulterior ones, such as annexation and denial of self-determination, then the occupation would become unlawful even if the objective criteria for self-defence were otherwise met. Of course, the existence of an ulterior purpose may enable an evidentiary inference that the objective criteria are not met, e.g. that there was no necessity to respond to an armed attack, but the point here is that an ulterior purpose can taint even an otherwise valid claim.

(iv) It is entirely possible for the predominant purpose to change over time—for example, for it to gradually become more and more oriented towards annexation. It is also

[137] See *Kavala v Turkey* [GC] App No 28749/18 (ECtHR, 10 December 2019) paras 230–232.

[138] The position is likely different from a purely human rights perspective, under which Israel would have the positive obligation to protect the right to life of Palestinians and Israeli settlers in the OPT equally. That duty does not depend on the legality of Israel's presence, or the legality of the presence of Israeli nationals, in the OPT, but on the fact of Israel's control over the territories.

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possible for that purpose to apply variably in different parts of the occupied territory, e.g. for it to be more prominent in respect of the West Bank than it is for Gaza.

If this approach were to be applied to the paradigmatic examples of Russia and Ukraine, nothing would change in relation to Russia's occupation of Ukraine's territory, which was illegal ab initio and never served any legitimate purpose. However, Ukraine's occupation of parts of the Kursk region, which was ab initio legal, could become illegal (if it continued) if the predominant purpose behind Ukraine's presence there was no longer a defensive one but was one of (say) annexation.

There are advantages to this approach. In some respects, it better describes reality—States, including Israel, can and do act with a plurality of purposes. But if, suddenly or gradually, an ulterior purpose becomes the predominant one—if the occupation is no longer primarily about self-defence, but it was the desire to forcibly acquire territory that 'truly actuated' it, to quote the ECtHR,[139] then the occupation can become illegal as such.

This approach can find purchase not only in the notion of an abuse of an occupying power's position in paragraph 261 of the *Palestine* AO, but also in the separate opinions of the judges. Thus, while Judge Tladi speaks of Israel's 'true purpose', it can be said that Israel may well have had several such purposes, but that one of them—the ulterior one—became predominant. The same goes for Judges Nolte and Cleveland's understanding of the occupation becoming 'a vehicle for achieving annexation', or for Judge Charlesworth's point that some purposes that Israel is pursuing may be incompatible with self-defence.[140]

There are, however, also disadvantages to this approach. Introducing a subjective purpose standard into *ad bellum* self-defence is not straightforward. Argument could be made in this vein, as Judge Charlesworth essentially does, that self-defence already includes a subjective purpose standard—the defensive purpose of repelling an ongoing or imminent attack, which distinguishes uses of force done with such purpose from reprisals, whose purpose is to punish a past wrong. Yet debates regarding whether a particular use of force constitutes self-defence or a forcible reprisal normally turn on objective questions of whether an armed attack exists or whether a response to it is necessary, rather than on a subjective inquiry into purpose.[141]

More importantly, objective tests are arguably better suited to the already incredibly politicised *jus ad bellum*; they allow international lawyers, and judges, to cloak themselves with formalism and reject accusations that they are practising politics, rather than law. Indeed, this is probably precisely why, in that most

[139] *Merabishvili v Georgia* (n 129) para 303.

[140] See also Benvenisti (n 50) 245–46 (arguing, in the Israeli/Palestinian context, that a refusal to negotiate a peaceful settlement in good faith could taint an occupation with illegality).

[141] See, e.g. A Haque, 'Iran's Unlawful Reprisal (and Ours)' (*Just Security*, 8 January 2020) <https://www.justsecurity.org/67953/irans-unlawful-reprisal-and-ours/>; M Schmitt, 'Retaliation, Retribution, and Punishment and International Law' (*Articles of War*, 18 April 2024) <https://lieber.westpoint.edu/retaliation-retribution-punishment-international-law/> (arguing, in part, that 'States that respond to other States' hostile actions may *harbor* the desire to retaliate, seek retribution, or punish, but their actions must comport with legal standards that take no notice of such goals' (emphasis in original)).

important of all *ad bellum* cases—*Nicaragua*—the ICJ said the following in response to the applicant's submission that the United States (US) was relying on self-defence pretextually:

> Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely "pretexts" for the activities of the United States. It has alleged that the *true motive* for the conduct of the United States is unrelated to the support which it accuses Nicaragua of giving to the armed opposition in El Salvador, and that the *real objectives* of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of *an additional motive, one perhaps even more decisive for the United States*, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, *could not deprive* the latter of its right to resort to collective self-defence.[142]

This holding seems to squarely contradict an ulterior purpose approach in the *ad bellum* context; the ICJ would either have to depart from it or nuance it somehow. Again, there are genuine benefits to confining a legal analysis in the *ad bellum* context to objective criteria and separating legal discourse from the political as much as possible.[143] This is also true for *ad bellum* rules other than self-defence. Consider, for example, the question of the legality of the US and the United Kingdom invasion of Iraq in 2003, which they justified by developing the 'revival' argument, under which their use of force was impliedly authorised by past UNSC resolutions.[144] Would it really be desirable for an international court to answer the question of legality here by inquiring into the true purposes of Bush and Blair, rather than by engaging in a systematic interpretation of the relevant UNSC resolutions in light of the object (and purpose) of the UN Charter-based system of collective security? There are also the more pragmatic evidentiary obstacles, which may be difficult to surmount if State officials do not publicly articulate the purpose(s) that they are pursuing. Even if such statements existed, there could be arguments about whether they reflected the purpose which 'truly actuated' those State officials who made the relevant decisions—for example, the statements in questions could have been made mainly for domestic constituencies.

A possible nuance to the laudable objective formalism of *Nicaragua* is that resort to a subjective ulterior purpose test would really be necessary only if a State using force (including through an occupation) had at least a plausible argument for why its use of force was justified and there was evidence of an ulterior purpose that was particularly morally and legally reprehensible, such as territorial conquest or denial of self-determination. Thus, not any ulterior purpose would vitiate a valid *ad bellum* claim, but only one that affected the fundamental values of the international community, to the

[142] *Nicaragua* (n 19) para 127 (emphasis added).
[143] See generally D Kritsiotis, 'Arguments of Mass Confusion' (2004) 15 EJIL 233, 237–41.
[144] See Committee of Privy Counsellors, 'The Report of the Iraq Inquiry' (HC 2016, 265-V).

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extent it was preponderant—indeed, the ECtHR's jurisprudence expressly refers to the reprehensibility of the ulterior purpose as a relevant consideration.[145]

Therefore, a subjective purpose test could be reserved for those exceptional cases in which it could perform a useful function, that is, those cases in which a purely objective approach could validate uses of force that transgress the fundamental values of the international community. It is likely that in these cases an ulterior purpose could be inferred from the evidence reasonably easily, as was in fact the case in the *Palestine* AO.[146]

An alternative framing, resting on similar foundations of prioritising those rules of international law that safeguard its most important values, has been proposed by Yaël Ronen[147] and Ata Hindi.[148] In their view (with some differences between them), an occupation becomes illegal once the occupying power commits serious breaches of peremptory norms of international law, including the prohibition of the use of force, the prohibition against annexation and the right to self-determination.[149] The appeal of this approach is, at least partly, that it depends on the application of objective tests.

In fact, many of these norms often require proof of some kind of ulterior purpose, at least by implication. Focusing on the peremptory character of the norm breached, of a hierarchically superior rule trumping one of lower status, perhaps creates an artificial impression that this operation is an easy one. In the Ukraine and Kursk example, this approach would mean that the very moment Ukraine announced or otherwise implemented any policy to annex parts of Russian territory, it would have to terminate its occupation and not just the unlawful annexation—despite ongoing Russian attacks, despite Ukraine's clear right to self-defence (which itself may be argued to be a jus cogens norm, or an emanation of such a norm) and despite the fact that its presence in the region may predominantly be motivated by a legitimate, defensive purpose.

The ICJ did not adopt a jus cogens-centred approach in the *Palestine* AO, even if the judges grappled with the relevance of jus cogens and erga omnes obligations in the case, and Judges Xue and Tladi, in particular, found the peremptory norm issue to be crucial.[150] Notably, Judge Tladi, who had previously served as the International Law

[145] *Merabishvili v Georgia* (n 129) para 307: 'Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.'

[146] Proving purpose is often said to be more difficult than it actually is in practice, as the ECtHR's Article 18 jurisprudence demonstrates: see further Finnerty (n 134).

[147] Ronen (n 45).

[148] A Hindi, 'Unlawful Occupations? Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms' (2023) 4 TWAIL Review 1.

[149] Ronen (n 45) 226–27, 244–45; Hindi (n 148) 19.

[150] See further E Carli, 'Obligations Erga Omnes, Norms of Jus Cogens and Legal Consequences for "Other States" in the ICJ Palestine Advisory Opinion' (*EJIL:Talk!*, 26 August 2024) <https://www.ejiltalk.org/obligations-erga-omnes-norms-of-jus-cogens-and-legal-consequences-for-other-states-in-the-icj-palestine-advisory-opinion/>; H Deng, 'Reflections on the Identification of Jus Cogens by the ICJ in the Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories: Taking into Account the ILC Draft Conclusions on Jus Cogens' (*EJIL:Talk!*, 27 August 2024) <https://www.ejiltalk.org/reflections-on-the-identification-of-jus-cogens-by-the-icj-in-the-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories-taking-into-account-the-ilc-draft-conclusi/>.

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Commission's rapporteur on the topic of peremptory norms, did not himself argue that the peremptory status of the norms at issue in the case as such led to the occupation's illegality.

6. Conclusion

This article analysed the 'leap' that the ICJ took from finding that Israel violated international law in how it conducted the occupation of the OPT, to concluding that the occupation as such, and as a whole, had become illegal. There is, as explained, substantial uncertainty as to how the Court took that leap, its reasoning for doing so and how its holding on the abuse of the occupying power's position can be applied to cases other than Israel and Palestine.

That uncertainty may be regrettable, but it should not be surprising. It resulted both from the complexity of the issues raised and from the diverging views of the judges. Lack of clarity was simply the price that had to be paid for compromise and consensus. As Judge Tladi well put it in his separate opinion, '[g]iven the collective nature of the Court's decision-making process, the reasoning is not always going to be as clear as it could be, but this should not detract from the overall significance of the Opinion in the continuing search for peace in the Middle East'.[151] One can only hope.

The uncertainties explored in this article should not detract from the big picture: 14 of the 15 judges of the Court thought that Israel systematically violated international law, and that it pursued a policy of annexation and frustration of Palestinian self-determination. The choice before the Court was therefore simply whether to label these Israeli policies and practices as illegal and rule that they must stop, or to also find that the occupation as such is unlawful and must be terminated. A substantial majority of 11 judges took the latter route, but both options can reasonably be defended. A further important outcome was that the Court found the occupation as a whole to be unlawful, rather than only in those territories where Israel's annexationist agenda was being pursued to its fullest.[152]

It seems inevitable that some of the judges' views in this case, both in the majority and the minority, were driven by the unique facts of the Israeli/Palestinian conflict—how could they not be? But, as a consequence it will be difficult to assess what the Court's ruling on the occupation's illegality means for other comparable situations, to the extent there are any.

As argued in this article, the Court's silence on self-defence as a possible justification for the occupation does not mean that self-defence was or should have been irrelevant in assessing the legality of Israel's occupation. On the contrary, it is only self-defence that can accommodate Israel's security concerns. That is, it is only self-defence that could possibly justify the occupation's continuance. There are, it is submitted, two plausible approaches to self-defence on the facts of this case. First, self-defence could either be regarded as legally barred for some reason (Judge Tladi's view) or, more persuasively, it

[151] *Palestine* AO (n 1) para 1 (Declaration of Judge Tladi).

[152] See also UNGA Res ES-10 (13 September 2024) UN Doc A/ES-10/L.31/Rev.1, para 2 (demanding 'that Israel brings to an end without delay its unlawful presence in the Occupied Palestinian Territory, which constitutes a wrongful act of a continuing character entailing its international responsibility, and do so no later than 12 months from the adoption of the present resolution').

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can be argued that the occupation can no longer satisfy the necessity and proportionality criteria (per Judges Yusuf and Charlesworth). This is the more orthodox approach—Israel's self-defence claim fails under criteria internal to the rule, even if the ICJ did not say so in so many words.

The second approach, the outlines of which are seen in the joint opinion of Judges Nolte and Cleveland by reference to paragraph 261 of the AO, is that even a valid claim of self-defence, which satisfies the criteria internal to the rule, can be vitiated if it is tainted by a predominant ulterior purpose, such as annexation and frustration of self-determination. There is promise in this approach, but it has both advantages and disadvantages. A major virtue of this approach is that it acknowledges the coexistence of different purposes of the occupying State (i.e. of its officials)—which is simply the reality of things—and that it focuses on the predominance of an ulterior purpose as the turning point at which a (plausibly) legal occupation can become illegal.[153] It is questionable, however, whether such reliance on a subjective purpose standard is needed, when Judge Charlesworth's analysis of objective necessity seems to do all the work required in the Israel/Palestine scenario.

On either of these approaches, the Court's ultimate conclusion that the occupation as such was illegal makes sense. If for no other reason, this is because it was, in 2024, practically impossible to separate Israel's occupation from the annexation and frustration of Statehood. Could it even be possible for Israel, in its current political context, to cease all the policies and practices that 14 ICJ judges thought to be unlawful, including annexation, settlement-building, racial discrimination and denial of self-determination, without at the same time terminating the occupation?[154] How could this even work? That is, is it even remotely conceivable that an Israeli occupation of the OPT could shed all the ulterior purposes that have motivated it, and the tainted practices that were accordingly implemented over decades, and then somehow be reborn as a 'pure' exercise of self-defence (on the assumption that a self-defence claim exists)? That just could not be done, even if there were Israeli political leaders willing to make it so. From the standpoint of the law of State responsibility, Israel's duty to cease its internationally wrongful acts[155] can in practical terms not be complied with without terminating the occupation.

In sum, the existence of the occupation is, on the facts, so inextricably linked with the manifestly illegal policies and practices that Israel has been pursuing, that the ICJ's ruling that the occupation as such has become internationally wrongful makes eminent practical sense. This pragmatic consideration—that Israel's occupation is so tied up with serious violations of international law that the two are impossible to separate—is likely what bound the 11 judges in the majority together, whatever the disagreements

[153] See also Ronen (n 45) 205 (who, while arguing along a different conceptual path, rightly notes that it is essential to establish whether the 'illegality goes to the heart of the status of occupation. This distinguishes an occupation which is accompanied by a violation of international law from an occupation which rests on a violation of international law. Without this distinction, any violation of international law puts in doubt the status of the occupation as a whole, and the status of the occupation may change at any moment according to the particular measures that are taken by the occupant at that moment. To avoid such a problem, the illegality should be limited to violations that directly bear on the continued existence of the occupation').

[154] See also Hindi (n 148) 26–27.

[155] See ARSIWA (n 118) art 30.

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between them. This does not obviate the need for a theory of why, legally, self-defence could not justify Israel's continued occupation, but it does explain why the majority ruled as it did.

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