



Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'legal' or 'illegal' in international law?

LEGAL OPINION

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[Human Rights in Occupied Territories](#)

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Summary

This Opinion clarifies what the terms ‘legal’/‘illegal’ mean, in relation to the occupation of the Palestinian West Bank (including East Jerusalem) and Gaza, according to the relevant, multiple areas of applicable international law. It explains how the different forms of ‘legality’/ ‘illegality’ relate to each other, and how they apply to the occupation. In each area of law, it explains what difference ending illegality would make (e.g., ending abuses, preventing annexation, ending the occupation itself). The meaning and significance of the following terms/areas of international law are explained: self-determination; settler colonialism; the *jus ad bellum*/law on the use of force/aggression; (belligerent) occupation/prolonged occupation; statehood; sovereignty; title to territory; annexation; apartheid; *jus in bello*/law of armed conflict/international humanitarian law (IHL)/laws of war/occupation law; international human rights law (IHRL); international criminal law (including the crime of aggression, war crimes, crimes against humanity, the crime of apartheid, the crime of torture); United Nations law and the law of treaties.

Legality/illegality can refer to the existence of the occupation, or its conduct, or both.

As to existential legality/illegality, the occupation, simply by virtue of exercising control over the West Bank (including East Jerusalem) and Gaza, and consequently preventing the Palestinian people from full and effective self-governance, constitutes a fundamental impediment to the realization of the right of self-determination enjoyed by the Palestinian people in international law.

The only basis such an impediment could be legally justified is according to the law on the use of force—the *jus ad bellum*. Assuming, hypothetically, that Israel had a

right of self-defence in 1967 that justified, legally, the introduction of the occupation then, this justification has not persisted, nor has an alternative legal justification arisen. There has been no actual or imminent armed attack justifying, as necessary and proportionate, the occupation as a means of self-defence. And the doctrine of preventative self-defence, justifying the occupation as a means of stopping a threat from emerging, has no basis in international law. Neither United Nations Security Council Resolution 242, nor the so-called Oslo Accords, provide an alternative legal basis for the existence/continuation of the occupation. Indeed, the Oslo Accords are themselves violative of international law, because 'consent' to them by the PLO was coerced through the illegal use of force, and, relatedly, they conflicted with norms of international law that have a special non-derogable/*jus cogens* status (the prohibition on the use of force other than in self-defence, and the right of self-determination). More generally there is no international law right to maintain the occupation pending a peace agreement, and/or as a means of creating 'facts on the ground' that might give Israel advantages in relation to such an agreement, and/or as a means of coercing the Palestinian people into agreeing a settlement to the situation that they would not accept otherwise.

The consequence of the foregoing is that there is no valid international law basis for the existence of the occupation. In consequence, the occupation is an unlawful use of force, an aggression, and a violation of the right to self-determination of the Palestinian people, on the part of Israel and, in the case of aggression, also a crime on an individual level for senior Israeli leaders. As a result, the occupation is existentially illegal and must end immediately. Legally, the requirement of termination is not contingent on particular circumstances being present. Specifically, the following factors or conditions cannot be, by themselves, a pretext for delaying termination: willingness/consent by Israel; the adoption of a peace agreement; the adoption of standards within or the giving of undertakings by the

Palestinian people; approval by the UN, the Quartet, other states etc. In consequence, every day the occupation continues is a breach of international law.

The existential illegality of the occupation arises out of the simple fact of the occupation as a system of control and domination without a valid legal basis. This is then compounded by the occupation's prolonged duration, its link to *de jure* and *de facto* annexation, and the egregious abuses perpetrated against the Palestinian people. The use of military force to annex territory is also an independent basis for existential illegality: also a violation of the international law on the use of force, and so also an aggression at both a state level and in terms of individual criminal responsibility. (By contrast, the prolonged length of the occupation, and its abusive nature, are not independent bases for existential illegality, but are relevant, as aggravating factors, to the question of existential legality as a matter of the law on the use of force; the abusive nature is also relevant to the separate matter of legality/illegality of conduct). Any purported annexations are also without legal effect, because in international law Israel is not and cannot be sovereign over any part of the West Bank or Gaza, including East Jerusalem, through the assertion of a claim to this effect based on the exercise of effective control enabled through the use of force, and in the absence of consent to such annexation freely given by the Palestinian people.

As to the legality/illegality of the conduct of the occupation, there are multiple, egregious breaches of the relevant areas of applicable international law: the laws of war/law of armed conflict/*jus in bello*/international humanitarian law including occupation law, international human rights law generally, and, within this, the prohibition of racial discrimination generally and the prohibition of apartheid in particular. These are breaches at the level of the state of Israel, and also, in some cases, individual crimes—war crimes, crimes against humanity, the crime of apartheid and the crime of torture.

The occupation is thus illegal in both its existence and its conduct, and in both cases this gives rise to both state and individual criminal responsibility.

(All the main areas of international law violated—the prohibition on the use of force other than in self-defence/the prohibition of aggression; the right of self-determination; the prohibition of racial discrimination generally and apartheid in particular; a sub-set of the protections in IHL; the prohibition of torture—are norms that have the special non-derogable/*jus cogens* status mentioned above in connection with the Oslo Accords. *Jus cogens* is not a separate category of substantive international legal rules but is, rather, a way of characterizing certain rules as being of a special character when it comes to their interaction with other rules of international law.)



Notes

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This Opinion is limited to the question of legality/illegality itself only and does not also address the follow-on questions of accountability and the consequences for third states and international organizations. All references to 'law' and its derivatives are to international law unless otherwise stated. Some of the ideas herein are summarized a Policy Brief, [The international law of self-determination and the use of force requires an immediate end to the occupation of the Palestinian West Bank and Gaza](#) (2022).

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I should declare the following. I was previously commissioned to provide independent legal advice, based on certain parts of my [book](#), to the then Palestinian Negotiation Support Unit/Project (NSU/PNSP) to the PLO, funded by the UK and other European states, on the various different models of shared sovereignty and internationalization adopted elsewhere in the world (not the subject of the present Opinion), in the context of the then peace negotiations. Also, I was previously, and am currently, commissioned to provide independent legal advice to the Palestinian NGO Al-Haq, on the Palestine Mandate arrangement (covered very briefly in the present Opinion) and another matter (entirely different from the subject and content of the present Opinion). Finally, as indicated on page 1, I was commissioned to write an [Expert Opinion](#) for the Swedish NGO Diakonia, on Israel and Palestine's overlapping human rights obligations in international law (some ideas from which being covered briefly in the present Opinion).

The views expressed herein are exclusively my own, for which I alone am responsible.

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1. Which areas of international law determine the question of legality/illegality?

1.a Rules of international law applicable to states

1. Self-determination (exists in customary international law and international human rights law (para. 4)), with an internal and an external dimension including, in the case of the Palestinian people, a *sui generis* right to return (in customary international law). See further section 2.b.
2. The law on the use of force (a.k.a. the *jus ad bellum*) including, within this, the prohibition on aggression (link to individual criminal obligations, section 1.b)
3. The law of armed conflict (LOAC) (a.k.a. the *jus in bello*)/international humanitarian law (IHL)/the laws of war, including the law of occupation (link to individual criminal obligations in paras. 8 & 9)
4. International human rights law (IHRL), including the prohibitions on racial discrimination generally and apartheid in particular (link to individual criminal obligations in section 1.b). This area of law includes self-determination.
5. United Nations law.
6. The law of statehood (with links to the aforementioned law of self-determination), title to territory, and the sovereign entitlement of states to non-interference.
7. Treaty law (as it applies not only to treaties involving states only but also, potentially, to treaties involving a non-state self-determination unit (on which, see below, section 2.b.i) as one of the parties).

1.b International criminal law applicable to individuals

8. Aggression (link to state obligations in para. 2)
9. War Crimes (link to state obligations in paras. 3 and 4, and, in the case of the prohibition of implanting settlers/settlements in occupied territory, also para. 1)
10. Crimes Against Humanity (link to state obligations in paras. 3 and 4) (includes, when part of a systematic attack, Apartheid, also a stand-alone crime, see para. 10; includes, when part of a systematic attack, persecution)
11. Apartheid (not stand-alone crime before the International Criminal Court (ICC)) (link to state obligations in para 4) (when conducted as part of an attack, falls under Crimes Against Humanity, above para 10).
12. Torture (not a stand-alone crime before the ICC) (link to state obligations in paras 3 and 4) (when conducted as part of an attack, falls under Crimes Against Humanity, para 10, when conducted in the context of an armed conflict, falls under War Crimes, para 9).

1.c *Jus Cogens*/peremptory/non-derogable status of some of the rules

13. Some of the foregoing rules of applicable international law have a special *jus cogens* or peremptory (non-derogable) status, because of their fundamental character: they are placed in a higher position compared to other rules of international law, with the consequence that insofar as there is any contradiction, the rules with *jus cogens* status prevail.
14. The rules with this status are:
 - 14.1. Self-determination (para 1).
 - 14.2. The prohibition on the use of force that is not legally justified in international law, and is therefore aggression (para. 2).

14.3. Some of the core rules of IHL (para. 3) including the prohibition of crimes against humanity (para. 10).

14.4. Some of the core rules of IHRL (para. 4), viz. the prohibition on racial discrimination generally and apartheid in particular, and the prohibition of torture.

15. It is important to note that *jus cogens* rules are not a substantive body of rules in their own right, supplementing the substantive areas of international law set out above (sections 1a and 1b). Rather, the *jus cogens* designation is a way of indicating the special character that some of the substantive rules of international law have. Thus to refer to a breach or violation of *jus cogens* rules is to refer not to an independent basis for illegality, operating alongside other bases of illegality but, rather, to emphasis a particular characteristic of the rules that have been breached.



2. General prior positions in international law that questions of legality/illegality proceed from, concerning statehood, self-determination, and territorial status

2.a Statehood

16. In international law, an entity is, legally, a state, if it meets certain criteria, concerning the exercise of governmental authority over a defined territory and population, free from certain forms of external control. The position taken on this by other states, 'recognition', can, when of a high quantum, also be legally determinative ('constitutive' of statehood) in certain situations, notably where conformity to the other criteria is somehow deficient (the effect being that it can have the legal effect of rendering the entity a state despite this deficient conformity to the other criteria). Generally, there is a presumption against the creation of a new state (but see section 2.b.i. for statehood on the basis of the realization of a right to external self-determination). Necessarily, only states meeting the legal definition can be bound by those areas of international law that apply only to states (section 1.a). If an entity is, legally, a state, then all states must respect and observe its entitlements in international law. This is the case even if they do not expressly 'recognize' it as a state, and/or if they expressly deny its existence as a state, and, if, in consequence of the foregoing, they do not engage in relations with it, either at all, or on a state-to-state basis.

2.b Self-determination of the Palestinian people in international law

17. The Palestinian people have a legal right of self-determination.

18. The right of self-determination of the Palestinian people has two elements based on the general international legal framework of external self-determination and internal self-determination, and one further element specific to them, the right to return.

2.b.i External self-determination

19. *What the right means and what a people with it are entitled to:* External self-determination is the right of a people to be self-governing 'externally', or 'internationally,' i.e., in a manner that is free from certain forms of foreign domination by another international legal person such as a state, including through occupation, which prevent effective self-government. A 'people' with this right has international legal personality in its own right, a 'self-determination unit'. If this people is already constituted as a state (in the international law sense (section 2.a.)), and the boundaries of this state correspond to the boundaries of the self-determination unit, then the legal personality of the state and the self-determination unit amount to the same thing. If it is not constituted as state, or it is constituted as a state but the boundaries of this state cover less territory than the boundaries of the self-determination unit, then two distinct, territorially-overlapping legal persons exist: the state, and the territorially-larger non-state self-determination unit within which the state is territorially located. The people of a self-determination unit have a right to freely determine their international legal status, for example to be (if they are not already) an independent state (or to join up with another state). Because of this aspect of the right, the usual presumption against the creation of new states in international law (see section 2.a) is reversed.

For a self-determination unit claiming to be a new state, there is a presumption in *favour* of the establishment, legally, of the entity as a state. What this means is that, all things being equal, the criteria for statehood operate less strictly (i.e. less effective control by a government over the people in a territory will need to be evident). Linked to the right to be free from external domination preventing effective self-government is the right to be free from such domination preventing the realization of that legal status (e.g. statehood), both *de facto* and *de jure* (cf. the nature of the international legal 'criteria' for statehood above – the ability of a people to meet these criteria is directly hampered by foreign occupation).

20. *Who has the right:* The people of a state, as a whole, have this right. Given that, as will be explained, a state of Palestine exists legally, the Palestinian people have this right on this basis, corresponding to the territory of the Palestinian state (defined below).

21. *Who also has the right:* Whether or not there is a Palestinian state legally, the Palestinian people *also* have this right on two further, different, non-statehood-bases, operating from different time periods, and (as explained below) with different territorial consequences:

21.1. There is a *sui generis* treaty-based right to what is effectively (but not termed in this way) external self-determination. This is derived not from the general anti-colonial norm that emerged in the mid-20th century (on which, see next para.) but the provisions of Article 22 of the League of Nations Covenant of 1919 applicable to Palestine as a particular type of Mandate (covered further below para. 31).

21.2. In any case, the Palestinian people also have the right of external self-determination on the '(anti-)colonial' basis that became part of customary international law around the mid- 20th century, because of their previous subjection to colonial rule by the British empire, and the continued denial of their ability to exercise self-determination since the creation of Israel in 1948, and the occupation of the West Bank (including East Jerusalem) and

Gaza since 1967. The enjoyment of this right on this basis on the part of the Palestinian people has been universally accepted and affirmed by states and UN organs, including the General Assembly, the Security Council, and the International Court of Justice.

22. Although the foregoing bases for the right of external self-determination are linked to particular territorial units, and this has potential implications for the territorial scope of the realization of this right and the legality/illegality of Israel's impediment of this, the individuals who have this right are not territorially limited in the same way, including, then, all the Palestinian people in and beyond the land between the river and the sea.

2.b.ii Internal self-determination

23. This is a right, both individually and at a group level, to be treated equally, when it comes to group-identity, as citizens in states where they have citizenship (e.g., Palestinian citizens of Israel), and to have their distinct group-based identity respected and protected in such states (and, linking the two, equal treatment including freedom from discrimination based their distinct identity). And, relatedly, this includes the enjoyment of rights by virtue of group identity, both individually and collectively, when subject to state authority in their place of residence in the absence of citizenship of that state (i.e., Palestinian people in the West Bank, including East Jerusalem, and Gaza). These rights are also covered additionally in various general areas of international human rights law concerned with non-discrimination in general and the prohibition of apartheid in particular; political rights; the rights of minorities generally and the rights of indigenous people in particular.

2.b.iii Right to return

24. The Palestinian people, individually and collectively, also have a *sui generis* legal right to return, effectively a special additional element to their right to self-determination.

2.c. The international legal status of the land between the river and the sea and the people of this land

2.c.i Israel

25. Israel is a state, legally, because of the widespread recognition of its status as such by other states, and UN membership on this basis.

26. The foregoing recognition and UN membership did *not* include sovereignty over any part of Al-Quds/Jerusalem. The legal consequence of this was to render the claim to statehood legally effective *but to exclude from the territorial scope of the state the territory of Al-Quds/Jerusalem* (hence states with state-to-state diplomatic premises in Israel other than, at the time of writing, Honduras, Guatemala and the USA, operate these premises outside Al-Quds/Jerusalem). This is legally significant to the *de facto* control exercised over West Jerusalem from 1948, and East Jerusalem from 1967.

27. It is only if Israel is a state in international law that the areas of international law covered in section 1.a above are applicable. In other words, only if Israel's statehood is assumed can these areas of law be applied to it to determine questions of legality/illegality.

28. The citizens of Israel have a legal right of external self-determination on the statehood basis (para. 20).

2.c.ii Palestine and the Palestinian people

29. Because the Palestinian people have the legal right to external self-determination, they constitute a collective entity (as mentioned, as 'self-determination unit') which has international legal personality in its own right, whether or not it is constituted as a state.
30. Israel's statehood operating in international law has the following consequences for the right of self-determination of the Palestinian people.
31. There is an ongoing and unresolved question over the legal consequences of the [violation](#) of what was, effectively, a right of Palestinian self-determination on the establishment of Israel's statehood in international law from 1948—the Nakba. This violation is linked back legally to the provisions of the League of Nations Covenant of 1919 applicable to 'A' class Mandates, of which the Palestine Mandate was one (the first non-statehood-basis for the enjoyment of the right of external self-determination on the part of the Palestinian people, see above, para 21.1). This violation was an integral feature of Israel's establishment as a state in international law from 1948, is a necessary consequence of Israel's international legal position as such, and, in consequence, is of an ongoing nature. Since this Opinion is limited to the question of the legality/illegality of the occupation of the West Bank (including East Jerusalem) and Gaza only, it does not address the question of the legal consequences of the violation of Palestinian self-determination inherent in the creation and existence of the state of Israel. Nor, for the same reason, does it address the right of internal self-determination, and other rights in international law, notably concerning the right to be free of racial discrimination, of Arab/Palestinian citizens of Israel, or the right of return of Palestinians to the territory of what is, on the basis explained herein, Israel.
32. Without prejudice to the foregoing issues, at a bare minimum the right of external self-determination of the Palestinian people operates on two separate bases:

32.1. In the first place, on the second non-statehood-basis for external self-determination (the post-WWII anti-colonial basis) above (para. 21.2). The international legal entity covered by this will be referred to as 'Self-Determination Unit Palestine'.

32.2. In the second place, on the people-of-a-state-basis above (para. 20). The international legal entity covered by this will be referred to as 'State of Palestine' (how this entity meets the test for statehood is addressed below).

33. Self-determination Unit Palestine

33.1. The territory covered by this entity is everything that is 'not Israel', legally, which certainly includes Al-Quds/Jerusalem in its entirety, the rest of the West Bank beyond East Jerusalem, and Gaza.

34. State of Palestine

34.1. This is a state in the international law sense, because of the following factors:

34.1.1. The presumption in favour of statehood for people with a right of external self-determination, which (section 2.a) lowers the standard that has to be met when it comes to meeting the criteria for statehood.

34.1.2. The collective recognition by a [large majority \(138\)](#) of the world's states of Palestinian statehood that was manifest when these states voted in 2012 the UN General Assembly to [re-designate Palestine's status at the UN](#) from 'non-member Entity' to 'non-member State', which (section 2.a) can be understood to have had a legally-constitutive effect on the establishment of statehood. (Note that although only states can be UN members, membership does not automatically follow from statehood, and is determined *inter alia* only if both the General Assembly and the Security Council agree—i.e. only if the five permanent members of the latter body all agree not to use their veto).

34.1.3. The acceptance of accession by the State of Palestine to a wide range of international treaties, notably human rights treaties and the Rome Statute for the International Criminal Court, by the relevant depository authority (the UN) and the enforcement bodies linked to these treaties (such as the ICC in the case of the Rome Statute), something which presupposes statehood given that the treaties in question can only be acceded to by states.

34.2. The territorial borders of this State certainly include the entirety of the West Bank, including East Jerusalem, and Gaza. In particular, East Jerusalem is included because, notably, it being part of Self-determination Unit Palestine, the link between the claim to statehood and the realization of self-determination of the Palestinian people, and the fact that some of the aforementioned accession-acceptances and subsequent legal proceedings (e.g. before the ICC) have expressly affirmed this. For the purposes of the present Opinion, which is limited to the question of the legality of Israel's occupation of the West Bank and Gaza only, it is unnecessary to address the legal status of West Jerusalem insofar as the link to State of Palestine is concerned.

35. To summarize:

35.1. State of Palestine, certainly covering the West Bank including East Jerusalem, and Gaza (whether it also covers West Jerusalem is beyond the scope of the present Opinion).

35.2. Self-determination Unit Palestine, covering Al-Quds/Jerusalem in its entirety, the West Bank beyond East Jerusalem, and Gaza.

36. The legal character of Israel's (non-sovereign) presence over Self-determination Unit Palestine is different as between West Jerusalem, on the one hand, and East Jerusalem, plus the rest of the West Bank and Gaza, on the other hand:

36.1. In the case of West Jerusalem, this territory was part of the wider territorial unit controlled by those who purported to secede from the larger

Mandatory Palestine territory, as a state, 'Israel', in 1948. However, it was excluded from the territorial scope of that state when it came to the internationally-legally-determinative international recognition and UN membership (section 2.c.i). Hence it not forming part of the sovereign territory of Israel.

36.2. In the case of East Jerusalem plus the rest of the West Bank and Gaza, Israel captured these territories, which were (and continue to be) outside its sovereign boundaries, and did so at a different time, in 1967, through the use of military force (covered further in section 6). This is reflected in the legal term 'occupation' in international law, which denotes the exercise of military control by a state over territory in respect of which that state does not enjoy sovereignty (id.). Hence these territories have been referred to as the 'occupied Palestinian territories' (oPt) since 1967.

37. With the more recent creation of State of Palestine, there is a risk that the continued use of the term 'occupied Palestinian *territories*' rather than, say, simply 'occupied Palestine' is taken misleadingly to imply that the occupation is not now of the territory of a state in international law. Moreover, the term oPt is inadequate, legally, as a comprehensive term to cover the entire territorial scope of Self-determination Unit Palestine or, put differently, to cover the entire territorial scope of those Palestinian areas controlled by Israel over which the state does not enjoy sovereignty, since it excludes West Jerusalem.

38. Returning to *what the right of external self-determination means and what a people with it are entitled to* (above section 2.b.i). In what follows, and in the remainder of this Opinion, the analysis is specific to the West Bank (including East Jerusalem) and Gaza. This is because of the overall limited scope of the present Opinion, to the question of the legality/illegality of the Israeli occupation of these territories. The following analysis is *without prejudice to the application of the legal framework of the right of self-determination of the Palestinian people beyond the limited territorial context covered by the post-1967 occupation*.

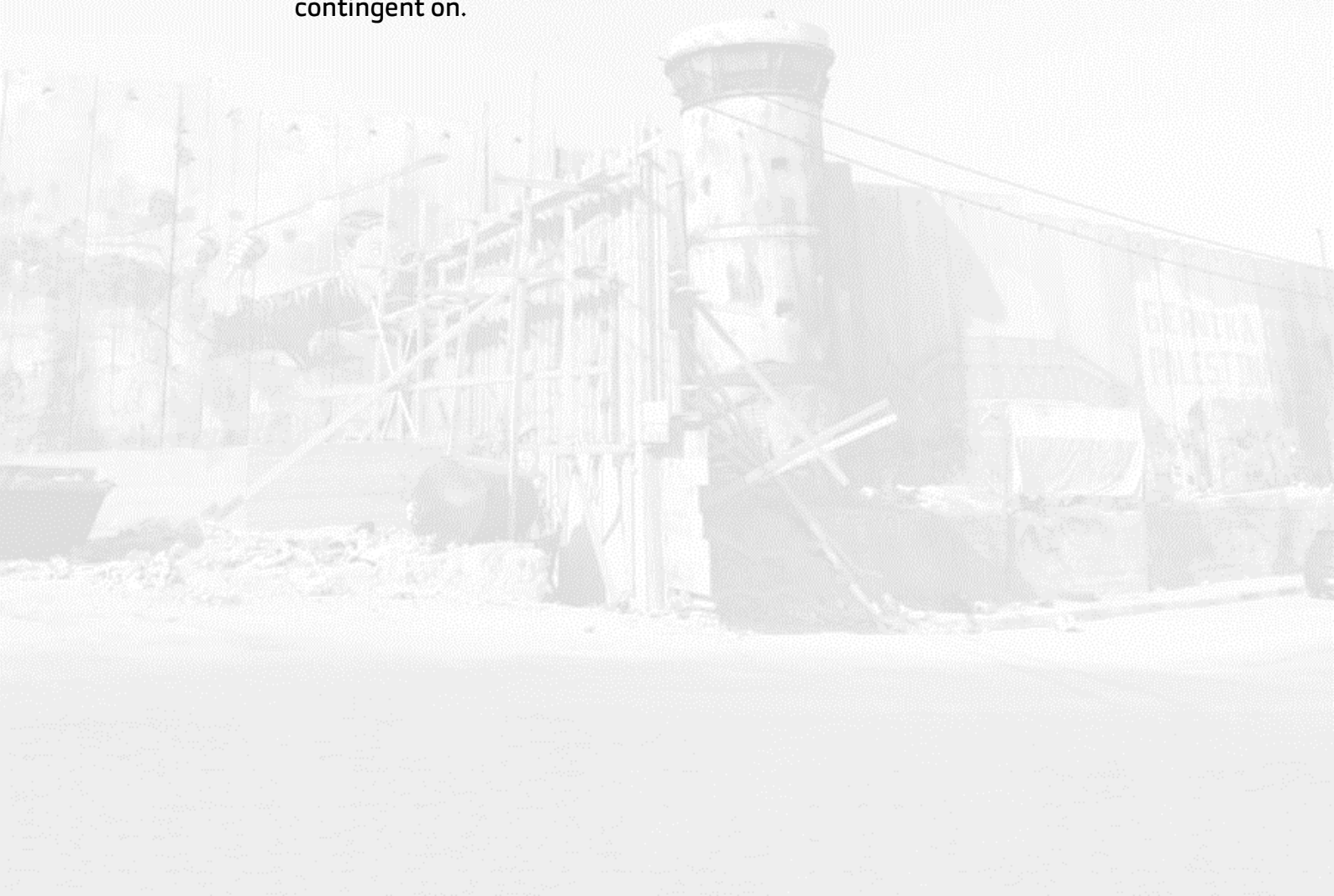
39. External self-determination is a right to be free of any external domination, including occupation or other forms of non-sovereign-based territorial control, which of its nature prevents the full *de facto* exercise of the right. Thus such domination should end in order for the right to be exercised. Particular features of this right to be free/obligation to enable such freedom:

39.1. It operates and exists simply and exclusively by virtue of the Palestinian people being entitled to it. It is not, therefore, something that depends on anyone else agreeing to it, whether Israel, the Quartet, the UN, other states etc. It is a right. Something which depends on the agreement/permission of another actor is by definition not a right. Moreover, having *some* of what the right encompasses realized on the basis of giving up to Israel *other* components of what it encompasses (a 'land for peace' deal) is, by virtue of the self-determination entitlement, a compromise that the Palestinian people are not legally required to make. And if they refuse such a compromise, including one insisted upon by Israel as the price for its willingness to end the occupation (to the extent covered by the compromise on offer), this refusal makes no difference to the existence of the right, and the concomitant requirement that the domination (the occupation), which prevents the realization of the right, should end.

39.2. The anti-colonial form of external self-determination adopted in international law around the mid-20th Century applicable to the Palestinian people was a repudiation of the concept of 'trusteeship over people'. According to this concept, people were, ostensibly, potentially to be granted their freedom by colonial authorities if and when they were deemed 'ready' by those authorities. The anti-colonial self-determination rule, which was the international legal basis for recognizing decolonization, scrapped this approach in favour of an automatic right. The new rule was and is rooted in the basic entitlement of people to freedom, not 'readiness'. In the words of the United Nations General Assembly in Resolution 1514(XV) of 1960,

'inadequacy of preparedness should never serve as a pretext for denying independence'. And the right operates regardless of whether the authority depriving the people of their ability to exercise self-rule agrees to relinquish control.

39.3. Necessarily, then, this form of 'freedom'—the end of external control—is to be realized immediately and automatically, without preconditions, such as standards having to be met first, on whatever basis (e.g. an agreement with/approval by Israel, the UN, the 'Quartet', other states etc.) in relation to whatever subject matter (e.g. governance, 'readiness', security issues, undertakings to Israel etc.) Whether or not the meeting of foregoing standards, and agreement or support for arrangements to end the occupation by the foregoing actors, are or are not important and desirable in a general sense is not the issue here. The point is that the meeting of such standards, and/or the agreement by such actors, is not something that the realization of external self-determination can lawfully be made contingent on.



3. Two distinct questions: is the *existence* of the occupation lawful; is the *conduct* of the occupation lawful?

40. Given what has been said above about the nature of the Palestinian right of self-determination, the *existence* of the occupation constitutes a fundamental impediment to the realization of this right. Although the right of Palestinian self-determination in international law, and the necessary consequence of this, that the Palestinian people should be able to exercise the right, free of Israeli control, is near-universally accepted, there is often a lack of acknowledgment of the crucial next steps in the legal position, as outlined above (para. 39): that the occupation should immediately end, and if it does not, its maintenance is illegal. Commentators affirm the right of Palestinian self-determination only in the abstract, as if this does not then have any material significance to the ending of the occupation. It is as if a thought process has been started, but not taken through to its logical conclusion. However, it is not possible to ignore these elements of the legal framework if a comprehensive determination is to be made. Moreover, further matters concerning the legality of the existence of the occupation need to be addressed, beyond the basic position already arrived at from applying the law of self-determination. These matters potentially have implications for when the occupation should end, even taking into account the self-determination right. They will be addressed in sections 4-6.

41. Separately, there is also a question about whether the way the occupation is *conducted*, notably in terms of the impact of it on the Palestinian people, also falls to be determined by international law, since various areas of international law regulate the exercise of authority by a state over people in such contexts, viz. internal self-determination (para. 1 and section 2.b.ii), the right to return, the laws of war/*jus in bello*/law of armed conflict/international humanitarian law/occupation law (para. 3); and international human rights law (para. 4), and,

relatedly, a sub-set of the foregoing obligations give rise also to individual criminal responsibility (section 1.b). This will be addressed in section 7.



4. Existential legality/illegality 1: Introduction—what falls to be determined here

42. The impact of the existence of the occupation as a drastic impediment to the realization of the self-determination entitlement of the Palestinian people renders the occupation existentially illegitimate and illegal unless a valid basis can be identified to justify its existence.

43. This is sometimes missed by commentators and policy makers, who seem to take the basic fact of the occupation as a given, and approach the question of its existential legitimacy and legality only in terms of aggravating factors (i.e. factors beyond the mere exercise of control by Israel over the Palestinian territories) linked to (certain) ostensible purposes, related practices, and objectionable conduct—settler-colonialism, apartheid, annexation, prolonged duration, bad faith, and abusive treatment of the Palestinian people. However, when things are approached in this way, the (presumably unintended) implication is that without these factors, the occupation would not be illegal. Or, put differently, that it is necessary to establish one or more of these factors in order for the existence of the occupation to be illegal.

44. This is an entirely mistaken position, legally. As will be explained, these aggravating factors do have legal consequences, including, in some cases, for the existential legality of the occupation. But none of them need to be established/invoked in order for the question of existential legality to be determined, and the implied suggestion otherwise risks creating the impression that somehow the simple denial of Palestinian self-determination by the existence of the occupation, and the fact of this from very early into the operation of the occupation, is not by itself sufficient as a basis for rendering the existence of the occupation illegal, when actually (as will be explained) it is. Whereas it is important to address the full-spectrum of legal issues—and the way that violations of ‘humane’ standards have

been widespread and grave—implicated in the occupation, and how this has been aggravated by the long duration, this should not be done, as is sometimes the case, in a way that suggests that these elements must all necessarily be established in order for the existential legality/illegality of the occupation, as a general proposition, to be determined. Quite apart from being an incorrect analysis of the legal position, this would have the perverse effect of making the threshold for existential illegality higher, more complicated, presumably only relevant to the later period of the occupation (because of the emphasis on long duration), and partly dependent on relatively more challenging and disputable arguments (e.g. concerning intent), compared to a position based simply on a) the right of self-determination and b) the fact of the occupation (and this fact from the very early period of its existence, not only after a long period elapsed). The consequence of this would be to diminish the prospects for the position to be widely understood and accepted (and, because of the duration requirement, to limit the significance of the position to only a certain later phase in the occupation's existence).

45. A further problem with an exclusive focus on the foregoing aggravating factors is that, ironically, it ignores the one factor which, unlike the factors invoked, could actually conceivably provide a legal justification for maintaining the occupation: Israel's security needs, and how these are linked to the international law of self-defence. It is, therefore, crucial to include this in the legal analysis, given its significance but almost complete absence from commentary on the question of the legality of the occupation. Ignoring it risks providing an incomplete appraisal of the situation, leaving open and unchallenged the possibility of a legal justification for the occupation even assuming the case has been made for the illegal nature of any alternative justifications implicated in the aggravating factors. This will be covered in the next section but one, after the aggravating factor that is most commonly invoked in this context—annexation—is addressed first.

5. Existential legality/illegality 2: Annexation, including ‘de facto’ annexation

5.a Meaning of annexation

46. In international law, ‘annexation’ means a situation where a state acquires sovereignty over territory in relation to which it did not enjoy sovereignty already. If territory has been ‘annexed’, it has become the sovereign territory of the state concerned.

5.b. Areas where Israel has seemingly purported to formally annex territory—East Jerusalem and, potentially, other areas of the West Bank

47. For various reasons, notably Israel’s extension of its national law to apply to East Jerusalem (e.g. the Basic Law of 1980), it might be said that Israel has purported to annex that territory.

48. As indicated above, East Jerusalem forms part of the territory of Self-determination Unit Palestine and the State of Palestine.

49. The only lawful basis on which Israel could annex East Jerusalem would be if this had been agreed to by the Palestinian people and approved by the United Nations. Such agreement and approval has not been forthcoming. The consequence of this is as follows.

50. East Jerusalem is not ‘annexed’. It is not part of the sovereign territory of Israel. It is under the sovereignty of Self-determination Unit Palestine and State of Palestine. It is, ostensibly (e.g. because of the extension of national law) ‘purportedly annexed’, i.e. subject to an (ostensible) attempt at annexation which has not been legally effective.

51.If Israel can be regarded as having purported to annex East Jerusalem, this constitutes two separate violations of international law concerned with the existential legality of the occupation (how it violates occupation law, concerned with the conduct of the occupation, is addressed separately below):

51.1. Israel's attempt to assert sovereignty is a violation of its legal obligations to respect the right of self-determination of the Palestinian people and the sovereignty of State of Palestine

51.2. Because it has been enabled and is maintained through the use of military force, and according to the law on the use of force, the annexation of territory is not a legally valid basis for using military force, Israel's use of force in order to annex East Jerusalem is a violation of the international law on the use of force.

52. An end to these violations involves the following:

52.1. Israel is required to immediately withdraw its claim to sovereignty over East Jerusalem

52.2. Israel is required to immediately end its exercise of control, including its use of military force, over East Jerusalem, *assuming there is no other legally-valid basis on which Israel can control that territory (the only other such basis is control as a non-sovereign, as a form of self-defence, covered below in section 6).*

52.3. Note that the reversal of these violations would *not* involve the invalidation of the annexation/acquisition of sovereignty, or, put differently, the end of Israeli sovereignty over East Jerusalem, since this purported annexation/acquisition has not happened.

53. The same logic applies to any other parts of the West Bank where purported annexation may have happened or may happen in the future.

5.c Other areas of the West Bank— 'de facto' annexation

5.c.i What is 'de facto' annexation?

54. It is sometimes said that in other parts/the rest of the West Bank, Israel is practising 'de facto' annexation. This is not a precise legal term with a single meaning. It is perhaps being used to mean the exercise of control over the West Bank on one or both of the following bases.

54.1. In the first place, acting as if it were the sovereign even while not formally claiming sovereignty, what might be called 'performing sovereignty', e.g. through asserting a monopolization on the legitimate use of violence, and enabling Jewish Israeli citizens, who view the land as part of Israel as a Jewish state, to move to and live on it—settlement—on the basis of their view that they are living in the Jewish state of Israel. Another way of putting this, legally, is a distinction sometimes made between 'sovereignty-as-administration', and 'sovereignty-as-title'. Whereas performance of the former usually presupposes the enjoyment of the latter—and so making a distinction between them serves no purpose—in some cases, as here, there can be the first without the second.

54.2. In the second place, establishing 'facts on the ground' through control and implanting settlers that could then pave the way for the eventual enjoyment of *de jure* sovereignty over the land in question (e.g. if provided for in a peace agreement on a 'land for peace' deal basis).

5.c.ii Lawfulness

55. Implanting settlers on occupied land is in and of itself, including as a form of de facto annexation understood as a performance of sovereignty/'sovereignty-as-

administration'-only and/or as a means of establishing facts on the ground to enable eventual territorial acquisition, a violation of occupation law on the part of Israel, and a War Crime on the part of the individuals involved in this practice as a matter of international criminal law. The prohibition here is a general one, however, not specific to any kind of *de facto* annexation context.

56. Occupying non-sovereign territory as a form of *de facto* annexation understood as a performance of sovereignty/'sovereignty-as-administration'-only and/or as a means of establishing facts on the ground to enable eventual territorial acquisition is not a valid international legal basis for conducting such a military occupation according to the international law on the use of force. In consequence, as with *de jure* purported annexation, occupation for these reasons is:

56.1. a violation of Israel's legal obligation to respect the sovereignty of the State of Palestine and a violation of Israel's legal obligation to respect the right of self-determination of the Palestinian people;

56.2. a violation of Israel's obligations in the international law on the use of force.

57. An end to these violations of international law would involve the following:

57.1. Israel is required to immediately remove the settlers and the settlements from occupied land (note that this is required simply because of the existence of the settlements and settlers, without the aggravated factor that it is linked to *de facto* annexation).

57.2. Israel is required to immediately end its exercise of control, including its use of military force, over those areas of the West Bank, *unless it has a different, legally-valid, basis for exercising such control (the only such basis would be as a form of self-defence under the international law on the use of force, addressed below in section 6).*

5.d. Why an exclusive focus on annexation is inadequate—it is not by itself dispositive of the question of the legality of the occupation

58. The foregoing determinations about the illegality of the occupation are *necessarily specific to its link to annexation and the parts of the oPt implicated in this*. The control Israel exercises over territory on the basis of (presumed) purported annexation (e.g. East Jerusalem) is unlawful on this basis—since Israel cannot annex territory in this way, the (presumed) purported annexation has not been legally effective, and thus Israel has no valid legal basis to control the territory on the basis that it is the sovereign. The control Israel exercises over other parts of the West Bank on the basis of ‘de facto’ annexation as defined above is also legally-invalid, since international law does not permit a state to use force to control the territory of a self-determination unit (and also, in this case, a state) for these purposes.

59. However, the right of the Palestinian people to be free of the occupation on the basis of the right of self-determination includes, but goes beyond, impediments to this which are linked to annexation. Ultimately it is the occupation as a general regime of control, wherever that exists, and regardless of the purpose for it, that is at issue. Framing the illegality of the occupation only in terms of annexation is necessarily inadequate in addressing this. Moreover, since the annexation focus is based on an idea of *why* Israel exercises control, it necessarily requires a complicated and variated analysis (given differences, e.g. between (ostensible) assertions of *de jure* and *de facto* sovereignty) which also must cover matters of intent that are contested and difficult to prove. The variated nature of the situation then makes it relatively more difficult (but, as indicated, not impossible) to make the case for the approach to capture the entire situation in the West Bank (e.g., needing to characterize the situation in both East Jerusalem, and Ramallah, as linked to annexation). The foregoing analysis in this section, then, is significant as

far as it goes. Which is to say, addressing certain elements of existential illegality but not providing a complete treatment of the matter.

60. Moreover, there is a further, alternative basis on which Israel could control the West Bank, including East Jerusalem, and which could potentially be internationally-legally-valid: as a means of self-defence according to the international law on the use of force. If such a valid basis subsists, then the occupation would be existentially lawful, even if it lacks legal validity on an annexationist basis.



6. Existential legality/illegality 3: The occupation as a form of self-defence; whether a peace agreement is legally required before it needs to end; the relevance of Security Council Resolution 242 and the Oslo Accords; the legal significance of the occupation being ‘prolonged’ and abusive

6.a. Security-basis for the occupation and the applicable framework of international law

61. Earlier (para. 40) it was mentioned that some commentators and policy makers who accept the Palestinian right of self-determination and the implications of this for the existence of the occupation (and the aforementioned bar on annexation), nonetheless resist from proceeding through to the seemingly logical conclusion that the occupation should end immediately. In some cases, such a position is adopted on the basis of a view that the occupation can and should be maintained by Israel for security purposes, and/or, relatedly, that its end should depend on a peace agreement that would include security guarantees for Israel obviating the need to maintain the occupation for these purposes.

62. Does international law permit Israel to maintain the occupation, notwithstanding the necessary impediment this causes to the realization of self-determination by the Palestinian people, on this basis?

63. The Israeli occupation of the Palestinian West Bank and Gaza is a *military* occupation. As such it is, to use the language of international law, a ‘use of force’. In international law, ‘use of force’ is a euphemism for war, including the conduct of military occupation. With Gaza in particular, although Israel removed its ‘boots on the ground’ presence in 2005, its military occupation of that territory has endured, through existing and new means and methods: an overall siege (notably, together

with Egypt, being exclusively determinative of the entry and exit of any and all people and material items, including food and medical supplies), the exclusive control of airspace and maritime territory, control of the water and electricity supply, and the ability to re-introduce boots on the ground from its own territory without any impediment. The foregoing constitutes an *ongoing use of force* exercised by Israel over Gaza. This is then periodically supplemented by further means and methods taken by Israel involving other forms of force, such as military incursions and firing missiles (e.g. in response to rocket attacks; 'mowing the grass' general degradation efforts; targeted assassinations etc.). However, incidents involving the latter are *not the only moments when Israel is using force in the international law sense with respect to Gaza – this is an ongoing situation*.

64. The only legal grounds for a state being entitled to control territory that does not form part of its sovereign territory, and which is either the territory of another state, or a non-state self-determination unit (as here), through the use of force in the foregoing way, is if one or more of the following are present: (a) the host sovereign entity has validly given its permission; (b) the UN Security Council has given its authority for this under Chapter VII of the UN Charter; (c) it is a legally-valid exercise of self-defence according to the international law on the use of force.

65. If such grounds exist, the impediment to self-administration involved in the action would not violate the international law right of self-determination of the people affected. In the case of reason (a), the consent is treated as a manifestation of this right (but therefore must be freely given, something that will be addressed further (section 6.d.ii)). In the case of reason (c), the exercise of self-defence is a manifestation of the right of self-determination of the people of the state, which is being violated by the armed attack that justifies the defensive response, trumping the entitlement, in self-administration terms, of a people as manifest in the policy of their administrative authority when it engages in aggression. Reason (b) raises more complex issues that are beyond the scope of the present Opinion (but, as will be explained in the next section, the Security Council has not purported to

authorize the existence or continuation of the occupation so the question of the compatibility of this with the law of self-determination does not present itself).

6.b Security Council Resolution 242 (1970)

66. In Resolution 242 of 1970—three years into the occupation—the United Nations Security Council affirmed that:

...the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity, and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.” (para. 1).

67. By invoking the withdrawal of occupation forces—i.e., the end of the occupation—in the context of a “just and lasting peace”, is the Security Council stipulating that the occupation can continue until there is a “just and lasting peace”—perhaps in the form of a peace agreement—which, moreover, must include a resolution of/provision for the matters set out in the second paragraph? And, if so, did this stipulation provide legal grounds for the occupation to continue from 1970? The answer to both these questions is no.

68. The Council was merely stating that a “just and lasting peace” would require both an end to the occupation and the resolution of all the matters in the second paragraph. It does not follow from this that the occupation can therefore continue *until* there is the “just and lasting peace” that also covers the resolution of all the

matters in the second paragraph. Or, put differently, that, in the absence of any of the elements of a “just and lasting peace” it requires as set out in the second paragraph, an absence of the element it sets out in the first paragraph—the end to the occupation—is thereby *justified*. That would be a *non sequitur*.

69. Moreover, in any case, the practice of the Security Council purporting to provide legal authority to use force to one or more states only emerged much later than when Resolution 242 was adopted. And key elements for it—the Council expressly stating that it is acting under Chapter VII of the UN Charter, expressly determining the situation to constitute a threat to international peace and security, and expressly calling upon the state to use “all necessary means” (a euphemism for the use of force)—are all absent from this Resolution (quite apart from what has already been said about the intended meaning of the relevant provisions).

70. Equally, the practice of the Council in purporting to alter the position when it comes to states’ rights and obligations in international law (potentially implicating Article 103 of the UN Charter), that might in a different fashion from providing authority to use force, somehow render lawful an occupation that would otherwise be illegal, again only emerged much later than when 242 was adopted. And again, in any case, key necessary elements are missing: the council merely “affirms” a position (less than clearly determinative language); it is not acting under Chapter VII; it does not directly address member states and their behavior and legal position.

71. Security Council Resolution 242 therefore provides no legal basis for the existence or continuation of the occupation.

6.c Self-defence

6.c.i Legal test

72. The use of force in self-defence (reason (c) above) is only legally permitted according to the international law on the use of force—the *jus ad bellum*—(above para. 2) if there is an actual or imminent threat of an armed attack, and the use of force involved—here, a military occupation—is necessary and proportionate to that attack/imminent threat of attack.
73. The question of whether the actual/imminent threat of armed attack existed in 1967, and the introduction of the occupation, as a consequence and part of the broader defensive response to it, was necessary and proportionate, is disputed, and beyond the scope of this Opinion. In what follows, it will be assumed, for the sake of argument, that the legal test was met then. But if it was not, then the occupation has been illegal from the beginning.
74. Proceeding on the hypothetical basis that there was a lawful basis for introducing the occupation in 1967, some commentators seem to suggest that provided this exists, the matter of legality has been resolved from not only that moment, but also the continued operation of the occupation. No further analysis is needed as time moves forward. In other words, the occupation can continue without this continuation itself needing to meet any justificatory test. Thus it is left to the occupier to decide if and when they wish to end the occupation.
75. A more common view is that there is a legal requirement to end the occupation (presumably because of the right of self-determination of the Palestinian people) but that the test for when the end should come or, put differently, the test the occupation has to meet in order to continue to be justified, is *something different from the general jus ad bellum test* set out above. Specifically, some have suggested that the test is that the occupation can continue until there is a peace

agreement. Bearing in mind the risk that such a test could enable the occupier to prolong the occupation by failing to take good faith efforts to pursue an agreement, a seemingly tighter version of this approach is that the occupation is permitted to continue until there is a peace agreement, provided that the occupier is making all possible good faith efforts to achieve that agreement.

76. However, the requirement to meet the general *ad bellum* test is an *ongoing* one in any continuing use of force, including a military occupation. Commentators and policy makers seem to overlook that the use of force requiring justification on this basis is not simply the initial period of invasion that precedes and enables an occupation. It is *also then the operation of the occupation, since the conduct of an occupation, quite separately from the circumstances of its introduction, is itself a use of force.*

77. In consequence, the test remains, on an ongoing basis, needing to establish an actual or imminent threat of an armed attack, and the type of force being used—here an occupation—being necessary and proportionate to that. If this test is not met, then the occupation is illegal, *even in the absence of a peace agreement.* Thus whether or not a peace agreement has been reached, and whether or not the occupying state is taking all good faith efforts to reach such an agreement, are *not by themselves dispositive of whether or not the occupation is or is not legally justified.* This is not to say that Israel is not required in international law to make good faith efforts to reach a peace agreement. It is. The point is that whether Israel makes such efforts is irrelevant to the question of whether it has a legal entitlement to maintain the occupation. Commentators and policy makers who wish to incentivise Israel to come to the negotiating table cannot invoke the right to maintain the occupation as a bargaining chip, since that right does not depend on willingness or otherwise to negotiate, but an entirely different legal test.

6.c.ii Does the occupation meet the *ad bellum* legal test for a lawful use of force in self-defence?

78. Beyond Israel's particular, episodic responses to rocket attacks from Gaza, the ongoing military control exercised by Israel over the West Bank and Gaza, if understood in defensive terms (without prejudice to the other annexationist objectives relating to the West Bank addressed above in section 5), is not about responding to actual or imminent attacks at all. Rather, it is pre-emptive or preventative self-defence: using force to stop a threat from emerging, either at all (the control exercised in the West Bank linked, in the case of Area A, to security-cooperation with the PA) or to a large extent (the siege of Gaza). Another element to this is to understand the occupation as a mechanism to prevent the existence of another fully-autonomous Arab state at its borders, out of a generalized defensive concern in relation to this state (thus the point of the occupation is, in effect, to prevent a fully-functioning Palestinian state).

79. In addition to this, the use of force in the West Bank is sometimes explained in self-defence terms as a means of protecting settlements and settlers. This can be in response to actual/imminent attacks and also understood in terms of the more long-term pre-emption and prevention of emergent threats.

80. Pre-emptive or preventative self-defence is not a valid basis for using force in self-defence in international law. Thus the occupation in general, and protective actions relating to settlements and settlers in particular, cannot be legally justified on this basis. This analysis has proceeded on the hypothetical basis that there was a *jus ad bellum* justification for introducing the occupation in 1967. The present conclusion of illegality in self-defence terms is based on the absence of the necessary actual or threat of imminent armed attack meeting the relevant test, or the existence of such a threat but the disproportional relationship between the occupation and that threat, in the period after the occupation began. Such a conclusion is arrived at from the manifest impossibility of such a situation being in existence, on a continued

basis, for anything other than a short period, given the narrow nature of the test, in terms of both the threat required, and the requirement of proportionality that the occupation must meet to be justified even if a threat meeting the test is in existence.

81. When it comes to the settlements and settlers, the use of force to protect them, even from actual or imminent attacks, is legally-invalid, bearing in mind the extraterritorial nature of the settlements. There is no legal right to use force in self-defence to protect a state's nationals outside its territory (e.g., nationals cannot be legally assimilated into the state in this extraterritorial context, so that an attack on them is an attack on the state). (Protection of the settlers from threats to them in the West Bank, including East Jerusalem, could be achieved by ending their illegal presence there.)

6.d What about the Oslo Accords?

6.d.i Potential significance

82. The 1993/5 so-called 'Oslo Accords' between Israel and the PLO were supposed to provide an interim regime for governance in the oPt, pending some sort of ostensibly permanent agreement/settlement. These are significant for present purposes because the interim regime amounted to a reconfigured version of the occupation: not bringing the occupation to an end, but altering how authority would be exercised under it as between Israel and representatives of the Palestinian people. It might be said that this arrangement presupposed the lawfulness of the (reconfigured) occupation regime it stipulated (assuming that the occupation was then conducted on this basis, which in many ways it has not been). Thus even if the occupation was existentially illegal up until that point, in reconfigured form it was provided with a valid legal basis thereafter, via consent to

this provided by the PLO, thereby meeting one of the tests indicated above (category (a), para. 64) for a lawful use of force by a state.

83. A complete treatment of the legal significance of the Accords to the question of the legal basis for the occupation is beyond the scope of the present Opinion. But what follows is sufficient to answer the question. For these purposes, it will be assumed for the sake of argument that the Accords can be understood as capable of being potentially binding treaties in international law, provided that certain standards are met (which, as will be explained, they are not). And that the particular core principles of treaty law that will be addressed in the following analysis, articulated in the United Nations Vienna Convention on the Law of Treaties (VCLT) (1969) as applicable to treaties between States, exist also in customary international law and are applicable, on this basis, to these instruments, given what has been said already about the legal position of the Palestinian people in international law as enjoying legal personality as a Self-determination Unit.

6.d.ii Invalidity (1): Coerced 'consent' through the illegal use of force

84. The Accords were 'agreed' to by the PLO in the context of the already-existing occupation, being conducted by the other party to the Accords, which, as established above, was an unlawful use of force. In international law, an agreement is void if, in the words of the VCLT, "its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations" (Art. 52). Without such a rule, which the VCLT (using its State-centric language, which can be applied here to a non-state Self-determination Unit) characterizes as "coercion of a State by the threat or use of force", states would be able to lawfully use force to gain advantages that would not be obtainable, or would be less easily obtainable, through peaceful means. Which would risk greater recourse to war internationally. The effort to limit war to narrow

circumstances of self-defence, in order, in the opening words of the UN Charter, to “save succeeding generations from the scourge of war”, presupposes and requires not only that such a doctrine of recourse to force as a means of self-help is itself illegal, but also, to bolster this, that provision is made for certain illegal-war-enabled advantages to be ruled out. This is the reason why, as indicated earlier, the use of force to annex territory is not only a violation of the international law on the use of force, but also, in terms of the law of title to territory, treated as a nullity (Israel is not sovereign over those areas it has purportedly annexed, like East Jerusalem).

85. As explained above, the existence of the occupation is not only a means, in certain areas, of Israel purporting to assert *de jure* annexation (so not, for Israel, an occupation at all, but an ostensible assertion of sovereignty). It is also more generally a means through which Israel establishes ‘facts on the ground’ to give it advantages when it comes to the terms of any agreement, including insofar as provision might be made there for Israel to acquire territorial sovereignty over parts of the West Bank. One such advantage is that the basic fact of this domination manifestly places the Palestinian people in an egregiously weak position when it comes to negotiations on any agreement, whether interim or final-status. This is of an acute manner when the agreement in question, as here, is *about the very nature of that domination itself* (re-configuring how the occupation will operate). Diana Buttu, reflecting on her time as a negotiator for the PLO in a later period, [observed](#): “There is a structural problem when Palestinians negotiate with Israelis. It’s like negotiating with a gun to your head; where the people under occupation have to negotiate their own release.”

86. Representatives of a dominated people were negotiating and supposedly agreeing with the state exercising domination over them about the terms of their domination, in the context where this particular form of domination was prohibited by international law as an illegal use of force, and, moreover, on the basis that the domination would not end, but be simply reconfigured, albeit ostensibly on an interim basis. Thus there is an unbroken continuation and correspondence

between the activity the Accords provided for on the part of Israel, and Israel's pre-existing activity. In the context where that activity was illegal as a matter of the international law on the use of force. This is a perverse situation where a state is using force illegally to coerce the victim of that illegal use of force to agree to an arrangement that amounts to a continuation (in partly reconfigured form) of the very same activity that was illegal up to that point. Needless to say, an immediate, automatic end to the occupation, which was not only what the Palestinian people wanted (and want), but also what international law required, was not an option.

87. Given that much of international law operates on the basis of a fiction of sovereign equality despite *de facto* inequality, treaties between unequal parties are not necessarily invalid for that reason. But one red line is when the powerful party, as here, is subjugating the other party in a particular manner—through an illegal use of force—in a way that has so compromised the freedom of action of that other party when it comes to their consent to the agreement, that the agreement can be understood to have been “procured” through that particular form of subjugation. The Oslo Accords meet this test and are legally-void on this basis. Indeed, their procurement in the context of the occupation constitutes a manifest and egregious form of coercion prescribed by the equivalent rule of customary international law to the provision in the VCLT when it comes to invalidity. At stake here is the integrity of the global rules on the use of force, and the legal prohibition on using force on a broad self-help basis.

88. The effect of this is that there cannot be any legally-valid settlement agreement between Israel and the Palestinian people until there is an end to the illegal use of force by Israel, i.e., the complete termination of the occupation of the West Bank (including East Jerusalem) and Gaza. It might be said that it is unreasonable to expect Israel to terminate the occupation until an agreement has been reached, notably because of the security concerns it has. And, in consequence, the prospects for settling the ‘dispute’, and so the eventual realization of self-determination for the Palestinian people this might bring about, are jeopardized by there being such

a requirement, since it risks a state choosing to violate international law if it sees this as necessary to ensure the continued survival of its people. Thus the imperative to adjust (as with Oslo) and eventually settle the dispute (and to enable Palestinian self-determination) should trump the foregoing considerations, and the Oslo arrangements, including, potentially, the purported acceptance they give to the continuation of the occupation (in reconfigured form) should therefore be regarded as valid. And so, potentially, the Oslo-compliant aspects of the occupation somehow became existentially lawful, at least initially (bearing in mind this was supposed to be an interim arrangement).

89. However, in international law disputes are supposed to be adjusted and settled, in the words of the UN Charter, “in conformity with the principles of justice and international law”—i.e., not adjustment and settlement at any cost, but adjustment and settlement that is just, and compatible with the applicable legal framework. An adjustment or settlement brought about through the egregious coercion of one party through the illegal use of force is unjust, and enabled through a violation of one of the most important areas of international law (reflected in it having *jus cogens* status, a matter to be addressed further below). It is ‘unjust’ because any agreement reached in such circumstances cannot not be relied upon to have been freely entered into by one of the parties, and is not, therefore, an ‘agreement’ worth the name. This matters, legally, because that party—the Palestinian people—are treated in international law as a collective entity with rights, notably the right of self-determination in particular. This right includes the right to freely choose whether or not to enter into international agreements. Suggesting that Israel’s justified objective of protecting its population can be furthered through an agreement imposed in this way is only legally permissible if the legal right of self-determination of the Palestinian people is to be treated as if it does not exist.

90. Furthermore, effectively bypassing the requirement of consent on the part of the Palestinian people on the grounds of Israel’s security concerns amounts to a re-

introduction, through the back door, as it were, of the legally-invalid doctrine that the use of force can be justified as a means of preventative self-defence (Israel can maintain the occupation for security reasons until it receives assurances in an agreement that are satisfactory to it). It would mean that even if Israel is not able to lawfully engage in the occupation as a form of preventative self-defence, if it nonetheless does this illegally, it can then use the inherent, profound power imbalance this creates as a means of subjugating the Palestinian people to coerce the representatives of those people to give their agreement to its continuance, thus removing the taint of illegality in use of force terms, and enabling the occupation's existential legality to have a valid basis through the ostensible consent of the sovereign authority.

6.d.iii Invalidity (2): Conflict with peremptory norms

91. The special status of the international law on the use of force that is violated by the occupation is reflected in the way that, as mentioned, the legal prohibition in this area of international law is given non-derogable or *jus cogens* status. Separate from provision on the invalidity of treaties procured through the use of illegal force, the VCLT also provides (Article 53) that a "treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law" (*jus cogens*), a stipulation that also exists in customary international law.

92. The Oslo Accords involved such a conflict in at least two ways.

93. In the first place, as already discussed, the Accords enabled Israel to use its illegal occupation to gain general advantages to serve its policy objectives which would have not been possible, or would have been more difficult, had the illegal occupation not been in existence at the time the Accords were negotiated and 'agreed'. By purporting to place such advantages on an international legal footing, the Accords conflicted with the legal prohibition on the use of force preventing a

state from using force other than in self-defence, i.e. the prohibition of its use by Israel to gain these advantages.

94. In the second place, again as indicated above, the Accords, if legally-effective, would enable Israel to obtain legal cover for its coercion, through the illegal use of force, of the Palestinian people in 'accepting' the arrangements they contained. As indicated above, this is incompatible with the right of self-determination, which also, as indicated above (section 1.c), has *jus cogens* status, since according to that right, such acceptance must be freely given. For this reason of bypassing meaningful consent alone, it conflicts with the right of self-determination. This is then aggravated by the fact that the particular arrangements provided for involve, in substance, a continued limitation of the Palestinian people to engage in self-administration. It is striking that this needs to be said, but coercing a people with a right of external self-determination through an unlawful denial of this right self-determination (the occupation) to accept a modified continued form of that denial of self-determination is a violation of that right.

95. The Accords are thus legally-void on two separate grounds of conflict with peremptory norms.

6.d.iv The Oslo Accords do not render the occupation lawful

96. The Oslo accords are legally-void because consent to them by the PLO was achieved through coercion in the form of an illegal use of force against the Palestinian people, and they conflict with two peremptory norms of international law. It might be said that, since the PLO acted as if the Oslo arrangements were valid, and invoked competences based on them, this has constituted an express agreement to, or at least acquiescence in, the agreements being valid/in force (and, moreover, because of this, they are estopped from raising invalidity). However, as a matter of treaty law, the legal consequence of invalidity on the particular grounds discussed here is

not affected in this way by such behaviour (unlike certain other grounds for potential invalidity), for good reason. (It is also important to acknowledge that insofar as the Oslo instruments provided for the devolution of power to/reduction in Israel's exercise of control over the Palestinian people, the requirement of Israel to do this, as a legal matter, does not depend on these agreements. It exists anyway, and in more fundamental form (the immediate requirement to end the occupation entirely), as indicated above, as a matter of the law of self-determination.)

97. The full legal consequences of the foregoing conclusions, and also further relevant legal matters that have not been addressed at all (such as the question of whether stipulations in the Accords conceived as ostensibly temporary arrangements have expired) are beyond the scope of the present Opinion. For present purposes, the foregoing analysis is sufficient to dispose of the question of whether the Accords somehow provide a valid legal basis for the existence of the occupation (configured in the particular fashion they stipulated): they do not.

6.e Conclusion—the occupation is an illegal use of force, and aggression

98. The effect of the foregoing analysis in this section is that there is no lawful basis for Israel to maintain the occupation or, put differently, to lawfully impede the Palestinian right of self-determination through maintaining the occupation. As a general matter, and in the specific context of protecting Israeli settlers and settlements. In consequence, the occupation of Gaza and the West Bank (including East Jerusalem) is existentially illegal as a breach of the international law on the use of force and the law of self-determination, and Israel is required to end it immediately. The latter is a necessary requirement of the right of the Palestinian people to realize their right to self-determination instantly, and, necessarily, not subject to any qualifications/conditions and/or the agreement to this by any other

actor, including Israel (see above, 2.c.iii, para 39). Every day this does not happen constitutes an illegal situation.

99. The nature of the breach of the international law on the use of force covered in the previous paragraph is such as to meet the definition of 'aggression' in international law. The term 'aggression' is usually as a synonym for a breach of the international law on the use of force, and, occasionally, a sub-set of such breaches that are of a particular grave nature. Insofar as the latter definition is concerned, the breach here meets and exceeds the threshold. It meets it with the existence of an unlawful, in *jus ad bellum* terms, occupation (the UN General Assembly has affirmed that an occupation can be an aggression). It then exceeds it through the aggravating factors of a link to annexation (above section 5), prolonged duration (addressed below section 6.f) and egregiously abusive conduct (addressed below in section 6.g). Aggression is illegal in terms of both the responsibility of the state of Israel, and also, for certain Israeli individuals in leadership positions (covered further below, section 8.c.v), individual criminal responsibility. The crime of aggression in the Rome Statute for the International Criminal Court is limited to aggression which because of its "character, gravity and scale constitutes a manifest violation of the Charter of the United Nations" (quotation from Art. 8*bis*, para. 1). For the same reasons that the breach of international law here falls within the (occasionally-used) definition of aggression covering a sub-set of breaches of the law on the use of force, the illegal nature of the use of force meets this ICC definition of the individual crime of aggression. Thus, in terms of this definition, the crime of aggression is being committed by certain individual Israelis. The question left to be determined (and beyond the scope of the present Opinion) is who these particular individuals are, in terms of meeting the relevant leadership test (see below, section 8.c.v.).

100. (What is left is a right to use force in self-defence in response to actual or imminent armed attacks on Israel (i.e. Israel within its borders, not 'Israel' in the form of settlers and settlements, or presence in territory that it claims to have

annexed but has not, such as East Jerusalem) from the West Bank or Gaza, for example rocket attacks from Gaza. Whether responses that have happened here have met the necessary test for legality is beyond the scope of the present opinion. (But the absence of a broader, ongoing right to use force in self-defence over the same areas means that these episodes cannot be folded into a general entitlement to use force when their lawfulness in *ad bellum* terms falls to be determined. They must stand or fall, legally, as individual incidents. This is significant to how the test operates, for example in terms of what constitutes an armed attack, and the question of imminence. Thus although, as mentioned above (para. 63) in the context of Gaza, the occurrence of these individual incidents is not the only moment when Israel is using force, the point is that there is no valid legal basis for the broader, ongoing use of force, and so indeed, when it comes to assessing legality, the incidents have to be addressed in isolation from the separate, related, broader use of force.))

6.f The 'prolonged' nature of the occupation—significant to, but not an autonomous basis for, illegality

101. The foregoing analysis indicates that the prolonged nature of the occupation is significant to the question of existential legality. But not as an autonomous heading of illegality. Its significance lies in the implications for the occupation meeting the *ad bellum* legal test, which is not itself about duration, but, rather, the existence of a particular legitimate aim, and proportionality to that aim. The effect of applying that legal test is to rule out a prolonged occupation. But the problem is, ultimately, not the duration itself, but the lack of a continually-existing valid purpose or the lack of consistent/continual proportionality between the occupation and a valid purpose that will inevitably present itself when occupations are prolonged. The end point might seem the same, but the journey to it is a different

one. And the end point might be different temporally, in that the effect of the legal test is to rule out anything other than a short-lived occupation, whereas sometimes the more general discourse around the 'prolonged' occupation suggests that a significant period needs to have elapsed before things became legally problematic. The difference, then, is that the legal test may lead to the conclusion that the occupation was illegal *from early into its existence*, and *therefore could not become prolonged*, whereas sometimes the discourse about the occupation being illegal because of its prolonged duration seems to suggest that it *only became illegal after it had become prolonged*. For sure, the prolonged nature of the occupation does mean that, as an illegal situation, the illegality is aggravated. This is potentially relevant to the (unusual) definition of 'aggression' (as a sub-set of an illegal use of force) and the ICC definition of the individual crime of aggression, but even here, as indicated above (para. 99), the definitions would be met without prolongation; prolongation just takes things further beyond the necessary threshold (and so at best can be seen as significant to the strength of any case being made).

102. A further point needs to be made about the relevance of the 'prolonged' nature of the occupation to its existential legality. Some commentators have suggested that occupation law, the occupation-specific component of the law regulating the conduct of armed conflict (the *jus in bello* or international humanitarian law (para. 3 above, addressed further in section 7 below)) *itself* rules out a prolonged occupation. This argument proceeds as follows. Occupation law addresses a situation after war, when a victorious state ends up in control of the territory that had been under the control of the defeated state. The situation has to be regulated to ensure that the rights of whomever is the actual sovereign over the territory concerned are preserved (in this case, because of the right of self-determination, the 'sovereign' is the Palestinian people). A regime is introduced to preserve the *status quo* and provide basic guarantees, until the legitimate sovereign can resume control, and the occupation ends. All of this assumes it is a temporary situation. Some take the existence of this assumption to conclude that, given that a

prolonged occupation would operate contrary to it, such an occupation would be illegal in occupation law. However, just because those who sought to regulate occupations saw such occupations as temporary does not mean that the temporary nature of occupations is thereby rendered legally obligatory by that regulatory framework. This is a *non sequitur*, transforming a regulatory regime only concerned with the operation of occupations into one that also addresses the existential matter of whether occupations should be in existence. As has been explained in the present section, the requirement that an occupation be temporary arises out of the entitlements of the sovereign entity in *general international law*, including the law of self-determination, to resume control of its territory, and the limits of the belligerent occupant's right to prevent this, which are determined by a test set by the *international law on the use of force*—the *jus ad bellum*. Treating the *in bello* regime of occupation law as if it had *ad bellum* characteristics in this way is to make a category error.

6.g. Is Israel's abusive treatment of the Palestinian people relevant to the question of the existential legality/illegality of the occupation? Yes and no.

103. The link to the *in bello* standards also requires a further matter to be clarified. As covered in the next section, these standards are concerned, essentially, with how ostensibly 'humane' Israel's treatment of the Palestinian people is under the occupation. Given that Israel's violation of these standards has been so widespread and grave—its treatment of the Palestinian people has been so abusive—some have suggested that this somehow itself constitutes an independent basis for the occupation to be rendered existentially illegal. The 'trusteeship' basis for the rules of occupation law is highlighted—the idea that the occupier is supposed to exercise authority not in its own interest, but in a protective manner in the interests of the occupied population—and, given that the violations have been so egregious, the

view is taken that this constitutes a fundamental breach of trust so as to delegitimize the existence of trusteeship relationship itself—the existence of the occupation. However, whereas occupation law does indeed impose what are effectively legal requirements of trusteeship onto occupations, as a legal regime it *does not also*, unlike certain other international legal arrangements for trusteeship over people (e.g. Article 22 of the League of Nations Covenant for the Mandates) provide the *legal basis for the existence of the trusteeship arrangement itself*. That existential authority comes from a different area of law—the law on the use of force. Thus the trusteeship rules (of occupation law, within the *jus in bello*) may be violated, but this does not by itself affect the legal position on the existence of the trusteeship arrangement, since this is determined by other norms (the *jus ad bellum*).

104. That said, there is a link between the two forms of legality/illegality. The *ad bellum* legal standards include within them a test, of necessity and proportionality, which is breached if the *in bello* standards are breached. In consequence, a violation of the latter standards affects the existential legitimacy of the occupation as a matter of the former standards. Thus in breaching the *in bello* standards, including occupation law, during an occupation Israel is acting beyond what is justified by the law on the use of force. This renders the occupation in and of itself illegitimate as a matter of the latter rules. That said, such illegitimacy could be remedied by bringing the practice into line with the rules. *Viz*, a complete reversal of key components of the occupation. If this happened, the *ad bellum* requirements of proportionality and necessity would not be breached, insofar as the indirect link to the IHL rules are concerned. Left to be determined would be whether the requirements of proportionality and necessity are met insofar as the link to the requirements of self-defense are concerned. As mentioned, such a determination leads to a conclusion of illegality. It is only this consideration, then, concerning the occupation's purpose, not its conduct, that is ultimately dispositive of its existential legitimacy in international law. If this test were *not* met, it would not matter whether breaches

of the *in bello* standards also rendered the occupation unlawful in *ad bellum* terms because of their significance for the necessity/proportionality test. The occupation is 'already' unlawful and thereby existentially illegitimate—these considerations just aggravate the illegality. If the test *were* met (which is not the case) then the occupation would, as a matter of the law on the use of force, have elements of legality (it has a just cause and is a proportionate means of meeting that cause) and illegality (aspects of its conduct are unjustified).

105. As with the prolonged nature of the occupation (see para. 101), the fact that the *ad bellum* illegality of the occupation is aggravated by the abusive way the occupation is conducted (thus taking things further beyond what is necessary and proportionate) is potentially relevant to the (unusual) definition of 'aggression' (as a sub-set of an illegal use of force) and the ICC definition of the individual crime of aggression, but even here, as indicated above (para. 99), the definitions would be met without this (and any other form of aggravation). Abusive conduct just takes things further beyond the necessary threshold (and so, as with prolongation, at best can be seen as significant to the strength of any case being made here).

106. Two final points need to be made about the significance, to the existential legality/lawfulness of the occupation, of Israel's abusive treatment of the Palestinian people. One set of commentators who adopt the aforementioned erroneous position that this by itself renders the occupation by Israel existentially illegal, conclude that in consequence, the Israeli occupation should be replaced by some sort of international trusteeship (presumably the idea being that this would not be abusive, or would be less likely to be so). This fails to acknowledge the significance of the right of self-determination, as a repudiation of trusteeship *in and of itself*, not simply trusteeship that is abusive (para. 39.2). Relatedly, it is also significant more broadly that the exclusive focus on the idea that the occupation being abusive renders it unlawful has the unfortunate effect of suggesting that the Palestinian people are only entitled to be free of the occupation because they have been treated abusively by the occupant, not also because of the simple fact of the

existence of the occupation itself. This ignores the more fundamental self-determination entitlement both as a basis for the Palestinian right to freedom, and also as a legal obligation that Israel is violating by maintaining the occupation, *in addition to* the obligations it is violating in the abusive way it treats the Palestinian people.



7. Legality/illegality of the *conduct* of the occupation

7.a. What law applies to the conduct of the occupation?

107. The Israeli exercise of control over the West Bank and Gaza is a use of force (see above) of a particular kind that is regulated by the *jus in bello*, a.k.a. the laws of war or international humanitarian law. It is beyond the scope of the present Opinion to clarify which precise norms are applicable here.

108. Within this body of law, 'occupation' law in particular is applicable if a use of force involves the effective overall control over non-sovereign territory. International human rights law also applies to a state exercising overall control over non-sovereign territory. As indicated above, the West Bank, including East Jerusalem, and Gaza, are both non-Israeli-sovereign territory (in particular, Israel is not sovereign in East Jerusalem). In both tests of applicability, the 'overall' element means that situations where control at lower levels is exercised by other actors (e.g., in the West Bank, in Area A, and those activities in Area B that are performed by Palestinian bodies; in Gaza, with the Hamas authority throughout, other than during Israeli incursions) still fall under the test for applicability if there is a super-structure of effective control operating respect to these arrangements, as is the case for the entirety of the West Bank and Gaza (on Gaza, see also what is said above, para. 63). In other words, put negatively, the test in both areas of law certainly encompasses, but is not limited to, situations where Israel is directly involved in exclusive administration, as in Area C, and East Jerusalem, and those activities performed by Israel in zones where there are also Palestinian bodies performing certain functions (i.e., Area B), *if*, as is the case here, Israel also performs further activities that places everything—i.e. not just in the foregoing areas/activities, in both the West and Gaza—under its effective control. This concept of 'effective control' can also be manifest in different ways, as is the case,

for example, where the nature of the Israeli control over the West Bank is compared to that over Gaza (on which, again, see above para. 63). There is no 'one size fits all' requirement in terms of required substantive practices, and thus a range of very different practices, from the land, sea and air siege-measures imposed on Gaza (id.), to the ongoing 'boots on the ground' presence in many parts of the West Bank, can (and do) all constitute effective overall control according to the test.

7.b. Who is responsible for what?

109. The State of Palestine is also bound by international human rights law, having ratified most of the main international human rights treaties. A full explanation of the complex interplay between Israel and Palestine's overlapping human rights obligations is beyond the scope of the present Opinion (see [here](#)). But a general point can be made. The overall nature of Israel's effective control with respect to the entirety of the West Bank and Gaza means that it is legally responsible for the realization of all the rights in the international human rights treaties it has ratified, in both places. The fact that in certain instances (e.g., notably in Area A, and Gaza) significant authority is exercised by Palestinian bodies, with potential implications for Palestine's human rights obligations, does not alter this. What it means is that in such situations the nature of responsibility is overlapping. Complicated and highly context-specific determinations need to be made. Conversely, because there is no overall Palestinian effective control anywhere in the West Bank or Gaza, those areas where there is no Palestinian administrative presence at all, and where Israel is the exclusive authority, such as East Jerusalem and Area C, there is no issue of overlapping responsibilities: Israel's obligations are the only relevant ones.

7.c The substantive meaning of Israel's obligations, bearing in mind the existentially illegal character of the occupation

110. Viewed in isolation, Israel's obligations in IHL (including occupation law) and IHRL would seem to permit, and indeed require, the state to take various positive actions in the West Bank and Gaza, to both protect its own soldiers, and also to protect the human rights of all people—the Palestinian people, and Israeli settlers—in both places. It might even be thought that the effect of these positive obligations would be to somehow require the continued existence of the occupation in order for the protective objectives of the obligations to be realized. This might, indeed, somehow then require a deepening of the occupation, such as intervening even more than is the case at the moment within area A, for example to protect human rights there if they are being violated by Palestinian bodies there.

111. However, the foregoing fails to take into account the complete legal picture. Given that the occupation is, as outlined above, existentially illegal, Israel has no right to exercise authority with respect to Gaza or the West Bank *at all*. The other rules of international law covered in the present section merely seek to regulate this authority if it is exercised; they do not also provide a normative basis for the authority to be in existence. (This is the other side of the coin from the earlier point (section 6.g) about the abusive nature of Israel's occupation, which involves a violation of these norms, not itself serving as a stand-alone basis for the occupation to be existentially illegitimate). Such a position is sometimes difficult to grasp, since human rights law, for example, when applicable territorially, is understood to operate on an assumption that the authority it is regulating—the state in its own territory—is legitimate. Extraterritorial applicability, by contrast, cannot operate on such an assumption, since the extraterritorial exercise of authority can sometimes, as here, be illegitimate.

112. It is important, then, when turning to the law regulating the conduct of the occupation, not to lose sight of the law reviewed earlier, which requires an

immediate end to the occupation. Since that law deals with whether Israel can even exercise authority in the first place, it has to be addressed first in the sense that a starting point for what Israel can or cannot do, legally, has to be a requirement to end the occupation, rather than a requirement to behave, as an occupier, in a certain way.

113. This matter also has implications for the legal validity of what Israel then does if it fails to end the occupation. This is addressed below in section 8.d.

7.d. Violations

114. As mentioned earlier, there has been and continues to be widespread violations of IHL, including occupation law, and international human rights law, by Israel in the West Bank, including East Jerusalem, and Gaza. These include violations arising out of positive actions by Israeli agents, including soldiers, as well as the failure to protect the Palestinian people from harm perpetrated against them by Israeli settlers. It is beyond the scope of the present Opinion to set out the case here, which is well-documented. Such violations have been wide-ranging, some falling into the categories of 'grave breaches' of the IHL Geneva Conventions, and 'other serious violations' of IHL, thereby constituting war crimes, such as the implanting of settlers and the establishment and maintenance of settlements. Israel's behaviour in East Jerusalem, acting as the sovereign when it is not, violates those areas of occupation law which rule out such behaviour, notably the prohibition on altering the existing domestic law unless absolutely prohibited, which Israel's purported extension of its own national legal system over the area drives a coach and horses through. Moreover, more generally, certain practices have constituted unlawful racial discrimination in general and apartheid in particular. These have constituted, in the case of apartheid, an international crime, and, more generally, when they have been part of an attack, crimes against humanity. Violations of other

areas of human rights law (which also in some cases constitute violations of IHL) have been and are widespread and covering the full spectrum of rights (and also involving attacks on and attempts to shut down and restrict the activities of human rights defenders, individually and in the form of NGOs), in terms of civil and political rights (e.g., the right to life; freedom from torture, inhuman and degrading treatment, which also gives rise to individual criminal responsibility; freedom of movement) and economic, social and cultural rights (e.g. the rights to housing, education, cultural heritage).

115. Israel also violates the right of internal self-determination through various measures that undermine the ability of the Palestinian people to freely participate in and live under a system of legitimate and effective self-government together with a fully functional and effective civil society. And it violates this right, the right to return (see 2.b.iii) the right of freedom of movement and residence and the right to religious freedom and expression by preventing Palestinian people from freely entering and leaving Gaza and the West Bank (including East Jerusalem) and moving within/between these territories and sub-divisions with them (e.g. the division between East Jerusalem and the rest of the West Bank) (the right of religious freedom of expression and religion being particularly affected in the case of access to holy sites, such as in the Old Cities in Al-Quds/Jerusalem and Al-Khalil, where issues of access are multiple, in terms of both entry to wider territorial units (e.g. for the Al-Quds/Jerusalem Old City sites, access to East Jerusalem generally, and the Old City in particular) and then access restrictions (whether episodic or ongoing) that are holy-site-specific (e.g. the Al-Masjid Al-Aqsa compound and the Church of the Holy Sepulchre in Al-Quds/Jerusalem; the Al-Masjid Al-Ibrahimi in Al-Khalil)).

8. Different (il)legalities—multiple meanings; ‘settler colonialism’; significance of differences; linkages between meanings; invalidity

8.a. Multiple meanings of ‘illegal occupation’ and ‘unlawful occupation’

116. The terms ‘illegal occupation’ and ‘unlawful occupation’ are ambiguous. They can denote existential illegality, or illegality of conduct, or both. Existential illegality can denote the basic fact of the occupation as a denial of self-determination, or the purposes associated with the existence of the occupation, such as annexation and/or self-defence, being invalid. Illegality in this sense can also be erroneously postulated in relation to a matter which is not an independent basis of existential illegality—such as the occupation’s prolonged nature and its abusive conduct—or is such a basis, but does not cover the entire situation—such as annexation. Illegality in conduct can be specific to a sub-set of the staggeringly wide-ranging and multi-faceted breaches of international law involved in that conduct. What all this suggests is that it is important to address the complete legal picture when assessing legality, to situate key features of the occupation in their correct place in the applicable legal frameworks (e.g. the question of the duration of the occupation being a factor in *ad bellum* legality not a separate heading of legality/illegality), to acknowledge when legality/illegality is being used in a non-comprehensive sense, and be alive to the possibility of such specificity when the terms are invoked by others.

8.b. Settler colonialism

117. Now that the complete legal picture has been reviewed, it is possible to clarify the legal significance of a particular term, commonly invoked as an ostensible basis for the charge that the occupation is illegal: 'settler colonialism'. Using this term to describe the actions of Israel and Israelis in the West Bank, including East Jerusalem, and Gaza, characterizes these actions in terms of the establishment and consolidation of the Israeli state, as a Jewish state, and Jewish communities identified as being of that state, as existing in those territories.

118. Settler colonialism is not itself a legal term in international law in the sense that it is something that is subject to distinct legal characterization and regulation/prohibition. But several of the legal concepts applied above address elements of what it is concerned with, and the consequence of their application is to render it unlawful.

119. The relevant legal concepts are (see above for further detail):

119.1. Annexation (formally claiming (Israeli) sovereignty) through the use of force (the areas of international law violated here being the law on the use of force, the law on self-determination, the sovereign legal entitlements of the State of Palestine, all on the Israeli-state level, and the crime of aggression on an individual level) (see section 5.b).

119.2. Using military force to control the territory in order to 'perform (Israeli) sovereignty'/conduct sovereignty-as-administration only (i.e. exercising state-like authority in the absence of a claim to annex) and/or to establish 'facts on the ground' that can pave the way for a claim to (Israeli) sovereignty (what might be meant by the term 'de facto' annexation) (the areas of international law violated here being, again, the law on the use of force, the law on self-determination, and the sovereign legal entitlements

of the state of Palestine, all on the Israel-state level, and the crime of aggression on an individual level) (see section 5.c).

119.3. Implanting Israeli settlements in occupied territories (the areas of international law violated here being occupation law on a state level and war crimes on an individual level) (see section 5.c).

119.4. The various, multiple, lethal, abusive and discriminatory practices perpetrated against the Palestinian people, including the practice of apartheid, implicating the various areas of international law that regulate the conduct of the occupation (see above, section 7) covering state and individual criminal responsibility, which are a necessary consequence of the foregoing policy of settler colonialism, given its Jewish, i.e. non-Arab-Palestinian, character, occurring in a land where the Palestinian people are already present. Acquiring territory for the state, but not wishing the individuals on that territory who are not Jewish to be part of the state, requires the presence of those individuals to be eliminated, whether through extermination, expulsion, or making life so hard that people are forced to leave. For those who remain, given that their presence is fundamentally at odds with the policy, the policy requires that they are denied citizenship, and, beyond this, treated in various ways involving acute disadvantages compared to Jewish Israelis.

120. Thus although 'settler colonialism' is not unlawful as a distinct heading of illegality, it is unlawful constructively through the application of the foregoing areas of international law.

8.c. Importance of the correct starting point: *everything* Israel does in the West Bank and Gaza lacks a valid international legal basis and is an illegal exercise of authority, not just those things that violate the rules applicable to the conduct of the occupation

8.c.i Illegal exercise of authority as a general matter

121. A fundamental consequence of the existential illegality of the occupation is that, necessarily, *everything Israel does in Gaza and the West Bank (including East Jerusalem) lacks a valid international legal basis, and is an illegal exercise of authority, not just those things which violate the law regulating the conduct of the occupation reviewed above in section 7.* Just as the existence of the conduct-regulatory framework does not provide a basis for Israel to maintain the occupation (see para. 103), so too, if the occupation is maintained by Israel, as it is currently, the fact that the substantive norms of this regulatory framework do then entitle and indeed require Israel to do certain things does not alter the more fundamental position that Israel lacks *any legal authority to do anything, and whatever it therefore does is illegal, even if it is compliant with and pursuant to the rules of the conduct-regulatory framework.* Thus the United Nations Human Rights Committee observed in para. 70 of its 2019 [General Comment 36](#) on the right to life in the International Covenant on Civil and Political Rights (to which Israel is a party) that a state engaging in a use of force that constitutes aggression—i.e., one that is existentially illegal in this way according to the *jus ad bellum*, as in the present case—violates *ipso facto* the obligation in the Covenant not to engage in the arbitrary deprivation of life. In other words, in an illegal war, *every* violation of the right to life is, necessarily, ‘arbitrary’ (i.e. lacking in legally-valid justification) and therefore illegal as a violation of the Covenant.

8.c.iii Interplay between *ad bellum* and *in bello* legality

122. How can international law simultaneously say that the very existence of the occupation is illegal, and that Israel is required and entitled to do certain things during it? How can, for example, Israel be understood to be entitled to use necessary and proportionate force to promote public order in the West Bank (according to IHL) if its very presence there, including when it comes to public order functions, is an illegal use of force (according to the *jus ad bellum*)—and in consequence, following the logic of the UN Human Rights Committee, a particular public order action, involving lethal force that is necessary and proportionate, and otherwise also IHL compliant, is illegal in human rights law?
123. The law does this because it operates at two different levels, dealing with matters of relatively different significance, both of which have to be taken into account to arrive at the complete legal picture. The pragmatic objective of having IHL—to rein in the excesses of war regardless of whether it has a just cause—necessarily means its rules apply equally to a state engaged in a use of force that is lawful in *jus ad bellum* terms, and one that is unlawful in such terms. But this does nothing to alter the more fundamental matter being dealt with by the law on the use of force. Instead, a sub-set of the violence that is illegal as a matter of the *jus ad bellum* is then rendered unlawful a second time for that state, in the *jus in bello*, in order for there to be rules in operation that would also render the same type of violence, if perpetrated by a state acting otherwise lawfully under the *jus ad bellum*, illegal. Put more crudely, to ensure that neither state acts in a manner considered to be ‘inhumane’, both states have to be subject to rules against ‘inhumanity’, even if, separately, the recourse to war by one such state is also to be treated as unjust on a more fundamental level, thereby prohibiting ‘inhumane’ and (supposedly) ‘non-inhumane’ acts alike by that state. This also has the benefit of enabling a more detailed set of requirements to be stipulated, with dedicated mechanisms of

enforcement, operating universally between belligerents, for the sub-set of belligerence that is to be impermissible on all sides.

124. Thus for Israel, the rules of IHL, including occupation law, ultimately offer no legal cover for anything it does during the occupation, since there is a more fundamental set of rules that it is still violating by being there, even if it is IHL-compliant. Moreover, when Israel violates IHL in particular incidents, framing things as only involving an IHL violation misses the point that that the acts in question are in any case illegal for a more essential and comprehensively-applicable reason than the matters IHL is concerned with (such as public order/military necessity, proportionality, protected persons etc.). And this illegality therefore subsists *even if IHL is complied with*. Appraising individual incidents only in terms of IHL compliance misses this, and, indeed, rests on a false premise that, once the question of such compliance has been resolved, the question of the legality/lawfulness of the incident has been comprehensively determined. When the outcome of the exclusively-IHL-based appraisal is that the incident was IHL-compliant, such an approach leads to an incorrect overall conclusion that the incident was lawful, when actually it was not. When the outcome of the exclusively-IHL-based appraisal is that the incident was unlawful, this leads to an incorrect overall suggestion that those aspects of the incident that led to the violation of IHL are the only basis for illegality—a misleading, distorted picture. It is the difference between saying that soldiers abusing and killing Palestinian people at checkpoints in the West Bank in ways that violate IHL is illegal because of the IHL-non-compliant abuse and killing only, and saying that it is illegal also because Israel has no valid right to even exercise any form of authority, including the operation of restrictions at checkpoints, in the first place. This difference can be illustrated further in the following example.

8.c.iv Example: the 2022 killing of Shirin Abu Akleh and the attack on her pallbearers

125. In May 2022, the world was shocked when Palestinian-American Al-Jazeera journalist Shirin Abu Aqleh was killed by a shot seemingly fired by Israeli soldiers in Jenin, and subsequently the pallbearers of her coffin were attacked by Israeli soldiers at St Joseph hospital in Sheikh Jarrah, Al-Quds/Jerusalem. The common approach taken by both critics of these incidents, and Israel in its defence of them, was to analyse the incidents in terms of whether or not, in each case, the force used was justified according to IHL and IHRL. So with the killing, the analysis focused on whether, if the shot had been fired by an Israeli soldier, it is permissible to target journalists or whether somehow the killing might have been permissible as collateral damage. And in the violence against the pallbearers, the analysis focused on whether there was legitimate security concern in that situation and whether, if so, the response was necessary and proportionate. On the basis of these lines of enquiry, critics claimed that the norms of IHL and IHRL were breached; Israel claimed these areas of law were complied with. What united everyone was that this was the way to think about the situation, as a general matter, and as far as which areas of international law are relevant and need to be applied to it.

126. But focusing only at this level of analysis ignores a more fundamental point, which Diana Buttu highlighted when commenting on the killing in an interview on al-Jazeera given at the time: that it was only possible because Israeli soldiers were in Jenin in the first place. Diana Buttu was inviting her audience to shift their level of analysis, to take in the broader context—the occupation itself—and understanding it, in and of itself, as a form of oppression and an act of violence. Because it is an exercise of authority that is illegitimate. This political point is rooted in the legal position, once the *jus ad bellum* and the law of self-determination (which is part of IHRL—something commentators invoking his law

to appraise these incidents in the way outlined above seem to overlook) is brought into the picture.

8.c.v Different actors and different obligations

127. It might be said that the foregoing legal position creates potential confusion and contradiction, with soldiers acting on the basis of IHL only (or IHL plus IHRL minus self-determination only), thus not following the complete set of standards that need to be taken into account to ensure lawful behaviour. A full treatment of this issue is beyond the scope of the present opinion, but the following points can be made. As a general matter, individual soldiers are not the direct subjects of the areas of international law applicable here, whether the *jus ad bellum* or the *jus in bello* (see section 1.a. above); it is the state of Israel. A sub-set of these obligations are then made directly applicable to them on the basis of individual criminal responsibility (see section 1.b above). This is, with one exception, limited to certain standards concerned with the conduct of the occupation only. And it is those standards only that are typically the basis on which soldiers are trained and which they are expected to follow in theatre. The exception to the foregoing occupation-conduct-specificity of international criminal responsibility is the crime of aggression (see above para. 99), which does indeed deal with the existential illegality of the occupation. However, this is limited only to individuals in senior positions who are in a position to determine its existence—in the words of the Rome Statute for the ICC, “in a position effectively to exercise control over or to direct the political or military action of a State” (art. 8 *bis* 1).

128. The effect of these differences is to disaggregate the legal framework in a manner that corresponds to the different determinative roles that actors play. Those in a position to determine the continued existence of the occupation, whether in civilian or military positions, are potentially subject to an international criminal

sanction—the crime of aggression—for their role in this continued existence. The state of Israel is also itself legally responsible here, as a matter of the *jus ad bellum* and the law of self-determination (setting aside the question of whether states can commit crimes), and, linking the individual and state responsibilities, it is for the leaders of that state to ensure it complies with that responsibility. If they do not do this, and the occupation continues, then it is these individuals, and the state of Israel, who are legally responsible for the fact that the soldiers in the West Bank have no right to be there, and, within this, no right to exercise any form of authority—whether or not IHL-compliant—in the first place. These individual soldiers, by contrast, are not internationally-legally-responsible in this way, their responsibilities in international law being limited very narrowly to areas of international criminal law concerned with IHL-compliance, as reflected in the specificity of their training, and the limitations of their capacities within the chain of authority. Any deprivations of life by these soldiers pursuant to the occupation which does not involve a breach of IHL will still be an unlawful violation of the right to life in human rights law. But that violation will be one committed by the state in whose name they acted (and, in terms of the crime of aggression, individual leaders). The state’s obligation to ensure its agents do not act in this way so as to lead to violations of its obligations in human rights law would require the state to end the occupation. Thus the constructive effect of the prohibition of the arbitrary deprivation of life in international human rights law is to require the state subject to such an obligation not to engage in the illegal use of force. Equally, leaders seeking not to commit the crime of aggression must use their power to direct state policy in this way.

8.c.vi Is the 'everything is illegal' position problematic in removing an incentive on the part of Israel to comply with international humanitarian law?

129. It might be said that foregrounding the existential illegality of the occupation, and taking the consequences of it to their logical conclusion, which is that, for example, any deprivation of life is going to be illegal, not just those deprivations of life that are unjustified in IHL terms, risks creating a perverse outcome. Israel will no longer have the same incentive to follow the rules of IHL in its conduct of the occupation, since even IHL-compliant actions will be unlawful on the alternative, more fundamental basis. Thus the conduct of occupation might be even more abusive than it is already.

130. Assuming for the sake of argument that it is helpful to even think about IHL in terms of an incentivising structure (something which is contentious, with account needing to be given to the alternative understanding of IHL in terms of common minimum standards), the *jus ad bellum* and law of self-determination is still existent and applicable, even if this is ignored by those who selectively emphasise only the application of IHL. The only way to address the foregoing concern, then, would be to do away with these areas of international law, and so when it comes to war, only regulate war when it happens, not also recourse to war itself. Then a belligerent who would, previously, have had the very conduct of war itself rendered illegal would no longer face that situation, and would only risk breaching international law if they behaved in an ostensibly 'inhumane' way on the battlefield. This would mean an end to the global efforts since 1945 to seek to use law to restrict when states can go war. Insofar as those rules make a difference in reducing the incidents of war, the incidents of war would presumably likely increase. And necessarily, in any such war, challenges to it as an existential matter would no longer be possible in legal terms.

131. In the context of the occupation, this would mean that Israel would be potentially strengthened in its current position of behaving as if it is entitled to exercise

authority over the West Bank and Gaza. Discussions of the question of the legitimacy of that authority would be even more likely to be only in terms of how ostensibly 'humane' it is, and not also whether it should be in existence in the first place and, if so, on what basis. International law would enable, by omission, Israel, its leaders and citizens to avoid thinking about these matters without having to account for any legal challenge to this mindset. This legal framing would also be compatible with a view of Palestinian people as somehow lesser human beings, who may deserve protection (like children) but not freedom as equals (the trusteeship concept as evident in IHL, including occupation law, supposedly repudiated by self-determination). This may degrade even further the capacity of Israeli society to comprehend at a collective level, with implications for government policies including on the question of ending the occupation, the nature of what is at stake in maintaining the occupation in terms of its effect on the Palestinian people. It would also have potential follow-on negative consequences for the discriminatory treatment of Arab-Palestinian citizens of Israel by other Israelis and the Israeli state.

132. The matter of potentially problematic incentives works both ways, then. There is no escape from such questions, whether the focus is on the complete legal framework, or only the IHL component of it. And being selective, invoking only potential problems with the former, risks exacerbating the potential problems with the latter, by failing to acknowledge their existence and thus presenting the situation as more easily appraised than is actually the case.

8.d. Invalidity, and implications for individual rights

8.d.i Invalidity generally

133. The illegal nature of Israel's presence and exercise of authority in the West Bank, including East Jerusalem, and Gaza, necessarily means that, a general matter, everything that Israel has done and is doing there—including, in the case of certain parts of the West Bank, decisions involving the full-spectrum of territorial administration matters, from the question of land ownership to issues of cultural heritage—on whatever basis (including, potentially, an ostensibly purportedly sovereign basis when it comes to East Jerusalem) is legally-invalid.
134. The interplay between the existential illegality of the occupation generally (not, then, simply the illegality of Israel's seemingly purported exercise of sovereignty in East Jerusalem, but its exercise of authority over the Palestinian territories as a whole) and what the applicable regulatory legal framework—chiefly, occupation law—permits and requires, again needs to be addressed here. As earlier, a full treatment of this issue is beyond the scope of the present Opinion. But in general terms it is important, as before, to put things in their correct order, and not jump to what occupation law might permit and even require Israel to do as if somehow there is not a more fundamental matter concerning whether it should be engaged in the occupation in the first place which needs to be addressed first. Moreover, when attention turns to occupation law, it is necessary to interpret the meaning of this law in the context the broader, more fundamental legal position. So, for example, the occupation law rules requiring an occupier to maintain the *status quo* in occupied territory unless absolutely prevented have to be interpreted in the light of what is potentially at stake if the *status quo* is altered—the right of self-determination of the Palestinian people—the existence of this right in international law, and *jus cogens* nature of the right.

135. On the specific issue of freedom of movement within, and freedom of entry and exit to and from, the West Bank (including East Jerusalem) and Gaza, of people and goods (including aid), it is important to note the following.

135.1. As indicated above (section 7.d), many of the decisions Israel makes and practices it engages in that impact on this matter violate the relevant conduct-regulatory applicable law. But in any case, more fundamentally, as Israel has no legal entitlement to exercise authority over these territories in the first place, necessarily, it has no legal entitlement to be making decisions about movement, entry and exit of people and goods (including aid) *at all*. Beyond, then, such decisions which violate the conduct-regulatory law—or, put differently, those decisions which may be understood to fall within what is permitted by such law, such as occupation law— *all such decision violate international law, since they are part and parcel of Israel's exercise of authority over these territories which is a violation of the law on the use of force and the law of self-determination*. And this illegality is evident, as explained above, simply by virtue of the exercise of authority itself, not simply, where it exists, illegality based on an invalid purported exercise of sovereignty. Put differently, Israel's imposition of restrictions on freedom of movement of people and goods (including aid) within, and entry and exit from, the West Bank (including East Jerusalem) and Gaza is illegal not just because Israel is not the territorial sovereign authority in these areas. It is also illegal because Israel lacks a legal entitlement to exercise authority in those areas on a non-sovereign basis.

135.2. The consequence of the foregoing is that any and all decisions and actions Israel takes to purportedly regulate and restrict freedom of movement of people and goods (including aid) within, and entry and exit from, the West Bank (including East Jerusalem) and Gaza is *legally invalid*. In other words, it has no international legal entitlement to do these things.

Thus actually Israel has no international legal capacity to prevent anyone, or any goods (including aid), from entering, leaving or moving within and between the West Bank (including East Jerusalem) and Gaza, for whatever reason. This is an entirely different situation, then, from one where a state is making decisions on movement within, and entry to and from, its own territory, or such decisions in relation to non-sovereign territory where that state has an internationally-lawful basis to exercise authority there.

8.d.ii Individual rights

136. Whereas everything done by Israel under the occupation has been and is invalid as a general matter, human rights law requires that certain consequences of this be treated as legally valid for individuals, if to do otherwise would violate their rights in human rights law. This is yet another matter that requires a full treatment going beyond the scope of the present opinion.

137. It is also complicated because of the presence of Israeli settlers, whose legal rights need to be correctly appraised. It is sometimes mistakenly suggested that the application of human rights law to Israel in the West Bank including East Jerusalem somehow enables such settlers to claim, on the basis of human rights, things (e.g. land and real property) which they would otherwise have no right to and which in some cases have been purportedly acquired on the basis of administrative and judicial decisions by Israel made on a discriminatory basis and pursuant to overall authority that is illegal. Thus human rights law somehow enables certain key components of settler colonialism and undermines or dilutes the impact of international law in rendering this practice illegal in the ways outlined above.

138. This is mistaken in multiple respects. The operative legal regime applicable to the occupation is arrived at by taking into account human rights law *together with* the rules of IHL, including occupation law, which contains important normative

distinctions between the Palestinian population, on the one hand, and Israeli settlers, on the other. Moreover, in any case, individuals do not have the human right to benefit from unlawful discrimination—quite the reverse, the breach of human rights law involved in that discrimination requires individuals benefiting from that breach to be deprived of the benefit. More generally, it is a basic legal principle that if something is illegally taken from its owner, valid title cannot be passed on to a third party. Furthermore, most of human rights law, and certainly when it comes to freedom from interference in enjoyment of land and property, freedom of movement and freedom of residence in human rights law, is concerned with context-specific balancing, of both conflicting rights and also between rights and legitimate restrictions on such rights. Necessarily, contextualism means that sometimes very different substantive legal positions are arrived at in relation to superficially similar situations, in relation to different groups of people, because of the context and how this context cuts differently as between the different groups.

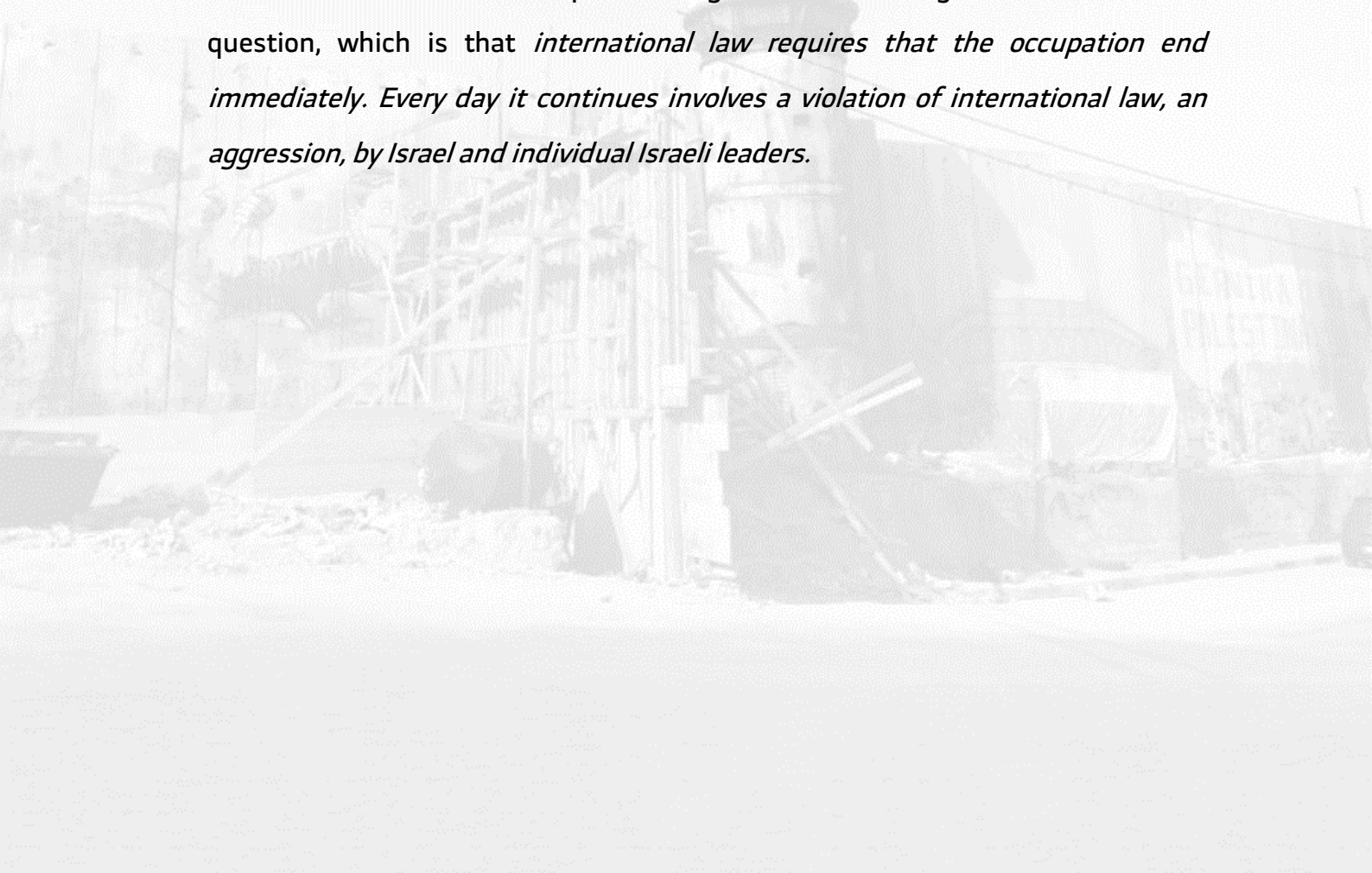
139. Context for present purposes includes, in addition to the aforementioned legal regime of IHL in general and occupation law in particular, the prohibition on racial discrimination generally and apartheid in particular, and the right of self-determination, areas of human rights law which, as indicated, have special non-derogable status, something which most other rights in human rights law (including freedom from interference in property use, freedom of movement and freedom of residence) do not. To state the obvious, in the West Bank (including East Jerusalem) the right of self-determination has a profoundly different significance for the Palestinian people compared to Israeli settlers. The former group of people are living on land that constitutes the territorial basis for their right to self-determination as Palestinian people. The latter group of people, by contrast, are *outside* the land that constitutes the territorial basis for their right to self-determination as Israelis (and as citizens of other states, as is sometimes the case). Hence their presence in the West Bank as settlers being illegal in international law. Treating these two groups of people as if the human rights they have in the West

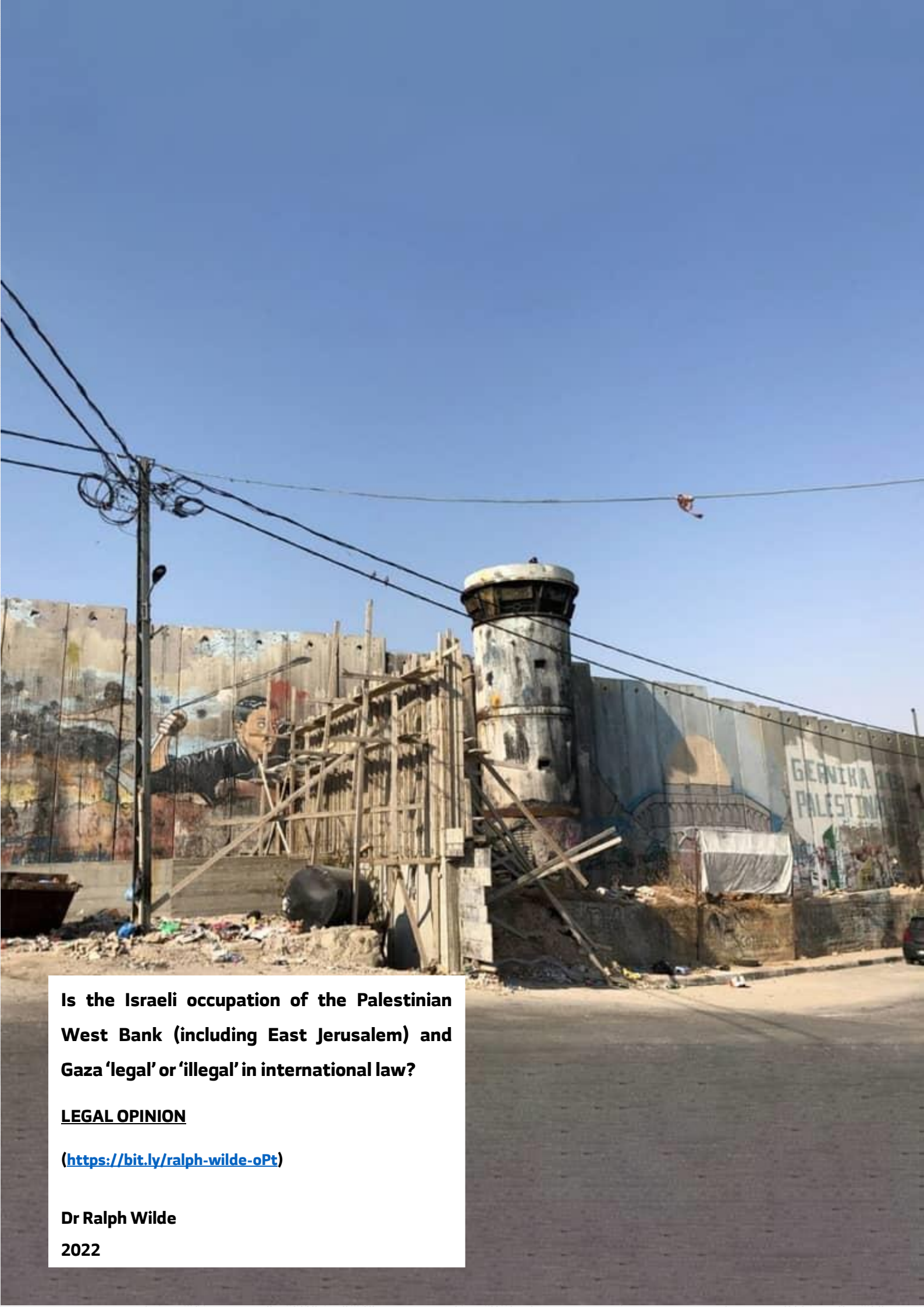
Bank have an identical substantive meaning misses this. This does not mean that Israeli settlers, as human beings, do not have human rights in the West Bank just as they would have them anywhere in the world. It is just that for those rights whose substantive meaning is dependent on context, the status of settlers *as settlers* is legally relevant.



9. Conclusion

140. Any treatment of the legality/illegality of the occupation cannot be selective. It is necessary to address the complete legal picture, as set out above. In consequence, all actors—states, officials of international organizations generally, the UN in particular, including the two international UN Committees set up to monitor the implementation of the human rights Covenants, other UN human rights institutions including Human Rights Council Special Procedures mandate-holders, human rights NGOs, and other interested parties—concerned with the compatibility of the occupation with international law generally, and international human rights law in particular, need to move beyond addressing merely how ostensibly ‘humane’ the conduct of the occupation is, and making a generalized affirmation of self-determination for the Palestinian people. They should also address the question of *the existence of the occupation, in and of itself, as a violation of the international law of self-determination and the international law on the use of force*. And face up to the significance of a negative answer to this question, which is that *international law requires that the occupation end immediately. Every day it continues involves a violation of international law, an aggression, by Israel and individual Israeli leaders*.





Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'legal' or 'illegal' in international law?

LEGAL OPINION

(<https://bit.ly/ralph-wilde-oPt>)

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