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CASE NOTE

THE KEYS TO THE DOOR AND THE TOOLS WE INHERIT: PALESTINE, INTERNATIONAL LAW AND THE INTERNATIONAL COURT OF JUSTICE

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CONTENTS

I INTRODUCTION

This case note brings together several contributions in order to analyse key aspects of the International Court of Justice's Advisory Opinion in *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* ('the *Opinion*').[1] The *Opinion* responded to a request from the United Nations General Assembly ('UNGA') to the International Court of Justice ('ICJ'), for an authoritative legal opinion on two legal questions:

a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition,

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[1] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 19 July 2024) ('*Policies and Practices of Israel in the OPT*').

character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

b) How do these policies and practices … affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?[2]

Public hearings were held in February 2024, where 49 member states and 3 international organisations presented their legal arguments and factual submissions concerning these questions.

The *Opinion*, delivered on 19 July 2024, clearly and unequivocally stated that Israel's continued presence in the Occupied Palestinian Territory ('OPT') is unlawful.[3] This goes beyond the previous international legal determinations over the past several decades finding specific actions of Israel in the OPT to be illegal[4] by deciding on the illegality of the occupation itself. As such, this most recent *Opinion* stated that Israel is under an obligation to bring to an end its unlawful presence in the OPT as rapidly as possible, cease immediately all new settlement activities, evacuate all settlers from the OPT and make reparation for the damage caused to all the natural or legal persons concerned.[5] Importantly, the Court found that all states are under an obligation not to recognise as lawful the situation arising from the unlawful presence of Israel in the OPT and not to render aid or assistance in maintaining the situation created by the continued presence of Israel within the OPT.[6] Finally, the *Opinion* requested that the UN, and especially the UNGA and the Security Council, 'should consider the precise modalities and further action required to bring to an end as rapidly as possible the unlawful presence of the State of Israel' in the OPT.[7]

In what follows, our collective of authors examines key aspects of the *Opinion*. We commence with an analysis of whether the nature of the dispute should be understood as "bilateral" or "universal", and how this question has evolved historically in relation to Palestine, especially in light of legal struggles over decolonisation. The next section expands upon this line of inquiry by considering how the Court used anti-colonial jurisprudence in its reasoning but did not reconcile — or even acknowledge — the tensions inherent in its exclusive focus on the OPT and its implicit or explicit acceptance of the partition and fragmentation of the Palestinian polity. The third substantive section of this case note builds on these two sections by specifically addressing the right of self-determination. Self-determination was the key legal terrain of the *Opinion*, which has importantly developed this area of the law by proclaiming aspects of the right to be of peremptory character. The next two sections of the case note address, in turn, the question of permanent sovereignty over natural resources, and the

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2 *Israeli Practices and Settlement Activities Affecting the Rights of the Palestinian People and Other Arabs of the Occupied Territories*, GA Res 77/247, UN GAOR, 4th Comm, 77th sess, 56th plen mtg, Agenda Item 47, Supp No 49, UN Doc A/RES/77/247 (9 January 2023, adopted 30 December 2022) para 18 ('*UNGA Res 77/247*').

3 *Policies and Practices of Israel in the OPT* (n 1) [261]–[262], [285].

4 Including in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 131 ('*Legal Consequences of the Construction of a Wall*').

5 *Policies and Practices of Israel in the OPT* (n 1) [267]–[271].

6 Ibid [285].

7 Ibid.

obligations of third states (particularly in economic matters) in light of the *Opinion*. Finally, in our conclusion, we turn to what the *Opinion* means for the future — what reparative justice might look like — and briefly address the question of whether international law can deliver such justice.

Inevitably, this case note is not exhaustive of all the matters raised by the *Opinion*. Rather, we have focused on the questions that existing commentary does not tackle adequately (such as the question of Palestine's partition) or on issues that we collectively consider to be important both as a matter of law (self-determination and the legal nature of the "question of Palestine") and as a matter of political dynamics (obligations of third states in the economic realm and resource exploitation) for the future of Palestine. We ultimately pay less attention to the Court's (correct) conclusion about the unlawfulness of Israel's presence in the OPT, not least because this has been an argument raised for decades by Palestinians and their allies.[8] Rather, we are interested in how the Court reached this conclusion: how the majority of judges as well as the states and international organisations that participated in the proceedings constructed their chains of reasoning by recovering specific aspects of international law; what factual information they considered to be pertinent; and what questions (legal and factual) they chose to bracket, ignore or sublimate.

II THE QUESTION OF PALESTINE: A "BILATERAL" OR "UNIVERSAL" QUESTION?

One of the first issues that the Court examined in its *Opinion* concerned '[w]hether the request relates to a dispute between two parties, one of which has not consented to the jurisdiction of the Court'.[9] With near unanimity, the Court found that it does not regard the two questions in the UNGA's request 'as being only a bilateral matter between Israel and Palestine'.[10] Although not unexpected, the Court's ruling is important, because it offers crucial insights into how the persistent question of Palestine is characterised in international legal discourse as either a bilateral or a universal question.[11]

Some participants (including Israel, Fiji, the United States and the United Kingdom) focused on the juridical nature of 'the dispute' between two parties,

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8 See, eg, Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press, 2019) ('*Justice for Some*'); Virginia Tilley (ed), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press, 2012); John Quigley, *The Case for Palestine: An International Law Perspective* (Duke University Press, 2005); Susan M Akram, Michael Dumper, Michael Lynk and Iain Scobbie (eds), *International Law and the Israeli–Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge, 2011).

9 *Policies and Practices of Israel in the OPT* (n 1) [33].

10 Ibid [35], [285].

11 On the 'Persistence of the Palestinian Question', see Joseph Massad, 'The Persistence of the Palestinian Question' (2005) 59 (Winter) *Cultural Critique* 1, 1.

Israel and Palestine.[12] In other words, they asserted that this was a bilateral dispute,[13] the resolution of which must be based on the consent of both parties. Responding to this argument, several participants in the proceedings before the Court (including Palestine, Brazil and South Africa) contended that the UNGA's request concerned 'the international community as a whole',[14] with all states then having a "legal interest" in the matter. Such a contestation between international law's bilateral and universal dimensions has been central to much of the legal discourse on the question of Palestine since the decolonisation era, and particularly since the 1990s.[15] One way to examine these competing arguments is to think of them as routine legal-technical matters and an intrinsic part of the judicial process, concerning the determination of the sources of law that would apply to the legal dispute and the scope of legal obligations for the concerned states. Although obviously correct, such a legal-technical approach to the two arguments can also obfuscate the political and economic strategies embedded in them.

The states that contended that the UNGA's request concerned a 'dispute' between two sides claimed that there exists a 'negotiating framework' for the resolution of 'the Israeli–Palestinian conflict'.[16] As per this argument, the negotiating framework was based on bilateral agreements concluded between Israel and the Palestine Liberation Organisation ('PLO') in the 1990s, collectively known as the Oslo Accords.[17] The Accords and attendant negotiations marked a

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12 See 'Written Statement by the United Kingdom of Great Britain and Northern Ireland', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List Number 186, 20 July 2023) 4 [8]–[9], 8–9 [19]. See also 'Statement of the State of Israel Pursuant to the Court's Order of 3 February 2023 Relating to the Advisory Proceedings Initiated by UN General Assembly Resolution 77/247', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 24 July 2023) 4 ('Statement of the State of Israel'); 'Memorial of Fiji', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 25 July 2023) 3–5 ('Written Statement of Fiji').

13 This argument sought to present 'unilateral actions' as an aberration to the bilateral framework: 'Written Statement of the United States of America', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 25 July 2023) 6 [2.1], 7 [2.3], 9–10 [2.10]–[2.11].

14 'Written Comments of the State of Palestine', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 25 October 2023) 17–22 [1.8]–[1.17].

15 See *Legal Consequences of the Construction of a Wall* (n 4), in which the nature of the Israel–Palestine 'dispute' was considered: at 158–9 [49]. See also the reference to *jus cogens* and 'universally accepted' rules in the written submission of some participants in that case, including in 'Written Statement of the Hashemite Kingdom of Jordan', *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, General List No 131, 30 January 2004) [5.37]–[5.38] and 'Written Statement Submitted by Palestine', *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, General List No 131, 29 January 2004) [393]. See also Erakat, *Justice for Some* (n 8) which offers a historical account of how the discourse on the juridical nature of the question of Palestine has changed over the years.

16 *Policies and Practices of Israel in the OPT* (n 1) [38], [41]–[42].

17 See Diana Buttu, 'The Oslo Agreements: What Happened?' in Mandy Turner (ed), *From the River to the Sea: Palestine and Israel in the Shadow of "Peace"* (Lexington Books, 2019) 17, 18–19.

decisive shift in the Palestinian struggle for self-determination. At least between 1974 and 1991, the PLO had presented the Palestinian struggle as one against the settler colonialism of Israel and a part of the global anticolonial movement.[18] Such a framing of the Palestinian struggle had resonated with, and found support from, Third World states and movements during the decolonisation era.

The Oslo Accords had the effect of fracturing the Palestinian national movement as well as the support it received from Third World states.[19] They facilitated a 'structure of fragmentation'[20] of Palestinian land and people — for instance, through the division of the OPT into different areas of jurisdiction administered by different authorities, producing different types of Israeli control over the West Bank, East Jerusalem and the Gaza Strip and different legal status for Palestinians living in these territories.[21] At the same time, the Accords designated negotiations between Israel and Palestine as the only means of ending Israel's settler colonial rule.[22] This process of bilateral negotiations coupled with the broader decline of Third Worldism weakened the support that the Palestinian national liberation movement received from Third World states.[23] The erosion of Third World solidarity on the question of Palestine also meant that the bilateral negotiating framework displaced the UN, which had been a principal site of Palestinian advocacy until then.[24] So, as Noura Erakat argues: '[t]he peace process reframed the struggle as a conflict between two equal parties that required compromise by both sides to achieve a resolution.'[25] By inventing the idea of Israel and Palestine as two 'equal' parties, capable of resolving the question of Palestine through bilateral negotiations, the Oslo Process obfuscated the political, economic and military imbalance between the two sides and the limitations of negotiations between the coloniser and the colonised;[26] or, in the words of Ghassan Kanafani, 'between the sword and the neck'.[27]

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18 Erakat, *Justice for Some* (n 8) 166–7.

19 Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia University Press, rev ed, 2010) xxiii, xxxii.

20 Rabea Eghbariah, 'Toward Nakba as a Legal Concept' (2024) 124(4) *Columbia Law Review* 887, 981. See also Tariq Dana, 'The Political Economy of Fragmentation: Palestine after 1948' in Michael Dumper and Amneh Badran (eds), *Routledge Handbook on Palestine* (Routledge, 2024) 223.

21 Mahmood Mamdani, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (Belknap Press, 2020) 304. See also Joseph Massad, 'Against Self-Determination' (2018) 9(2) *Humanity* 161, 179–81.

22 Buttu (n 17) 19, 26–32.

23 See, eg, Linda Tabar and Chandani Desai, 'Remembering Histories of Third World Internationalism Between India and Palestine: An Interview with Vijay Prashad' (2017) 6(1) *Decolonization: Indigeneity, Education and Society* 99, 102–4. Cf Nahed Samour, 'Palestine at Bandung: The Longwinded Start of a Reimagined International Law' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 595, 596–7, 602.

24 Noura Erakat, 'The UN Statehood Bid: Palestine's Flirtation with Multilateralism' in Karim Makdisi and Vijay Prashad (eds), *Land of Blue Helmets: The United Nations and the Arab World* (University of California Press, 2017) 95, 96.

25 Erakat, *Justice for Some* (n 8) 167.

26 Said described the 1993 Oslo Accord as 'an instrument of Palestinian surrender, a Palestinian Versailles': Edward Said, 'The Morning After' (1993) 15(20) *London Review of Books*.

27 'ABC's Richard Carleton interviewing Ghassan Kanafani', *ABC News* (Australian Broadcasting Corporation, 1970) 0:04:21–0:04:31 <https://www.abc.net.au/news/2024-09-19/abc-richard-carleton-interviewing-ghassa/104368218>, archived at <https://perma.cc/WRJ9-BL5H>.

This brief account of the Oslo Accords enables us to grasp how Israel and its allies mobilised international law to justify the fragmentation of the OPT, including through Israel's right to maintain its presence in the OPT.[28] The states that contended that the UNGA's request concerned a bilateral matter mobilised the principle of state consent to argue that the Oslo Accords have instituted 'a binding legal framework established specifically to resolve the Palestinian–Israeli conflict'.[29] The argument about the specificity of this consent-based legal framework (or *lex specialis*) was made by these participants to justify the purported irrelevance of the general rules and principles of international law in determining the illegality of Israel's policies and practices in the OPT. Consequently, the advocates of this argument suggested that determination of the 'ultimate status' of the OPT by the Court would 'dismantle' the consent-based bilateral legal framework as Israel had not consented to the resolution of the dispute by the ICJ.[30]

One of the ways in which several other states (including Palestine) countered this argument before the ICJ was by locating the UNGA request in a different frame of reference.[31] In their contention, the UNGA request concerned norms accepted and recognised by the international community as a whole, and, therefore, state consent could not justify derogations from them.[32] This was a reference to peremptory norms of international law (or *jus cogens*)[33] and the related concept of *erga omnes* obligations,[34] specifically the right to self-determination.[35]

To better understand the limits and potential of this argument, we should pay attention to the historical, 'competing ideological and institutional pressures' that

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28 Statement of the State of Israel (n 12) 3.

29 Written Statement of Fiji (n 12) 2. See also 'Statement of the State of Israel' (n 12) 3.

30 'Written Comments United States of America', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 25 October 2023) 9 [9], 10 [10].

31 'Written Comments of the State of Palestine' (n 14) 18–23 [1.10]–[1.18]; 'Written Statement of the Federative Republic of Brazil', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (International Court of Justice, General List No 186, 25 July 2023) 11–12 [58]–[64]; 'Statement of Ireland', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (International Court of Justice, General List No 186, 25 July 2023) 3 [9].

32 'Written Comments of the State of Palestine' (n 14) 17–18 [1.8] n 39, 18–23 [1.10]–[1.18].

33 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53.

34 The inclusion of the concept of *erga omnes* obligations in the international law discourse is traced back to *Barcelona Traction*, *Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3 ('*Barcelona Traction*'). Some scholars contend that the Court's articulation regarding this concept was meant to 'regain confidence' among the Third World states 'which were not happy with its judgment in the *South-West Africa Cases*': VS Mani, 'The Barcelona Traction Case (Second Phase) 1970 through the International Court: A Case Comment' (1971) 11 *Indian Journal of International Law* 112, 123. The relationship between the concepts of *jus cogens* and *erga omnes* has been the subject of considerable analysis, including recently in the work of the International Law Commission: *Report of the International Law Commission: Seventy-Third Session (18 April–3 June and 4 July–5 August 2022)*, UN GAOR, 77th sess, Supp No 10, UN Doc A/77/10 (2022) 64–9.

35 'Written Comments of the State of Palestine' (n 14) 18–22 [1.10]–[1.17].

informed the juridical architecture of *jus cogens*.[36] The concept of *jus cogens* entered the international legal discourse during the decolonisation era, primarily through the efforts of Third World lawyers and diplomats, who believed that placing peremptory norms at the apex of the sources of international law would assist the 'decolonization project'.[37] They forged *jus cogens* as a challenge to traditional consent-based international law, which, in their view, favoured Western powers and had proven burdensome for the newly independent states of Asia and Africa.[38] In this sense, the concept of *jus cogens* sought to institute an 'anti-imperialist universalism', and formed part of what Özsu describes as 'the international law of decolonization'.[39] Though the concept of *jus cogens* pursued 'a top-to-bottom reconfiguration of international legal order', in which the nation-state form and state sovereignty remained central,[40] the universalism embedded in the project of *jus cogens* and its hierarchical superiority to other rules of international law opened up a juridical space for contesting the unfettered exercise of authority by Western states.

In light of the above, it is worth paying attention to the Court's approach to the characterisation of the UNGA's request. Specifically in relation to determining whether it should give an opinion on the UNGA's request, the Court rejected the argument that the subject-matter of the request concerned a bilateral matter and that giving an opinion would circumvent 'the principle of consent to judicial settlement'.[41] In so doing, the Court adopted neither of the two approaches discussed above, but instead, it reasoned that the question of Palestine has been 'a matter of particular interest and concern to the United Nations'.[42] So, the Court used a third approach in characterising the subject-matter before it as multilateral in nature, without resorting to *jus cogens*.

Nevertheless, the question of peremptory norms became relevant when the Court examined the arguments by Israel and its allies about the Oslo Accords, particularly when it took up the question of applicable law and Israel's policies and practices in the OPT. In considering the contention that the Accords established a specific legal framework governing the Israeli–Palestinian conflict, the Court offered two different interpretations of the relationship between the Accords and the rules and principles of international law.[43] On the one hand, the Court offered an interpretation internal to the Accords by directing attention to its provisions, which call for respecting the pertinent rules of international law (such as international human rights law and the laws of occupation).[44] For the Court, this

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36 Umut Özsu, 'An Anti-Imperialist Universalism: *Jus Cogens* and the Politics of International Law' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press, 2017) 295, 297 ('Anti-Imperialist Universalism?').

37 Umut Özsu, *Completing Humanity: The International Law of Decolonization, 1960–82* (Cambridge University Press, 2024) 77 ('*Completing Humanity*').

38 Ibid 74–5.

39 Özsu, 'Anti-Imperialist Universalism?' (n 36); Özsu, *Completing Humanity* (n 37).

40 Özsu, 'Anti-Imperialist Universalism?' (n 36) 298.

41 *Policies and Practices of Israel in the OPT* (n 1) [35].

42 Ibid. Some states had also articulated such an approach in their written statements and comments: see, eg, 'Written Comments of the State of Palestine' (n 14) 18–22 [1.10]–[1.17].

43 *Policies and Practices of Israel in the OPT* (n 1) [102]. See above nn 12–13, 16–17 and accompanying text.

44 *Policies and Practices of Israel in the OPT* (n 1) [43], [102], [140], [263].

meant that the Oslo Accords do not establish an autonomous bilateral legal regime which permits Israel to detract from its obligations under the relevant rules of international law.[45] On the other hand, the Court stated that 'in cases of foreign occupation … the right to self-determination constitutes a peremptory norm of international law', which means that a bilateral legal framework cannot be used by Israel to 'fragment and frustrate the ability of the Palestinian people to exercise its right to self-determination'.[46] By stating the right to self-determination is a norm from which no derogation is permissible, the Court's *Opinion* has the effect of limiting any bilateral framework in so far as it is detrimental to the exercise of this right by the Palestinian people.

While the Court made a few crucial observations on the Accords,[47] it stopped short of examining the (il)legality of the Accords vis-a-vis the peremptory norm of self-determination. This omission is important because the Accords were the basis of Israel and its allies' justification for Israel's presence in the OPT, its policies and practices, as well as the fragmentation of Palestinian territory and people. As Judge Tladi stated in his declaration, the Court's hesitancy to examine the compatibility of the Oslo Accords with the peremptory norm of self-determination meant that the Court only gave 'an incomplete response' to a complex question about Israel's presence in the OPT.[48] Instead, as per Judge Tladi, 'a proper judicial response would have required the Court to consider … the relationship between the right of self-determination and the Oslo Accords'.[49] Such a response from the Court would have required examining to what extent the Accords themselves sustain the structure of fragmentation and authorise Israeli practices and policies in the OPT. Thus, even though the Court made it clear that the right to self-determination cannot be limited by the Oslo Accords, or any future bilateral agreement, [50] its reluctance to concretely examine the doctrinal implications of the conflict between treaties and peremptory norms left open the question about the *extent* of the Accords' incompatibility with the Palestinians' right to self-determination.

Despite this crucial limitation, it is important to think about the Court's opinion on Israel's violations of certain *jus cogens* and *erga omnes* obligations (including self-determination, which we discuss at length below) and its legal consequences for other states. The Court's observation that other states have an obligation not to recognise or contribute to Israel's actions in relation to the OPT evokes a Third Worldist tradition of international law — or international law of decolonisation — based on 'solidaristic visions of world order', a point expanded on in the next section.[51]

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45 Ibid [102].
46 Ibid [233], [262].
47 Ibid [263].
48 Ibid [34]–[35] (Judge Tladi).
49 Ibid [35] (Judge Tladi).
50 This could be seen in the Court's observation that 'the existence of the Palestinian people's right to self-determination cannot be subject to conditions on the part of the occupying Power, in view of its character as an inalienable right': ibid [257].
51 Özsu, *Completing Humanity* (n 37) 75.

III INTERNATIONAL LAW AGAINST PARTITION (?)

Much like with international law in general, the relationship between the ICJ and colonialism has been complicated. From the Court's refusal in 1966 to render a substantive judgment on South Africa's colonisation of South West Africa (contemporary Namibia) to its past unwillingness to take seriously colonial dynamics in territorial delineation cases,[52] the Court's anti-colonial credentials are decidedly mixed. If one also factors in the Court's past reluctance to give unequivocal answers to politically controversial questions, notably in cases concerning the right to self-determination,[53] then one would appreciate that the way the ICJ approached this *Opinion* was neither obvious nor inevitable. Not only did the Court answer unambiguously the controversial and ambitious legal questions posed by the UNGA, but it also constructed its reasoning about the OPT drawing from legal sources that deal specifically with the question of colonialism and/in international law. By mobilising both its own past jurisprudence,[54] and the anti-colonial resolutions of the UNGA, the ICJ's reasoning (more than its conclusions) indirectly vindicated the Third Worldist reading that sees Palestinian oppression and dispossession not as an "ordinary" case of human rights violations, but as an instance of colonialism and racial-minority rule.[55]

The Court's reliance on anti-colonial jurisprudence as the most appropriate legal framework for the OPT is particularly evident in paras 230–43, where the Court discussed the right to self-determination. Although its (cryptic) pronouncement that the right has achieved peremptory status in the context of foreign occupations was criticised even by judges of the majority as being unnecessarily narrow and obscure,[56] the Court's broader reasoning not only clarified the contours of the right but also demonstrated how Israel's occupation goes against its fundamental tenets. For example, the ICJ cited UNGA resolutions 1514 (colloquially known as the Declaration of Independence) and 2625, alongside common art 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, and early commentary by the Human Rights Committee to affirm the foundational nature of self-determination for the international legal order.[57] The Court also drew from its earlier findings concerning the Chagos Archipelago to affirm that territorial integrity is a corollary of Palestinians' right to self-determination and, as a consequence, Israel's systematic policy of settlement and annexation of the

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52 See *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6; *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6.

53 See especially *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 438 [82]–[83].

54 *Policies and Practices of Israel in the OPT* (n 1) [265], citing *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 138–9 [177] ('*Separation of the Chagos Archipelago*').

55 For a clear articulation of this approach, see The Ezra Klein Show, 'Transcript: Ezra Klein Interviews Aslı Ü Bâli', *The New York Times* (online, 17 May 2024) <https://www.nytimes.com/2024/05/17/podcasts/transcript-ezra-klein-interviews-asli-bali.html>, archived at <https://perma.cc/4KVT-M5P4>. On the idea of anti-colonial jurisprudence/lawmaking, see Jeena Shaah, 'The Imperialist Anatomy of Sanctions' (2024) 46(1) *University of Pennsylvania Journal of International Law* 65.

56 See *Policies and Practices of Israel in the OPT* (n 1) [2]–[5] (Judge Xue); [14]–[15], [18]–[27] (Judge Tladi).

57 Ibid [231]–[233].

OPT not only violated the laws of war but also rendered the occupation as such unlawful.[58] In a notable departure from its own previously narrow focus on specific rules of international humanitarian and human rights law,[59] the Court built on this anti-colonial jurisprudence to centre Palestinians' right to exist as a political community and therefore found 'acts aimed at dispersing the population and undermining its integrity as a people' to be in violation of peremptory norms of international law.[60]

In so doing, the Court affirmed the continuing relevance of the 'international law of decolonization' that we discussed above for the discipline of international law and for international politics writ large.[61] Oftentimes, the efforts of postcolonial states and scholars to reshape the international legal order in the service of (formal and substantive) decolonisation are presented within our field as having been unsuccessful or as having largely lost their relevance with the putative completion of decolonisation.[62] The ICJ's recent jurisprudence concerning both the OPT and the Chagos Archipelago evidences that even if we adopt a narrow, legalist and statist lens, the question of de/colonialisation remains open for the international legal order and therefore the legal rules that postcolonial states and scholars helped produce in the 1960s and 70s are still relevant and legally consequential. This is especially the case in light of the Court's unambiguous statement that the realisation of the Palestinian right to self-determination cannot be subject to conditions imposed by Israel or others.[63] Dominant political and even legal discourse has often treated Palestinian self-government (and, rarely, sovereignty) as a sort of "reward" for "good behaviour" or as a concession to be granted by Israel and/or its allies. In a sharp departure from this conceptualisation of Palestinians as essentially rightless,[64] the Court affirmed the inalienable character of their right to self-determination and concluded that the termination of the occupation ought to be swift and unconditional.[65]

Important as these affirmations of the Palestinians' right to self-determination may be, they cannot erase the fundamental tensions related to territory, territorial integrity and polity fragmentation running through the text of the *Opinion*. For the Court's unequivocal condemnations of Israel's systematic efforts to fracture Palestinian society need to be read in light of the question that it is addressing,

58 Ibid [237], [262].

59 See *Legal Consequences of the Construction of a Wall* (n 4).

60 *Policies and Practices of Israel in the OPT* (n 1) [239].

61 Özsu, *Completing Humanity* (n 37).

62 'The virtual end of decolonization therefore means that the legal debate does not have great practical significance today, except in the context of the struggle of the Palestinians for self-determination': Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 5th ed, 2018) 601, 606.

63 *Policies and Practices of Israel in the OPT* (n 1) [257].

64 On the rightlessness of Palestinians within the framework of contemporary liberal Zionism, see Mohammed Fadel, 'Beyond Liberal Zionism: International Law, Political Liberalism and the Possibility of a Just Zionism' (2024) 34(1) *Transnational Law and Contemporary Problems* 48.

65 *Policies and Practices of Israel in the OPT* (n 1) [257], [267].

which focuses exclusively on the territory that Israel occupied in 1967.[66] This territory, though, is less than 25 per cent of historic Palestine, and it is home to less than 50 per cent of Palestinians worldwide.[67] However, this fragmentation of Palestinian society and, by implication, the undermining of its right to self-determination began long before 1967 and was at times carried out through international legal means. Notably, the UNGA *Resolution 181 (II)* ('*Res 181 (II)*') recommended the partition of mandatory Palestine between an Arab and a Jewish state allocating to the latter 55 per cent of the territory and most of the fertile land, despite the fact that Palestinians outnumbered European Jews in Palestine at a 2:1 ratio in 1947.[68] The resolution was opposed at the time by Palestinians and other Arabs but also by the two states that had just emerged from a partition process, India and Pakistan.[69] Indian and Pakistani representatives pointed out that the partition of the Indian subcontinent — traumatic, chaotic and violent as it may have been — followed elections that, despite the limited franchise, had given at least parts of the population the opportunity to express their political preferences, and it followed the principle of majority rule. In contrast, Britain never carried out elections in mandatory Palestine precisely because they were keenly aware that the Arab majority staunchly opposed partition.[70] As Palestinian legal scholar Ardi Imseis has painstakingly documented, the partition plan was supported at the UN by Western and settler colonial states that openly embraced ideas of racial and civilisational hierarchy.[71] Despite the grounding of the initial partition plan on an openly gradated view of humanity that modern international law purports to reject,

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66 The first legal question stated for the Court was:

> What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, *settlement and annexation of the Palestinian territory occupied since 1967*, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

Ibid [1] (emphasis added).

67 According to the Palestinian Central Bureau of Statistics, the estimated number of Palestinians worldwide in 2025 was 15.5 million, out of which 5.5 resided in the OPT: see Palestinian Central Bureau of Statistics (State of Palestine), 'The Palestinian Central Bureau of Statistics (PCBS), Presents a Brief on the Status of the Palestinian People at the End of 2025' (Media Release, 31 December 2025) <https://www.pcbs.gov.ps/site/512/default.aspx?lang=en&ItemID=6137>, archived at <https://perma.cc/RL6X-45RJ>. Although Israel was allocated approximately 55 percent of the territory of historic Palestine by UNGA Resolution 181(II), it currently claims 78 percent of that territory. For a visual representation of this expansion, see 'Israel's Borders Explained In Maps', *BBC* (online, 11 October 2023) <https://www.bbc.com/news/world-middle-east-54116567>, archived at <https://perma.cc/A6YC-67SB>.

68 *Future Government of Palestine*, GA Res 181 (II), UN GAOR, 2nd sess, 128th plen mtg, Agenda Item 22, UN Doc A/RES/181(II) (29 November 1947). For legal analysis of the partition plan, see Erakat, *Justice for Some* (n 8) 44–57; Ardi Imseis, *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (Cambridge University Press, 2023) 60–76 ('*The UN and the Question of Palestine*'); Ardi Imseis, 'The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity' (2021) 57(1) *Stanford Journal of International Law* 1.

69 Victor Kattan, 'The Partitions of India and Palestine and the Dawn of Majority Rule in Africa and Asia' in Victor Kattan and Amit Ranjan (eds), *The Breakup of India and Palestine: The Causes and Legacies of Partition* (Manchester University Press, 2023) 159, 159.

70 Ibid 170–2, 178.

71 Imseis, *The UN and the Question of Palestine* (n 68) 95–6.

the ICJ cited *Res 181 (II)* repeatedly, not least due to its eventual acceptance by the PLO in 1988 as a precondition for the Oslo negotiations.[72]

Even so, the OPT is significantly smaller than the territory that *Res 181 (II)* allocated to the Arab state. This discrepancy is the result of Israel's military conquest of territories that were not allocated to it by the UN partition plan. Even though the Court implicitly adopted the Zionist narrative that war began when Israel declared independence and was attacked by its Arab neighbours in May 1948,[73] the historical record shows otherwise. A civil war had broken out between Jewish and Palestinian paramilitary groups in mandatory Palestine already since November 1947, following the adoption of *Res 181 (II)*.[74] Civil strife resulted in the flight and expulsion of hundreds of thousands of Palestinians before the commencement of inter-state war in May 1948.[75] Mass displacement of Palestinians accelerated over the period of inter-state war, resulting in the cumulative displacement of over 750,000 Palestinians from the territories that were assigned to the Jewish state by *Res 181 (II)* as well as by the additional territories that Israel conquered during the 1948–9 war with its Arab neighbours.[76] Known as Nakba ('the catastrophe' in Arabic), this systematic process of expulsion, displacement and fragmentation of the polity has been fundamental to the Palestinian experience and the main means through which Palestinian self-determination has been denied since 1947.[77] Although the ICJ had to respond to the UNGA's specific question and thus focus on the OPT, its instruction that states ought to 'distinguish in their dealings with Israel between the territory of the State of Israel and the Palestinian territory occupied since 1967', is in direct tension, if not outright contradiction, with its proclamation that 'a people is protected against acts aimed at dispersing the population and undermining its integrity as a people'.[78] Finally, the unequivocal — and legally unnecessary — embrace of the "two-state solution" by the Court not only left unanswered elementary questions about the viability of such a Palestinian state, which would be territorially fragmented and economically dependent, but also actively foreclosed the extension of the Court's discussions of Israel's policies of racial discrimination, fragmentation and denial of self-determination to Palestinians who remain within the territory of Israel.[79] In the next Part, we address some further limitations of the Court's engagement with the right to self-determination all the while

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72 'On 15 November 1988, referring to resolution 181 (II) "which partitioned Palestine into an Arab and a Jewish State", the PLO "proclaim[ed] the establishment of the State of Palestine"': *Policies and Practices of Israel in the OPT* (n 1) [64].

73 Ibid [53]. See Benny Morris, *1948: A History of the First Arab–Israeli War* (Yale University Press, 2008) 180–263 for the narrative itself and see Ilan Pappé, 'The Vicissitude in the 1948 Historiography of Israel' (2009) 39(1) *Journal of Palestine Studies* 6, 11–13, which discusses such narratives as Zionist.

74 Rashid Khalidi, *The Hundred Years' War on Palestine: A History of Settler Colonial Conquest and Resistance* (Profile Books, 2020) 72.

75 Ibid 74–5.

76 Eghbariah (n 20) 889.

77 On the inadequacy of existing international crimes and concepts when it comes to the plight of the Palestinian people that is centred around fragmentation and displacement, see ibid.

78 *Policies and Practices of Israel in the OPT* (n 1) [239], [278]. See below Part V.

79 Ibid [283]. On the legal and political subordination of Palestinians who hold Israeli citizenship, see Lana Tatour, 'Citizenship as Domination' (2019) 27(2) *Arab Studies Journal* 8; Eghbariah (n 20) 931–2.

acknowledging its important contributions to the doctrinal development of the right.

IV SELF-DETERMINATION: VICTORIES, LIMITATIONS AND POSSIBILITIES

Building on the above, it is clear that self-determination is the *key* terrain of contestation in the *Opinion*. It is also the overarching legal framework for the Court's examination of Israel's particular practices and policies. This is stated clearly in the UNGA's question to the ICJ, phrased as: 'What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination…?'[80] Although 'the question of self-determination' is addressed in detail in just a few pages and towards the end of the *Opinion* (after the Court had found that Israel's settlement policy, acts of annexation, and related discriminatory legislation and measures are in breach of international law),[81] the entire *Opinion* reverberates with this fundamental issue.[82]

The *Opinion* commenced with a 'General Context' of the situation of Israel in the OPT. This act of contextualisation started with the classification of Palestine by the League of Nations as a Class A mandate, under Great Britain as the mandatory power.[83] The nominal 'ultimate objective' of the League's mandates system was 'self-determination and independence of the peoples concerned'.[84] From this starting place, however, the Court did not stretch its gaze back to the vital Balfour Declaration or earlier,[85] with Balfour himself writing in 1919 that 'in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination'.[86] Nor did the Court engage with the *San Remo Resolution*, which vested the Mandate for Palestine with Great Britain and expressly made the latter 'responsible for putting into effect' the Balfour Declaration that constrained Palestinian self-determination.[87] In this respect, a "Palestine exception" was enacted within international law already since the days of the League of Nations, justifying significant deviations from the stated goals and principles of the mandate system.

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80 *UNGA Res 77/247*, UN Doc A/RES/77/247 (n 2) para 18.

81 *Policies and Practices of Israel in the OPT* (n 1) [230]–[243]. It has previously been affirmed that the Palestinian people have a right to self-determination: see *Legal Consequences of the Construction of a Wall* (n 4) 182–3 [118] .

82 *Policies and Practices of Israel in the OPT* (n 1) [14] (Judge Tladi). That declaration goes on to state that 'the main finding of the Court in this case is based on self-determination': at [15] (Judge Tladi). The Court states that

> [t]he sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory [('OPT')] and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the [OPT] unlawful: at [261].

83 *Policies and Practices of Israel in the OPT* (n 1) [51].

84 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 31 [53].

85 Khalidi (n 75) 23–7.

86 Letter from Arthur Balfour to Lloyd George, 19 February 1919, quoted in Isaiah Friedman, *The Question of Palestine, 1914–18: British–Jewish–Arab Relations* (Routledge and Kegan Paul, 1973) 325.

87 *San Remo Resolution*, United Kingdom–France–Italy–Japan, signed 25 April 1920.

Only focusing, then, on high-level legal principles laid down by the League of Nations offers a very partial history of the Palestine mandate, but it can nevertheless be instructive to consider self-determination as a right and its content, contours and challenges. It was at the League that 'semi-peripheral' actors worked to remove international legal obstacles to sovereignty, in particular the 'standard of civilization' — and in so doing, 'semi-peripherals made possible the emergence of a right to self-determination'.[88] This was a vernacular that many peoples grasped onto to frame their justice claims, both at the League and in the decades since.[89] But while self-determination was an argumentative strategy, it was the modalities of statehood — conceptualised as the coming together of government, population and territory — that became established law. This ultimately allowed some peoples to 'demand or obtain by force territorial control and thus acquire self-determination',[90] but it excluded those who could not make the same claims to statehood based on territorial control. In particular, Indigenous peoples from settler colonies used the argumentative strategy of self-determination at the League, but were rebuked.[91] Self-determination developed in ways that would strengthen states claims to territory rather than Indigenous justice claims.[92] Self-determination was 'appropriat[ed]' at the League, in ways that were 'aimed at warding off its radical implications',[93] and instead was 'deceptively imperial and conservative',[94] being used to support 'racial hierarchy'.[95] More so, in mandatory Palestine British promises about the establishment of a 'Jewish national home' required deviation from even the most minimalist commitments to self-rule.[96]

These tensions and shortcomings are useful background as we consider self-determination in this *Opinion*. The *Opinion* does not ground self-determination in the law of the League, but rather in the *UN Charter* and the international legal documents that define and prioritise self-determination, outlined in the previous section. It notes that in cases such as this one — cases of foreign occupation — the right to self-determination is a peremptory norm of international law[97] that is also a right opposable to everyone (*erga omnes*).[98] This is the first time the Court declared self-determination to be a peremptory norm, albeit apparently limited to

88 Arnulf Becker Lorca, *Mestizo International Law: A Global History 1842–1933* (Cambridge University Press, 2014) 226. On the 'standard' of civilisation and Class A mandates, see Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020) ch 3.

89 Sophie Rigney, 'On Hearing Well and Being Well Heard: Indigenous International Law at the League of Nations' (2021) 2 *Third World Approaches to International Law Review* 122.

90 Lorca (n 88) 226–7.

91 Rigney (n 89) 142.

92 Ibid.

93 Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press, 2019) 42.

94 Tracey Banivanua Mar, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge University Press, 2006) 88.

95 Getachew (n 93) 40.

96 John Quigley, 'Britain's Failure to Gain Legal Standing for the Balfour Declaration' (2023) 10(1) *Cogent Arts and Humanities* 1, 2–4.

97 *Policies and Practices of Israel in the OPT* (n 1) [233].

98 *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [29] ('*East Timor*'); *Separation of the Chagos Archipelago* (n 54) 139 [180].

cases of foreign occupation.[99] This determination, against a background of historical hesitancy to refer to peremptory norms both generally and specifically in relation to self-determination, is significant; indeed its significance 'cannot be overstated', as put by Judge Tladi.[100]

In order to answer the question posed to it, the Court was required to determine 'whether the policies and practices of Israel, as the occupying Power, in the [OPT] impede the exercise of the right of the Palestinian people to self-determination'.[101] The Court found that there are four elements relating to self-determination that are of particular relevance. These are, first, the right to territorial integrity as a corollary of the right to self-determination; second, that self-determination is a protective force against 'acts aimed at dispersing the population and undermining its integrity as a people';[102] third, that self-determination involves the right to 'exercise permanent sovereignty over natural resources'; and fourth, that 'a key element of the right to self-determination is the right of a people freely to determine its political status and to pursue its economic, social and cultural development'.[103] Ultimately, taking these four elements of self-determination together, the Court decided that:

> The prolonged character of Israel's unlawful policies and practices aggravates their violation of the right of the Palestinian people to self-determination … Israel's unlawful policies and practices are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination.[104]

The first three of these four elements concern the relationship between people and territory. Importantly, the Court held that Israel, 'as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign State, over the entirety of the [OPT]'.[105] The Court noted that 'Israel's annexation of large parts of the [OPT] violates the integrity of [that territory], as an essential element of the Palestinian people's right to self-determination'.[106]

Bolstering Palestinian self-determination on the basis of territorial integrity is in many ways a powerful move at a time when Israel seems committed to sever the ties between Palestinian people and their land both in Gaza and at the West Bank. However, strengthening both the right to self-determination alongside territorial and statehood claims for Palestinian people may further undermine the

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99 Also noted in *Mornah v Republic of Benin (Judgment)* (African Court on Human and Peoples' Rights, App No 028/2018, 22 September 2022) [298].

100 *Policies and Practices of Israel in the OPT* (n 1) [14]–[17], [22] (Judge Tladi).

101 Ibid [234].

102 Ibid [239], continuing the Court's previous concern with Israel's dispersal of the Palestinian population that undermined its integrity as a people: see *Legal Consequences of the Construction of a Wall* (n 4) 184 [122].

103 *Policies and Practices of Israel in the OPT* (n 1) [237]–[241].

104 Ibid [243].

105 Ibid [237].

106 Ibid [238]. There is some debate as to whether self-determination is violated at the moment of occupation or when that occupation is continuing over a certain time period: see Andrew Sanger, 'Inherent Illegality: Israel's Presence in Occupied Palestinian Territory Violates Fundamental Rules of International Law' (2025) 84(1) *Cambridge Law Journal* 1. It is important also to note that the Court's linkage between self-determination and the right to territorial integrity is one recognised under customary international law: *Separation of the Chagos Archipelago* (n 54) 134 [160].

self-determination claims of groups without continuous territorial claims. At the League, self-determination was malleable enough to be invoked in support of the rights of colonised peoples yet still support the imperial order.[107] This tension can also be observed today and in relation to the present *Opinion*. Self-determination can be mobilised 'to reinforce state structures' and in support of national liberation and 'revolutionary struggles'; and there is a real question as to whether self-determination 'sanction[s] or subvert[s] the international state system'.[108] Today, self-determination for Indigenous peoples has been limited under the *UN Declaration on the Rights of Indigenous Peoples* to claims within existing territorial states; this minimalist conception of self-determination becomes reducible to a right to be consulted.[109] While building a firm link between self-determination and territory may be welcome for the Palestinian people,[110] this framework may be equally limiting within an international law that continues to be imperial and concerned primarily with states.

An additional area of importance relating to these four elements of self-determination is the separate declaration of Judge Charlesworth. Although Judge Charlesworth did not directly address the right of self-determination outside two brief references, her Honour discussed at length the intersecting discrimination that Palestinian women face in the context of ongoing Israeli occupation, which has obvious implications for gendered self-determination.[111] This account needs to be read in conjunction with Judge Charlesworth's extensive consideration of the rights of Palestinian women to self-determination in her pathbreaking book with Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* ('*The Boundaries of International Law*').[112] There, the two feminist authors posit that the achievement of 'external self-determination' does not always translate to equal benefits for all members of the relevant group, pointing out that 'peoples' struggling for self-determination are not homogenous and often experience significant in-group discrimination.[113] Charlesworth and Chinkin's extensive account of the 'role of Palestinian women in the struggle for self-determination' highlights not only the negative effects of the occupation on women across the OPT, but also the discrimination that Palestinian women can experience 'internal[ly]' within patriarchal structures of Palestinian society.[114]

Judge Charlesworth's declaration reintroduces these concerns through an intersectional framework that demonstrates 'how being both Palestinian and

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107 See above nn 89–91 and accompanying text.

108 Özsu, *Completing Humanity* (n 37) 36. See also Getachew (n 95) 42.

109 See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 19, 46(1); Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) *European Journal of International Law* 141, 157 n 56.

110 But see our concerns above concerning the limitations of the *Opinion*'s territorial focus.

111 *Policies and Practices of Israel in the OPT* (n 1) [2]–[10], [14], [27] (Judge Charlesworth).

112 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, rev ed, 2022) 155–64. It is also interesting that the material for the case study on Palestinian women in this book was gathered at a conference in Gaza in 1994: at 155 n 185.

113 Ibid 154–5.

114 Ibid 161.

female in the [OPT] may interact to cause serious disadvantage'.[115] Her Honour's concluding points on this matter plainly indicate their relevance to 'Israel's policies and practices of settlement and annexation' analysed by the Court,[116] which primarily impacts Palestinian self-determination. Considering Charlesworth's earlier work alongside her recent declaration helps explicate the connections between intersecting discrimination faced by Palestinian women and their self-determination within and through the broader Palestinian struggle. In *The Boundaries of International Law*, the two authors clearly linked self-determination with the equal participation of men and women in political *and* economic life.[117] Politically, this is not just a shallow, tokenistic appearance within elite political levels, which, as the authors noted, was once prevalent in Gaza,[118] but a need to reflect 'gendered agency' where autonomous action is grounded in collective social relations,[119] as Charlesworth and Chinkin saw during the first intifada.[120]

Reading the declaration of Judge Charlesworth alongside her earlier feminist legal work is a useful reminder of the limitations of a state-centric approach to self-determination. One can acknowledge these limitations and nevertheless find both doctrinal and political value in the ICJ's engagement with this right. Part V will discuss one of these upsides, focusing on the ICJ's emphasis on permanent sovereignty over natural resources as a core component of self-determination.

V PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

In the *Opinion*, the ICJ highlighted that the right to exercise permanent sovereignty over natural resources ('PSNR') is one of the four elements of self-determination[121] and a principle of customary international law in its own right.[122] This principle was first articulated in the early 1950s.[123] It was a key demand of the Third World decolonisation movement in the 1960s,[124] as well as a central element of the proposal for the New International Economic Order in the 1970s.[125] Building on these movements asserting PSNR, the Palestinian people's right to permanent sovereignty over their natural resources has been affirmed repeatedly by the UNGA since 1972.[126]

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115 *Policies and Practices of Israel in the OPT* (n 1) [8] (Judge Charlesworth).

116 Ibid [10] (Judge Charlesworth).

117 Charlesworth and Chinkin (n 112) 163.

118 Ibid 158.

119 Maria O'Reilly, *Gendered Agency in War and Peace: Gender Justice and Women's Activism in Post-Conflict Bosnia-Herzegovina* (Palgrave Macmillan, 2018) 75, 78; Nancy Fraser and Rahel Jaeggi, *Capitalism: A Conversation in Critical Theory*, ed Brian Milstein (Polity Press, 2018) 118 ('*Capitalism*').

120 Charlesworth and Chinkin (n 112) 157.

121 *Policies and Practices of Israel in the OPT* (n 1) [240].

122 Ibid, citing *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 251–2 [244] ('*Armed Activities*').

123 Nico Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) 3. See also: at ch 2.

124 Özsu, *Completing Humanity* (n 37) ch 3.

125 *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UN GAOR, 6th special sess, 2229th plen mtg, Supp No 1, UN Doc A/RES/3201(S-VI) (1 May 1974) para 4.

126 Schrijver (n 123) 152–6, 161–3 (table 5.1).

The ICJ has addressed questions relating to PSNR in previous cases.[127] In the 2005 case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* the ICJ recognised the importance of PSNR in the context of occupation, even if it did not find it applicable on the facts.[128] In this *Opinion*, however, the ICJ found a breach, stating that 'Israel's policy of exploitation of natural resources in the [OPT] is inconsistent with its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources',[129] impeding the exercise of its right to self-determination.[130]

Most of the Court's discussion of how Israel has been exploiting the natural resources in the OPT was included in broader considerations of Israeli settlement policy. The Court treated the exploitation of natural resources — alongside transfer of civilian populations, confiscation or requisitioning of land, extension of Israeli law, forced displacement of the Palestinian population and violence against Palestinians — as an aspect of the international illegality of the settlements. In doing so, the Court identified a clear link between the principles of law dealing with occupation and those with PSNR, noting that '[w]here … an occupying Power pursues a policy of exploitation of natural resources in the occupied territory contrary to the law of occupation, this policy could be contrary to the principle of permanent sovereignty over natural resources'.[131]

The starting point for the Court's discussion of Israeli exploitation of natural resources was art 55 of the *Regulations Respecting the Laws and Customs of War on Land* ('*Hague Regulations*').[132] The ICJ interpreted this provision to mean that the 'occupying Power shall be regarded only as administrator and usufructuary of natural resources in the occupied territory' and that it must '"safeguard"' those resources.[133] The Court also drew on art 55 of the *Geneva Convention IV* to find that the 'use by the occupying Power of natural resources must not exceed what is necessary for the purposes of the occupation', and that there is a 'continuing duty to ensure that the local population has an adequate supply of foodstuffs, including water'.[134] The Court also engaged with principles on international environmental law, such as Principle 23 of the 1992 *Rio Declaration on Environment and Development* ('*Rio Declaration*') that states '[t]he environment and natural resources of people under . . . occupation shall be protected'.[135] Interestingly, this principle was proposed as a much more ambitious principle in the *Rio Declaration*

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127 See, eg, *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240; *East Timor* (n 98).

128 *Armed Activities* (n 122) 251–2 [244].

129 *Policies and Practices of Israel in the OPT* (n 1) [133].

130 Ibid [240].

131 Ibid [125].

132 *Laws and Customs of War on Land (Hague, IV)*, opened for signature 18 October 1907, 1 Bevans 631 (entered into force 26 January 1910) annex ('*Regulations Respecting the Laws and Customs of War on Land*') art 55.

133 *Policies and Practices of Israel in the OPT* (n 1) [124], quoting ibid.

134 *Policies and Practices of Israel in the OPT* (n 1) [124], citing *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 55.

135 *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol. 1) (3–14 June 1992) annex I ('*Rio Declaration on Environment and Development*') 7 (Principle 23), cited in *Policies and Practices of Israel in the OPT* (n 1) [124].

by the G77 and China, who had sought to include a preceding sentence that stated: '[p]olicies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated'.[136] At the time, Australia, Canada, the European Community, New Zealand and the US opposed the inclusion of this principle due to 'concerns about the principle's potential links to the Israeli occupation of the Palestinian Territories'.[137] During the negotiations, Israel made a strong statement condemning the inclusion of this principle, calling it a 'political virus polluting the UNCED'.[138] Ultimately, a compromise was reached, which limited the principle to 'expressing the particular need to protect the environmental and resource rights of people under oppression, domination or occupation — without speaking to the legitimacy of the underlying policies'.[139] Read in this context, the Court's *Opinion* appears to have gone against this compromise that separated the question of the legality of occupation from the question of protecting environmental and natural resources of people under occupation.

Most of the Court's discussion of the factual evidence was focused on 'Area C' of the West Bank, an area the Court noted is 'rich in natural resources'.[140] Focusing particularly on water, the ICJ reviewed an extensive body of evidence that showed how 'Israel exploits these natural resources, including water, minerals and other natural resources, for the benefit of its own population, to the disadvantage or even exclusion of the local Palestinian population'.[141] The ICJ highlighted how water supply to settlements is prioritised by Israel and how Palestinians are prevented from accessing ground water or the water from the River Jordan. This control over water has been central to the occupation: two military orders in 1967 transferred authority over all water resources in the OPT to the Israeli military and prohibited Palestinians from constructing new or maintaining existing water installations without a military permit.[142] The ICJ also identified how water and land policies reduced Palestinian agricultural land by more than half between 1980 and 2010, decimating the agricultural sector, which in 1972 contributed 35 percent to GDP, but by 2020 contributed less than 4 percent.[143]

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136 Chee Yoke Ling, *The Rio Declaration on Environment and Development: An Assessment* (Third World Network, 2012) 53–4.

137 Mara Tignino, 'Principle 23: The Environment of Oppressed Peoples' in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 558; ibid 54.

138 Chee Yoke Ling (n 136) 54.

139 Tignino (n 137) 558–9.

140 *Policies and Practices of Israel in the OPT* (n 1) [126].

141 Ibid [126]. It is instructive to read the Court's opinion in respect of access to water alongside the 'Written Statement of the Republic of Maldives', *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 25 July 2023) [36]–[41].

142 *Policies and Practices of Israel in the OPT* (n 1) [127]–[128]; Gamal Abouali, 'Natural Resources under Occupation: The Status of Palestinian Water under International Law' (1998) 10(2) *Pace International Law Review* 411, 484–5; Michael Lynk, Special Rapporteur, *Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem, with a Focus on Access to Water and Environmental Degradation: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, 40th sess, Agenda Item 7, UN Doc A/HRC/40/73 (30 May 2019) 8, [45] ('*Lynk Report*').

143 *Policies and Practices of Israel in the OPT* (n 1) [130].

However, the ICJ's analysis of the illegal exploitation of Palestinian resources by the occupying power failed to engage with how the 'systematic control' exercised over Palestinian resources has 'engineered dependency' that is 'designed to displace and control life', and operates to benefit both Israel and the corporate entities profiting from this exploitation.[144] Nor is the economic significance of these industries foregrounded by the Court. Already in a 2019 report, then Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, documented how Israeli quarry companies extract approximately 17 million tonnes of stone from the West Bank annually, with all royalties going to Israel.[145] Approximately 94 percent of the stones, gravel and gypsum extracted is used in Israel for construction and infrastructure purposes, supplying 20–30 percent of Israeli annual requirements.[146] In 2011, an NGO sought to challenge this exploitation in the Israeli Supreme Court in *Yesh Din v The Commander of IDF Forces in the West Bank*.[147] The Supreme Court however dismissed this case, relying on a exceedingly narrow interpretation of art 55 of the *Hague Regulations*, and invoked the interests of the occupied and the need to restore civil life long term to justify continued mining concessions.[148] As such, Israeli human rights lawyer Michael Sfard, who appeared in the case, argued that the Supreme Court 'transform[ed] limitations on the powers of the occupant to exploit the natural resources of an occupied territory into an authorization to advance the very colonial enterprise they were set to eliminate'.[149] Additionally, Lynk drew attention to the exploitation of 'substantial natural and mineral wealth, including groundwater, salt, sand, potash and mud' from the Dead Sea.[150] He cited a 2012 study by Al-Haq, which found there were approximately 50 Israeli cosmetic factories operating in the Dead Sea extracting mud and other resources for domestic and export markets.[151]

In her recent report, Francesca Albanese draws attention to 'how corporate interests underpin the Israeli settler-colonial twofold logic of displacement and replacement aimed at dispossessing and erasing Palestinians from their lands'.[152] In contrast, the *Opinion* does not mention any of the corporate actors profiting

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144 Francesca Albanese, Special Rapporteur, *From Economy of Occupation to Economy of Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, 59th sess, Agenda Item 7, UN Doc A/HRC/59/23 (2 July 2025) 15 [53]–[54] ('*Albanese Report*').

145 *Lynk Report*, UN Doc A/HRC/40/73 (n 142) 8 [26], 16–17 [57], citing Yesh Din, *The Great Drain: Israeli Quarries in the West Bank* (Position Paper, September 2017).

146 *Lynk Report*, UN Doc A/HRC/40/73 (n 142) 16–17 [57], citing Yesh Din (n 145).

147 *Yesh Din v The Commander of IDF Forces in the West Bank* [2011] HCJ 2164/09 (26 December 2011) (Supreme Court of Israel) [tr Yesh Din <https://www.yesh-din.org/en/petition-to-halt-all-israeli-quarry-and-mining-activities-in-the-west-bank-hcj-216409-yesh-din-volunteers-for-human-rights-v-the-commander-of-the-idf-forces-in-the-west-bank/>, archived at <https://perma.cc/QD3M-TRSK>].

148 Ibid 16–17 [10], 18–19 [13].

149 Michael Sfard, 'Usufruct' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press, 2018) 417, 421.

150 *Lynk Report*, UN Doc A/HRC/40/73 (n 142) 17 [58].

151 Ibid, citing Claudia Nicolette and Anne-Marie Hearne, *Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory* (Al-Haq, 2012) 21.

152 *Albanese Report*, UN Doc A/HRC/59/23 (n 144) 2 [2].

from the exploitation of natural resources in the OPT (except for a passing reference to Mekorot, the Israeli national water company).[153] The *Opinion* also does not mention fossil fuel resources. There are substantial oil, gas and shale oil deposits in the Mediterranean Sea off the coast of Gaza and Israel. The resources in the Gaza Marine Field could generate USD 4 billion in revenue but have not been developed due to ongoing disputes over ownership.[154] The law is, however, as clear-cut as it gets: under the *United Nations Convention on the Law of the Sea* 'Palestine possesses all sovereign prerogatives, including title over, and exploration of, Gaza Marine, in the same footing as any other state party'.[155] In October 2023, amidst genocidal violence in Gaza, the Israeli Ministry of Energy announced that it awarded licenses to six Israeli and international companies to explore for gas in 'Zone G',[156] despite the fact that 62 percent of 'Zone G' is within the maritime boundaries declared by the State of Palestine in 2019.[157] Yet, the ICJ did not address these wrongful acts.

Finally, while the *Opinion* recognised that the Israeli exploitation of resources in the OPT is illegal, the Court's conception of resources — and thus of the natural world in which they are embedded — remained a narrow and economically reductionist one.[158] Resources are not just economic inputs — although they are crucially that — but also are the material conditions of our world and how it is made habitable or inhabitable. As Albanese has written, Israel's 'grip on resources in the West Bank' must be understood as an 'incubator of conditions of life calculated to destroy' and thus 'cannot be viewed in isolation from the destruction unfolding in Gaza'.[159] For example, as former Special Rapporteur Lynk wrote in his 2019 report, '[w]ater is an indispensable precondition for life, a vital public good, an economic cornerstone, a finite resource and a necessary crucible for ensuring human dignity'.[160] Similarly, access to agricultural land concerns the ability of a people to feed and sustain themselves, but is also integral to Palestinian

153 *Policies and Practices of Israel in the OPT* (n 1) [127].

154 Patrick Wintour, 'Recognised Palestinian State Could Develop Disputed Gas Resources, Expert Says', *The Guardian* (online, 20 July 2025) <https://www.theguardian.com/world/2025/jul/20/recognised-palestinian-state-could-develop-disputed-gas-resources-expert-says>, archived at <https://perma.cc/JZ9E-GDD6>.

155 Mutaz M Qafisheh, Jinan Bastaki and Victor Kattan, 'Gaza Marine: The Facts and the Law' (2025) 38(1) *Leiden Journal of International Law* 42, 56–7.

156 Al Mezan Centre for Human Rights, 'Israeli Gas Exploration Licenses in Palestine's Maritime Areas are Illegal and Violate International Law' (Press Release, 8 February 2024) <https://www.mezan.org/en/post/46372/Israeli-Gas-Exploration-Licenses-in-Palestine%E2%80%99s-Maritime-Areas-are-Illegal-and-Violate-International-Law>, archived at <https://perma.cc/KE77-5YMY>, describing 'Israel's brutal military offensive against Gaza characterized by the International Court of Justice (ICJ) as plausibly constituting genocide against the Palestinian people in Gaza'. See also *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, UN GAOR, 80th sess, UN Doc A/80/337 (14 August 2025) 17 [68], concluding 'that the State of Israel is responsible for the commission of genocide against the Palestinians in Gaza'.

157 Ministry of Foreign Affairs and Expatriates (State of Palestine), 'Declaration of the State of Palestine Regarding its Maritime Boundaries in Accordance with the United Nations Convention on Law of the Sea' (Media Release, 24 September 2019).

158 See Julia Dehm, 'Natural Resources' in Koen De Feyter, Gamze Erdem Türkelli and Stéphanie de Moerloose (eds), *Encyclopedia of Law and Development* (Edward Elgar Publishing, 2021) 211.

159 *Albanese Report*, UN Doc A/HRC/59/23 (n 144) 15 [54].

160 *Lynk Report*, UN Doc A/HRC/40/73 (n 142) 12 [41].

culture, connection, steadfastness and resistance — especially olive trees.[161] In the context of Israel's genocide in Gaza, the deep imbrications between ecocide and genocide are impossible to miss.[162] Kaamil Ahmed, Damien Gayle and Aseel Mousa write: '[o]live groves and farms have been reduced to packed earth; soil and groundwater have been contaminated by munitions and toxins; the sea is choked with sewage and waste; the air polluted by smoke and particulate matter'.[163] This ecological violence reflects a systemic and deliberate infliction on Palestinians of the 'conditions of life calculated to bring about [their] physical destruction in whole or in part'.[164]

Overall, then, the *Opinion* did not engage with this intricate interconnectedness between violations of the right of self-determination, destruction of the natural environment and political economy. Indeed, it remains to be seen whether the Court will be able to appreciate the links between ecocide and genocide as they have been unfolding in Gaza.[165] Nevertheless, by engaging extensively with the political economic aspects of the occupation, the ICJ also laid the groundwork for its own discussion about the obligations of Israel as well as of third states. These obligations are the focus of our case note's final substantive Part.

VI DIFFERENTIATING BETWEEN THE ECONOMY OF THE OPT AND ISRAEL: ILLOGICAL, UNREALISTIC AND DISTORTIVE

So far, our case note has focused on the Court's treatment of Israel's violations of international law. What is equally important, especially from a practical point of view, is the ICJ's pronouncements about the obligations of third states in light of its findings about the prima facie unlawfulness of Israel's presence in the OPT. Paragraph 278 of the *Opinion*, which outlines third-state responsibility, is arguably one of the most significant — yet also one of the most open-ended — paragraphs of the ruling. Here, the Court ruled that third-party states have 'an obligation not to recognize any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem'.[166] Further, all states must abstain from entering into economic or trade dealings with Israel concerning the OPT and prevent trade or investment relations that assist in the maintenance of the illegal occupation.[167]

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161 See generally Michael Fakhri, Special Rapporteur, *Report of the Special Rapporteur on the Right to Food: Starvation and the Right to Food, with an Emphasis on the Palestinian People's Food Sovereignty,* 79th sess, UN Doc A/79/171 (17 July 2024).

162 '"No Traces of Life": Israel's Ecocide in Gaza 2023–2024', *Forensic Architecture* (Web Page, 29 March 2024) <https://forensic-architecture.org/investigation/ecocide-in-gaza>, archived at <https://perma.cc/R7Z9-DD89>. See generally Shourideh C Molavi, *Environmental Warfare in Gaza: Colonial Violence and New Landscapes of Resistance* (Pluto Press, 2024).

163 Kaamil Ahmed, Damien Gayle and Aseel Mousa, '"Ecocide in Gaza": Does Scale of Environmental Destruction Amount to a War Crime?' *The Guardian* (online, 29 March 2024) <https://www.theguardian.com/environment/2024/mar/29/gaza-israel-palestinian-war-ecocide-environmental-destruction-pollution-rome-statute-war-crimes-aoe>, archived at <https://perma.cc/JV6K-V3ZF>.

164 *Convention on the Prevention and Punishment of the Crime of Genocide,* opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art II(c).

165 See generally Rachel Killean, 'Ecocide's Evolving Relationship with War' (2025) *Environment and Security* (advance).

166 *Policies and Practices of Israel in the OPT* (n 1) [278].

167 Ibid.

However, limiting such economic measures to those with direct and evidenced connections to the OPT is a paradoxical move that ignores the reality of the occupation, the substantive findings of the judgment and customary rules on state responsibility. The only logically coherent interpretation of this crucial paragraph compels states to impose comprehensive sanctions on Israel as a whole, while respecting the human rights of its population.

The Court stressed that grave violations of international law give rise to responsibilities on behalf of all third states.[168] According to customary international law, in such a context third states have a duty to 'cooperate to bring [the grave illegality] to an end through lawful means', and not to 'recognize as lawful a situation created' by the grave illegality.[169] The purpose of third state responsibility is to prompt adherence to international law, by peacefully using collective leverage against the perpetrating state. Given this reality, third-party states must refuse to recognise the legality of the oppressive legal frameworks shaping Israel's economic infrastructure, based on the duty of non-recognition. To articulate the scope of third state obligations, the Court moved on to demand that states suspend all economic activity with Israel where it purports to be acting on behalf of the OPT, and to abstain from economic relations that assist in the maintenance of the illegal occupation.[170] States have a duty to exercise due diligence to ensure compliance in their own dealings as well as in those of their nationals. As one of the few provisions outlining concrete measures amid largely abstract articulations of legal obligations, this section has been frequently cited in subsequent statements by states, organisations and institutions endorsing the ICJ's decision. For example, the Hague Group, which is a coalition of Global South states dedicated to taking collective action in support of Palestinian rights as articulated by international law, has referenced the *Opinion* in support of its decision to suspend arms transfers to Israel.[171]

However, differentiating between economic dealings with Israel itself and when Israel claims to act on behalf of the OPT is illogical, unrealistic and distortive. Economic relations in the OPT are inextricably linked to the Israeli economy.[172] 'The economic relationship between Israel and Palestine is deeply embedded within Israel's settler-colonial project, making separation both impractical and redundant.'[173] The occupation cannot be divorced from the broader colonial framework of the Israeli state — a structure designed, since its

168 Ibid [273]–[277].

169 International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (23 April–1 June and 2 July–10 August 2001) ch IV(E)(1) ('*Draft Articles on State Responsibility for Internationally Wrongful Acts*') arts 40–1; *Legal Consequences of the Construction of a Wall* (n 4) 200 [159].

170 *Policies and Practices of Israel in the OPT* (n 1) [278].

171 The Hague Group, 'Inaugural Joint Statement' (Media Release, 31 January 2025) <https://thehaguegroup.org/meetings-hague-en/>, archived at <https://perma.cc/JLL7-7PZA>.

172 See Eghbariah (n 20), discussing the fragmentation of Palestinians' legal rights and economic dealings.

173 Law for Palestine, *Third State Economic Responsibility in light of the International Court of Justice's Advisory Opinion on the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Report, April 2025) 15.

inception, to facilitate the systematic exploitation of Palestinian resources, as discussed above.[174] From the mass displacement of Palestinians during the 1948 Nakba to the present, Israel's economic foundations have been built on the deliberate underdevelopment and constriction of the Palestinian economy.[175] As in all colonial systems,[176] Palestinian economic dependency has been purposefully engineered — control over natural resources, tourism, energy and currency ensures Israeli dominance.[177] This structural oppression is codified in Israeli land laws, which institutionalise colonial dispossession.[178] Meanwhile, administrative mechanisms enforce an asymmetrical interdependence, further entrenching domination.[179] Israel itself recognises these economic entanglements, with its government deliberately mislabelling products to avoid boycott,[180] which suggests deliberate obfuscation and ongoing issues for third-party states to trust that Israel can be compelled to disclose the precise scope of its economic activities in the OPT.[181]

By failing to acknowledge this institutionalised structure of domination, which is compounded by Israel's persistent lack of transparency, third-party states risk artificially restricting prohibited economic relations solely to those directly involving illegal Israeli settlements in the West Bank. However, this is a fraction of the relevant economic activities entangled with the illegal occupation. Current practice demonstrates how this reductive interpretation has gained traction within

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174 Shahd Hammouri, 'Systemic Economic Harm in Occupied Palestine and the Social Connections Model' (2021) 22(1) *Palestine Yearbook of International Law* 112; George T Abed (ed), *The Palestinian Economy: Studies in Development under Prolonged Occupation* (Routledge, 1988); Leila Farsakh, 'Palestinian Labor Flows to the Israeli Economy: A Finished Story?' (2002) 32(1) *Journal of Palestine Studies* 13.

175 See Khalidi (n 75).

176 Walter Rodney, *How Europe Underdeveloped Africa* (Verso, rev ed, 2018) ch 6; Theotonio Dos Santos, 'The Structure of Dependence' (1970) 60(2) *American Economic Review* 231; Samir Amin, 'Underdevelopment and Dependence in Black Africa: Origins and Contemporary Forms' (1972) 10(4) *Journal of Modern African Studies* 503.

177 Yusif A Sayigh, 'The Palestinian Economy under Occupation: Dependency and Pauperization' (1986) 15(4) *Journal of Palestine Studies* 46, 53, 56, 60–1; Taher Labadi, 'How Israel Dominates the Palestinian Economy', *Jacobin* (online, 13 January 2024) <https://jacobin.com/2024/01/israel-palestine-settler-colonialism-labor-economy>, archived at <https://perma.cc/7VXL-A4S2>. See generally Alaa Tartir, Tariq Dana and Timothy Seidel (eds), *Political Economy of Palestine: Critical, Interdisciplinary and Decolonial Perspectives* (Palgrave Macmillan, 2021).

178 See Hadeel S Abu Hussein, *The Struggle for Land under Israeli Law: An Architecture of Exclusion* (Routledge, 2022).

179 Al Haq et al, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports: 100th Session* (Report, 10 November 2019) <https://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19th-periodic-reports-10-november-2019-final-1573563352.pdf>, archived at <https://perma.cc/X7CX-29M9>.

180 See, eg, Therezia Cooper, 'Mehadrin Mislabels Products from Illegal Settlements to Avoid Boycott [Israel]', *Business and Human Rights Centre* (Web Page, 22 January 2013) <https://www.business-humanrights.org/en/latest-news/mehadrin-mislabels-products-from-illegal-settlements-to-avoid-boycott-israel/>, archived at <https://perma.cc/7RNX-EMPV>.

181 See the arguments on third-state responsibility and Israel's failure to adhere to international law in 'Petition to the UN General Assembly: Unseating Israel Is the Only Way to Preserve the Integrity of the International Legal System', *Law for Palestine* (Web Page) <https://law4palestine.org/petition-to-the-un-general-assembly-unseating-israel-is-the-only-way-to-preserve-the-integrity-of-the-international-legal-system/>, archived at <https://perma.cc/7HFS-6UQY>.

international institutions, enabling continued systemic exploitation while maintaining a veneer of compliance.[182] This proposed approach represents a dangerous preoccupation with process over substance.[183] Historical experience demonstrates that attempts to surgically disentangle these deliberately enmeshed economies inevitably boil down to technical debates while achieving no meaningful change.[184] This does not lead to the implementation of international law but to institutionalised paralysis — a bureaucratic theatre that serves only to normalise and prolong the occupation. Such paralysis would undermine the Court's unambiguous finding that Israel's presence in the OPT must end 'as *rapidly as possible*'.[185] In the context of an illegal occupation and, in our view, an ongoing genocide, such an approach would cause significant harm that can easily amount to complicity.

The Court's decision to adopt this hair-splitting approach arguably reflects a political compromise that condemns the occupation without acknowledging its centrality for Israel's colonial project. Similarly, it reminds us of the need for judicial reckoning with the reality and history of colonialisation.[186] Articulating this need, Judge Ammoun stated in his separate opinion in the *Barcelona Traction Case*:

> Thus it is in the interests of justice and of law that these problems [prompted by the political change of decolonisation] should be approached with a clear vision of the meaning of history and an overall picture of a world from which no-one should henceforth be excluded, no matter how late he has come on the scene.[187]

The history and reality of Palestine is that of violent settler colonisation. To end this grave illegality, states must cooperate using their leverage to make this illegality economically unsustainable for Israel. The Court's call for differentiation between the two economies undermines its own articulation of the gravity of the

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182 Thus far international organisations have demonstrated a position that can be described as orchestrated mediocracy vis-a-vis Palestine. As argued elsewhere, relevant UN bodies have assessed the context through a liberal lens which overlooks lessons learned from colonisation: see Shahd Hammouri, 'The Commission of Inquiry on Palestine and Israel: To Speak of Genocide from a European Liberal Lens' (2024) 8(2) *Peace Human Rights Governance* 229. See generally United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 'Legal Analysis and Recommendations on Implementation of the International Court of Justice, Advisory Opinion, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*' (Position Paper, 18 October 2024) <https://www.un.org/unispal/wp-content/uploads/2024/10/2024-10-18-COI-position-paper_co-israel.pdf>, archived at <https://perma.cc/Q2PQ-XXZT>.

183 Discussing East Timor, Catriona Drew also observes the international institutional tendency to focus on process rather than substance in relation to the question of self-determination: Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12(4) *European Journal of International Law* 651.

184 Sahar Taghdisi-Rad, 'The Economic Strategies of Occupation: Confining Development and Buying-Off Peace' in Mandy Turner and Omar Shweiki (eds), *Decolonizing Palestinian Political Economy: De-Development and Beyond* (Palgrave Macmillan, 2014) 13; Tariq Dana, 'Dominate and Pacify: Contextualizing the Political Economy of the Occupied Palestinian Territories since 1967' in Alaa Tartir, Tariq Dana and Timothy Seidel (eds), *Political Economy of Palestine* (Palgrave Macmillan, 2021) 25.

185 *Policies and Practices of Israel in the OPT* (n 1) [267] (emphasis added).

186 See, eg, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005); Anne Orford, *International Law and the Politics of History* (Cambridge University Press, 2021).

187 *Barcelona Traction* (n 34) 288 [1] (Judge Ammoun).

illegalities committed by Israel — demonstrating an indirect and perhaps unconscious inclination to ignore reality and precedents when articulating concrete action. Palestinian political aspirations transcend mere political independence — they demand the complete dismantling of these engineered dependencies, all rooted in fundamental illegalities that the international community is obligated to reject, not regulate.[188]

VII CONCLUSION: A WORLD VIEW, REPARATIVE JUSTICE AND LOOKING TO THE FUTURE FOR PALESTINE

> Do I speak to you as a Palestinian and tell you that we are a remarkable people, fighting for the noble cause of freedom. That we understand clearly that this is a genocidal campaign intended to complete the Nakba. To fulfill the Zionist fantasy of a land without a people, despite a valiant people that refuse to disappear, who vow to stay in their homes rather than become refugees again, whose pride and love and rootedness and tradition and song and prayer and belonging will forever, forever, haunt settlers who build nuclear weapons, marshal global superpowers and still tremble before the truth of our existence.[189]

After finding that Israeli policies and practices are in breach of international law and that the continued presence of Israel in the OPT is illegal, the Court turned to examine the legal consequences arising from these internationally wrongful acts.[190] In doing so, the Court did not depart from well-established principles of state responsibility, namely that a state that is responsible for an internationally wrongful act has to cease that act. The Court found that Israel must cease all settlement activity and repeal all legislation and measures that are creating or maintaining the unlawful situation.[191] Additionally, the Court found Israel to be under an obligation 'to provide full reparation for the damage caused by its internationally wrongful acts to all natural or legal persons concerned', including through restitution, compensation and/or satisfaction.[192] The Court briefly discussed some of the specifics of what this entails, holding that restitution includes obligations to return land, other immovable property and all assets seized from Palestinian individuals and institutions since 1967.[193] The Court noted that obligations of restitution also include the requirement to evacuate all settlers from existing settlements, dismantle the (substantial) part of the separation wall that is located within the OPT and allow Palestinians displaced during the occupation to return home.[194] This opens up important discussions about the right to return of Palestinian refugees displaced during the 1967 Naksa (meaning 'the setback' in Arabic), where approximately 245,000 people fled from the West Bank and Gaza

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188 See Tsenay Serequeberhan (ed), *Return to the Source: Selected Texts of Amilcar Cabral* (Monthly Review Press, rev ed, 2022) 30, 31.

189 Noura Erakat, 'In This Moment' (Speech, Palestinian Literature Festival, 1 November 2023) <https://speakingoutofplace.com/podcast_blog_posts/in-this-moment-noura-erakats-speech-at-palestinian-literature-festival-new-york-nov-1-2023/>, archived at <https://perma.cc/XW8P-66XE>.

190 *Policies and Practices of Israel in the OPT* (n 1) [265]–[266].

191 Ibid [268].

192 Ibid [269].

193 Ibid [270].

194 Ibid.

into Jordan, and a further 11,000 people from Gaza into Egypt.[195] Where such restitution is 'materially impossible', the Court found that Israel has an obligation to compensate, although it did not provide any more detailed examination of how this compensation might be calculated.[196]

While positive, these discussions of reparations remained limited. There was for example, no explicit discussion of the obligation to make reparations for the illegal exploitation of Palestinian natural resources. However, the UNGA resolutions on the Palestinian peoples' permanent sovereignty over natural resources have since 1973 included the right to claim 'restitution of and full compensation for the exploitation and looting of, and damages to, the natural resources … of the occupied territories'.[197] Moreover, the Court did not discuss the reparative and compensative obligation owned by private companies that have profited from the illegal occupation. This need for corporate reparations was highlighted by Special Rapporteur Albanese, who opined that corporate entities ought to

> promptly cease all business activities and terminate relationships directly linked with, contributing to and causing human rights violations and international crimes against the Palestinian people, in accordance with international corporate responsibilities and the law of self-determination [and] … pay reparations to the Palestinian people, including in the form of an apartheid wealth tax along the lines of post-apartheid South Africa.[198]

This question of reparative justice raises a number of complex issues about how a reparations regime could be designed to support the Palestinian right to self-determination and to build a sustainable economic basis for genuine and equitable human-focused development. Ultimately, the key limitation to the ICJ's discussion of reparations flows from the framing of the *Opinion* around illegal occupation. As we discussed above, in response to the questions posed to the Court, only violations since 1967 were considered, and any obligations for compensation and restitution must relate to post-1967 violations. The discussion of reparations thus avoids engaging with the Nakba as well as with the systematic oppression of Palestinians within Israel and how the 'spectacular violence of conquest, dispossession and displacement evolved into a brutally sophisticated regime of oppression'.[199]

To conclude, we wish to address the role of law in stating a norm, and what this may or may not make possible. In particular, returning to the significance of naming self-determination as a peremptory norm, Judge Gómez Robledo's words are worth pausing on: that in delivering its *Opinion*,

> the Court gives the primacy of the right to self-determination its full import and weight in the hierarchy of the fundamental rights and duties that structure the contemporary international order. This is of prime importance and should be

195 Ghassan Elkahlout, 'Settler Colonialism and the Rhetoric of Voluntary Migration in Gaza' (2025) *Third World Quarterly* (advance), 8–9.

196 *Policies and Practices of Israel in the OPT* (n 1) [271].

197 *Permanent Sovereignty over National Resources in the Occupied Arab Territories,* GA Res 3175 (XXVIII), UN GAOR, 28th sess, 2203rd plen mtg, Supp No 30, UN Doc A/RES/3175(XXVIII) (17 December 1973) para 3.

198 *Albanese Report*, UN Doc A/HRC/59/23 (n 144) 26–7 [95].

199 Eghbariah (n 20) 889.

> recalled at all times and in all places to all people … The Court also confers on the right of peoples to self-determination its full axiological nature, as a concept that reflects and, at the same time, inspires a world view.[200]

What is this world view? What would a free and self-determined Palestine look like? And what is the distance between the two? We must be expansive in our imaginations: we must see a future where children are well fed and safe; where fishermen catch bountiful nets of fish, and the olive trees are full, and the water is clean; where the land is tended and cared for; where people have safe homes that they can return to and fit their keys into their doors. None of this was what the Court was asked about or pronounced on. Ultimately, the Court worked with a limited and limiting set of questions and with a legal framework that is at best complicated and ambivalent when it comes to de/colonisation, self-determination and the rights of Indigenous peoples. Our generally positive evaluation of the ICJ's findings is neither celebratory nor uncritical. Rather, it rests on the acknowledgment that the legal tools at our disposal are neither the ones that we would have preferred nor the ones capable of delivering the full measure of justice for Palestine. Nevertheless, the *Opinion* allows us to see how we can work with the tools that we inherited without confusing means with ends or legal victories with liberation and justice.

200 *Policies and Practices of Israel in the OPT* (n 1) [28] (Judge Gómez Robledo).