The Gaps and Failures of the ICJ's 2024 Advisory Opinion on Palestine

POSITION PAPER

A Critical Analysis of the ICJ's Advisory Opinion on *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*

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The Gaps and Failures of the ICJ's 2024 Advisory Opinion on Palestine

A Critical Analysis of the ICJ's Advisory Opinion on *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*

1. Introduction

On 19 July 2024, the International Court of Justice's (ICJ)[1] Advisory Opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*[2] (hereinafter "2024 Advisory Opinion") was issued based on the request in the United Nations General Assembly (UNGA) Resolution 77/247. Essentially, the Court was asked to examine the "legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination" and the effect of Israel's "policies and practices" on the "legal status of the occupation," including the legal consequences for all States.[3]

The ICJ determined in its 2024 Advisory Opinion that the Israeli policies and practices examined are unlawful, in violation of international law and a breach of Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). It also reaffirmed the Palestinian people's right to self-determination and emphasized that

1 Throughout this paper, the terms 'ICJ' and 'the Court' are used interchangeably.

2 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (ICJ Advisory Opinion) 19 July 2024 [hereinafter 2024 Advisory Opinion] <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>.

3 77/247. Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem (30 December 2022) UNGA Res 77/247 [hereinafter UNGA resolution 77/247] <https://www.un.org/unispal/wp-content/uploads/2023/01/A.RES_.77.247_301222.pdf>.

Israeli policies and practices were violating this right. Additionally, this 2024 Advisory Opinion is stronger than that of the 2004 ICJ ruling on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[4] with the application of international law being more extensive and more critical of Israeli policies and practices.

Consequently, the 2024 Advisory Opinion was hailed as a breakthrough by Palestinian and international audiences alike. While this partial application of international law is indicative of the Israeli colonial-apartheid regime's further isolation in the international arena, the 2024 Advisory Opinion contains significant and noteworthy flaws and gaps in its approach, which impact its ruling in ways that cannot be overlooked or ignored. The 2024 Advisory Opinion provides insufficient analyses using partial and inaccurate reflections of the historic and current realities. The flawed approach resulted in weak terminology and framing, leading the Court to provide solutions that exceeded its mandate, further fragmenting the Palestinian people and marginalizing their rights.

The ICJ also determined that "the policies and practices contemplated by the request of the General Assembly do not include Israeli conduct in the Gaza Strip,"[5] a decision that unreasonably and unjustifiably distances the Court from the ongoing genocide. This determination aligns with the same improper analysis that enhances the decontextualization of the root causes, fragmentation of the Palestinian people and the marginalization of their rights. As such, this approach led the Court to erroneously characterize the Israeli genocide as being "in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023" and further removing the 2024 Advisory Opinion

4 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Advisory Opinion) 2004 [hereinafter Wall Advisory Opinion] <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

5 2024 Advisory Opinion (n 2), para 81.

from the current context.[6] Symptomatic of political bias, the ICJ's decision to not consider and discuss the Israeli genocide in Gaza was based on the excuse that "the request for an advisory opinion was adopted by the General Assembly on 30 December 2022",[7] despite the ICJ's acknowledgement that the UNGA "asked the Court to address Israel's 'ongoing' or 'continuing' policies and practices."[8] It is legally unreasonable and politically biased to conclude that 'ongoing and continuing' policies and practices would not include those the Israeli regime has been perpetrating in the Gaza Strip, particularly when these acts constitute genocide.

Based on the above concerns, BADIL Resource Center for Palestinian Residency and Refugee Rights provides this review and analysis of the ICJ's 2024 Advisory Opinion. This position paper first discusses the overarching decontextualization issue due to the adoption of a 1967 temporal and geographic approach that informs the ICJ's 2024 Advisory Opinion. The Court applies a decontextualized analysis of Palestinian history that omits the root causes, leading to an incorrect and insufficient analysis of the current context, and resulting in a flawed and selectively politicized application of the rights to self-determination, return, and resistance. This position paper then explains how this decontextualization has led to the expansion of the ICJ's mandate and the promotion of diplomatic and political "solutions." Finally, the paper delves into how the 2024 Advisory Opinion influenced UNGA resolution A/ES-10/L.31/Rev.1 of 18 September 2024 entitled "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (hereinafter "2024 UNGA resolution").[9]

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6 ibid.

7 ibid.

8 ibid.

9 Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory (13 September 2024) UNGA Res A/ES-10/L.31/Rev.1 [hereinafter 2024 UNGA resolution] <https://documents.un.org/doc/undoc/ltd/n24/266/48/pdf/n2426648.pdf>.

2. Decontextualization due to Geographic and Temporal Restrictions

2.1 Decontextualizing Palestinian History and Refusing to Address Root Causes

It was possible that the questions posed for consideration to the ICJ could have been taken in a broader and more comprehensive way, particularly since the Court was instructed by the UNGA to also consider "the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004."[10] However, it is clear that the ICJ takes a more restrictive and narrow approach: one that completely negates the historical context that led up to the 1967 moment discussed in the 2024 Advisory Opinion.

The 2024 Advisory Opinion starts off with a "general context" section that discusses the historical backdrop that led up to the present moment. It begins with the British Mandate, but then jumps to the UN partition plan of 1947 with no mention of Zionist colonization in the lead up to that moment in history. There is no mention of the Nakba: only a brief and misleading description that the Israeli regime "proclaimed its independence in 1948" and war broke out as a result.[11] There is a complete lack of recognition of the creation of 'Israel' as a Zionist colonial project: no mention of the massacres and mass forced displacement that occurred during the Nakba, no mention of the subsequent denationalization and denial of the right of return of refugees, and even no mention of the period between 1948 to 1967 and the colonization process that took place therein.

10 UNGA resolution 77/247 (n 3), para 18.

11 2024 Advisory Opinion (n 2), para 53.

The ICJ then concludes with an acknowledgement that “from 1967 onwards, Israel started to establish or support settlements in the territories it occupied and took a number of measures aimed at changing the status of the City of Jerusalem.”[12] Although the Court is required to limit its judgment to the time frame determined in the question referred to, the ICJ is still required to consider the historical evolution of the root causes.

This lack of consideration for the historical context and root causes that clearly establish that the Israeli regime is a colonial-apartheid one informs the entire 2024 Advisory Opinion. The Court’s understanding of the Israeli regime’s existence in Palestine is based within the highly restrictive 1967 temporal and geographic framework, with heavy leaning to the international humanitarian law framework, at the expense of the more applicable frameworks of colonization and apartheid. As a result, this selective, improper and unreasonable approach has limited the subjective and objective content and scope of the Palestinian people’s inalienable rights to self-determination and return.

2.2 Incorrect and Insufficient Analysis of the Current Context

The restrictive 1967 framework and de-contextualization of Palestinian history consequently lead to the use of inaccurate language and insufficient analysis of the current situation. If the law is to be applied in an accurate, fair, and just way, it is necessary to recognize the Zionist movement’s goal: the creation of a ‘Jewish state’ in Mandatory Palestine with an artificially engineered Jewish majority in the land. The pillars on which this goal has been created and maintained is forced displacement and transfer of the Palestinian people, colonization and apartheid, and which continue to be necessary for the Israeli regime’s survival. These three pillars are the principal drivers of Israeli-perpetrated ethnic

12 ibid para 59.

cleansing, institutional discrimination and suppression policies[13] to maintain a 'Jewish state' between the Jordan River and the Mediterranean Sea, thereby denying the Palestinian people's inalienable rights to self-determination and return.[14]

However, the terminology utilized in the 2024 Advisory Opinion does not accurately nor responsibly reflect the root causes and historical context, which when taken into consideration would make the above clear.

Despite the fact that all policies and practices analyzed in the 2024 Advisory Opinion are explicit features of colonization, the words colonization, colonial, and decolonization appear only six times in the 83-page document, and their mention is vague and not directly applied to, nor associated with, the Israeli colonial-apartheid regime.

When discussing the terminology around "settlements," the ICJ "notes a certain degree of ambiguity in the English term 'settlement', as used in the resolution of the General Assembly and in other texts," clarifying that "the French version of the resolution uses the term 'colonisation', thus indicating that the Court is called upon to examine Israel's policy in relation to settlements comprehensively."[15] Despite there being a direct and recognizable connection between colonization and settlements here, the ICJ ignores this, returning to the language of "settlements" alone and failing to discuss the use of colonies or "settlements" as a tool of colonization. The misuse of language in the 2024 Advisory Opinion goes beyond colonies to the issue of expropriation and colonization

13 For more information on the Israeli policies of forcible displacement, see BADIL, *Forced Population Transfer: The Case of Palestine* (Working Papers No. 15 - 23) <https://www.badil.org/publications/working-papers>.

14 For more information on the decolonization framework, see BADIL, *Decolonization: The Case of Palestine* (Working Paper No. 30, BADIL 2023) [hereinafter BADIL, Decolonization] <https://www.badil.org/cached_uploads/view/2023/06/09/wp30-decolonization-intro-eng-1686312277.pdf>.

15 2024 Advisory Opinion (n 2), para 111.

of land, as well as implantation of colonizers and displacement and transfer of Palestinians. The ICJ consistently refers to the Israeli policy of land confiscation and denial of use as "annexation", rather than acknowledging that this Israeli policy is one of many designed to ethnically cleanse Palestinians and entrench its colonization of Palestinian land.

Further, this omission appears to be intentional providing that historically, the ICJ has used the language of (de)colonization, and given that the ICJ's understanding is that these practices "[presuppose] the intent of the occupying Power to exercise permanent control over the occupied territory."[16] One clear example is the ICJ's Advisory Opinion of 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Here, the ICJ states: "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago [...], thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination,"[17] and that "all Member States must co-operate with the United Nations to complete the decolonization of Mauritius."[18]

Similarly, the ICJ discusses the centrality of the right to self-determination, especially in the context of decolonization in broader terms. It explains that "in the context of decolonization, the General Assembly has repeatedly emphasized the significance of the right to self-determination as an 'inalienable right'."[19] Additionally, it emphasizes that "the General Assembly has also underlined that 'there is no alternative to the principle of self-determination' in the process of decolonization."[20] To evidence

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16 ibid para 158.

17 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 25 February 2019, para 178 <https://www.icj-cij.org/sites/default/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>.

18 ibid, para 182.

19 2024 Advisory Opinion (n 2), para 233.

20 ibid.

these statements, the ICJ cites multiple UN resolutions, all of which explicitly employ the language of colonization and decolonization. However, when discussing the Palestine case, **the ICJ fails to use the terms colonization or decolonization and instead reverts to using the term "foreign occupation."** Even though the resolutions cited in the 2024 Advisory Opinion, such as resolution 40/25 of 1985, explicitly affirm that the Israeli regime is a colonial power and that the Palestinian people specifically, who are under foreign and colonial domination, have the right to self-determination, national independence, territorial integrity, national unity and sovereignty without foreign interference.[21]

Although it may be understood that the ICJ's inclusion of these resolutions are an inference that "foreign occupation" also means colonization since they were mentioned in the same sentence, the direct connection was not made here and cannot necessarily be assumed. In the Palestinian context, this ambiguity reinforces the ongoing failure to address the root causes, and instead favoring the contextualization approach. Further, the ICJ did not prescribe Israeli presence in the occupied Palestinian territory (oPt) as a "prolonged" occupation. Instead, it determined that the "prolonged character of Israel's unlawful policies and practices aggravates their violation of the right of the Palestinian people to self-determination," without consideration that the prolonged character of these policies and practices is what constitutes the Israeli regime as a colonial one.

There are several issues with how the ICJ deals with the issue of apartheid in relation to Israeli policies and practices in oPt. The ICJ "observes that Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities," and

21 40/25. Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights (29 November 1985) UNGA Res 40/25 <https://documents.un.org/doc/resolution/gen/nr0/477/32/pdf/nr047732.pdf>.

"considers that Israel's legislation and measures constitute a breach of Article 3 of CERD."[22]

First, the ICJ does not explicitly state that 'Israel' is an apartheid regime, nor does it explicitly say that its policies and practices constitute or amount to apartheid. Instead, the ICJ merely states that Israeli policies and practices "constitute a breach of Article 3 of CERD."[23] Given that this breach does automatically render the state committing it an apartheid state, and its policies as apartheid policies, it is unclear why the ICJ did not conclude that 'Israel' is committing apartheid. In fact, the word "apartheid" only appears a total of three times throughout the whole 2024 Advisory Opinion, despite all of the policies and practices placed under scrutiny clearly constituting acts of apartheid. The Court additionally did not make any reference to the International Convention on the Suppression and Punishment of the Crime of Apartheid, further supporting the idea that the Court is unsure about the apartheid component of the Israeli regime.

Second, due to the temporal and territorial limitations that the Court is working within, it limits the scope of the application of Article 3 of CERD, which indicates policies of apartheid to "the West Bank and East Jerusalem," excluding Gaza, and the rest of Jerusalem and Mandatory Palestine.[24] It is highly concerning that the ICJ has limited its use of

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22 2024 Advisory Opinion (n 2), para 226.

23 ibid.

24 For more information on the Israeli policies and practices of apartheid, see BADIL, *Forced Population Transfer: The Case of Palestine - Segregation, Fragmentation, and Isolation* (Working Paper No. 23, BADIL 2020) [hereinafter BADIL, Segregation, Fragmentation, and Isolation] <https://www.badil.org/phocadownloadpap/badil-new/publications/research/working-papers/WP23-SFI.pdf>; BADIL, *Israel's Apartheid-Colonial Education: Subjugating Palestinian Minds and Rights* (Working Paper No. 26, BADIL 2020) <https://www.badil.org/cached_uploads/view/2021/04/19/wp26-right2education-1618824001.pdf>; BADIL, 'Survey of Palestinian Refugees and Internally Displaced Persons 2019-2021' (2022) X Survey of Palestinian Refugees & IDPs [hereinafter BADIL, Survey] <https://www.badil.org/cached_uploads/view/2022/10/31/survey2021-eng-1667209836.pdf>.

the apartheid framework to one that is only applicable to the separation between the "settler and Palestinian communities" in the West Bank and East Jerusalem, and not to current Israeli genocide in Gaza, nor the 17-year-long blockade on Gaza. The ICJ ignored the realities and components of the illegal blockade that has seen the separate and discriminatory treatment against the Palestinian population there, including *inter alia* severe fragmentation and isolation,[25] restrictions on the freedom of movement, the import and export of goods, materials, and services, and the intentional withholding of food, electricity, gas, and medical supplies - down to the number of calories each person in Gaza is allowed to consume.

The third issue is that the concept of apartheid as discussed in the 2024 Advisory Opinion is presented as a standalone phenomenon, rather than one of the primary pillars of the Israeli colonial-apartheid regime. It is handled as an issue implemented by a specific government targeting Palestinians in specific areas. As such, the ICJ did not even mention the apartheid policies that Palestinians with Israeli citizenship and those in exile have been subjected to by the same regime.[26] This interpretation is a direct consequence of the ICJ stripping Palestinian history of its colonial context, and refusing to engage with (de)colonization as it applies to Palestine.

While it is welcome that the ICJ recognizes that the Israeli regime is carrying out policies in breach of Article 3 of CERD, the apartheid paradigm on its own is insufficient, as Israeli apartheid is simply "one form of domination within a settler colonial project."[27] To restrict

25 See BADIL, Segregation, Fragmentation, and Isolation (n 18).

26 See ibid; UN Economic and Social Commission for Western Asia (ESCWA), 'Israeli practices towards the Palestinian People and the Question of Apartheid' (15 March 2017) E/ESCWA/ECRI/2017/1 <https://www.middleeastmonitor.com/wp-content/uploads/downloads/201703_UN_ESCWA-israeli-practices-palestinian-people-apartheid-occupation-english.pdf>.

27 Nihal El Aasar, 'Why Won't Amnesty Say "Colonialism"?' (*Novara Media*, 8 February 2022) <https://novaramedia.com/2022/02/08/why-wont-amnesty-say-colonialism/>.

discussions of apartheid to a liberal analysis of inequality, especially one that confines itself to the 1967 temporal and territorial limitations, strips the Palestinian struggle of its anticolonial context and treats racial domination "as a standalone feature of the Israeli state, disconnected from the settler-colonial enterprise in Palestine."[28]

2.3 Consequent Misinterpretation of the Rights to Self-determination, Return, and Resistance

The Court's decision to limit all of its legal analysis to the 1967 temporal and territorial restrictions, along with its decontextualization of the political and historical context and subsequent avoidance of the root causes, lead to an inaccurate and dangerous interpretation of the concepts of self-determination, return and resistance throughout the 2024 Advisory Opinion. In the 2024 Advisory Opinion, as well as its Wall Advisory Opinion,[29] the ICJ reaffirms that "the existence of the Palestinian people is not at issue,"[30] thus recognizing the existence of the Palestinian people as a people that possess the inalienable right to self-determination, sovereignty and national independence. It is widely accepted that the Palestinian people are "fixed and determinate" and have lived in Palestine "forever, since time immemorial,"[31] with international jurisprudence having repeatedly affirmed that the Palestinian people's national identity emerged since, at the very least, "the declining supra-national Ottoman empire."[32] Therefore, the Palestinian people, and the

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28 Lana Tatour, 'Why calling Israel an apartheid state is not enough' (*Middle East Eye*, 18 January 2021) <https://www.middleeasteye.net/opinion/why-calling-israel-apartheid-state-not-enough>.

29 Wall Advisory Opinion (n 3), para 118.

30 2024 Advisory Opinion (n 2), para 190.

31 Francis Boyle, 'The Creation of the State of Palestine', (1990) 1(1) EJIL 301, 302 <https://doi.org/10.1093/oxfordjournals.ejil.a035773>.

32 See, for example, UN, 'Right of Self-Determination of the Palestinian People' (1979) ST/SG/SER.F/3 <https://www.un.org/unispal/document/auto-insert-196558/>; UN, 'The International Status of the Palestinian People' (1981) <https://www.un.org/unispal/document/auto-insert-204352/>.

inalienable right to self-determination that they are entitled to, cannot be restricted to a specific territorial border nor to a specific time period. The forcible displacement of two thirds of the Palestinian people and their fragmentation do not diminish their right to self-determination. The right of return is similarly applicable to all Palestinian refugees and internally displaced persons regardless of where or when they have been displaced, and is a right that is indivisible from the right to self-determination.[33] That the ICJ positions Israeli violations of the Palestinian people's right to self-determination solely within the 1967 framework it employs is significantly problematic.

When discussing the right of return, the Court notes that "Israel is also under an obligation to provide full reparation for the damage caused by its internationally wrongful acts to all natural or legal persons concerned," emphasizing that "reparation includes restitution, compensation and/or satisfaction."[34] However, on restitution, the Court includes the obligation to return land and other immovable property, as well as all assets seized from any natural or legal person, **but limits it to the start of the Israeli occupation in 1967**. Restitution also includes the "evacuation of all settlers from existing settlements and the dismantling of the parts of the Wall constructed by Israel that are situated in the Occupied Palestinian Territories, as well as allowing all Palestinians **displaced during the occupation** to return to their original place of residence."[35] With these determinations, the ICJ disregards the essential aspect of territorial integrity within the right to self-determination through the division of the Palestinian people across the 1967 lines and limiting the application of the rights to self-determination and return solely to the Palestinians living in the oPt. In doing so, the Court also implies that the right of return - and, by extension, the right to self-determination - applies only

33 See BADIL, Decolonization (n 14); BADIL, *Palestinian Self-Determination: Land, People, and Practicality* (Working Paper No. 28, BADIL 2021) <https://www.badil.org/cached_uploads/view/2021/11/15/wp-28-self-determination-1636973309.pdf>.

34 2024 Advisory Opinion (n 2), para 269.

35 ibid 271 [emphasis added].

to Palestinians forcibly displaced since 1967, completely disregarding the 76 percent of the total 9.17 million displaced Palestinian population worldwide who were displaced prior to 1967.[36]

Finally, despite the Court covering the inalienable right of peoples to self-determination, there is not one mention of the right to resist or even the words “resistance” or “resist” throughout the entire 2024 Advisory Opinion. Many of the resolutions utilized in its sections on self-determination specifically affirm the right of peoples to resist. For example, resolution 40/25 referenced by the ICJ “reaffirms the legitimacy of the struggle of peoples for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle,” and identifies the Palestinian struggle as one against colonial domination.[37] The omission of the right to resist from the 2024 Advisory Opinion is no doubt informed by the Court’s inaccurate application of self-determination and return, and its failure to recognize the root causes and the Palestinian struggle as one against colonization and apartheid.

36 BADIL, Survey (n 24), 40.

37 UNGA Res 40/25 (n 21), arts 2 & 3.

3. Expansion of the ICJ's Mandate and Endorsement of Political Solutions

The inappropriate de-contextualization employed by the ICJ in the 2024 Advisory Opinion paves the way for the expansion of its mandate through the promotion of political - not legal and human rights-based - solutions, which have been and are currently incompatible with the Palestinian people's rights to self-determination and return. At the end of its 2024 Advisory Opinion, the Court opines that it "also considers that the realization of the right of the Palestinian people to self-determination, including its right to an independent and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States, as envisaged in resolutions of the Security Council and General Assembly, would contribute to regional stability and the security of all States in the Middle East."[38] This is an extremely problematic addition to the 2024 Advisory Opinion that is politically motivated, illegitimate, irrelevant, and legally flawed. It endorses a "conflict" resolution paradigm, cemented by the Oslo Accords, which rests on multiple erroneous assumptions and asymmetry of powers. This paradigm grievously distorts the reality on the ground, notably by obscuring the root causes and pillars of Israeli colonial domination. It places the Israeli colonial-apartheid regime and the Palestinian people on equal footing, reconstructing the context to be one of two equal states at war with one another, as opposed to one of a people's struggle for national liberation against colonization and apartheid.

Equalization of the parties' statuses and utilizing a "balanced" approach does not only conceal the facts on grounds, but it mitigates third parties' obligations. The Court has thus gone beyond its mandate as a court of law to a court of diplomacy, providing political "solutions" that stand in direct contravention with the Palestinian people's rights to self-determination and return. The Court goes further to place the onus on the Palestinian people to live "side by side in peace" with the

38 2024 Advisory Opinion (n 2), para 283.

very colonial-apartheid regime that has deprived the Palestinian people of their rights to self-determination and return to begin with. It also releases states from their obligations to act firmly in supporting the Palestinian people's rights and struggle and taking practical actions to dismantle the Israeli colonial-apartheid regime.

As explained above, the Palestinian right to self-determination is not restricted to the 1967 lines, and cannot be forfeited in favor of a diplomatic/political agreement that sees the Palestinian people capitulate to their colonial oppressor. Upon further investigation, it becomes clear that in no other ICJ Advisory Opinion or judgment - such as those related to the cases of *Ukraine v Russian Federation*,[39] *Bosnia and Herzegovina v Serbia and Montenegro*,[40] and others - is a party expected to live side by side in peace with its perpetrator at the expense of its people's access to self-determination.

This decontextualization and reliance on the "conflict" resolution paradigm allows the ICJ to give more reverence to the Oslo Accords than is just. For example, when discussing the legal consequences for third states, the Court states that it is "of the view that Member States are under 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, **except as agreed by the parties through negotiations and to distinguish in their dealings with Israel between the territory of the State of Israel and the Palestinian territory occupied since 1967**."[41] This stands in direct contradiction with Article 47 of the Fourth

39 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* General List No 166 [2024] ICJ <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf>.

40 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* General List No 91 [2007] ICJ <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.

41 2024 Advisory Opinion (n 2), para 278 [emphasis added].

Geneva Convention, which states that the protected population "shall not be deprived" of the benefits of the Convention "by any agreement concluded between the authorities of the occupied territories and the Occupying Power."[42] While referencing this article and considering "that the Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory,"[43] the entire 2024 Advisory Opinion remains informed by the restrictive 1967 framework, which prioritizes the facilitation of a "two-state solution" that has been unjust from its inception and rendered obsolete long ago.

42 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 47 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf>.

43 2024 Advisory Opinion (n 2), para 102.

4. Impact of the 2024 Advisory Opinion on the UNGA's Resolution of 18 September 2024

On 18 September 2024, the UNGA adopted resolution A/ES-10/L.31/Rev.1 that is clearly directly influenced by the ICJ's 2024 Advisory Opinion.[44] The resolution demands that the Israeli regime "brings to an end without delay its unlawful presence in the Occupied Palestinian Territory" and that it "comply without delay with all its legal obligations under international law, including as stipulated by the International Court of Justice."[45] The 2024 UNGA resolution also "calls upon states to comply with their obligations under international law, inter alia, as reflected in the advisory opinion," and upon "international organizations, including the United Nations, and regional organizations not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory."[46] As a result of the decontextualization and the application of a conflict resolution paradigm that are the basis of the 2024 Advisory Opinion, the 2024 UNGA resolution similarly does not offer any precise or clear recommendations, uses weak and ambiguous language and proffers vague and ineffective resolutions devoid of practical measures.

Consequently, the resolution is astoundingly weak relative to the severity of Israeli crimes over one year of genocide in Gaza, and over 76 years of ongoing Nakba. The resolution does not offer any material recommendations, nor does it raise the political ceiling of the international community's engagement with the Palestinian struggle. It also operates within the restrictive and insufficient 1967 framework. The resolution makes no reference to Palestinian refugees and their ongoing denial of their right of return, nor does it recognize that they are entitled to exercise their right of return to all of Mandatory Palestine. Similarly, the resolution adopts the ICJ's interpretation of Article 3 of CERD

44 2024 UNGA resolution (n 9).

45 ibid, 5.

46 ibid, 2.

without explicitly recognizing that ‘Israel’ is an apartheid regime, and without making reference to the Apartheid Convention, nor calling to establish a special committee to report to the UNGA on apartheid. This stands in stark contrast to past UNGA resolutions discussed below, particularly those concerning colonialism in South Africa and Namibia, that employed specific measures and accurate language.

Historically, the UN has not shied away from making strong recommendations that impose measures and consequences on complicit and other member states. In its declarations on Namibia, the UNGA states, in very clear terms, that governments must:

> “take legislative, administrative or other measures [...] in order to put an end to such [colonial] enterprises and to prevent new investments that run counter to the interests of the inhabitants of those Territories,”[47] and must “take effective measures to end the supply of funds and other forms of assistance [...] to those regimes which use such assistance to repress the peoples of the colonial Territories and their national liberation movements.”[48]

Further, the UNGA called on:

- the international community to “take definitive action to ensure the complete and unconditional withdrawal of South Africa from Namibia;”[49]

47 31/7. Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia and Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa (5 November 1976) UNGA Res 31/7, art 7 <https://documents.un.org/doc/resolution/gen/nr0/301/90/pdf/nr030190.pdf>.

48 ibid, art 9.

49 S-9/2. Declaration on Namibia and Programme of Action in Support of Self-Determination and National Independence for Namibia (3 May 1978) UNGA Res S-9/2, para 35 <https://documents.un.org/doc/resolution/gen/nr0/101/87/pdf/nr010187.pdf>.

- "the Security Council to take the most vigorous measures, including sanctions provided for under Chapter VII of the Charter of the United Nations, particularly comprehensive economic sanctions, an oil embargo and an arms embargo;"[50]
- "States to cease forthwith, individually and collectively, all dealings with South Africa in order totally to isolate it politically, economically, militarily and culturally."[51]

With regards to the question of apartheid in South Africa, the UNGA requested Member States to take various measures to bring about an end to South Africa's apartheid policies, including:

- severing diplomatic relations;
- closing their ports to all vessels flying the South African flag;
- enacting legislation prohibiting their ships from entering South African ports;
- boycotting all South African goods and refraining from exporting goods, including all arms and ammunition; and,
- refusing landing and passage facilities to all South African government and registered companies' aircraft.[52]

It also called upon Member States to discourage in their territories:

- all activities and organizations which support the apartheid regime's policies and propaganda;
- the flow of immigrants, particularly skilled and technical personnel to South Africa; and,

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50 ibid.

51 ES-8/2. Question of Namibia (14 September 1981) UNGA Res ES-8/2, art 14 <https://documents.un.org/doc/resolution/gen/nr0/209/95/pdf/nr020995.pdf>.

52 1761 (XVII). The policies of apartheid of the Government of the Republic of South Africa (6 November 1962) UNGA Res 1761(XVII) <https://documents.un.org/doc/resolution/gen/nr0/192/69/pdf/nr019269.pdf>.

- the suspension of cultural, educational, athletic and other exchanges with the regime and organizations or institutions which practice apartheid.[53]

And importantly, it called upon all states and organizations to "provide greater moral, political and material assistance to the South African liberation movement in its legitimate struggle."[54]

In these resolutions, the UNGA uses the language of colonization, apartheid, and racism, commends national liberation struggles and urges the imposition of sanctions and isolation of violating states. Therefore, it is unjustifiable and incomprehensible for the UNGA to selectively apply international law to its resolution on Palestine, and to completely refrain from using the language of colonization and apartheid while failing to provide any strong recommendations.

Accordingly, an accurate, unbiased, and just interpretation of the law in the 2024 Advisory Opinion would inform and urge the UNSC to act under Chapter VII of the UN Charter, including to impose sanctions on the Israeli regime. It would instruct Member States to boycott and sanction the Israeli colonial-apartheid regime and isolate it politically, militarily, financially, and culturally. It would commend and encourage support for the Palestinian national liberation struggle against its colonial oppressors. Finally, it would address the root causes by contextualizing the reality: the Palestinian people's anti-colonial national liberation struggle against the Israeli colonial-apartheid regime that has oppressed them and violated their inalienable rights for decades.

53 2396 (XXIII). The policies of apartheid of the Government of South Africa (2 December 1968) UNGA Res 2396(XXII), art 10-12 <https://documents.un.org/doc/resolution/gen/nr0/243/56/pdf/nr024356.pdf>.

54 ibid, art 9.

5. Conclusion

The ICJ's 2024 Advisory Opinion, while reflecting the Israeli colonial-apartheid regime's isolation in the international arena by adopting stronger language in its scrutinization of its policies and practices, has failed to substantially raise the legal ceiling to practically and effectively hold the Israeli regime accountable. Instead, the 2024 Advisory Opinion reiterates the same approach that other UN agencies and bodies have been using for decades: a conflict resolution paradigm that seeks to manage rather than provide just and durable solutions grounded in international law, principles and standards. The Court's decontextualization of the legal, historical, and political context as a result of its use of the highly restrictive 1967 framework has led to the promotion of this management approach that dangerously places restrictions on the rights to self-determination and return to the entirety of the Palestinian people. Further, the ICJ expands its mandate by offering political and diplomatic solutions that directly contravene international law and the inalienable rights of the Palestinian people. Rather than furthering the already existing recommendations set in many UN resolutions and developing the implementation mechanisms of those resolutions, the ICJ fails to give concrete or material recommendations to the General Assembly. It reverts the issue back to the General Assembly and Security Council, stating that it is for the General Assembly and the Security Council to determine how to go forward with any further action required to put an end to the illegal presence and policies and practices of the Israeli regime.

Finally, the 2024 Advisory Opinion directly informed the 2024 UNGA resolution and the weak approach, terminology and recommendations therein. This stands in stark contrast with the UNGA's historic resolutions in similar contexts of colonization and apartheid, where the UNGA set precise, clear, and firm measures that states must take from the onset. The outcomes of the 2024 Advisory Opinion and the 2024 UNGA resolution are correlational: on the one hand, the 2024 Advisory

Opinion did not materialize the legally available interventions which therefore informed the 2024 UNGA resolution's weak enforcement of international law. On the other hand, the ICJ's 2024 Advisory Opinion and restricted decontextualized approach were informed by the accumulated and repeated inaction and failure of the UN and the negligence and/or complicity of its member states. Thus, both the ICJ and UNGA continue to apply an inaccurate, decontextualized and "balanced" approach to Palestine, devoid of the applicable and accurate legal terminology and frameworks which allow the Israeli regime to continue its colonization, apartheid, forced displacement, and genocide with blanket impunity.

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