Will history repeat itself? Anticipating the ICJ advisory opinion on the legal status of Israel's occupation and its consequences

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By Yael Ronen January 30, 2023

The Request for Advisory Opinion

On 30 December 2022 the UN General Assembly adopted Resolution A/RES/77/247, containing the annual indictment of Israeli practices in the West Bank, East Jerusalem and Gaza. In addition, the resolution contains one novelty, a request addressed to the ICJ to render an Advisory Opinion on the following 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, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to in paragraph 18(a) above [the previous paragraph] 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?

Question (a) refers to breaches of the very tenets of the law of occupation, such as prolongation despite the temporary character of occupation, and annexation despite the fact that occupation cannot generate sovereignty unilaterally. It also refers to breaches of specific express provisions of the law of occupation, that in the specific circumstances, it is argued, result in undermining of the same tenets, such as settlement and discriminatory practices. In light of the legal and political discourse of recent years, the goal of the authors of the request appears to be quite clear: for the ICJ not only to find Israel in violation of the norms governing a regime of occupation, but to declare the Israeli occupation illegal. The September 2022 Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Francesca Albanese, heavily criticized 'the absolute illegality of the settler-colonialism and apartheid that the prolonged Israeli occupation has imposed on the Palestinians in the occupied Palestinian territory', calling for a change in the 'overall assessment' of the nature of the occupation. Shortly afterwards, the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory Report of October 2022 not only introduced the possibility that the occupation has become illegal, but also explicitly recommended that the General Assembly request an advisory opinion on the consequences of the situation

(see Boeglin). While Question (a) leaves the Court some leeway to limit its opinion to findings of violations of specific norms, Question (b) clearly calls on it to characterise the regime as a whole, and to determine the legal consequences of that characterization.

One can prudently expect that the Court will largely deliver what is sought of it. In its 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it already suggested that the separation barrier and its associated régime 'create a "fait accompli" on the ground that could well become permanent, in which case… it would be tantamount to a *de facto* annexation' (para. 121). Twenty years later, the Court has every reason to hold that not only the situation generated by the barrier but Israel's hold has become tantamount to a *de facto* annexation, at least throughout that part of the Palestinian territory that is under direct Israeli territorial administration (Area C under the Oslo Accords). The policy guidelines of the Israeli government that took office in late 2022 certainly provide ammunition for this view, when they announce that the Jewish people holds the exclusive and indisputable right over all of Eretz Israel (mandatory Palestine and the Golan Heights), and the government's intention to promote and develop settlement in the West Bank.

While it may be easier to characterize the situation as an 'illegal occupation' (see this post on the jus ad bellum and jus in bello arguments that may be made in this regard) rather than a *de facto* annexation, the legal consequences of that characterization may be harder to ascertain. The uncertainty has already arisen following the 2004 Advisory opinion which concluded by declaring construction of the wall in the occupied territory illegal and noted the obligation on states not to recognize the illegal situation resulting from it, nor render assistance to its maintenance. However, it did not spell out the concrete implications of this obligation.

History repeated?

Rarely are two situations in international law identical. But the circumstances of the present request are eerily similar to those of the 1970 request for an ICJ advisory opinion regarding the *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa),* and the opinion rendered in 1971.

In the mid-1960s, Namibia (then known as South West Africa) was a C category mandate under South African administration (having been a German colony until World War I). South Africa ran the territory in line with its own ideology; in fact, it applied apartheid in Namibia even before it formalised it in South Africa itself. The situation in the territory worsened over the years. In 1966 the UN General Assembly, after finding that South Africa had in fact disavowed the Mandate by failing to ensure the well-being and security of the indigenous inhabitants of Namibia, terminated the South African Mandate and declared that South Africa had no right to administer the Territory. In 1969 the Security Council called upon South Africa to withdraw its administration, which it referred to as 'occupation', and in 1970 it declared 'the continued presence' of South Africa in Namibia

illegal. It then requested an advisory opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276(1970).

Comparison

Belligerent occupation and Mandate are similar in that both are territorial administrations, both are presumed temporary, and both impose obligations on the administrator to ensure the well-being and security of the local inhabitants. Like South Africa's administration of Namibia, the Israeli management of the occupation has been criticized, including in the annual resolution itself, for 'in fact' disavowing its status as occupant, and failing to ensure the well-being and security of the local population. While the direct grounds for the ICJ's 1971 declaration of South Africa's continued presence in Namibia illegal was the latter's refusal to comply with the Security Council's resolution requiring its withdrawal from Namibia, the basis for the demand for withdrawal itself was the fact that Namibia was administered under apartheid and in violation of the right to self-determination. Those are presently invoked with regard to Israel's occupation.

There are nonetheless differences between the Israeli case and the South African one: to date the Security Council has not passed judgment on the status of the Israeli presence in the territories as a whole. Furthermore, Israel has not been formally called upon to withdraw from the territories unilaterally and unconditionally. Even the resolution requesting the Advisory Opinion does not call for that. Relatedly, once the Mandate had been revoked in 1966, South Africa's continued presence in Namibia became an act of aggression. In the case of the Israeli occupation, since there had not been a formal demand of withdrawal, aggression is harder to establish, although there are those who consider the manner in which the occupation is administered to already constitute aggression (see review by Power). The request for an advisory opinion appears to aim for the 'completion' of these elements by the ICJ.

Obligation of unconditional withdrawal as a consequence of illegality

In the Namibia advisory opinion the ICJ held that in the absence of a valid Mandate, South Africa had no legal basis for its continued presence in Namibia, and was thus obligated to withdraw unconditionally from the territory. Israel's presence as occupant raises somewhat different questions, since occupation is not a legal title deriving from right, but a factual situation deriving from might. This does not mean that it is not governed by law. Thus, A declaration by the Court of the occupation or Israel's presence in the territories as illegal would mean an unconditional obligation to terminate the situation by withdrawal.

Obligation of non-recognition by other states

Assuming, realistically, that Israel does not heed a demand to withdraw from the West Bank, international law provides legal tools to induce it to do so. The right to self-determination (and apartheid, to the extent that it is be held to be relevant) is widely regarded as a peremptory norm (although see Israel's view to the contrary). Under the

law of state responsibility, when a state grossly or systematically fails to fulfill an obligation arising from a peremptory norm, other states have an obligation to bring that breach to an end, including by not recognizing that situation, nor rendering aid or assistance in maintaining it. In the case of Namibia, states were under obligation not to recognize as lawful South Africa's claim to quasi-sovereign title over the territory and to abstain from entering into economic and other dealings with South Africa which may entrench South Africa's authority over Namibia (there are other, contemporary examples). Insofar as East Jerusalem is concerned, the Security Council has already called for a measure of non-recognition. Israel's status in the West Bank is more obscure: So long as Israel claims to be no more than an occupant (although Levine-Schnur, Megiddo and Berda argue that the amalgamation described by Hostovsky Brandes of recent legal measures constitutes annexation *de jure*), what is it that states would be obligated not to recognize, aid or assist?

In part, the obligation would extend to acts or their consequences that imply recognition of Israeli rights in the West Bank that extend beyond what the law of occupation allows. This would encompass, for example, not recognizing settlements' products as those of Israel, and not granting Ariel University the status and benefits accorded to Israeli academic institutions. If at present some states already do so as a matter of policy, a Namibia-like advisory opinion would declare this policy required by law. But these measures assume the validity of occupation and applicability of its law; what would non-recognition of the validity of the occupation itself mean?

Non-recognition means rejecting the legal validity of the consequences of the unlawful conduct (without ignoring the factual occurrence itself). As I discussed elsewhere, since occupation is itself a factual situation rather than a legal claim, it is unclear what there is to reject. One possibility is that non-recognition of the legality or validity of the status of occupation mean inapplicability of the law of occupation as *lex specialis*, so that only international human rights law would apply. Yet as Gross argues, human rights law may be harmful rather than beneficial to the Palestinian population; the Namibia Advisory Opinion itself qualifies the obligation of non-recognition so as not to result in detriment to the inhabitants of the territory. Another possibility might be that since the law of occupation acknowledges the inevitability (within limits) of the occupants' military needs in the territory, non-recognition would mean a refusal to take such needs into account when evaluating the legality of the (illegal) occupant's conduct. This would result essentially in the application of IHRL modified by the denial of 'national security' as a legitimate ground for limiting rights; alongside maintenance of the special protections for protected persons under the law of occupation, such as the prohibition on the taking of private property (which will become absolute, since military needs will no longer qualify this protection).

The (in)effectiveness of non-recognition in bringing illegal territorial situations to an end

It took 17 years before South Africa capitulated and began to negotiate a territorial withdrawal from Namibia, and even that was prompted primarily by exhaustion from armed conflict rather than by non-recognition. In fact, non-recognition alone has never

been effective in inducing states to withdraw from territory that they coveted. As someone other than Einstein famously said, “insanity is doing the same thing over and over again and expecting different results”. To what extent this observation applies in law is yet to be seen.

Photo: ‘An interior shot of the Peace Palace, the seat of the International Court of Justice, the principal judicial body of the United Nations’ (UN Photo/Andrea Brizzi. 01/01/1993. The Hague, Netherlands. Photo ID 110331.).