Authoritatively Stating International Law? The ICJ and Israeli Withdrawal from the OPT

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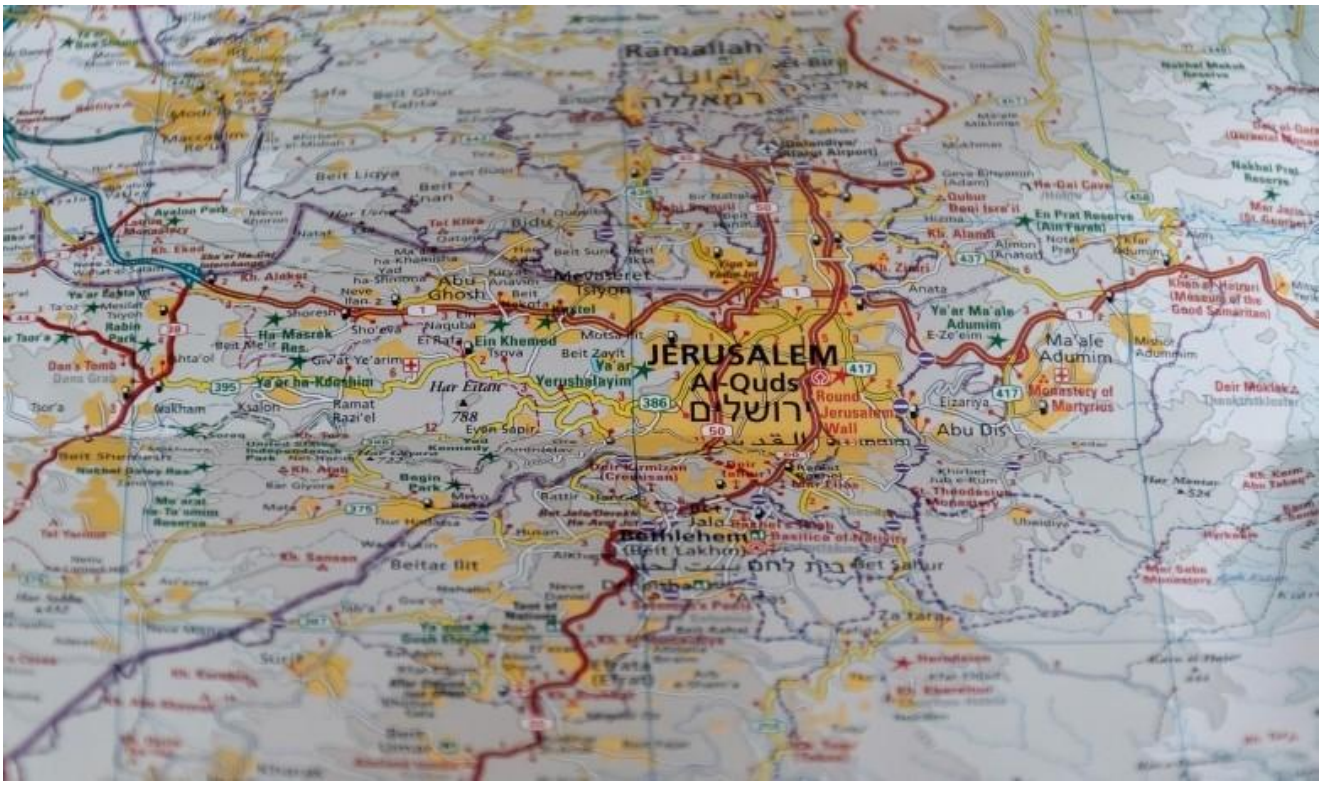

On July 21, 2024, the International Court of Justice ("ICJ" or "Court") delivered its advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*. On its own terms, the Court's opinion is damning in the breadth and scope of its findings against Israel. In particular, the opinion found Israel's continuing presence in the Occupied Palestinian Territory (OPT; shorthand for the West Bank, east Jerusalem and Gaza) to be unlawful. The Court stated that Israel must end its presence therein "as rapidly as possible" and that Israeli settlements must be dismantled, while also opining on obligations of third states regarding the situation (para. 285).

The purpose of this post is not to address the various findings of the Court. Rather, its purpose is to consider more specifically the authority of the opinion in relation to Israel's obligation to withdraw from the OPT.

Binding Effect and Persuasion

It is worth recalling that, unlike judgments in contentious cases, advisory opinions are not binding. Of course, the ICJ's pronouncements—whether in contentious or advisory proceedings—nevertheless carry persuasive weight given the stature and prestige of the Court. Indeed, commenting on the ICJ's *Chagos* advisory opinion, an International Tribunal of the Law of the Sea (ITLOS) Special Chamber stated in *Mauritius/Maldives* that "an advisory opinion entails an authoritative statement of international law on the questions with which it deals" and that "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law" (paras. 202-203).

Leaving aside the purported legal effects, the ITLOS Special Chamber deduced from that statement—a matter of debate—the Special Chamber's statement calls for some nuance. Indeed, the greater the controversy within the Court, the greater the challenge there will be to the Court's findings by virtue of its mere stature and prestige. This was perhaps less of an issue regarding the *Chagos* opinion, given that its main findings on the merits were not subject to serious controversy within the Court. Yet, the formal authority of an opinion—i.e., the authority following from the fact that it was stated by the Court—cannot be the same when judges are speaking in unison as when they are speaking conflictingly. This is reflected in the *Barcelona Traction* case (p. 29). The Court was asked by one of the parties to rely on a precedent in an earlier case (concerning a niche jurisdictional question), but the Court expressed reluctance to do so since several judges on the Court—albeit still a minority—diverged from the Court's reasoning.

In contentious proceedings, the existence of disagreement within the Court is generally of little (direct) significance for the parties. The operative paragraphs of a judgment are binding on the parties "in respect of that particular case" (ICJ Statute, Article 59; *Nicaragua v Colombia*, para. 61). The operative paragraphs are each adopted by majority vote, with the President's vote serving as a tiebreaker (ICJ Statute, Article 55). In contentious proceedings, these rules serve a crucial purpose. The ICJ's "function is to decide in accordance with international law such disputes as are submitted to it" (Article 38(1)). To adhere to the limits of its judicial function, the ICJ must be able to reach a decision in instances of disagreement. Additionally, the majority's reasoning is only of legal significance for the purposes of interpreting the operative paragraphs (*Temple (Interpretation)*, para. 68). Moreover, as the ICJ underlined in *Guinea-Bissau v Senegal* (para. 33), it does not make a difference if an individual judge disagrees with the terms of an operative paragraph if that same judge voted in its favour.

Yet, in advisory proceedings, it is only upon its persuasive value that the opinion rests. Dissents, caveats and other reservations of judges can—and should—implicate the weight given to an opinion. The greater the disagreement within the Court, the less the Court's stature as such really adds to the formal authoritative weight of an opinion (see Sir Franklin Berman, p. 824-25).

Finally, perhaps more obviously, authority should also be considered substantively. Here, too, the ITLOS Special Chamber's statement calls for nuance. If an advisory opinion is substantively unpersuasive, it is just that. Perhaps the ICJ's stature can cover for the absence of persuasiveness, but that can only go so far. Indeed, precedents in ICJ judgments and advisory opinions which proved to be unpersuasive have often been unheeded by States or even sometimes contradicted by the Court itself.

What does this all mean for the appropriate persuasive weight to be given to the advisory opinion in its findings on Israel's obligation to end its presence in the OPT? Before reaching a conclusion, it is necessary to recall what the Court's opinion and individual judges stated on the matter.

Israel's Continued Presence in the OPT – An Opinion and Concurring Opinions

As noted previously, the ICJ reached the conclusion, by 11 votes to 4, that Israel must terminate its presence in the OPT "as rapidly as possible." Essentially, the opinion reasoned 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 and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful" (para. 261).

Interestingly, three judges who voted in favour of the ICJ's conclusion added some nuance and caveats to their support. First, Judge Iwasawa stated explicitly that, "[g]iven its legitimate security concerns, Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally" (para. 20). Rather, he referred to the modalities established under UN Security Council Resolution 242 (1967), and in particular its "land for peace" framework for resolving the conflict between Israel and its neighbours.

Second, somewhat more cryptically, Judges Nolte and Cleveland stated in their joint declaration that, "[w]hile the duty to withdraw 'as rapidly as possible' applies as a general matter, this duty nevertheless may be implemented differently depending on the situation that prevails in a particular part of the occupied territory" (para. 16). These judges, moreover, considered that their position finds support in the Court's opinion itself, since the latter did not state that Israel must withdraw "immediately, totally and unconditionally," as urged by some participants in the proceedings.

Both Judges Nolte and Cleveland added further nuance in their individual separate opinions. Judge Nolte observed that the Court's consideration of issues was limited to a "bird's-eye view" and that "[a]ny conclusive legal determination of Israel's responsibility for specific conduct would require a full investigation into the facts constituting such conduct, including a careful consideration of whether Israel's security concerns may be legally relevant with

respect to any specific situation" (para. 6). For her part, Judge Cleveland observed that "Israel's participation in the oral proceedings . . . would have benefited the Court" but "the failure of a State to participate cannot prevent the Court from fulfilling its responsibilities in replying to an advisory request" (para. 4). It seems that both judges concede—the former expressly, the latter implicitly—that the factual record laid out before the Court as a basis for its opinion was lacking.

As a side note, it is questionable whether judges are adhering to the limits of the ICJ's advisory jurisdiction if they are willing to answer the legal question posed when the factual record is lacking; or at least to the extent potential absent facts could alter the answer given to a question. In other words, if the Court was asked to answer—presumably accurately—a question regarding which it lacked an adequate factual record, it is not clear how it could properly give an answer to the said question if there was sufficient reason to believe that the answer given may not be accurate. In such circumstances, the ICJ should arguably be compelled to exercise its discretion under Article 65 of the Statute and decline to deliver an opinion (see *Nuclear Weapons*, Vice-President Schwebel, p. 322). In any event, the statements of Judges Nolte and Cleveland undercut the ITLOS Special Chamber's above-quoted observation that judicial determinations in advisory proceedings are made "with the same rigour and scrutiny" as in contentious cases. At least, the validity of the Special Chamber's assertion warrants consideration on a case-by-case basis.

Israel's Continued Presence in the OPT – Dissenting Opinions

As alluded to earlier, four judges voted against the ICJ's operative paragraphs on the illegality of Israel's presence in the OPT and the requirement to vacate the territories. Judges Tomka, Abraham, and Aurescu appended a joint opinion (Judge Tomka also appended an individual declaration, though it is less relevant for the present purposes), while Vice-President Sebutinde appended a dissenting opinion.

According to Judges Tomka, Abraham, and Aurescu, the Court's opinion on this point "is not based on any serious or sound legal reasoning" (para. 21). They argued that "[t]he Opinion does not justify in any way, except through general and vague formulations, the abrupt transition from the finding that, by its conduct in the occupied territories, the occupying Power fails to comply with its obligations to the assertion of the illegality of the occupation itself" (para. 25). Rather, they considered that Israel "faces serious security threats, and that the persistence of these threats could justify maintaining a certain degree of control on the occupied territory, until sufficient security guarantees, which are currently lacking, are provided" (para. 37). The three judges also analysed in detail the relevant Security Council resolutions—particularly Resolution 242 (1967) and subsequent resolutions reaffirming it—and the Oslo Accords, which also incorporate the key resolutions. They considered that "[t]he intrinsic interdependence of [the rights to self-determination and to security], as resulting from the Oslo Accords and the relevant Security Council resolutions, creates a legal obligation of their simultaneous implementation" (para. 62).

Vice-President Sebutinde also rejected the Court's conclusion on Israel's purported obligation to withdraw from the OPT on several grounds. She referred to similar reasons to those provided by Judges Tomka, Abraham, and Aurescu (paras. 56-58), but also considered that Israel has valid competing territorial claims in the OPT, whereas "withdrawal would be tantamount to denying Israel's legal claims pertaining to parts of those territories" (para. 59).

Taking Stock

Despite the Court's unequivocal finding that Israel must withdraw from the OPT, the authoritative weight of this aspect of the opinion may be questioned, both formally and substantively. Formally, certain judges who voted in its favour added caveats, or otherwise indicated that their conclusions were based on a lacking factual record, whereas four judges voted against such findings. Rather than an apparent broad consensus, when accounting for the four dissenting judges as well as the caveats and nuances in the individual opinions of Judges Iwasawa, Nolte and Cleveland, the Court seems to be quite split on the key question of Israeli withdrawal.

Substantively, the Court's reasoning on this point comes across as unpersuasive, particularly for the reasons laid out by Judges Tomka, Abraham, and Aurescu. These three judges engage in detail with the agreed upon legal framework for resolving the Middle East conflict in the form of Resolution 242 (1967) and subsequent Security Council resolutions—particularly their "land for peace" premise—which is also incorporated in *binding* agreements between Israel and the Palestine Liberation Organization. Such analysis is lacking in the Court's opinion and only receives cursory treatment in some of the individual opinions (see Judge Charlesworth, para. 18; Judge Tladi, paras. 49-54).

Certainly, the treatment of Resolution 242 (1967), outside the opinions of Vice-President Sebutinde and Judges Tomka, Abraham, and Aurescu, fails to accord with the ICJ's own approach to interpreting Security Council resolutions, as laid out in its *Kosovo* opinion. There, the ICJ enumerated several elements relevant to the interpretative process, including: taking guidance from Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which constitute the customary rules of treaty interpretation; analysis of statements of members of the Security Council at the time of the resolution's adoption; subsequent resolutions on the matter; and the practice of organs and states affected by the relevant resolution (para. 94).

Has the ICJ authoritatively stated international law on the question of the legality of Israel's continued presence in the OPT? For the reasons set out above, I would respectfully argue that it has not.

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Ori Pomson is a PhD candidate at the Faculty of Law of the University of Cambridge. The author was consulted by Israeli Government legal advisors in November-December 2022 on procedural aspects concerning a potential request for an advisory opinion. The author did not provide further counsel after December 2022. The views expressed in this post are solely those of the author.

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