Security Considerations, the Duty to End Belligerent Occupations and the ICJ Advisory Opinion on Israeli practices and policies in the Occupied Palestinian Territory

Yuval Shany & Amichai Cohen

13.10.2024 doi: 10.59704/d8f341a7b69238e6

In its advisory opinion the ICJ held by a vote of 11:4 that "the State of Israel's continued presence in the Occupied Palestinian Territory is unlawful" and that "the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible". The basis for this conclusion is, however, less that fully clear (for a discussion, see Milanovic). Whereas 14 out of the 15 judges seemed to be of the view that Israel's practices and policies are fundamentally incompatible with basic international law principles – in particular, with the right of Palestine to self-determination and the prohibition against acquisition of territory by force – some of the judges did not consider that the first finding, regarding the illegality of practices and policies, should lead to the second finding, regarding the illegality of the continued presence. In fact, three judges who wrote a joint dissenting opinion on this point (Judges Tomka, Abraham and Aurescu) opined that to do so would ignore Israel's real security considerations (para. 36):

> *"In fact, the relevant question is whether the occupying Power — Israel — could today completely withdraw from the occupied territories "as rapidly as possible", in the absence of any guarantee, without exposing its security to substantial threats. In the current context, we find it quite difficult to answer this question in the affirmative. Israel's full withdrawal from the occupied territories and the implementation of the right to self-determination by the Palestinian people is intrinsically linked to Israel's (and Palestine's) right to security."*

Still, the majority on the Court rejected the proposition that Israel's "right to security" could serve as a possible justification for its continued presence in the Occupied Palestinian Territory (OPT). The Opinion explained the approach taken on this question only in a cursory fashion, however. In para. 254 it explained that "Israel's security concerns [cannot] override the principle of the prohibition of the acquisition of territory by force" and in para. 283 it suggested that realization of the Palestinian right to self-determination leading to two States living side by side within secure and recognized borders will contribute to regional stability and security.

In this contribution, we discuss three possible rationales for the Court's rejection of the relevance of Israel's security concerns to its legal conclusions: Lack of proof of serious and legitimate security concerns by Israel, the insufficiency of broad security concerns to justify the continued use of force, and the insufficiency of broad security concerns to deny realization of Palestinian self-determination. We will then offer a few final observations – which tend to be aligned with the position of Judges Tomka, Abraham and Aurescu on the appropriate balance that should hold between security considerations and continued presence in occupied territories.

Three possible explanations for the Court's position

The first rationale for the Court's position rejecting Israel's security claims is that these claims were simply unpersuasive. A key passage in the Court's opinion is para. 261 which reads as follows:

> *"The Court considers that the violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the Occupied Palestinian Territory. The 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."*

When read against the separate opinion of Judge Nolte and the Joint Declaration of Judges Nolte and Cleveland, it seems that the Court was not persuaded by Israel's claim that its presence in the West Bank is backed up by *genuine* and sufficiently weighty security considerations. Nolte alluded in his opinion, *inter alia,* to the fact that Israel did not provide relevant information to the Court (para. 7):

> *"It is regrettable that the Advisory Opinion and the reports on which it relies have not engaged more with security concerns which Israel has and expresses as reasons for its policies and practices. It is also regrettable that Israel did not comment on the substance of the questions put by the United Nations General Assembly, including regarding its security concerns".*

Furthermore, Nolte and Cleveland wrote jointly (in para. 8) that:

> *"Israel has legitimate security concerns. Nevertheless, the presence of occupying forces can only be justified by a credible link to a defensive and temporary purpose; in our view, therefore, any possible justification is necessarily lost if such a presence is abused for the purpose of annexation and suppression of the right to self-determination."*

At the heart of this "abuse of right" approach (which finds an echo in the Opinion's reference to "sustained abuse"), there appears to be the following legal proposition: A legal occupation based on legitimate security concerns may evolve into illegal presence, if the justified temporarily control of the occupied territory is used for other political agendas – annexation of land and/or prevention of the local population's right to self-determination. The problem with this approach is, however, that it implicitly assumes that: (a) States cannot have two distinct motivations which underlie their practices and policies; and (b) that establishing the illegality of one motivation necessarily undermines the credibility of the other, legal, motivation. We do not believe that there is much support in international law for such a doctrine. In reality, States often develop practices and policies for a variety of reasons (e.g., self-defence, deterrence and domestic politics) – some of which international law recognizes as valid reasons and some of which it does not, and the mixture of valid and invalid reasons has not been generally viewed as incompatible with international law.

Alternatively, Judges Nolte and Cleveland's assertion could be read to mean that the existence of an illegal annexationist aim suggests that the security concerns raised by Israel were merely pretextual in nature. Although we can accept that mixing claims regarding security concerns with policies designed to annex the occupied territories could and should raise suspicions about the genuineness of the security concerns alleged, they cannot be rejected on that basis alone. Such suspicions are merely the starting point of the discussion, and not the end of it. This is especially so if the evidence in support of security concerns is clear and overwhelming. Indeed, we are of the view that the evidence concerning the serious security challenges that would be facing Israel upon withdrawal from the occupied territories is compelling (see e.g., here), especially after the 7 October 2023 attack from Gaza (an area from which Israel unilaterally withdrew in 2005, on this see also the posts by Gross and Medina in this symposium). Such evidence, which is a matter of public record, also throws into doubt Judge Nolte's

insinuation that Israel incurs some responsibility for the outcome of the Advisory Opinion due to its failure to provide more information to the Court about its security concerns.

Some of the judges appear to have taken, however, a different approach towards the question of evaluating Israel's security concerns. For Judges Charlesworth and Yusuf, the key issue appears to have been Israel's security concerns falling below the threshold for exercising a continuing right to use force under *jus ad bellum*. Charlesworth wrote in her individual declaration (in para 16) that: "the existence of 'security concerns' is not a legal ground for the maintenance of an occupation, nor indeed for its establishment, unless it can be translated into the currency of the accepted grounds for the use of force — for example, self-defence". In the same vein, Yusuf wrote in (para. 13) of his individual opinion that: "the occupying Power must be able to show, at all times, that the maintenance of its prolonged occupation is due to military necessity, which has to be proportionate to legitimate military objectives. However, the self-defence rationale cannot be invoked against a potential or future threat that might emanate from the occupied territory".

This approach also finds some support in the Opinion, stating in para. 253 the following:

> *"The Court observes that an occupation involves, by its very nature, a continued use of force in foreign territory. Such use of force is, however, subject to the rules of international law governing the legality of the use of force or jus ad bellum."*

The position taken by President Yusuf and Judge Charlesworth regarding the outer limits of the use of force under *jus ad bellum* is controversial, however. Note that Judges Nolte and Cleveland, in their joint declaration, distanced themselves from the proposition offered by Charlesworth and Yusuf that Israel's security concerns fail to reach the *jus ad bellum* threshold of necessity and proportionality for self-defence. Instead Nolte and Cleveland wrote (in para. 6) that:

> *"... once a State has exercised its right of self-defence and, as a result, has occupied territory that is not its own, a reasonable period should be available for an occupying State to assess the situation on the ground and the extent to which its continued presence is necessary to ensure that remaining relevant threats warranting the ongoing use of force in self-defence are not revived; to negotiate, in good faith, an arrangement laying down the conditions for a complete withdrawal in exchange for security guarantees; and, eventually, to organize an orderly withdrawal of its troops. Accordingly, the confines laid down by Article 51 of the United Nations Charter, which include the requirements of necessity and proportionality with respect to acts undertaken in self-defence, need to be interpreted in such a way as to allow for such considerations in determining, after the end of major hostilities resulting from an exercise of the right of self-defence, when an occupation must come to an end."*

In other words, Judges Nolte and Cleveland maintained that the right to self-defence may also encompass the continued occupation of enemy territory that is necessary to ensure that military threats are not revived.

This latter position appears to be aligned with a doctrinal position on self-defense that considers that the overall use of defensive force may be commensurate not only with the aggressive force actually used, but also with the need to remove the threat of future aggression that is reasonably foreseeable. Support for this approach can be found in the writings of Dinstein (pp. 266-267), Kretzmer (p. 270) and Schmitt (p. 28), to name just a few authors. It also finds support in State practice – from the push to unconditional surrenders of defeated powers in World War Two to the Iranian counter-offensive in the 1980-1988 Iran-Iraq war, which went far beyond repelling the initial invasion. By contrast, the position expressed by judges Charlesworth and Yusuf is consistent with that of authors like Cassese (p. 355) and Corten (p. 489), who subscribe to a limited right of self-defense, aimed only at repelling and reversing the original attack. While it is fair to say that doctrine on the matter is not fully settled, it is important to note that Security Council Resolution 242 (1967) – one of the most important international law documents dealing with the Israeli-

Palestinian conflict – clearly supports the more expansive approach to use of force, since it ties Israeli withdrawal from territories it occupied in 1967 to peace and security arrangements. This approach implicitly accepts the prolonged control of the occupation regime pending appropriate security arrangements.

A third possible explanation for the Court's somewhat dismissive approach towards Israel's security concerns, which can be extracted from the separate opinions penned by ICJ judges, is that security concerns cannot override the right to self-determination of the Palestinian people. Judge Tladi wrote in this connection (in para. 44) that:

> *"security interests as such, no matter how serious or legitimate, cannot override rules of international law, a point made by the Court. Indeed, save where called for by a specific rule, security concerns cannot even serve as a balance against rules of international law and certainly not against peremptory norms. Thus, the notion that the Palestinian right of self-determination must be balanced with, or is even subject to, Israeli security concerns is incongruous as a matter of international law".*

In the same vein, Judge Xue wrote in para. 9 that "Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people", alluding, inter alia, to their right to self-determination. At the basis of this approach is the view that security concerns, in and of themselves, cannot serve as the basis for denial of self-determination. Measures restricting the realization of self-determination may take place, if at all, in the context of the exercise of specific rights under *jus ad bellum* – adding thereby another set of arguments in support of the narrow approach to self-defence, at least in situations involving the right to self-determination.

We do not believe that positions centered around the *jus cogens* nature of the right to self-determination resolve the debate over the outer-limits of necessity and proportionality relating to the right to self-defence. If the right to self-defence encompasses the security concerns claimed by Israel, then it would trump under article 51 of the UN Charter all other Charter provisions, including those related to self-determination ("nothing in the present charter shall impair the inherent right of individual or collective self-defence…"). Moreover, belligerent occupation is, almost by definition, in unavoidable tension with the right of self-determination, as it allows the temporary loss of control over a territory by its lawful sovereign – that is, by the lawful self-determination unit. Hence, underscoring the importance of self-determination does little to negate Israel's self-defence claim, if such a claim exists under international law.

In sum, we do not dispute the Court's finding that a major goal of the current Israeli government is to gradually annex parts of the OPT and that such a policy is unlawful under international law. However, the further conclusion that the Court drew from this finding, namely that Israel should withdraw from the OPT, regardless of any security concerns it alleges it has, does not seem to us to fully reflect international law doctrine. The dissenting opinion of Judges Tomka, Abraham and Aurescu seems to us to stand on much firmer doctrinal grounds than the majority's position. At the very least, the Court should have treated Israel's security concerns more seriously – as suggested by judge Nolte – including assessing on the basis of publicly available evidence whether such concerns are genuine and how they should affect the manner of realization of Palestinian self-determination through moving towards ending the occupation. As it currently stands, however, the Court's advice is lacking in the quality of the factual and legal analysis offered.

Concluding remarks

Still, it may be the case that the majority of the Court did sense the *problématique* in downplaying Israel's security concerns. This, we believe, explains the somewhat qualified position the Court took regarding the temporal dimension of Israel's obligation to end its presence in the occupied territories. As mentioned above, the Court – not persuaded by Israel's claims regarding security concerns – called on Israel to end its

presence. However, the language used in the Opinion's *dispositif* remains somewhat open-ended:

> *"the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory* ***as rapidly as possible****" (emphasis added).*

The specific formulation used was explained in the joint declaration of Judges Nolte and Cleveland as being made in recognition "that there are significant practical issues that would make an 'immediate' withdrawal and cessation of some aspects of Israel's presence not possible" (para. 16). Arguably, such practical issues could also include pressing security concerns. Still, given the Court's skepticism about Israel's security concerns, it appears as if the latitude afforded to Israel in this context remains quite limited.

Putting legal doctrine aside, the Court's skepticism towards Israel's security concerns does not bode well for the chances of implementation of those parts of the Advisory Opinion that call on Israel to unilaterally withdraw from the OPT. Israel's traditional position is that its national security will be seriously compromised if it withdraws from territories without putting in place robust security arrangements – in line with Security Council Resolution 242. This traditional position still enjoys some international support and has received strong validation from the events of 7 October 2023, which were perceived by many Israelis as the direct result of the 2005 unilateral withdrawal from Gaza without security arrangements.

As long as international law doctrine on the duty to end a belligerent occupation despite the prevalence of serious security concerns remains contested, and as long as security conditions in the region remain extremely unstable, it is unlikely that a withdrawal will be deemed practicable – putting aside other political and legal considerations concerning Israel's presence in the area. It appears to us that also from this *realpolitik* viewpoint, the approach taken by Judges Tomka, Abraham and Aurescu mediates well between a possible interpretation of international law norms, the prevailing diplomatic framework (which calls for negotiated security arrangements) and the very real security concerns of Israel. Indeed, one sad lesson from the recent history of the Gaza Strip is that withdrawal without security arrangements creates conditions which empower extreme factions, and fosters security instability which harms the interests of both Israelis and Palestinians. Granted, the expansion of the settlements and settler violence also cause instability and unrest. Yet, the Court did not just call for halting these practices, and for third states and the UN to pressurize Israel to comply. The majority on the Court called for a complete withdrawal without any attempt to ensure that Israel's security concerns would be taken into account. As a result, it seems to us that many of Israel's allies would hesitate to call upon it to fully withdraw from the occupied territories under these circumstances. In fact, the less than fully nuanced position taken by the Court on the question of withdrawal actually seems to us to reduce the chances of a broad international consensus forming around the need to fully implement the Advisory Opinion.

ABOUT THE AUTHORS

Yuval Shany
Yuval Shany is the Hersch Lauterpacht Chair of Public International Law at the Hebrew University of Jerusalem.
Amichai Cohen
Amichai Cohen is a professor of law at the Ono Academic College, and a Senior Fellow at the Israel Democracy Institute.Amichai Cohen is a professor of law at the Ono Academic College, and a Senior Fellow at the Israel Democracy Institute.



SUGGESTED CITATION

Shany, Yuval; Cohen, Amichai: Security Considerations, the Duty to End Belligerent Occupations and the ICJ Advisory Opinion on Israeli practices and policies in the Occupied Palestinian Territory, Verfassungsblog, 13.10.2024, doi: 10.59704/d8f341a7b69238e6.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20241014-010058-0.