

**A LONG-OVERDUE LINE IN THE SAND:
LEGAL CONSEQUENCES ARISING FROM THE
POLICIES AND PRACTICES OF ISRAEL IN THE
OCCUPIED PALESTINIAN TERRITORY,
INCLUDING EAST JERUSALEM**

I INTRODUCTION

The rights to self-determination and freedom from racial discrimination, segregation and apartheid lie at the heart of the international legal framework.¹ On 19 July 2024, the International Court of Justice (‘ICJ’) rendered its Advisory Opinion on the *Legal Consequences of Israel’s Policies and Practices in the Occupied Palestinian Territory, including East Jerusalem* (‘Advisory Opinion’).² The *Advisory Opinion*, rendered on the request of the United Nations General Assembly,³ ultimately found the prolonged occupation and settlement policies of Israel in the Occupied Palestinian Territory (‘OPT’) to contravene international law.⁴ As a result, the ICJ identified active obligations for Israel, other States, and international organisations.⁵ While they lack the binding force of judgments,⁶ advisory

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¹ *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, 19 [53]; International Law Commission, *Report of the International Law Commission*, UN GAOR, 77th sess, Agenda Item 77, Supp No 10, UN Doc A/77/10 (1 January 2022) 16.

² *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) (‘Advisory Opinion’).

³ *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for Advisory Opinion)* (International Court of Justice, General List No 186, 19 January 2023).

⁴ *Advisory Opinion* (n 2) 68 [245].

⁵ *Ibid* 73 [269], 76 [278]–[280].

⁶ *Statute of the International Court of Justice* art 59; Florencia Montal, ‘Does Consent Engender Compliance? Insights from Empirical Research on International Tribunals’ (2021) 115 *AJIL Unbound* 160, 162; Edvard Hambro, ‘The Authority of the Advisory Opinions of the International Court of Justice’ (1954) 3(1) *The International and Comparative Law Quarterly* 2, 5.

opinions have historically been afforded significant weight by international authorities on the basis of the Court's influence.⁷

In Part II, this case note will provide a brief background to the settlement, as well as the circumstances giving rise to the *Advisory Opinion*. Part III will then explore both the conclusion of illegality adopted by the majority, and the dissenting position of Vice-President Sebutinde, who voted against the majority in all findings of the ICJ except the first — that the Court had jurisdiction to provide the requested *Advisory Opinion*. Vice-President Sebutinde raised concerns, inter alia, about the exercise of judicial discretion, and the unilateral, biased nature of the information considered in making the determination. Part IV will discuss potential implications of the *Advisory Opinion* regarding its unenforceability, the circumvention and undermining of established negotiation methods, and the polarity between the Judges' positions. Part V concludes.

II BACKGROUND

A *Historical Context*

In the wake of World War I, Palestine was one of several Ottoman territories entrusted by the League of Nations to the United Kingdom.⁸ Mass Jewish immigration led to conflict between Arab and Jewish communities.⁹ In 1947, the United Kingdom expressed its intention to evacuate the mandated territory and referred the matter to the United Nations ('UN').¹⁰ The UN General Assembly adopted a resolution calling for the partition of Palestine into two distinct Arab and Jewish States ('Resolution 181').¹¹ This proposed partition was accepted by the Jewish population but was rejected by the Arab population and States on the basis, inter alia, that it was unbalanced.¹²

In May 1948, Israel declared its independence as set out in Resolution 181, and conflicts erupted between Israel and the Arab States the following day.¹³ By the

⁷ Hambro (n 6) 6.

⁸ Avi Shlaim, 'Britain and the Arab-Israeli War of 1948' (1987) 16(4) *Journal of Palestine Studies* 50, 50.

⁹ Mark Tessler, *A History of the Israeli-Palestinian Conflict* (Indiana University Press, 2nd ed, 2009) 209–11.

¹⁰ Shlaim (n 8) 51.

¹¹ Ibid; *Future Government of Palestine*, GA Res 181(II)A-B, UN Doc A/RES/181(II) A-B (29 November 1947).

¹² Debra Shushan, 'Palestine and Israel at the United Nations: Partition, Recognition, and Membership' in Ian Shapiro and Joseph Lamber (eds), *Charter of the United Nations: Together with Scholarly Commentaries and Essential Historical Documents* (Yale University Press, 2014) 157, 162.

¹³ Gideon Biger, 'The Boundaries of Israel-Palestine Past, Present, and Future: A Critical Geographical View' (2008) 13(1) *Israel Studies* 68, 84.

conclusion of the conflict, Israel emerged with control of most of the territory, beyond its allotment under Resolution 181.¹⁴ With a resolution in November 1948, the UN Security Council ordered an armistice to be established in all sectors of Palestine — this was followed by the conclusion of armistice agreements between Israel and its neighbouring States through mediation by the UN, fixing armistice demarcation lines between Israeli and Arab forces which came to be collectively referred to as the ‘Green Line’.¹⁵ Later that month, Israel applied for admission to membership of the UN. This was granted by the UN General Assembly in May 1949.¹⁶

In 1967, an armed conflict known as the ‘Six-Day War’ commenced between Israel and a coalition of neighbouring Arab States. Upon cessation of the hostilities, Israeli forces occupied ‘all the territories of Palestine under British Mandate beyond the Green Line’.¹⁷ Later that year, the UN Security Council adopted a resolution emphasising the ‘inadmissibility of acquisition of territory by war’, calling for the withdrawal of Israeli armed forces from the occupied territories.¹⁸ From 1967 onwards, Israel established numerous settlements in the occupied territories — encompassing the West Bank, East Jerusalem and the Gaza Strip¹⁹ — and sought to change the status of the City of Jerusalem despite ongoing condemnation from the UN Security Council.²⁰

In 1974, the UN General Assembly recognised the Palestinian Liberation Organization (‘PLO’) as the representative of the Palestinian people following further armed conflict between Israel and neighbouring States.²¹ It further recognised the right of the Palestinian people to self-determination under the UN Charter.²² In 1988, the PLO sought to establish the State of Palestine, in alignment with the principles of Resolution 181,²³ and in the 1990s both Israel and the PLO signed the two Oslo Accords. The first Oslo Accord established guidelines for negotiations, and the second divided the occupied West Bank into three distinct areas

¹⁴ Shushan (n 12)163.

¹⁵ Biger (n 13) 84.

¹⁶ *Admission of Israel to Membership in the United Nations*, GA Res 273, UN Doc A/RES/273 (III) (11 May 1949).

¹⁷ *Advisory Opinion* (n 2) 22 [57].

¹⁸ SC Res 242, UN Doc S/RES/242 (22 November 1967).

¹⁹ *Advisory Opinion* (n 2) 27 [78].

²⁰ SC Res 298, UN Doc S/RES/298 (25 September 1971).

²¹ *Invitation to the Palestinian Liberation Organization*, GA Res 3210 (XXIX), UN Doc A/RES/3210(XXIX) (14 October 1974).

²² *Question of Palestine*, GA Res 3236 (XXIX), UN Doc A/RES/3236 (XXIX) (22 November 1974).

²³ Burns Weston et al, ‘International Law and Solutions to the Arab-Israeli Conflict’ (1989) 83 *Proceedings of the Annual Meeting (American Society of International Law)* 121, 122–3.

entitled A, B, and C.²⁴ Area C, covering over 60% of the land, was left exclusively to Israel.²⁵ The Oslo Accords mandated Israel to transfer certain powers and responsibilities exercised in areas A and B to Palestinian authorities, however these transfers have only occurred to a limited extent.²⁶

Conflict endured into the 2000s,²⁷ and in 2002 Israel commenced construction of a 'wall' separate from the Green Line,²⁸ expanding settlements in the OPT despite condemnation from the ICJ in a 2004 Advisory Opinion ('*Wall Opinion*').²⁹ Although Palestine was given non-member observer State status in the UN in 2012,³⁰ by 2023 almost 700,000 settlers resided in the OPT.³¹

B *The Question Posed to the ICJ*

In January 2023, the UN Secretary-General communicated the General Assembly's decision to submit its questions to the ICJ for an advisory opinion.³² Two questions were submitted:

- (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 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?³³

The Court rendered the *Advisory Opinion* on 19 July 2024.³⁴

²⁴ *Advisory Opinion* (n 2) 23 [65].

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Diana Buttu, 'Behind Israel's Demand for Recognition as a Jewish State' (2014) 43(3) *Journal of Palestine Studies* 42, 44.

²⁸ Ran Greenstein, 'Israel, Palestine, and Apartheid' (2020) 22(1) *Insight Turkey* 73, 78.

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (International Court of Justice, General List No 131, 9 July 2004) 168 [80] ('*Wall Opinion*').

³⁰ *Status of Palestine in the United Nations*, GA Res 67/19, UN Doc A/RES/67/19 (4 December 2012, adopted 29 November 2012). See also Amnon Kapeliouk, 'Israel, Terrorism, and the PLO' (1986) 16(1) *Journal of Palestine Studies* 187, 187.

³¹ *Advisory Opinion* (n 2) 24 [68].

³² *Advisory Opinion* (n 2) 7 [1]; *Israeli Practices and Settlement Activities Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, GA Res 77/247, UN Doc A/RES/77/247 (30 December 2022).

³³ *Advisory Opinion* (n 2) 7 [1].

³⁴ *Ibid.*

III DECISION OF THE ICJ

A *Preliminary Considerations*

Prior to the provision of its opinion, the ICJ first considered several preliminary concerns: jurisdiction, discretion, and the scope and meaning of the questions posed. It found unanimously that it possessed the jurisdiction to provide the requested opinion.³⁵ While Vice-President Sebutinde voted to exercise the Court's discretion to decline to give an opinion, her vote was outnumbered fourteen to one.³⁶ In relation to the scope and meaning of the questions, the ICJ first defined the 'policies and practices of Israel' as constituting three types of conduct: (1) the ongoing violation by Israel of the right of the Palestinian people to self-determination; (2) Israel's prolonged occupation, settlement and annexation of the OPT since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem; and (3) Israel's adoption of related discriminatory legislation and measures.³⁷ In terms of territorial scope, the ICJ also clarified that the OPT, encompassing the West Bank, East Jerusalem and the Gaza Strip, would be treated as a single territorial unit.³⁸

It was also noted that in terms of temporal scope, the *Advisory Opinion* would consider Israeli measures in the OPT from 1967, but would not include Israel's conduct in response to the attack in the Gaza Strip by Hamas and other armed groups on 7 October 2023 as this was not an 'ongoing' or 'continuing' policy or practice.³⁹

B *Applicable Law*

Premising its discussion on the assumption that Israel is still currently occupying the OPT — as it was in 2004 when the Court's *Wall Opinion* was issued⁴⁰ — the ICJ distinguished that the decisive criterion in determining whether a territory remains occupied under international law 'is not whether the occupying Power retains its physical military presence in the territory at all times but rather whether its authority has been established and can be exercised'.⁴¹ As such, the noted withdrawal of

³⁵ Ibid 78 [285].

³⁶ Ibid.

³⁷ Ibid 25 [74].

³⁸ Ibid 27 [78].

³⁹ Ibid 27 [80]–[81].

⁴⁰ Ibid 28–9 [74].

⁴¹ *Convention (IV) Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 2010) annex ('*Regulations Respecting the Laws and Customs of War on Land*'), art 42 ('*Hague Regulations*').

Israeli military from the Gaza Strip in 2005 did not release Israel of its obligations under the law of occupation, as it maintains effective control over the Gaza Strip.⁴²

The ICJ then identified the international laws which would be most relevant to the conduct of Israel in the OPT. Such laws included the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*⁴³ and the annexed *Hague Regulations*.⁴⁴ Despite Israel not being a formal party to the latter, both laws are binding as a matter of customary international law.⁴⁵ Also included were a number of legal instruments relating to racial discrimination,⁴⁶ economic, social and cultural rights,⁴⁷ and civil and political rights⁴⁸ which Israel is party to.⁴⁹

C Policies and Practices of Israel in the OPT

1 Prolonged Occupation and Settlement

The ICJ began its substantive legal analysis by first examining whether Israel's policies and practices affect the right of the Palestinian people to self-determination, and if so, how.⁵⁰ In examining the three types of relevant conduct, it first found that Israel's occupation of the OPT, as recognised by the *Wall Opinion*, has already been sufficiently established and remains ongoing.⁵¹

The Court subsequently examined Israel's settlement policy as carried out in the OPT between 1967 and 2005, limiting this examination to the activity in the West Bank and East Jerusalem due to the withdrawal of settlements from the Gaza Strip in 2005. It noted that this withdrawn policy was not substantially different from those continuing in the West Bank and East Jerusalem.⁵² In the *Wall Opinion*, the ICJ found Israel's settlement policy to be 'in breach of the sixth paragraph of Article 49 of the Fourth Geneva Convention' which prohibits the occupying Power

⁴² *Advisory Opinion* (n 2) 30 [93].

⁴³ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, signed 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*').

⁴⁴ *Hague Regulations* (n 41).

⁴⁵ *Advisory Opinion* (n 2) 31 [96].

⁴⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

⁴⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

⁴⁸ *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

⁴⁹ *Advisory Opinion* (n 2) 31 [97].

⁵⁰ *Ibid* 33 [103].

⁵¹ *Ibid* 33–4 [104]–[110].

⁵² *Ibid* 35–6 [114].

from deporting or transferring parts of its civilian population into the occupied territory.⁵³ In the current *Advisory Opinion*, the ICJ noted that there is nothing in the relevant article to suggest this unlawful transfer must be forcible, thus finding Israel's provision of incentives for the relocation of Israeli individuals and businesses into the OPT unlawful under the *Fourth Geneva Convention*.⁵⁴

It also found the expansion of Israel's settlements to be based upon the confiscation or requisitioning of large areas of land, for the benefit of the civilian settler population and to the detriment of the local Palestinian population contrary to Articles 46, 52 and 55 of the *Hague Regulations*.⁵⁵

The Court then scrutinised the use of natural resources, noting that Article 55 of the *Hague Regulations* regards the occupying Power as administrator and usufructuary of natural resources, including forests and agricultural estates.⁵⁶ This provision involves an obligation to 'safeguard the capital of these resources',⁵⁷ meaning that Israel's use of natural resources must not exceed 'what is necessary for the purposes of the occupation' and must be sustainable.⁵⁸ It must also ensure that the local population has an adequate supply of foodstuffs including water.⁵⁹ The ICJ found that Israel's mass diversion of natural resources to its own population, including settlers,⁶⁰ was a breach of Israel's obligations as an administrator and usufructuary of the OPT.⁶¹ It also found that restricting the access of the Palestinian population to water available in the OPT was inconsistent with its obligations within Article 55 of the *Hague Regulations*.⁶²

The next policy considered was the extension of law. The Court, with reference to Article 43 of the *Hague Regulations* and Article 64 of the *Fourth Geneva Convention*, noted an occupying Power's obligation to respect the law in force in the occupied territory unless 'absolutely prevented from doing so'.⁶³ Since 1967, Israel has expanded its sphere of legal regulation far into the West Bank and instated its own military law in the OPT, replacing the local law to a significant degree. Settler councils have assumed de facto jurisdiction over settlements in the West Bank, and domestic Israeli law has operated to the exclusion of any other domestic law in East

⁵³ *Wall Opinion* (n 29) 183 [120].

⁵⁴ *Advisory Opinion* (n 2) 37 [119].

⁵⁵ *Ibid* 38 [122].

⁵⁶ *Ibid* 38 [124].

⁵⁷ *Hague Regulations* (n 41) art 55.

⁵⁸ *Advisory Opinion* (n 2) 338 [124].

⁵⁹ *Ibid*.

⁶⁰ *Ibid* 39 [127].

⁶¹ *Ibid* 41 [133].

⁶² *Ibid*.

⁶³ *Ibid* 41 [134].

Jerusalem since 1967.⁶⁴ The ICJ found these practices inconsistent with the rule reflected in the *Hague Regulations* and the *Fourth Geneva Convention*.⁶⁵

The *Advisory Opinion* further explored how the confiscation of land and deprivation of access to natural resources induced the departure of the local population.⁶⁶ This was exacerbated by Israeli military measures, with the ICJ holding that the lack of any viable alternative constituted an unlawful ‘forcible’ transfer under Article 49 of the *Fourth Geneva Convention*.⁶⁷

An issue of particular international contention is the violence used by settlers and the Israeli military against Palestinian people.⁶⁸ The Court stated that Israel’s systematic failure to prevent or punish attacks by settlers against the life or bodily integrity of Palestinians, and its excessive use of force against Palestinians, is inconsistent with obligations under several treaties. It constitutes a violation of the Palestinian people’s right to life,⁶⁹ humane treatment, and protection against all threats or acts of violence.⁷⁰

In light of the above contraventions of Israel’s international obligations through its practices and policies, the ICJ reaffirmed that the Israeli settlements in the OPT were established and continue to be maintained in violation of international law.⁷¹

2 *Annexation of the OPT*

The ICJ also considered annexation, defining it as the ‘forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power’.⁷² By this characterisation, the Court referred to Israel’s policies and practices, including the expansion of settlements, construction of associated infrastructure, exploitation of natural resources, and application of Israeli domestic law in the OPT, as amounting to annexation due to their permanent and irreversible nature.⁷³

⁶⁴ Ibid 42 [137]–[138].

⁶⁵ Ibid 43 [141].

⁶⁶ Ibid 43 [143].

⁶⁷ Ibid 44 [145].

⁶⁸ Oren Yiftachel, “‘Creeping Apartheid’ in Israel-Palestine” (2009) (253) *Middle East Report* 7, 15.

⁶⁹ *Hague Regulations* (n 41) art 46.

⁷⁰ *Fourth Geneva Convention* (n 43) art 27; *ICCPR* (n 48) arts 6–7.

⁷¹ *Advisory Opinion* (n 2) 47 [155].

⁷² Ibid 47 [158].

⁷³ Ibid 53 [179].

3 *Discriminatory Legislation and Measures*

The final element of Israel's policies and practices to be scrutinised was the potentially discriminatory nature of its legislation and measures. The Court examined the nature of several Israeli measures in the OPT such as residence permit policies, restrictions imposed on the movement of Palestinians, and the demolition of Palestinian properties.⁷⁴

Discrimination is prohibited under international humanitarian law when it relates to 'race, religion or political opinion'.⁷⁵ Discrimination on the basis of race or national or social origin is further prohibited in the *International Covenant on Civil and Political Rights*,⁷⁶ the *International Covenant on Economic, Social and Cultural Rights*,⁷⁷ and the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁷⁸ This prohibition now forms part of customary international law.⁷⁹

The ICJ identified that through its comprehensive restrictions on Palestinians in the OPT, Israel's legislation and measures constitute systemic discrimination based on, 'inter alia, race, religion, or ethnic origin in violation of the abovementioned provisions of international law'.⁸⁰

4 *Impact on Self-Determination*

Ultimately, the ICJ determined that the settlement policy, acts of annexation, and related discriminatory legislation and measures of Israel are unlawful.⁸¹ It adopted the position that as a consequence of these decades-long policies and practices, the Palestinian population has been deprived of its right to self-determination — that is, the right to determine its own political status and pursue its economic, social, and cultural development.⁸²

D *Effects of the Practices and Policies on the Legality of the Occupation*

Upon determining the illegality of Israel's policies and practices in the OPT, the ICJ emphasised the scope for this illegality to affect the legal status of the occupation.⁸³ The Court adopted the view that Israel's assertion of sovereignty and annexation of certain parts of the OPT constitutes a violation which would directly

⁷⁴ Ibid 56–64 [192]–[222].

⁷⁵ *Fourth Geneva Convention* (n 43) art 27.

⁷⁶ *ICCPR* (n 48) arts 2, 26.

⁷⁷ *ICESCR* (n 47) art 2.

⁷⁸ *CERD* (n 46) art 1.

⁷⁹ *Advisory Opinion* (n 2) 55 [189].

⁸⁰ Ibid 64 [223].

⁸¹ Ibid 65 [230].

⁸² Ibid 68 [242].

⁸³ Ibid 70 [252].

impact the legality of its continued presence as an occupying Power in the OPT.⁸⁴ This, combined with Israel's obstruction of the Palestinian people's right to self-determination, renders the continued presence of Israel in the OPT unlawful.⁸⁵

E *Legal Consequences*

In the latter part of the *Advisory Opinion*, the ICJ explored the legal consequences of the illegality of Israel's continued presence in the OPT. Consequences were categorised as impacting three distinct groups: (1) Israel; (2) other States; and (3) the UN.⁸⁶

For Israel, the Court identified obligations to end its presence in the OPT as rapidly as possible and to put an end to its unlawful policies and practices.⁸⁷ It also emphasised the need for Israel to repeal all legislation and measures creating or maintaining the unlawful situation and to provide full reparation for the damage caused by its wrongful acts to all natural or legal persons concerned.⁸⁸ Such reparation would include compensation, and restitution such as the returning of land and other immovable property, all seized assets, and all cultural property.⁸⁹ In the event that such restitution proves materially impossible, Israel would have an obligation to compensate all natural or legal persons having suffered any form of material damage as a result of its wrongful acts.⁹⁰

For other States, the ICJ primarily identified an obligation not to render aid or assistance in maintaining the situation, and not to recognise the situation arising from the unlawful presence of Israel in the OPT as legal.⁹¹ The Court further asserted that this latter duty of non-recognition also applied to international organisations, including the UN.⁹²

F *Dissent of Vice-President Sebutinde*

While the ICJ ultimately voted in the majority for its findings, there were persistent dissenting votes and perspectives advocated by Vice-President Sebutinde on most findings made by the Court. While her Excellency's separate dissent was extensive and complex, several key points emerged.

The first point concerns discretion. Vice-President Sebutinde took the stance that the ICJ should have exercised its discretion to decline to give its opinion. Her Excellency

⁸⁴ Ibid.

⁸⁵ Ibid 72 [261].

⁸⁶ Ibid 73 [266].

⁸⁷ Ibid 73 [267].

⁸⁸ Ibid 73–4 [269]–[270].

⁸⁹ Ibid 74 [270].

⁹⁰ Ibid 74 [271].

⁹¹ Ibid 75–6 [277].

⁹² Ibid 76 [280].

asserted that the Court lacked accurate, balanced information which would enable it to make a proper decision,⁹³ and that the questions posed by the General Assembly were inherently one-sided, leading the ICJ to adopt implicit presumptions without analysis of relevant issues such as Israel's own rights and security concerns.⁹⁴

Further, her Excellency asserted that, by only addressing Israel's legal obligations and ignoring its rights and Palestine's obligations, the Court circumvented the already-established negotiation principles set out in the Oslo Accords.⁹⁵ It was asserted that the Oslo Accords are binding agreements signed by both Israel and Palestinian representatives with the purpose of serving as a mechanism to reach a compromise acceptable to both parties, while the *Advisory Opinion* purportedly served to oblige Israel to have its disputes be submitted to judicial settlement without its consent.⁹⁶

Vice-President Sebutinde raised several other points of contention, but her Excellency was ultimately outnumbered in all the findings with which she disputed.⁹⁷

IV COMMENT

Numerous implications arise from the *Advisory Opinion* provided by the ICJ. Some particularly salient implications concern the unenforceability of the *Advisory Opinion* and the circumvention of a mutually negotiated solution as identified by Vice-President Sebutinde.

A Unenforceability and Associated Inaction

One concern which has arisen since the delivery of the *Advisory Opinion* is that due to its unenforceability, it may be difficult to prompt the radical change required to remedy — or at least begin to address — the harm caused to Palestinians within the OPT. The enforceability of international decisions is a generally difficult and long-standing issue,⁹⁸ ameliorated only by the good faith participation and compliance of involved States. Historically, it has been rare for the 'losing party' to refuse to give effect to an outcome rendered,⁹⁹ enabling the international judicial system to, in a sense, self-regulate. However, concerns arise where such a losing party refuses to act in accordance with a determined advisory opinion. Israel has demonstrated

⁹³ Ibid 18 [42] (Vice-President Sebutinde).

⁹⁴ Ibid 18–19 [42], 26–7 [68] (Vice-President Sebutinde).

⁹⁵ Ibid 19 [23] (Vice-President Sebutinde).

⁹⁶ Ibid 20 [46] (Vice-President Sebutinde).

⁹⁷ Ibid 78–9 [285].

⁹⁸ Makau Mutua, 'The International Criminal Court: Promise and Politics' (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law)* 269, 272; LeRoy Parker, 'The Enforcement of the Decisions of an International Court' (1900) 62(4) *The Advocate of Peace* 90, 90.

⁹⁹ Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54(1) *American Journal of International Law* 1, 2.

through its responses — or lack thereof — to previous ICJ criticism an unwillingness to abide by the recommendations of such advisory opinions or take substantive steps to rectify breaches of international law which arise from its conduct.¹⁰⁰ In the face of this inaction, there are no available practical means to compel Israel to comply with the *Advisory Opinion*.

The *Advisory Opinion* calls upon the States to refuse to recognise the legitimacy of Israel's settlement activities and refuse to render to it aid or assistance.¹⁰¹ Crucial States have not committed to this refusal.¹⁰² As such, the substantive impact of this *Advisory Opinion* remains uncertain at this stage, relying to a significant extent on the compliance of both Israel and other States.

However, the results of a recent UN General Assembly resolution raise the possibility that the *Advisory Opinion* has had at least some influence. In late 2024, 157 UN member States voted in favour of Israel's withdrawal from the OPT, countering eight votes against the resolution and seven abstentions.¹⁰³ Australia was positioned in the majority group, taking a definitive stance against the unlawful occupation for the first time in two decades.¹⁰⁴ This shift in attitude may be attributed at least in part to the strong position taken in the *Advisory Opinion*, which was expressly referenced in the recent resolution.¹⁰⁵ It is, nonetheless, impossible to know with certainty how much influence the *Advisory Opinion* actually had on these changes in State policy and resultant action within the UN. While States such as Canada, New Zealand, and the United Kingdom also voted for the resolution, other countries such as the United States of America, Argentina, and Hungary maintained positions of solidarity with Israel.¹⁰⁶ Given the difficulty of obtaining clear evidence of States' motivations and reasoning in such contexts, the wider impact of the *Advisory Opinion* remains unclear.

¹⁰⁰ SC Res 242, UN Doc S/RES/242 (22 November 1967); SC Res 298, UN Doc S/RES/298 (25 September 1971).

¹⁰¹ *Advisory Opinion* (n 2) 75 [277].

¹⁰² Sarah Leah Whitson, 'The White House's Defense of Israel is Undermining International Law', *Foreign Policy* (online, 18 September 2024) <<https://foreignpolicy.com/2024/09/18/biden-israel-icc-icj-gaza-netanyahu-international-law/>>; Reuters, 'Scholz Says Germany Will Supply Israel with Weapons to Defend Itself', *Reuters* (online, 17 October 2024) <<https://www.reuters.com/world/middle-east/scholz-says-germany-will-supply-israel-with-weapons-defend-itself-2024-10-17/>>.

¹⁰³ *Peaceful Settlement of the Question of Palestine*, GA Res 79/81, UN GAOR, 79th sess, 46th plen mtg, Agenda Item 35, UN Doc A/79/L.23 (3 December 2024).

¹⁰⁴ Edwina Guinan and Alex Anyfantis, 'Australia Reverses 20-Year Old Position in the UN on Israeli Occupation of Palestinian Territories', *SBS News* (online, 4 December 2024) <<https://www.sbs.com.au/news/podcast-episode/australia-reverses-20-year-old-position-in-the-un-on-israeli-occupation-of-palestinian-territories/wnxp2akyi>>.

¹⁰⁵ *Peaceful Settlement of the Question of Palestine*, GA Res 79/81, UN GAOR, 79th sess, 46th plen mtg, Agenda Item 35, UN Doc A/79/L.23 (3 December 2024) 2.

¹⁰⁶ United Nations, 'General Assembly Adopts Three Resolutions to Advance Middle East Peace, Two-State Solution' (Media Release GA/12661, 3 December 2024).

B *Undermining of Negotiation*

Another concern, raised in the dissent of Vice-President Sebutinde, is the circumvention of existing negotiation avenues. With the existence of the Oslo Accords, the first of which proposes a mechanism to reach a mutually agreed compromise, there is consideration to be given to the benefit of the *Advisory Opinion*, and whether this outweighs the potential detriment.¹⁰⁷ It is possible that with this determination, the potential for a mutually agreed-upon solution between Israel and Palestine has shifted increasingly further from reach. There is speculation that the provision of a determination without the consent of Israel may serve as a signal to Palestinian communities that engaging in mutual negotiations towards peace is unnecessary as a desirable outcome can be obtained through alternate means.¹⁰⁸

It is relevant, however, to note that the Oslo Accords have not been effective in facilitating negotiations or resolving conflicts between Israel and Palestine.¹⁰⁹ This historic failure of the Oslo Accords to effectuate any substantive mutual peace negotiations between the two parties renders Vice-President Sebutinde's assertion somewhat specious — in the absence of an effective existing mechanism to resolve the conflict, the current *Advisory Opinion* can be seen to remain necessary.

V CONCLUSION

In a long-anticipated *Advisory Opinion*, the ICJ held the ongoing policies and practices of Israel in the OPT to be unlawful, rendering its continued occupation illegal as a result. This determination created an expectation for Israel to make reparations for the damage caused, for all States to abstain from rendering aid or assistance in maintaining the situation arising from the unlawful occupation, and for States and international organisations not to recognise this situation as legal. Strong dissent was voiced by Vice-President Sebutinde, who raised concerns as to the accuracy of the information considered and the undermining of the Oslo Accords. The comment examined the implications of this undermining, as well as the futility which may be associated with the unenforceability of such advisory opinions. Ultimately, the *Advisory Opinion* makes great strides in clearly defining the illegality of Israel's continued conduct in the OPT, but its practical impact in ceasing this conduct relies largely on both the willingness of Israel to do so, and the willingness of other States and international organisations to hold Israel accountable until it does.

¹⁰⁷ *Advisory Opinion* (n 2) 23 [65] (Vice-President Sebutinde).

¹⁰⁸ Martin Pritikin, 'What the ICJ Got Wrong About the "Occupation" of the West Bank' (LinkedIn, 23 July 2024) <<https://www.linkedin.com/pulse/what-icj-got-wrong-occupation-west-bank-martin-pritikin-hfpnc/>>.

¹⁰⁹ Oren Barak, 'The Failure of the Israeli-Palestinian Peace Process' (2005) 42(6) *Journal of Peace Research* 719, 723.